No. 23-30634

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOLLY SMITH; Individually and on Behalf of All Others Similarly Situated, Real Party in Interest ALEX A.; KENIONE ROGERS, Individually and on Behalf Of All Others Similarly Situated, Real Party in Interest BRIAN B., Real Party in Interest, CHARLES C.,

Plaintiffs-Appellees,

v.

JOHN BEL EDWARDS, Governor; in his official capacity as Governor of Louisiana; WILLIAM SOMMERS, in his official capacity as Deputy Secretary of the Office of Juvenile Justice, JAMES M. LEBLANC, in his official capacity as Secretary of the Louisiana Department of Public Safety & Corrections,

Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Louisiana

BRIEF OF DEFENDANTS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

No. 23-30634

MOLLY SMITH; Individually and on Behalf of All Others Similarly Situated, Real Party in Interest ALEX A.; KENIONE ROGERS, Individually and on Behalf Of All Others Similarly Situated, Real Party in Interest BRIAN B., Real Party in Interest, CHARLES C.,

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Defendants-Appellants.

Under Fifth Circuit Rule 28.2.1, appellants, as governmental parties, need not furnish a certificate of interested persons.

/s/ Lemuel E. Montgomery III
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Counsel for Defendants-Appellants

STATEMENT REGARDING ORAL ARGUMENT

The Court has scheduled oral argument for December 5, 2023.

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INTRODUCTION

The district court entered a preliminary injunction ordering the Louisiana Office of Juvenile Justice ("OJJ") to depopulate and shutter one of its secure care facilities, the Bridge City Center for Youth at West Feliciana ("BCCY-WF").

The preliminary injunction was improperly granted for several reasons:

- Plaintiffs did not exhaust their administrative remedies for the specific claims asserted in the second motion for preliminary injunction, in violation of the Prison Litigation Reform Act ("PLRA");
- The district court misapplied the deliberate indifference standard, finding an objective risk of harm (psychological harm from housing youth in an adult facility) but finding Defendants subjectively disregarded a different alleged harm (the injury from excessive cell restriction);
- The district court abused its discretion in finding OJJ's use of cell restriction, mechanical restraints, and chemical spray, and OJJ's restriction of family visitation was "excessive" because the court disregarded evidence of the legitimate government interests justifying such measures;
- The district court abused its discretion by failing to properly consider the injury to Defendants caused by the injunction and the public interest in maintaining safety and security;

- The preliminary injunction is a prohibited "prisoner release order" in violation of the PLRA; and
- The preliminary injunction is not narrowly tailored, in violation of the PLRA.

The Court should reverse the district court's order, vacate the preliminary injunction, and dismiss the case.

STATEMENT OF JURISDICTION

The district court had jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. § 1331. This Court has appellate jurisdiction over the preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1).

This Court has pendant appellate jurisdiction over the district court's order certifying the class. *Escobar v. Montee*, 895 F.3d 387, 391 (5th Cir. 2018) (exercising pendant appellate jurisdiction is appropriate "(1) If the pendent decision is 'inextricably intertwined' with the decision over which the appellate court otherwise has jurisdiction, … or (2) if 'review of the former decision [is] necessary to ensure meaningful review of the latter.'" (quoting *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 51 (1995))).

The finding that Plaintiffs properly exhausted their administrative remedies is intertwined with the court's preliminary injunction ruling and its class certification order. During trial, the Court ruled orally that Plaintiffs properly exhausted their

administrative remedies. ROA.7615-17. After trial, but before granting the preliminary injunction, the district court granted class certification; in that ruling, the district court again found Plaintiffs exhausted their administrative remedies. ROA.4421. Then, in its preliminary injunction ruling, the district court "adopt[ed] by reference its [class certification] Ruling" on the issue of PLRA exhaustion. ROA.5351. Accordingly, the class certification order is inextricably intertwined with the preliminary injunction. Review of the class certification order is necessary to ensure a meaningful review of the preliminary injunction.

ISSUES PRESENTED

1. Whether Plaintiffs' carried their burden of demonstrating a substantial likelihood of success on the merits where: (a) Plaintiffs failed to exhaust their administrative remedies before filing suit, as the claims at issue on the preliminary injunction were never grieved in the administrative review process; (b) under the stringent deliberate indifference standard, Plaintiffs failed to present evidence of an objective risk and subjective awareness and disregard for that objective risk; (c) under the Fourteenth Amendment excessiveness standard, Plaintiffs failed to present evidence that Defendants imposed any conditions of confinement with an express intent to punish or for any non-legitimate government interest and failed to establish that any such conditions were disproportionate to the conduct of the youth; and (d) Plaintiffs failed to present evidence that any youth who qualified for special

education did not receive special education services consistent with his Individual Education Plan ("IEP");

2. Whether Plaintiffs carried their burden to prove an imminent risk of irreparable harm;

3. Whether the district court abused its discretion by discounting the harm to Defendants caused by the preliminary injunction and by disregarding the paramount public interest of safety and security; and

4. Whether the preliminary injunction, which depopulates and closes BCCY-WF instead of merely correcting the alleged constitutional infractions, violates the PLRA's prohibition on "prisoner release orders" and the PLRA's mandate that injunctions must be narrowly tailored.

STATEMENT OF THE CASE

1. OJJ and Its Mission

The Louisiana Legislature charges OJJ to provide rehabilitation services to juveniles who have been adjudicated delinquent. ROA.1018 at ¶ 11. Certain youth who have been adjudicated delinquent require placement in a secure care facility. ROA.663 at ¶ 10. Assignment to secure care is based upon multiple factors, but usually occurs when the youth has committed an underlying crime involving violence or sexual assault; when the youth has repeatedly committed serious crimes;

or when the youth has refused to cooperate in less restrictive programs (e.g., probation, group homes, etc.). *Id.*; ROA.1018 at ¶ 13.

Before October 2022, OJJ operated five secure care facilities with open dormitory living quarters. ROA.663-64; ROA.1018-19. While movement of the youth throughout each facility campus is controlled by staff, the youth in these five facilities are free to move from one area of the campus to another. *Id.* These five secure care facilities were constructed with non-reinforced walls and standard ceiling heights. ROA.664 at ¶ 15. Historically, although youth will occasionally break the rules, OJJ did not experience large scale or serious security events (e.g., riots, escape attempts, armed violence against other youth or staff). ROA.664 at ¶ 15; ROA.1019 at ¶ 16. Thus, the construction of these five secure care facilities was consistent with the expected historical behavior. *Id.*

2. Increased Frequency and Severity of Incidents Led to the Need for BCCY-WF.

In mid-2021, certain high-risk youth within OJJ secure care began engaging in routine criminal acts and violent behavior including riots, escape attempts, and acts of armed battery against other youth and staff. In May 2021, these high-risk youth completely destroyed the Cypress Unit at the Swanson Center for Youth ("SCY"), rendering it unusable. ROA.1021 at ¶ 23. OJJ then transferred these high-risk youth to the Ware facility in Alabama, which the youth also destroyed, leading Alabama officials to promptly demand the youth's removal from Ware. *Id.* at ¶ 24.

With no remaining option, OJJ rehoused these high-risk youth in OJJ's five open dormitory style facilities. *Id.* Violence, escapes, and destruction ensued:

- On May 25, 2022, several youth were involved in a fight in their dormitory that caused over $35,000 in damage at SCY. ROA.833 at ¶ 15.
- On June 13, 2022, five youth at SCY were involved in a physical altercation wherein the youth battered four staff members, one requiring hospitalization. ROA.1021 at ¶ 25.
- On June 16, 2022, approximately 20 youth escaped their dormitory at Bridge City Center for Youth in Jefferson Parish ("BCCY(JP)"), took over part of the facility, and caused a riot. ROA.1021 at ¶ 26. The riot resulted in injuries requiring medical attention to two youth. *Id.* One staff member was hospitalized. *Id.* Five youth escaped. *Id.*
- On July 17, 2022, six other youth escaped BCCY(JP). ROA.1022 at ¶ 27. Five of them stole a truck and repeatedly rammed it into a Sheriff's Deputy's vehicle. *Id.* Following a pursuit, they ultimately crashed the truck. *Id.* A sixth youth carjacked a vehicle at gunpoint and shot the occupant, a 59-year-old New Orleans man, who was critically injured. *Id.* at ¶ 32; ROA.666 at ¶ 30.

The five existing secure care facilities lack the physical infrastructure necessary to house these high-risk youth. ROA.1022 at ¶¶ 28-29. OJJ is currently

constructing a permanent housing unit for the high-risk youth to be located on campus of one of the existing secure care facilities. *Id.* at ¶ 32; ROA.666 at ¶ 30.

In the interim, OJJ needed a suitable location to house and treat these high-risk youth. Defendants considered several locations, but none could meet the immediate needs. ROA.6370:4-6371:2. Ultimately, a building located just inside the main gate of the Louisiana State Penitentiary ("LSP") campus became available. ROA.648 at ¶ 16. With relatively minor renovations, this building could provide the necessary layout and infrastructure to serve these youth and meet OJJ's security needs. ROA.666 at ¶ 29; ROA.648 at ¶ 14. Thus, OJJ reconfigured the building to become the Bridge City Center for Youth at West Feliciana. ROA.666 at ¶ 27; ROA.648 at ¶ 9.

