

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

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

FOURTEEN JUDGES’ RESPONSE IN OPPOSITION TO MOTION TO CONTINUE AND CROSS-MOTION FOR STAY OF THE PRELIMINARY INJUNCTION PENDING COMPLETION OF APPELLATE PROCEEDINGS AND ENTRY OF A MODIFIED INJUNCTION REFLECTING THE FIFTH CIRCUIT’S RULING

Defendants Judges of Harris County Criminal Courts at Law 1–13 and 15 (“the County Judges”) oppose Plaintiffs’ motion to continue indefinitely the status conference and to forestall vacatur of the invalidated preliminary injunction until after the Fifth Circuit adjudicates any forthcoming petitions for panel rehearing or rehearing en banc. The County Judges also respectfully move pursuant to Federal Rule of Civil Procedure 62(c) for this Court to stay its preliminary injunction and enter a revised injunction reflecting the Fifth Circuit’s ruling pending the completion of appellate proceedings. A proposed injunction, taken verbatim from pages 22 to 26 of the Fifth Circuit’s opinion, is attached as Exhibit A.

1. Plaintiffs sought, and this Court entered, an injunction requiring Harris County to release within 24 hours of arrest misdemeanor arrestees who claim they cannot afford money bail. The Fifth Circuit has now squarely rejected Plaintiffs’ central constitutional claim, and it has instructed this Court to vacate the preliminary injunction. The Fifth Circuit expressly declined to recognize Plaintiffs’ proposed “fundamental substantive due process right to be free from any form

of wealth-based detention,” and it instead affirmed the County Judges’ argument throughout this litigation that the Constitution does *not* require States to release all arrestees who cannot afford money bail, so long as appropriate procedures are provided. Panel Op. at 22 (attached as Exhibit B). Because the preliminary injunction requires Harris County to release arrestees who claim they cannot afford bail, the Fifth Circuit held that the “sweeping injunction is overbroad” and must be vacated. *Id.*

2. Having lost their bid to craft a novel constitutional right to affordable bail, Plaintiffs now unreasonably seek to hold in place a preliminary injunction that improperly recognized that claimed right. Plaintiffs pursue this tactic even as they implicitly concede in their Motion to Continue that they do *not* plan to seek further review of the Fifth Circuit’s holding that the preliminary injunction must be vacated. Plaintiffs’ forthcoming petition for panel rehearing will address only what Plaintiffs concede is a “narrow issue” concerning “the Fifth Circuit’s decision to dismiss the Defendant Sheriff Ed Gonzalez.” Motion to Continue ¶ 4 (Feb. 26, 2018), Doc. 389. Rehearing on that ancillary issue cannot possibly affect the Fifth Circuit’s holding that the preliminary injunction must be vacated and replaced with a much narrower injunction limited to procedural requirements that tracks the appellate court’s modified injunction. Accordingly, there is now a *certainty* that the Court’s injunction will be vacated, and there can be no justification for postponing vacatur while Plaintiffs pursue further appeal of an irrelevant issue.

3. Plaintiffs’ effort to hold the invalidated preliminary injunction in place for a few more months is particularly unjustifiable because that injunction continues to visit irreparable harm upon the citizens of Harris County and undermine the County’s ability to operate a functioning criminal justice system that properly balances the constitutional rights of arrestees with the public’s need for safety. As predicted, failure-to-appear rates have skyrocketed to near-catastrophic levels

during the eight months in which the preliminary injunction has been in place. From June 6, 2017 through December 31, 2017, forty-five percent—*almost half*—of bonds issued pursuant to the preliminary injunction have been forfeited for failure to appear. In contrast, less than nine percent of secured money bonds were forfeited for that same reason. *See* Bond Failure Statistics (attached as Exhibit C). Harris County must return as quickly as possible to a world consistent with the Fifth Circuit’s revised injunction.

4. The Fifth Circuit has already set forth in great detail the relief that this Court should enter. The panel’s extraordinarily specific four-page modified injunction, which “represents the sort of modification that would be appropriate” in this case, Panel Op. at 22, varies in very significant respects from the preliminary injunction now in force. Most importantly, the much narrower remedy mandated by the Fifth Circuit does not require Harris County to categorically release misdemeanor arrestees who claim they cannot afford money bail. Instead, the Fifth Circuit has specified the procedural requirements that Harris County must satisfy when setting bail. The Fifth Circuit has permitted Harris County to use secured money bail—even when arrestees claim they cannot afford it—whenever magistrates, exercising their considered discretion and complying with the specified procedural safeguards, conclude that a particular amount of secured money bail is necessary in a particular case. And the Fifth Circuit has squarely foreclosed substantive review of the bail decisions made by Harris County Hearing Officers and County Judges, holding that relief is not available against these judicial officers in their judicial or legislative capacities. Panel Op. at 24.