3. BCCY-WF

LSP is a sprawling campus of more than 18,000 acres. ROA.561. BCCY-WF is the first building behind the main gate of the LSP campus and is 1.5 miles from the nearest adult facility on the LSP campus. ROA.648 at ¶ 15.

BCCY-WF has its own fence-line, surrounding the BCCY-WF building and grounds and separating BCCY-WF from all other facilities on the LSP campus. *Id.* at ¶ 17. The BCCY-WF fence-line is wrapped in "black-out" fabric; no one can see in or out of the BCCY-WF building and grounds. *Id.*

BCCY-WF is a youth-only facility. ROA.666 at ¶ 31. No adult inmates are housed at or provide services (e.g., food services, custodial, groundskeeping, etc.) to BCCY-WF. *Id.* at ¶¶ 31, 34. No adult inmates are permitted within the BCCY-WF fence-line for any reason. *Id.* at ¶ 33. BCCY-WF is designed and staffed for complete physical separation of the youth from adult inmates at all times. *Id.*; ROA.648 at ¶¶ 13, 18, 19.

4. OJJ's Administrative Review Procedure

OJJ has an Administrative Remedy Procedure ("ARP") that applies to all youth within its care. ROA.4801.

Standard ARP: A youth must exhaust a two-step grievance process. ROA.4806-09. A youth initiates Step 1 by filing an ARP form. ROA.4806. The facility director must respond within 30 days. ROA.4807-08. If the youth is dissatisfied, he has 15 days to exercise Step 2, seeking review from the Deputy Secretary of Youth Services. ROA.4808. The Deputy Secretary must respond within 21 days of the request. ROA.4809.

Emergency ARP: If the youth's grievance states he believes he is at immediate risk of harm and any delay would subject him to substantial risk of immediate personal injury or other serious or irreparable harm, the ARP is immediately forwarded to the Facility Director, Statewide Youth Facilities Director, and Deputy Secretary. ROA.4809-10. OJJ must provide an initial response within 48 hours.

ROA.4810. If reviewers determine the grievance is emergent, OJJ has five calendar days to provide a final decision. *Id*. If reviewers determine the grievance is not emergent, the grievance is processed as a standard ARP.

5. Plaintiff Alex A.'s ARP

Alex A. is a youth in OJJ secure care. ROA.49 at ¶ 10. In August 2022, he was housed at BCCY(JP) in Jefferson Parish. *Id.* On August 16, 2022—two months before BCCY-WF was opened and before it housed any youth—Alex A., through his attorney, filed an "Emergency ARP Application," demanding that OJJ not open BCCY-WF. ROA.51 at ¶ 15; ROA.637. His grievance was specifically based on the fear that he would be housed with adult inmates and/or that he would not receive youth education, medical care, or rehabilitation because BCCY-WF, located at an adult facility, would lack youth services. ROA.637-44.

OJJ denied emergency processing of Alex A.'s ARP because there was no immediate plan to transfer Alex A. to BCCY-WF. ROA.645. When Alex A. filed his grievance, BCCY-WF was still months from opening. Since it was not an emergency, OJJ processed Alex A.'s grievance as a standard ARP. ROA.592 at ¶ 9; ROA.645. Before receiving a final response to his ARP, Alex A. filed suit as the sole named plaintiff and filed the first preliminary injunction motion to prevent BCCY-WF from opening. ROA.592 at ¶¶ 10, 46-60, 64-66.

To date, Alex A. has never been housed at BCCY-WF. ROA.1426 at ¶ 6; ROA.4520.

6. First Preliminary Injunction Motion

A full evidentiary hearing was conducted on Plaintiff's first preliminary injunction motion.

The district court found the high-risk youth's conduct "caused significant disruption in OJJ's ability to deliver educational and rehabilitation services to the other youth in its custody" and caused physical injuries to youth, OJJ staff, and the public. ROA.1019-20 at ¶¶ 17-20. The district court found OJJ lacked high security accommodations for high-risk youth, OJJ had an immediate need for a more secure facility, and BCCY-WF was a necessary response to the violent behavior of high-risk youth. ROA.1022 at ¶ 29; ROA.1023 at ¶ 35; ROA.1024 at ¶ 40. The district court denied Plaintiffs' motion. ROA.1008-09.

7. Plaintiff Charles C. and His ARP

Plaintiff Charles C. is a youth in OJJ's secure care system. ROA.1233 at ¶¶ 46-47. On October 25, 2022, Charles C., through his attorney, filed an "emergency" ARP with OJJ – nearly identical to Alex A.'s ARP. ROA.4819-25. Charles C. was not housed at BCCY-WF at that time.[1] ROA.4819. The same day Charles C. filed

[1] Charles C. was housed at BCCY-WF from June 2 to August 2, 2023.

his ARP, and before receiving a response, he joined this suit by filing his amended complaint. ROA.1218-58.

8. Second Preliminary Injunction Motion

On July 17, 2023, Plaintiffs filed a second motion for preliminary injunction. ROA.2149-52. Unlike the first motion (which focused on Alex A.'s fear of being in an adult facility and anticipated lack of youth services), the second motion aimed at actual operations of BCCY-WF, conditions that did not and could not have existed before the facility opened (when Alex A. filed his ARP and lawsuit). *Id*.; ROA.2601-49. Plaintiffs' second motion cited seven conditions at BCCY-WF that allegedly presented a risk of harm:

(1) being housed in a building constructed for adult incarceration;

(2) lack of adequate education;

(3) lack of rehabilitative services;

(4) improper use of cell restriction;

(5) improper use of chemical spray;

(6) improper use of handcuffs;

(7) improper withholding of family visitation; and

(8) exposure to prolonged periods of excessive heat and lack of potable water.

ROA.2611-24. The court conducted an evidentiary hearing on the second motion.

9. The Preliminary Injunction and Related Orders

At the close of Plaintiffs' case, Defendants moved for judgment as a matter of law on Plaintiffs' motion for preliminary injunction, including on the defense of failure to exhaust under the PLRA. The district court denied that motion. ROA.4439.

On August 31, 2023, after the close of the hearing on the injunction motion, the district court granted Plaintiffs' motion for class certification and appointed Alex A. and Charles C. as class representatives. ROA.4418-38. In the class certification order, the court found Alex A. properly exhausted his administrative remedies for claims asserted in the second motion for preliminary injunction. ROA.4432-35.

The district court verbally announced the preliminary injunction ruling on September 8, 2023 (ROA.4471) and entered the written ruling on September 14, 2023 (ROA.5341-60). The preliminary injunction incorporated by reference the district court's class certification order as to findings on PLRA exhaustion. ROA.5351. The preliminary injunction ordered OJJ to remove all youth from BCCY-WF and to stop transferring youth to BCCY-WF. ROA.5360.

SUMMARY OF THE ARGUMENT

1. Plaintiffs failed to establish a substantial likelihood of success on the merits; the district court's holding to the contrary was an abuse of discretion. Plaintiffs lack a substantial likelihood of success on the merits for at least the following reasons:

a. Plaintiffs did not properly exhaust their administrative remedies before filing suit and before filing the second motion for preliminary injunction. Charles C. filed suit the same day he filed his administrative grievance. Alex A. filed suit after OJJ denied emergency treatment of his grievance, but before OJJ issued a final response to his grievance. Alex A. filed his grievance before BCCY-WF was even opened, i.e. before any conditions of confinement existed. To date, Alex A. has never been housed at BCCY-WF. Plaintiffs cannot "pre-exhaust" by filing a grievance on anticipated conditions of confinement before a facility becomes operational. Additionally, neither Plaintiff grieved the specific conditions that formed the basis of the second preliminary injunction motion, thus robbing OJJ of its opportunity to cure.

b. The district court erred in finding Plaintiffs have a substantial likelihood of success on the merits on their deliberate indifference claim. The district court found the objective component was satisfied by the alleged harm of housing youth in a facility originally designed for adults, but then found the subjective component was satisfied by the alleged harm of cell restriction practices. The objective and subjective components must address the same alleged harm.

c. The district court abused its discretion in finding Plaintiffs have a substantial likelihood of success on the merits on their Fourteenth Amendment claim. The district court found no express intent to punish the youth. The undisputed evidence confirmed OJJ uses cell restriction, mechanical restraints, chemical spray, and restrictions on privileges only for the legitimate governmental interests of maintaining order and safety of youth and staff. The district court found these measures were used "excessively" but refused to consider the reasons for their implementation. The district court also focused on isolated, anecdotal instances to infer widespread, systemic conditions.

d. The district court abused its discretion in finding Plaintiffs have a substantial likelihood of success on the merits of their Americans with Disabilities Act ("ADA") and Rehabilitation Act ("RA") claims. The only alleged youth disability identified by the district court was special education needs of certain youth. But the undisputed testimony showed, at all of OJJ's secure care facilities, special education is provided by the Louisiana Special School District, and at the time of the hearing, the two youth at BCCY-WF were receiving special education services that fully complied with their IEPs.

2. Plaintiffs failed to carry their burden to establish an imminent risk of irreparable harm. The district court's holding that youth were at risk of psychological

harm if they were housed in an adult setting was based on the vague testimony of Plaintiffs' retained expert who merely testified that she would expect housing youth in such a setting would cause non-specific "regression."

3. The district court abused its discretion in disregarding the harm to Defendants caused by the preliminary injunction and disregarding the strong public interest of maintaining safety and security within the secure care facilities and in the public at large.

4. The preliminary injunction violates the PLRA because:

a. The preliminary injunction constitutes a prisoner release order, and the district court did not first issue an injunction ordering Defendants to correct the alleged constitutional violations and did not afford Defendants a reasonable opportunity to comply with that order; and

b. The preliminary injunction is not narrowly tailored to curtail the alleged constitutional violations. Instead, it is the most restrictive possible order and thus violates the PLRA.

STANDARD OF REVIEW

This Court reviews the district court's grant of a preliminary injunction for abuse of discretion. A decision based on a legal error or a clearly erroneous assessment of the evidence is an abuse of discretion. *United States v. Henderson*, 636 F.3d 713, 717 (5th Cir. 2011) (per curiam). "Findings of fact are reviewed only

for clear error; legal conclusions are subject to de novo review." *Women's Med. Cty. of Nw. Hous. v. Bell*, 248 F.3d 411, 419 (5th Cir. 2001).

A preliminary injunction "is an extraordinary and drastic remedy, not to be granted routinely, but only when the movant, by a clear showing, carries a burden of persuasion." *Black Fire Fighters Ass'n of Dallas v. City of Dallas* , 905 F.2d 63, 65 (5th Cir. 1990). The movant must establish four elements: "(1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and (4) that granting the preliminary injunction will not disserve the public interest." *Anibowei v. Morgan*, 70 F.4th 898, 902 (5th Cir. 2023). The likelihood of success on the merits is "arguably the most important" factor. *Tesfamichael v. Gonzales*, 411 F.3d 169, 176 (5th Cir. 2005). "Irreparable injury is harm for which there is no adequate remedy at law." *Anibowei*, 70 F.4th at 902 (internal quotation marks omitted).

ARGUMENT

1. Plaintiffs Failed to Prove a Substantial Likelihood of Success on the Merits, and the District Court's Holding Was an Abuse of Discretion.

A. The district court's finding that Plaintiffs exhausted their administrative remedies is an abuse of discretion.

"[N]o action shall be brought under [S]ection 1983 …, or any other Federal law, by a prisoner confined in any … correctional facility until such administrative

remedies as are available are exhausted." 42 U.S.C. § 1997e(a).[2] Plaintiffs sue under 42 U.S.C. § 1983, the RA, 29 U.S.C. § 794, and the ADA, 42 U.S.C. § 12101. ROA.1252-54. Thus, Plaintiffs' claims are subject to the PLRA. *See Ferrington v. Louisiana Dep't of Corr*., 315 F.3d 529, 532 (5th Cir. 2002).

The PLRA requires Plaintiffs to exhaust their administrative remedies before filing suit. *Gates v. Cook*, 376 F.3d 323, 332 (5th Cir. 2004); *Wilson v. Epps*, 776 F.3d 296, 299 (5th Cir. 2015). Where a prisoner raises new and distinct claims in a motion for preliminary injunction, the PLRA also bars those claims if they are not exhausted. *See, e.g.*, *Tolliver v. Collins*, No. 2:08–cv–00722, 2010 WL 2640061, at *2 (S.D. Ohio April 29, 2010); *Jimerson v. Rheams*, No. 21-119, 2021 WL 2005492, at *1 (M.D. La. April 15, 2021) (quoting *Muhammed v. Wiles*, 841 Fed. Appx. 681, 685-86 (5th Cir. 2021)). "Proper" exhaustion requires the plaintiff to comply with agency deadlines and procedural rules. *Woodford v. Ngo*, 548 U.S. 81, 90 (2006). This Court takes "a 'strict' approach to [PLRA's] exhaustion requirement." *Wilson*, 776 F.3d at 299-300.

i. <u>Any finding that Charles C. exhausted his administrative remedies was an abuse of discretion.</u>

On October 25, 2022, Charles C. filed an "emergency" ARP. ROA.4819-25. That same day (without waiting the 48 hours OJJ had to respond and without

[2] "Prisoner" includes youth adjudicated as delinquent. 42 U.S.C. § 1997e(h).

receiving a response to the ARP), Charles C. joined this lawsuit by filing his Amended Complaint. ROA.1218-58. Thus, Charles C. did not properly exhaust before filing this suit. The district court ignored this issue. ROA.4432-35.

To be sure, the district court did not find that Charles C. exhausted. The court simply "adopt[ed] by reference its [class certification] Ruling finding that Plaintiffs have exhausted their administrative remedies" under the PLRA. ROA.5351 (emphasis added). There is no express finding in the class certification order that Charles C. exhausted. ROA.4432-35. Rather, the district court merely noted that Charles C. filed an ARP before he was transferred to BCCY-WF, the ARP addressed the same issues raised by Alex A.'s ARP, and when Charles C. transferred to BCCY-WF (nearly nine months after he filed his ARP), he then experienced certain alleged conditions of confinement. ROA.4433.

To the extent the preliminary injunction or class certification order can be interpreted to hold that Charles C. exhausted, the court abused its discretion.

ii. The district court's conclusion that Alex A. exhausted his administrative remedies was an abuse of discretion.

The district court improperly stacked multiple legal errors to find Alex A.'s August 2022 ARP exhausted administrative remedies:

a. The district court erred in concluding that Alex A. timely filed his lawsuit.

On August 16, 2022, Alex A. filed an emergency ARP complaining of OJJ's purported "decision to imminently move" him to BCCY-WF. ROA.4826-34. Because Alex A. was not housed at BCCY-WF and not subject to the alleged conditions, OJJ denied emergency consideration, and under OJJ policy, processed the grievance as a standard ARP. ROA.4835. When Alex A. filed his original complaint, it was before OJJ's deadline to respond. ROA.46-60. Therefore, Alex A. failed to exhaust before filing suit. The district court incorrectly ruled that OJJ's refusal to process Alex A.'s ARP as an emergency constituted a decision upon which Alex A. could rely in filing suit. ROA.1010-13.

The complaint and all subsequent filings, including the preliminary injunction, were premature and prohibited by the PLRA. This Court should reverse the district court's exhaustion ruling, vacate the injunction, and render dismissal.

b. The district court erroneously concluded that Alex A. could pre-exhaust conditions of confinement claims for an unopened facility.

It is undisputed that BCCY-WF did not open until two months after Alex A. filed his grievance. ROA.1223 at ¶ 15. The district court found Alex A.'s August 2022 ARP (before the facility opened in October) exhausted claims for conditions that could not have existed until after the ARP was filed. This eviscerates the purpose of PLRA exhaustion.

Exhaustion serves two important purposes; it gives prison officials: notice of an alleged problem and a fair opportunity to address that problem. *Johnson v. Johnson*, 385 F.3d 503, 522 (5th Cir. 2004); *Woodford*, 548 U.S. at 89.[3] The court's ruling—allowing exhaustion of anticipated conditions of confinement before a facility opens, before anyone is housed there, and before any conditions exist—is directly at odds with those purposes. This is why courts have universally held that a plaintiff cannot preemptively grieve and exhaust remedies for claims based on future events that have not yet occurred. As the Tenth Circuit articulated:

> A grievance obviously cannot exhaust administrative remedies for claims based on events that have not yet occurred. Nor does a grievance exhaust administrative remedies for all future complaints of the same general type. [Plaintiff's] grievance did nothing to alert prison officials to any inadequate treatment that might take place in the future. Consequently, it did not further the purposes of the PLRA's exhaustion requirement—allowing prisons to address specific complaints internally to obviate the need for litigation, filtering out frivolous claims, and creating a useful administrative record—as to the [specific] claims [plaintiff] now pursues in federal court.

Ross v. County of Bernalillo, 365 F.3d 1181, 1188 (10th Cir. 2004).[4]

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[3] "The PLRA attempts to eliminate unwarranted federal-court interference with the administration of prisons, and thus seeks to 'affor[d] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case.'" *Woodford*, 548 U.S. at 93 (quoting *Porter v. Nussle*, 534 U.S. 516, 525 (2002); citing *Booth v. Churner*, 532 U.S. 731, 739 (2001)).