5. Pursuant to the Fifth Circuit’s modified injunction, Harris County must provide misdemeanor arrestees a hearing within 48 hours of arrest (not 24 hours) where the arrestee has “an opportunity to describe evidence in his or her favor, and to respond to evidence described or

presented by law enforcement.” Panel Op. at 24. The decisionmaker must “conduct[] an individual assessment of whether another amount of bail or other condition provides sufficient sureties” at a hearing where “the arrestee [has] an opportunity to describe evidence in his or her favor, and to respond to evidence described or presented by law enforcement.” *Id.* The decisionmaker may set bail in excess of what the arrestee can afford, so long as the decisionmaker “provide[s] written factual findings or factual findings on the record explaining the reason for the decision” and the County “provide[s] the arrestee with a formal adversarial bail review hearing before a County Judge.” *Id.*

6. This Court has ordered the parties to exchange proposed modified injunctions on March 2, 2018, and it has set a hearing for March 6, 2018 at which the parties may address the relief that the Court should enter in light of the Fifth Circuit’s order. The Court has thus recognized the need to act promptly to implement a new injunction. The Court should stay the course it has already charted and conduct prompt proceedings designed to enter an order that tracks the Fifth Circuit’s modified injunction.

7. The Defendants Fourteen County Judges, Harris County, and the Hearing Officers submitted their proposed injunction to Plaintiffs on February 21, 2018, and requested that Plaintiffs provide dates and times when they are free to meet and confer. That proposed injunction, which is identical to the proposed injunction attached as Exhibit A to this motion, is taken verbatim from pages 22 to 26 of the Fifth Circuit’s opinion. Plaintiffs have not responded to Defendants’ February 21, 2018, email or otherwise provided their own proposed injunction.

8. Both this Court and the Fifth Circuit may enter a stay of an injunction pending appeal. *See* FED. R. CIV. P. 62(c) (power of district court); FED. R. APP. P. 8(b) (power of appellate court, normally to be exercised after a party first moves before the district court). Now that the

Fifth Circuit has issued its ruling on the merits, the stay factors easily weigh overwhelmingly, and indeed exclusively, in favor of prompt vacatur of the prior injunction and entry of the injunction framed by the Fifth Circuit. The familiar four-factor test applies to a request for a stay pending appeal: “(1) whether the stay applicant has made a strong showing that he [or she] 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.” *Campaign for Southern Equality v. Bryant*, 773 F.3d 55, 57 (5th Cir. 2014) (quoting *Veasey v. Perry*, 769 F.3d 890, 892 (5th Cir. 2014)).

9. First, Defendants are *100 percent certain*—not simply “likely”—to succeed on the merits of their claim that the preliminary injunction must be vacated and replaced with a new injunction that tracks the Fifth Circuit’s modified injunction. They *have already prevailed* on this issue before a unanimous panel of the Fifth Circuit, and Plaintiffs have indicated they will only seek further appellate review of the admittedly “narrow issue” (Motion to Continue ¶ 4) of whether the Sheriff is a proper party. The Fifth Circuit has painstakingly delineated, in extraordinary detail, the injunction that must be entered, and resolution of the ancillary issue of whether the Sheriff is a proper party cannot possibly change the scope of that injunction, much less the scope of the Fifth Circuit’s substantive constitutional ruling.

10. Second, Defendants are also certain to suffer irreparable harm absent a stay. As previewed above, the preliminary injunction severely impairs Harris County’s ability to protect public safety and ensure that those accused of a crime appear in court to answer for their alleged offense. From June 6, 2017 to December 31, 2017, 44.75 percent of bonds issued pursuant to the preliminary injunction have been forfeited because the arrestee has failed to appear. *See* Exhibit C. By contrast, only about 8.75 percent of secured money bonds have been forfeited during that

time span. *Id.* Plaintiffs have claimed in this litigation that secured and unsecured bail will result in similar appearance rates. But the numbers do not lie: Bonds issued pursuant to this Court's order are *more than five times* more likely to be forfeited than secured money bonds.