[4] Abrogated on other grounds by *Jones v. Bock*, 549 U.S. 199 (2007). *See also Barnes v. Allred*, 482 Fed. Appx. 308, 312 (10th Cir. 2012); *Sheltra v. Christensen*, No. 1:20-CV-0215-DCN, 2021 WL 1792054, at *3 (D. Idaho May 5, 2021) (citing cases); *London v. Evans*, No. 1:20-

The district court's ruling creates a regime where the mere complaint about a future possible condition at another facility throws open the doors of the courthouse to anyone who may ever be housed (or even never housed, *see infra*) at that facility at some point in the future. That is not the law. This ruling was legal error.

c. The district court erroneously concluded that Alex A. could exhaust claims about a facility where he was never housed and about conditions he never experienced.

Alex A. has never been exposed to conditions at BCCY-WF; he has never resided there. To grieve a condition at BCCY-WF, Alex A. must first be housed at BCCY-WF and thereby exposed to the condition. *See, e.g. Miller v. Eichenlaub*, No. 07-CV-10177, 2008 WL 3833715, at *6 (E.D. Mich. Aug. 13, 2008) (grievance filed at former facility "cannot operate to exhaust any claim based on the conduct of [staff]" at facility to which plaintiff was subsequently transferred; claim "would have necessarily occurred *after* that grievance was initiated") (emphasis in original); *Gross v. Unknown Director of Bureau of Prisons*, No. 7: 08–111, 2008 WL 2280094, *3 (E.D. Ky. 2008) (inmate "did not and could not have received administrative review" of conditions at prison to which he was transferred after initiating grievance process).

CV-174, 2020 WL 4748065 (D. Dela. 2020); *Postelwaite v. Duncan*, No. 14-cv-0839-MJR-SCW, 2015 WL 13035046, at *5 (S.D. Ill. July 1, 2015); *Toenniges v. Ammons*, No. 1:09–CV–165, 2014 WL 66589, at *1 (M.D. Ga. Jan. 8, 2014); *Adams v. Fochee*, No. 12–cv–01076, 2013 WL 3093479, at *8 (D. Colo. June 18, 2013); *Pasion v. McGrew*, No. 10-00443 HG-LEK, 2010 WL 3184518, at *2 (D. Haw. Aug. 11, 2010) ("It is axiomatic that Petitioner cannot grieve a wrong that has not yet occurred[.]"); *Beltran v. O'Mara*, 405 F. Supp.2d 140, 156 (D. N.H. 2005).

If youth (or adults) in custody can "pre-grieve" future conditions of confinement in facilities where they do not reside, this would be an easy end-run around the exhaustion requirement. The court's exhaustion ruling was legal error.[5]

d. The district court erroneously found that Alex A.'s ARP addressed the claims raised in the second motion for preliminary injunction.

PLRA grievances must be "sufficiently specific to give officials a fair opportunity to address the problem that will later form the basis of the lawsuit." *Petzold v. Rostollan*, 946 F.3d 242, 254-55 (5th Cir. 2019). A grievance about one particular incident does not exhaust claims that arise from future incidents, even of the same general type. *Yankton v. Epps*, 652 Fed. Appx. 242, 245-46 (5th Cir. 2016). If one claim is properly exhausted, but other asserted claims are not, only the specific exhausted claim may proceed to litigation. *Jones v. Bock*, 549 U.S. 199, 201 (2007) (PLRA requires dismissal of unexhausted claims even where exhausted claims proceed); ROA.4250-51 (citing cases). This achieves the purposes of exhaustion: giving officials notice of a specific complaint and an opportunity to resolve it.

The grievances contained in Alex A.'s 2022 ARP were materially different issues than those raised in the 2023 second preliminary injunction motion. Thus, the grievance could not exhaust the subsequent claims.

[5] The court's error is compounded by the fact that the court granted class certification and appointed Alex A. as class representative, meaning Alex A. is deemed to have vicariously exhausted for all class members, even though Alex A. has never been housed at BCCY-WF.

In 2022, Alex A. grieved his fear of being housed with adult prisoners and his belief there was no plan to provide youth services (e.g., education, rehabilitation, medical) at BCCY-WF because LSP is an adult facility. ROA.4826-34. Specifically:

1. Alex A. feared being housed in a "notorious adult maximum security prison" because "youth who are incarcerated in adult prisons face an unacceptable and heightened risk of suicide and sexual assault. [Alex A.] and his mother are both immensely fearful for [Alex A.'s] safety and the serious threats he will face upon his move to Angola."
2. As a child adjudicated delinquent, "[Alex A.] has not been convicted of a crime. As a result, [Alex A.] and his peers are entitled under both federal and state law to receive treatment and rehabilitation, not punishment in an adult prison."
3. "[Alex A.] is a student with a disability who is entitled to receive educational accommodations and other services under federal law to ensure equal and non-discriminatory access to the classroom. As a maximum security adult prison, Angola does not have a school capable of providing those services and neither OJJ nor the Department of Public Safety and Corrections ('DPSC') have provided detailed information or a plan for how those services will continue to be provided to youth at Angola."

4. "Angola [as an adult prison] does not have [anger management, substance abuse, and other types of therapy and counseling] programs or available staff to fill this extreme need. Neither OJJ nor DPSC have provided any information or plan regarding how they will ensure consistent delivery of these vital services."
5. "Given the structure, layout, and operation of Angola and the heavy reliance on prisoner labor throughout Angola, sight and sound separation [from adults incarcerated at LSP] will be impossible when [Alex A.] and his peers are moved to Angola."
6. "As a means of avoiding sight and sound interaction with incarcerated adults, OJJ may resort to confining [Alex A.] for large portions of the day to his cell."
7. "When [Alex A.] and his peers are moved to Angola, they will experience constitutionally deficient medical care. Angola is currently in ongoing litigation regarding the quality of health care it provides, and courts have recognized the serious and persistent deficiencies in the provision of healthcare that the adults incarcerated at Angola receive. OJJ and DPSC have failed to provide [Alex A.] or his peers with information about how they will ensure access to a constitutionally adequate mental or physical health care system for youth moved to Angola."

8. "OJJ and DPSC's failure to develop an acceptable plan to ensure medical care, mental health treatment, education, and other forms of rehabilitative treatment to youth at Angola–without illegally placing children in solitary confinement or exposing them to sight and sound contact with incarcerated adults—demonstrates that there is no plan in place to assure the constitutional rights of youth who will be moved to Angola."

Id. (emphasis added).

On Plaintiff's first preliminary injunction motion, the district court conducted a full evidentiary hearing regarding these specific grievances. Afterward, the court issued a detailed opinion, finding Defendants had a sufficient plan to prevent youth contact with adult inmates and to provide youth services at a former adult facility; thus, Alex A. was not substantially likely to prevail on the merits. ROA.1007-70.

In 2023, the allegations of the second preliminary injunction motion were substantially different than those listed above:

- OJJ excessively uses cell restriction as a form of discipline (not to create sight/sound separation between youth and adult inmates);
- OJJ's educational services, while offered, are constitutionally deficient;
- OJJ fails to provide adequate recreation and exercise;
- OJJ limits family visitation;

- OJJ's mental health and rehabilitation services, while offered, are constitutionally deficient; and
- OJJ exposes youth to excessive heat and deprives youth of potable water.

ROA.2612-23.

The district court correctly found Alex A. had not exhausted claims regarding heat or water. ROA.4439; ROA.4433 at n.94; ROA.7916-17. The court allowed all other claims to proceed.

Nowhere in Alex A.'s ARP does he mention mechanical restraints, chemical spray, visitation, or recreation. Indeed, the court made no specific finding that Alex A. ever grieved or exhausted those claims. Still, these claims form at least some basis for the court's preliminary injunction. ROA.5345-47. Any finding that Alex A. exhausted claims regarding mechanical restraints, chemical spray, visitation, or recreation is an abuse of discretion because Alex A. never grieved (much less exhausted) these issues whatsoever. ROA.4826-34.

As to other claims (cell restriction, education, and rehabilitation), Alex A. filed grievances that in some way concern those issues – but the grieved issues were not the same claims later pled in the second preliminary injunction motion. Thus, Alex A.'s 2022 grievances failed to exhaust the later asserted claims on cell restriction, education, and rehabilitation.

(1) Cell Restriction

In 2022, Alex A. grieved that he was afraid he might be in solitary confinement at BCCY-WF to create sight/sound separation from adults. ROA.4829. His ARP made no claim that OJJ would use cell restriction for discipline (or use it excessively). ROA.4826-34. Comparatively, a year later, the second preliminary injunction motion alleges excessive cell restriction for discipline; nowhere in that motion do Plaintiffs allege OJJ used solitary confinement or cell restriction for sight/sound separation. ROA.2614-18.

The district court found because Alex A. raised a concern about solitary confinement (in the specified context of avoiding sight/sound of adult inmates), all claims about solitary confinement in any context were exhausted. ROA.7616. This robbed OJJ of its notice and opportunity to resolve. Indeed, OJJ's potential responses to these two complaints would differ because the issues are wholly different. As to the first, OJJ might respond by taking other measures to create sight/sound separation; as to the second, OJJ might respond by using different disciplinary means.

Alex A's 2022 grievance and the 2023 preliminary injunction motion simply raise different claims about cell restriction. The grievance could not and did not properly exhaust the cell restriction claim in the second preliminary injunction motion.

(2) Education

Similarly, Alex A.'s ARP complained that LSP had no school for youth and that OJJ had no plan to deliver youth education at LSP. ROA.4828. But in the second preliminary injunction motion, Plaintiffs acknowledged BCCY-WF has a school but complained that education provided at that school was inadequate. ROA.2618-20. The court recognized BCCY-WF employs teachers, has equipped classrooms, has education laptops and software, and has written educational materials. ROA.5348-50. But Plaintiffs complained in the second motion that OJJ should have hired more teachers, used computers less frequently, and provided education only in the classroom and not on housing tiers. ROA.2178-80.

Alex A.'s ARP addressed none of the specific education complaints that were later asserted in the second preliminary injunction motion. Of course, the ARP could not have because BCCY-WF did not exist when Alex A. filed his ARP.

(3) Rehabilitation Services

Likewise, Alex A.'s ARP complained that there would be no rehabilitation services for youth at BCCY-WF because LSP (as an adult prison) does not have youth services and OJJ had no plan to deliver such services. ROA.4828-29. But in the second preliminary injunction motion, Plaintiffs complain about the quality and the frequency of rehabilitation services at BCCY-WF. The district court recognized that such services are being provided but took issue with the counselor's qualifications and the frequency of rehabilitative services. ROA.5348, 5350-51.

Alex A.'s ARP (concerning his fear that rehabilitative services would not be offered at BCCY-WF whatsoever) could not and did not put OJJ on notice about the qualifications of the counselor or the frequency of services. Again, the ARP could not have done so because BCCY-WF did not exist when Alex A. filed his ARP.

In sum, the specific claims that formed the basis of the second preliminary injunction motion were not properly exhausted; those claims are barred.

B. The district court committed legal error in finding that plaintiffs had a substantial likelihood of establishing deliberate indifference.

Liability under § 1983 requires proof that prison officials acted with deliberate indifference to a substantial risk of serious harm. *See Jones v. Tex. Dep't of Crim. Justice*, 880 F.3d 756 (5th Cir. 2018) (Eighth Amendment); *Estate of Pollard v. Hood County, Tex.*, 579 Fed. Appx. 260 (5th Cir. 2014) (Fourteenth Amendment). This is "an extremely high standard to meet." *Valentine v. Collier*, 956 F.3d 797, 801 (5th Cir. 2020) (citation omitted). Negligence, even gross negligence, is not enough. *Hare v. City of Corinth, Miss.*, 74 F.3d 633, 645 (5th Cir. 1996). Deliberate indifference requires deprivation of "basic human needs." *Valentine*, 956 F.3d at 801.

A two-part test applies to prove deliberate indifference. *Id.* First, the plaintiff must establish an "objectively intolerable risk of harm." *Id.* Second, the plaintiff must establish the defendant acted with subjective indifference to that risk; that is, the defendant: "(1) was aware of facts from which the inference could be drawn that

a substantial risk of serious harm exists; (2) subjectively dr[e]w the inference that the risk existed; and (3) disregarded the risk." *Id.* (citations and quotations omitted).

i. The district court erred by finding deliberate indifference where the objective risk is not the same risk of which OJJ was alleged to be subjectively aware.

To be liable under Section 1983, OJJ must be subjectively aware of an objective risk of harm and then must disregard that risk. *Farmer v. Brennan*, 511 U.S. 825, 825 (1994) ("prison official may be liable … for acting with 'deliberate indifference' … only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it") (emphasis added).[6]

Here, the district court recognized the deliberate indifference standard, including the required objective and subjective components. ROA.5352-53. Where the court erred was in its application. The court found there was an objective risk of harm but did not find OJJ was subjectively aware of or disregarded that risk. Instead, the court found OJJ was subjectively aware of (and disregarded) some other risk. This was legal error.

[6] *See also Truss v. Daniels*, No. 2:12cv360, 2015 WL 4066871, at *17 (M.D. Ala. June 30, 2015) (citing *Farmer*); *Marbury v. Warden*, 936 F.3d 1227, 1238 (11th Cir. 2019) ("[I]t bears mention that subjective awareness of only *some* risk of harm to a prisoner is insufficient for a deliberate-indifference claim.; holding it is insufficient to show notice that plaintiff "faced some unspecified risk of harm to his well-being") (emphasis in original); *Comstock v. McCrary*, 273 F.3d 693, 703 (6th Cir. 2001).

Throughout the case, the district court identified one intolerable risk of harm to satisfy the objective prong—"the placing [of] any child in a maximum-security facility designed for adults" because it is "unreasonably psychologically harmful to children." ROA.5353-54 (second injunction ruling); ROA.1054-55 (first injunction ruling). However, on the first motion, the court found Plaintiffs failed to satisfy the subjective prong of deliberate indifference.

In denying Plaintiffs' first motion, the district court correctly analyzed whether Plaintiffs established the subjective component as to the identified objective risk. The court rightly found "there is no evidence that OJJ officials subjectively drew the inference that housing youth on the grounds of Angola in the designated facility poses a serious risk of psychological harm." ROA.1055. The court found OJJ witnesses "credible and deeply committed to the rehabilitation of youth in their custody"; "[n]ot a single OJJ witness struck the Court as cavalier or dismissive about the needs of the youth to be rehabilitated," and "none testified in a manner which was suggestive of a vengeful or retaliatory intent in creating the transfer plan." ROA.1055-56.

A year later, at Plaintiffs' second injunction hearing, no additional evidence was introduced that Defendants subjectively disregarded the alleged harm of placing youth in a former adult facility. The court did not retract or modify its earlier finding that Defendants lacked subjective intent and made no findings that

Defendants had subjective intent as to the only identified objective risk: placing youth in an adult facility. ROA.5352-56.

Instead, on the subjective component, the court examined an entirely different alleged harm—the use of cell restriction. The court concluded OJJ "was aware of and indifferent to the serious harm caused by excessively confining adolescents in their cells." ROA.5355-56 (emphasis added). But to be liable under Section 1983, OJJ must be subjectively aware of an objective risk of harm and then must disregard that risk – not just any risk. *See Farmer*, 511 U.S. at 825. Here, the court found there was an objective risk of one harm (placing youth in an adult facility), but then found OJJ was subjectively aware of some other risk of harm (cell restriction). This incongruity constitutes legal error.

ii. The district court erred by improperly stacking different conditions to arrive at a finding of deliberate indifference.

The district court also misstated the law on the subjective component of deliberate indifference when the court held: "The cumulative effect of different deficiencies can demonstrate the subjective component of deliberate indifference, as the Supreme Court acknowledged in *Wilson v. Seiter*, 501 U.S. 294 (1991)]." ROA.5353. It is somewhat unclear if the court actually applied this incorrect statement of law,[7] but if it did, it was legal error.

[7] This would potentially explain how the court found deliberate indifference where the objective and subjective components did not involve the same alleged harm.

In *Wilson*, the Supreme Court clarified its prior holding in *Rhodes v. Chapman*, 452 U.S. 337 (1981), making clear that "our statement in *Rhodes* was not meant to establish the broad proposition that petitioner asserts [that in a case involving multiple deficient conditions 'each condition must be "considered as part of the overall conditions challenged."']" *Wilson*, 501 U.S. at 303-04. Rather, *Rhodes* stands for the proposition that "*some* conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise—for example, a low cell temperature at night combined with a failure to issue blankets." *Id.* at 304 (italics in original; underlining added).

Here, the district court's legal conclusion—that "[t]he cumulative effect of different deficiencies can demonstrate the subjective component"—is the opposite of *Wilson*, which flatly rejected the notion that the cumulative effect of different deficiencies can establish deliberate indifference. *Wilson* further rejected the argument that "overall conditions" constitute an Eighth Amendment violation. *Id.* at 305. "Nothing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists." *Id.*

Likewise, the district court's holding that "systemic deficiencies in a custodial setting can provide the basis for a finding of deliberate indifference at an institutional level" is also legal error. ROA.5353. For this, the district court cited *Gates v. Cook*, 376 F.3d 323 (5th Cir. 2004). *Id.* at n. 30. But *Gates* simply restated the holding from *Wilson*. *Gates*, 376 F.3d at 333 (citing *Wilson*, 501 U.S. at 304).

The district court appeared to stack different alleged violations—cell restriction, mechanical restraints, etc.—concerning various human needs to arrive at a finding of deliberate indifference. The court did not find (and could not find) these conditions had a "mutually enforcing effect" that deprived a "single, identifiable human need." This violates binding Supreme Court case law and was legal error.

C. The district court erred in its application of the Fourteenth Amendment due process standard.

The district court correctly noted the test to determine whether Defendants' conduct constituted "punishment" in violation of the Fourteenth Amendment: a youth offender "can demonstrate that he was subjected to unconstitutional punishment in either of two ways: (1) by showing 'an expressed intent to punish on the part of the detention facility officials,' or (2) by showing that a restriction or condition is not rationally related to a legitimate government objective or is excessive in relation to that purpose." ROA.5356; *see also* ROA.1057 (citing *Bell v. Wolfish*, 441 U.S. 520, 535 (1979)).