11. The public safety threat caused by the injunction does not end there. To take just one more example, the injunction also creates a revolving door whereby the County must release within 24 hours of arrest individuals who are re-arrested on new misdemeanor charges or on warrants for failure to appear. Thus, if an arrestee who claims to be indigent fails to appear in court once, twice, or ten consecutive times, Harris County must continually re-release that individual on personal bond within 24 hours of re-arrest without requiring secured money bail.

12. Defendants are also certain to suffer irreparable harm because “[w]hen a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws.” *Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013). The preliminary injunction enjoins Texas law requiring magistrates to set bail by weighing five factors, only one of which is the ability to pay bail, as well as Texas law granting magistrates the discretion to determine whether an arrestee's bail must be set at a certain amount notwithstanding the arrestee's professed inability to afford that amount. *See, e.g.*, TEX. CONST. art. I, § 11; TEX. CODE CRIM. PROC. art. 17.03(a). The Fifth Circuit's revised injunction restores that discretion, subject to compliance with the procedural safeguards the Fifth Circuit has specified.

13. Third, issuance of a stay cannot possibly injure Plaintiffs. The Fifth Circuit has already announced the scope of their constitutional rights, and it does *not* include the categorical right to release within 24 hours of arrest. Issuance of a stay and entry of the Fifth Circuit's modified injunction will ensure that Plaintiffs are afforded the full panoply of constitutional rights to which

the Fifth Circuit has held they are entitled: a hearing on the record within 48 hours of arrest, with the procedural safeguards identified by the Fifth Circuit and a subsequent right to review before a County Judge.

14. Fourth, issuance of a stay will protect the public interest. “As the State is the appealing party, its interest and harm merges with that of the public.” *Planned Parenthood*, 734 F.3d at 419. And even considering the “public interest” to include both the plaintiff class and Harris County, entry of the Fifth Circuit’s decision properly protects both parties *as a matter of law*. The Fifth Circuit has already ruled on how the Constitution properly balances the rights of accused misdemeanants to pretrial release upon receipt by the State of sufficient sureties, against the public’s right and interest in maintaining a functioning criminal justice system. The County Judges seek entry of an injunction that adopts that proper balance.

15. Plaintiffs argue in their Motion to Continue that the County Judges’ proposal “would result in an interim revised preliminary injunction subject to further revisions once the parties have completed their proceedings before the Fifth Circuit.” Motion to Continue ¶ 9. Not so. The injunction the Court should enter pending completion of appellate proceedings should be identical to the injunction to be entered once the case is remanded: the injunction specified in the Fifth Circuit’s opinion. Tellingly, Plaintiffs have been unable to identify any justification for departing in any respect from the Fifth Circuit’s detailed specification of the relief. Plaintiffs do not intend to seek reconsideration on any issue related to the merits of the injunction, and rehearing on the question whether the Sheriff is a proper party cannot possibly affect the scope of the injunction. Thus the County Judges’ proposal will not at all “disrupt the post-arrest system in Harris County and waste the parties’ and judicial resources.” *Id.* Instead, it will simply ensure that Harris County implements as quickly as possible the remedy ordered by the Fifth Circuit—a

remedy that more properly balances the rights of misdemeanor arrestees with the public's interest in safety and a functioning criminal justice system.

16. A proposed order granting Plaintiffs' motion is attached as Exhibit D. Pursuant to this Court's Local Rule 7.1(D), the County Judges have conferred with counsel for the other parties to this case. Judge Fields does not oppose the relief sought in this motion. Plaintiffs and Judge Jordan oppose this motion. Defendants Harris County and the Hearing Officers have not yet reached agreement on whether to support or oppose this motion. Sheriff Gonzalez did not respond.

CONCLUSION

For the foregoing reasons, the County Judges respectfully request that this Court deny Plaintiffs' motion to continue the status conference. The Court should continue to enforce the March 2 deadline for the parties to submit proposed injunctions, and it should proceed with the March 6 status conference. The County Judges also respectfully move pursuant to Federal Rule of Civil Procedure 62(c) for this Court to stay its preliminary injunction and enter a revised injunction reflecting the Fifth Circuit's ruling pending the completion of appellate proceedings.

Date: February 26, 2018

Respectfully submitted,

/s/ Charles J. Cooper

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been served on counsel of record who are deemed to have consented to electronic service on this February 26, 2018, via electronic filing using the Court's CM/ECF system.

/s/ Nita Moore, Senior Paralegal