The district court correctly ruled on the first preliminary injunction motion that the "expressed intent to punish" prong prevents officials from punishing youth offenders for the underlying crime for which the youth has been detained, *i.e.*, punishment simply because the youth is a detainee. ROA.1058 (citing *Bell*, 441 U.S. at 535, 539). But, as the court also explained, the Fourteenth Amendment does not prohibit officials from disciplining youth for infractions committed while in detention. *Id.* "[M]aintaining institutional security and preserving internal order and discipline are essential goals" of a detention facility. *Bell*, 441 U.S. at 546.

On the first preliminary injunction motion, the district court expressly found "there is no evidence that OJJ officials 'expressed intent to punish' the youth subject to transfer [to BCCY-WF]." ROA.1058. On the second motion for preliminary injunction, no evidence was introduced indicating Defendants housed youth at BCCY-WF with an express intent to punish them for being detainees or that Defendants were imposing alleged conditions with an express intent to punish youth for being detainees. The district court made no such finding. ROA.5356. Accordingly, to find a Fourteenth Amendment violation, the court had to find conditions were imposed excessively in relation to a legitimate government interest. *Bell*, 441 U.S. at 535.

As shown below, the only evidence introduced at trial about cell restriction, mechanical restraints, chemical spray, or denial of family visitation,

demonstrated that, when these conditions occurred, they were for legitimate government interests of maintaining order, safety, and security. There was no evidence that any of these were imposed for any non-legitimate purpose or were imposed excessively.

i. OJJ's use of cell restriction is not excessive; the district court's holding to the contrary was an abuse of discretion.

The district court's findings regarding cell restriction at BCCY-WF are manifestly erroneous. The court found that "right from the start, youth are locked in their cell for 48 to 72 hours" and "youth are locked in their cells excessively and for days at a time as punishment." ROA.5344. Based upon these factual findings, the court concluded that "cell restrictions as used at Angola are *de facto* solitary confinement in both use and affect [sic]," that cell restriction at BCCY-WF "meet[s] the statutory definition of solitary confinement" under Louisiana statutory law, and that OJJ "was aware of and indifferent to the serious harm caused by excessively confining adolescents in their cells." ROA.5355-56.

These findings are inconsistent with extensive evidence and testimony put on at the injunction hearing. Moreover, the court refused to admit evidence regarding the reasons for imposing cell restriction and disregarded significant portions of evidence to reach its erroneous findings. Every defense witness testified that OJJ's use of cell restriction is in response to safety and security concerns at the facility. ROA.5502-03; ROA.6645-47; ROA.6780-81; ROA.7111-12; ROA.7486-87;

ROA.7775, 7782-83. OJJ employees consistently stated that cell restriction is never used as punishment. ROA.5499-500; ROA.6590, 6596; ROA.7113. Plaintiffs did not present a single instance where a youth was placed in cell restriction arbitrarily. Even Plaintiffs' attorneys acknowledged that cell restriction is used "because of conflict or potential for violence." ROA.5494:21-24.

Further, Plaintiffs failed to put on any evidence that cell restriction was "excessive." Plaintiffs presented limited anecdotal evidence of isolated instances where individual youth were placed on cell restriction (ROA.5344) but withheld all information regarding why those youth were placed on cell restriction in those instances. The court systematically excluded evidence of the reasons for cell restriction and disallowed testimony and evidence regarding the correlation between youth behavioral infractions and use/extent of cell restriction. ROA.7799-7808, 7836-37.

Defendants proffered voluminous records correlating youth violence and aggression (toward staff and other youth) with frequency and duration of cell restriction – direct evidence establishing OJJ used cell restriction only when necessary to address serious and immediate threats of harm and to ensure facility safety and security, with frequency and duration in proportion to youth conduct. ROA.10227, 10243, 10253, 10263, 10290, 10357, 10386, 10532, 10662, 10802, 11033, 11046, 11066, 11095, 11119, 11142. Such evidence also demonstrated OJJ's

sparing use of cell restriction spanning most months of BCCY-WF's operation when youth violence (and concomitantly cell restriction) occurred infrequently. *Id.*

Without allowing testimony and evidence of the underlying bases for cell restriction, the court had no record on which to conclude that OJJ's use of cell restriction was indeed "excessive." This was legal error.

a. Any reliance on La. R.S. 15:905 was legal error.

To the extent the district court relied on Louisiana Revised Statute 15:905—which restricts solitary confinement of youth—that reliance is legal error for at least two reasons.

First, Plaintiffs never pled a claim for alleged violation of La. R.S. 15:905. Courts disregard claims that are not expressly pled. *Allstate Ins. Co. v. Plambeck*, No. 08-CV-0388-M-BD, 2012 WL 2130982, at *4 (N.D. Tex. Jan. 4, 2012).

Second, an alleged violation of a state statute is not cognizable under § 1983. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984). The Eleventh Amendment prohibits federal courts from enjoining state facilities to follow state law. *Valentine*, 956 F.3d at 802 (citing *Pennhurst*, 465 U.S. at 103–23).[8]

[8] Even if the Louisiana state statute defining "solitary confinement" was relevant to this federal proceeding, ample evidence was presented establishing OJJ's cell restriction practices at BCCY-WF did not violate that statute or otherwise constitute solitary confinement, i.e. youth are not isolated or alone on the tier and receive constant interaction and programming. ROA.5495-97, 5643-46, 6583-84, 6620-21, 6641-43, 7052-53, 7110, 7662, 7774-75, 7834.

ii. OJJ's use of mechanical restraints is not excessive; the district court's holding to the contrary was an abuse of discretion.

The district court found OJJ's "untrained and undocumented use of handcuffs" violates the Fourteenth Amendment. ROA.5356. But evidence of OJJ's allegedly untrained use of mechanical restraints was non-existent at the hearing on the second preliminary injunction motion. In fact, Plaintiffs' expert admitted he reviewed deposition testimony confirming that OJJ staff is trained on safe restraint practices. ROA.5771.

To the extent there was any testimony regarding mechanical restraints at BCCY-WF, all testimony confirmed the use of such restraints was for a legitimate governmental interest—the safety of youth and staff. Testimony confirmed mechanical restraints are used "when a kid is becoming irate, to maintain control of the kids and to keep the kid from self-harming or harming others." ROA.6782:12-17. Less restrictive means are used when able. ROA.6782:18-20.

The district court received testimony that mechanical restraints were used in the recreation yard following an incident where some youth escaped their restraints, wrapped those restraints around their hands (to use like brass knuckles), and then attempted to assault a responding staff member. ROA 7117:8-15. The court also heard testimony that mechanical restraints were used in response to several violent incidents, including a youth assault of staff resulting in permanent damage to a staff

member's eye, a youth assault of staff resulting in a headwound to the staff member that required multiple staples, and a youth assault of staff where the youth wounded the staff member with broken glass. ROA.7114-15.

The district court's finding that OJJ's use of mechanical restraints is "excessive" appears to be based solely on the district court's own observation when the court made a site visit. ROA.6844. The court stated it observed four youth handcuffed in the dining room while playing cards or journaling. *Id.* But at the hearing, the court questioned Facility Director Linda London about these observations; she testified that the court's visit to BCCY-WF coincided with a period when the youth were "displaying very aggressive and violent behavior" and openly admitting their plans to "abuse staff" and "jump other kids." (ROA.6844-45). Director London further explained that youth were in mechanical restraints during recreation and programming as a "step down" process from earlier cell restriction to test youth behavior. ROA.6845:11-21. There was no record evidence to the contrary; thus, the court's ruling was clear error. *See Delahoussaye v. Performance Energy Srvcs., LLC*, 734 F.3d 389, 392 (5th Cir. 2013) (factual findings are clearly erroneous if, *inter alia*, "the findings are without substantial evidence to support them").

As with cell restriction, the court found use of mechanical restraints was excessive based only on the fact that the restraints were used but with no assessment

of the bases for application or frequency of restraint use under specific circumstances. Just as with cell restriction, without the "why," the court could not possibly determine excessiveness.

iii. OJJ's use of chemical agent is not excessive; the district court's holding to the contrary was an abuse of discretion.

The district court found OJJ punitively uses chemical agent at BCCY-WF; this finding is manifest error. ROA.5345. The record makes clear that use of chemical agent at BCCY-WF is for legitimate government interests, namely maintaining safety and security of youth and staff. ROA.5587:15-5588:2; ROA.6782:9-11. These are recognized legitimate justifications for use of chemical agents. *Scott v. Hanson*, 330 Fed. Appx. 490, 491 (5th Cir. 2009), *cert. denied* 558 U.S. 1031 (2009) (use of mace on plaintiff restrained in cell was justified by plaintiff's continued refusal to comply with orders to cease disruptive behavior); *Thomas v. Comstock*, 222 Fed. Appx. 439, 441-542 (5th Cir. 2007); *Lynott v. Henderson*, 610 F.2d 340, 342-42 (5th Cir. 1980).

The district court cited to Exhibit P-440, which is video footage of a single discharge of chemical agent by a single juvenile justice specialist ("JJS"), and a portion of the testimony from a second JJS, Daja McKinley, about the events that led to that single discharge. ROA.5346.

In short, after an outburst and verbal threats to youth and staff in the cafeteria earlier in the day, a youth (who had been escorted back to his cell) then tied his bed

linens together, tossed them across the tier hallway, and attempted to pull a fan from the wall. ROA.7085:17-7086:19. JJS McKinley went to the youth's cell to counsel and de-escalate him. ROA.7086:24-7087:18. The youth dipped a cup inside the toilet, filling it with liquid. ROA.7089:8-7090:19. JJS McKinley continuously asked the youth to give her the cup; he refused. *Id.* When JJS Edwards arrived, the youth threw liquid from the toilet on JJS McKinley and JJS Edwards. *Id.* JJS Edwards deployed chemical agent. ROA.7091:24-25.

Even if this particular use of chemical agent was found excessive (which is denied), a lone incident does not establish systemic unconstitutional conditions of confinement. *Infra.* Plaintiffs did not establish a single other unwarranted discharge of chemical agent, much less a pattern of similar events. To the contrary, JJS staff testified that they "rarely use chemical agents." ROA.7076:2.

The court found chemical agent use at BCCY-WF excessive. The record demonstrates otherwise. The district court noted that "records show that mace was used five times in July alone." ROA.5347. But Lieutenant Colonel Travion Gordon testified that the use of chemical agent during the month of July 2023 was due to an uptick in youth violence. ROA.7900:21-25. According to the logs in evidence, chemical agent was not deployed at all between May 30 and July 5, 2023. ROA.11216. Chemical agent was utilized on July 6, July 7, July 8, and twice (during

the same incident) on July 11, 2023. *Id.* Chemical agent was not deployed again during the month of July. *Id.*

Similar to cell restriction and restraints, the district court also discounted youth misconduct that necessitated use of chemical agent. The evidence revealed that chemical agent was discharged following incidents involving: a youth who broke a sharp metal object from a light fixture in his cell, threw the object at a JJS, threatened to kill staff, assaulted staff by kicking, punching, and biting, and tried to escape the cell (ROA.10831-52); a youth refused to return to his cell, became combative, and threatened to assault staff (ROA.10884-97); a youth threw water from the toilet at a JJS while she was serving lunch, became hostile, displayed aggressive behaviors, and threatened the staff (ROA.10914-25); and three youth worked together to remove their mechanical restraints, threatened to use the mechanical restraints as weapons, wrapped the restraints around their fists, and attempted to attack a JJS from behind (ROA.10953-66, 10978-79).

Use of chemical agent at BCCY-WF is not excessive in relation to legitimate government interests of maintaining safety and security for staff and other youth. Once again, the district court primarily based its ruling on an isolated anecdote and disregarded the "why" to determine use of chemical agent was "excessive." This was legal error.

iv. OJJ's limitation of family visitation is not excessive; the district court's holding to the contrary was an abuse of discretion.

The district court's finding that family contact is "systemically denied" as punishment is manifestly erroneous. ROA.5356.

As an initial matter, the court cited to only a single instance in which a youth was allegedly denied one family phone call. Again, a single episode cannot constitute systemic conditions of confinement. *Campos v. Webb County, Tex.*, 597 Fed. Appx. 787, 791-92 (5th Cir. 2015) (citing cases).

Moreover, upon examination, the court also misconstrued that lone instance. The court cited to Ex. D-399[9] and found the youth's mother was told for three consecutive weeks that she would not be permitted to speak with her son because of behavioral infractions. ROA.5347. This is incorrect. The records show that the youth in Exhibit D-399 had zoom calls on 6/23, 6/27, 7/7, 7/13, and 7/19. ROA.10082, 10084-86. On 7/6, the youth was unable to make a zoom call because he was placed on cell restriction for pushing a staff and running out of his authorized area. ROA.10083. But the very next day, the youth had the zoom call. ROA.10084. Further, the facility counselor testified she never turns down a youth's request for a phone call. ROA.7637:16-17.

[9] The Court mistakenly cited to this exhibit as P-399.

The district court's finding that family contact is systemically denied is divorced from the evidentiary record, clearly erroneous, and an abuse of discretion.

D. The district court's finding of a violation of the ADA/RA was an abuse of discretion.

The district court's finding that "Plaintiffs are substantially likely to succeed in showing that, because of their disabilities, they are being denied necessary services to which they are entitled as a matter of law" is vague and unsupported by the factual record. ROA.5358. As an initial matter, it is unclear to what disability the district court is even referring. The only "factual finding" by the court as to a disability involves special education services, wherein the court states: "There was no evidence of the provision of any special services." ROA.5349. That holding is directly contrary to the evidence presented at the second injunction hearing, which was:

- Special education is provided by the Louisiana Special School District ("SSD"), which provides special education instructors, pupil appraisals, staff, evaluations to determine whether students need special education services, and other related services (speech, orthopedic impairment, counseling, etc.). ROA.7965:13-21.
- At the time of the hearing, two special education teachers provided services to BCCY-WF: one provided 90 minutes per week of instruction, and the other provided 60 minutes per week of instruction. ROA.6686:13-

15; 7965:1-6. The special education teacher schedule was entered into evidence. ROA.10046.

- At the time of the hearing, only two youth at BCCY-WF qualified for special education; of those, one was classified as gifted. ROA.6693:8-12.
- The special education services provided by SSD to the two special education students at BCCY-WF fully complied with those students' IEPs. ROA.6693:13-17.[10]

Importantly, there was zero evidence indicating that any youth has ever been denied special education services because of their disability. *Delahoussaye*, 734 F.3d at 392 (clear error where findings are without substantial evidence).

The State delegated to OJJ responsibilities for delivering education and special education to youth in custody. The OJJ, through the SSD, discharged that obligation in full compliance with the youths' IEPs. The district court lacks the expertise necessary to understand delivery of these services; it should not substitute its own judgment for the judgment of the OJJ and the SSD. This is why the Supreme Court has cautioned federal courts to be reluctant to inject themselves into day-to-day operations of a correctional institution.

[10] The only testimony remotely related to a lack of special education services was the testimony that, at the beginning of the school year, the IEPs for certain special education students had not yet been forwarded to BCCY-WF. But the testimony was clear that the IEPs were received at BCCY-WF within three days of the start of the school year. ROA.6681:5-9, 6693:25, 6694:2.

The district court's finding that special education services were not provided is divorced from the record evidence and constitutes an abuse of discretion. Plaintiffs are not substantially likely to succeed on the merits of their ADA/RA claim. The court's contrary holding was an abuse of discretion.

2. Plaintiffs Failed to Establish an Imminent Risk of Irreparable Harm.

The district court found that the imminent risk of irreparable harm in this case was the risk of "psychological harm." ROA.1046; ROA.5358. The district court cited to the testimony of Plaintiffs' retained expert Monica Stevens, who (according to the court) "opined that placing any child in a maximum security facility designed for adults is unreasonably psychologically harmful to children." ROA.1054 (citing ROA.5915-5916). But Dr. Stevens testified to nothing other than the potential for non-specific "regression" from placing a juvenile in an adult prison setting. ROA.5916:4-8.

First, Defendants can identify no case law from this Court finding that psychological harm alone constitutes irreparable harm. In the closest analogous cases, the Court has held that "stress" is not an irreparable harm. *See Cupit v. Jones*, 835 F.2d 82, 86 (5th Cir. 1987) (pretrial detainees not entitled to stress-free atmosphere).

Second, as noted above, Dr. Stevens never testified to any specific psychological harm that would purportedly befall youth placed at BCCY-WF.

Rather, she testified that if a youth offender is placed in an environment that looks like an adult prison, she would "expect regression from most kids." ROA.5915:25-5916:4. She admitted that not all youth would regress, but "[t]he risk of harm [she] think[s] is unreasonable." ROA.5916:13.

Third, Dr. Stevens never attempted to quantify the magnitude of any purported "harm" caused by "regression." "[W]hile 'it is not so much the magnitude but the irreparability that counts,' the scale of the projected harm must be 'more than de minimis.'" *Career Colleges & Sch. of Texas v. United States Dep't of Educ.*, No. 1:23-CV-433-RP, 2023 WL 4291992, at *8 (W.D. Tex. June 30, 2023) (quoting *Louisiana v. Biden*, 55 F.4th 1017, 1035 (5th Cir. 2022)). Dr. Stevens' testimony does not establish the scale of the purported harm.

In sum, Dr. Stevens' vague, non-specific, conclusory allegation of "harm" or non-descript "regression" does not establish the imminent risk of irreparable harm that the law requires for liability. *Mitchell v. Sizemore*, No. 6:09CV348, 2010 WL 457145, at *3 (E.D. Tex. Feb. 5, 2010) (plaintiff's "vague and conclusory allegation that he is undergoing 'a number of problems' is insufficient to show entitlement to injunctive relief") (citing *Lakedreams v. Taylor*, 932 F.2d 1103, 1107 (5th Cir.1991)).

The district court's finding of irreparable harm was an abuse of discretion.

3. The District Court Erred in Finding the Alleged Harm to Plaintiffs Outweighed the Harm to Defendants and that the Public Interest Favored Entering the Preliminary Injunction.

In balancing harms to determine whether to issue an injunction, the district court improperly discounted the *per se* harm the injunction imposes upon Defendants and altogether ignored the strong public interest in maintaining BCCY-WF for purposes of safety and security. This was an abuse of discretion.

A. The district court erred in discounting the certain and immediate harm to defendants.

The harm of this injunction to Defendants is clear: it robs OJJ of its autonomy to operate Louisiana's secure care system according to evolving needs of youth in custody.[11]

The Supreme Court recognizes that "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." *Valentine*, 956 F.3d at 803 (quoting *Maryland v. King*, 567 U.S. 1301, (2012) (Roberts, C.J., in chambers)).

[11] The court identified three purported harms to Plaintiffs: (1) placement of youth at an adult facility; (2) allegedly excessive cell restriction; and (3) purported lack of education, mental health and rehabilitation. ROA.5358. As shown herein, as to the first two of these "harms," Plaintiffs do not have a substantial likelihood of success. As to the third, there is no established constitutional right to educational and rehabilitative programming. The Supreme Court has declined to address the appropriate federal standards to judge conditions of a state juvenile detention facility, both generally and as applied to such services. *Ingraham v. Wright*, 430 U.S. 651, 669 n.37 (1977). In the Fifth Circuit's only case addressing it, the Court vacated an injunction in favor of juvenile detainee class, explaining a "right to treatment for juvenile offenders has not been firmly established" and is "doubtful." *Morales v. Turman*, 562 F.2d 993, 997-98 (5th Cir. 1977). Thus, the district court gave undue weight to unproven and questionable harms to Plaintiffs and gave no weight to harms to Defendants. This was an abuse of discretion.

Here, as in *Valentine*, the State has "assigned the prerogatives" of juvenile detention policy to Defendants. The court's injunction "prevent[s] the State from effectuating the Legislature's choice and hence imposes irreparable injury." *Id.* The Supreme Court "has repeatedly warned that it is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." *Id.* (quotations omitted). Operation of juvenile detention centers is no different.

As in *Valentine*, these Defendants are irreparably harmed by the preliminary injunction – and that harm is "particularly acute" where the injunction interferes with OJJ's "system-wide approach" to respond to changing needs of youth in OJJ's care. *Id.* This injunction thwarts Defendants' "ability to continue to adjust its policies" because it "lock[s] in place a set of policies," such that Defendants are not free to act "without a permission slip from the district court." *Id.* As a matter of law, "[t]hat constitutes irreparable harm." *Id.*

In failing to give due weight to this issue, the court abused its discretion.

B. The district court abused its discretion by failing to consider the significant public interest in safety and security.

"[W]hen a state statute vests state officials with broad discretionary authority concerning [prison operations], the Constitution affords the prisoners no constitutionally protected interests that might outweigh defendants' or the public interests in prison administration." *Patterson v. Daniels*, No. 12-1674, 2010 WL

2100546, at *21 (E.D. La. March 22, 2013) (referencing *Olim v. Wakinekona*, 461 U.S. 238, 249–50 (1983); *Merit v. Lynn*, 848 F. Supp. 1266, 1267–68 (W.D. La. 1994)).

The district court asserts it is "always" in the public interest to prevent the violation of constitutional rights. ROA.5359. But there are limits to this sweeping statement.[12] While the public may have an interest in avoiding constitutional violations, the public also has an interest in safety and security in detention centers and in the public at large. *Zantiz v. Seal*, No. 12-1580, 2013 WL 357069, at *4 (E.D. La. Jan. 29, 2013) ("To issue an injunction against this facility would limit those best equipped to make decisions about the proper procedures to maintain safety, and would therefore disserve the public interest in maintaining the safety of the prisoners and officers at the facility.").

The high-risk youth have a documented history of escapes, riots, extensive property destruction, and extreme violence including attempted murder of an innocent citizen. ROA.664 at ¶¶ 17-18; ROA.665 at ¶¶ 19-23. The public surely has a strong interest to maintain a facility that can safely and securely detain this population to ensure their treatment and rehabilitation before they are re-introduced

[12] If there were no limits on this position, the fourth factor would be a moot point; it would always weigh in favor of a movant claiming deprivation of constitutional rights.

into society. *Zantiz*, 2013 WL 357069, at *4. BCCY-WF is the only OJJ facility that has proven over time that it can successfully do so. ROA.5443.

In ruling on the first motion for preliminary injunction, the district court expressly recognized this public interest. ROA.1069. In the most recent ruling, the district court made no mention of it. ROA.5341-60. The court's disregard of this strong public interest was an abuse of discretion.

4. The Scope of the Preliminary Injunction Violates the PLRA.

A. The Preliminary Injunction is a Prohibited Prisoner Release Order.

The preliminary injunction constitutes a prisoner release order under the PLRA. Because the district court did not satisfy the requirements for such an order, the injunction was legal error.

A "prisoner release order" is "any order, including … preliminary injunctive relief … that directs the release from or nonadmission of prisoners to a prison." 18 U.S.C. § 3626(g)(4).[13] The preliminary injunction directs that all youth be transferred from, and that no youth be admitted to, BCCY-WF. This is a prisoner release order. *See Ruiz v. Estelle*, 161 F.3d 814, 825-27 (5th Cir. 1998), *abrogated on other grounds as recognized in Camp v. McGill*, 789 Fed. Appx. 449, 450 n.6 (5th Cir. 2020). Before a prisoner release order can issue, the PLRA requires that:

[13] "Prison" includes juvenile facilities. 18 U.S.C. § 3626(g)(5).

(1) the court must have previously entered an order for less intrusive relief that failed to remedy the deprivation of the Federal right; and (2) the defendants must have been given a reasonable amount of time to comply with that prior order. *See* 18 U.S.C. § 3626(a)(3)(A)(i)-(ii).

The district court did not comply with either prerequisite. Accordingly, the preliminary injunction violates the PLRA and should be reversed and vacated.

B. District Court Committed Legal Error By Granting An Overbroad Injunction.

"A district court abuses its discretion if it issues an injunction that 'is not narrowly tailored to remedy the specific action which gives rise to the order as determined by the substantive law at issue.'" *O'Donnell v. Harris Cnty.*, 892 F. 3d 147, 163 (5th Cir. 2018) (quoting *Scott v. Schedler*, 826 F. 3d 207, 211 (5th Cir. 2016)), *overruled on other grounds by Daves v. Dallas Cnty.*, 22 F. 4th 522 (5th Cir. 2022).

The PLRA also limits the scope of injunctions. *Barbee v. Collier*, No. 22-70011, 2022 WL 16860944, at *2 (5th Cir. Nov. 11, 2022) (citing *Native Am. Council of Tribes v. Weber*, 750 F. 3d 742, 753 (8th Cir. 2014)), *cert. denied*, 143 S. Ct. 440 (2022). Under the PLRA, "preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the violation of the federal right, and be the least intrusive means necessary to correct the harm." 18 U.S.C. § 3626(a)(2). Federal courts are to "eschew toward minimum intrusion into the affairs

of state prison administration." *Gumns*, No. CV 20-231-SDD-RLB, 2020 WL 2510248, at *3 (M.D. La. May 15, 2020).

Closing BCCY-WF is the most intrusive means to correct the alleged harm. The district court already ruled that the BCCY-WF facility, itself, does not violate the Constitution. ROA.1068. By its own findings, then, closure of BCCY-WF is not necessary to comply with the Constitution.

The district court's ruling (parroting Plaintiffs' preliminary injunction brief), recounted eight "promises" the court contended were made and broken by Defendants concerning how BCCY-WF would operate. ROA.5341-5351. But "broken promises" is not the liability standard under the Eighth or Fourteenth Amendments. Even if the district court found one or more "broken promises" violated the Constitution, the preliminary injunction still must be narrowly drawn to address those alleged violations.[14] Instead, the district court issued sweeping relief, ordering Defendants to remove all youth from BCCY-WF and shut it down. The overbroad scope of this injunction constitutes an abuse of discretion. The preliminary injunction should be reversed and vacated.

[14] For example, if the district court found that using mechanical restraints violated the Constitution, then the preliminary injunction should have enjoined OJJ to stop using mechanical restraints, not close BCCY-WF.

CONCLUSION

The Court should reverse the district court's order, vacate the preliminary injunction, and render a judgment of dismissal in favor of Defendants.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

On October 27, 2023, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,259 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word (the same program used to calculate the word count).

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