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

REPLY BRIEF OF DEFENDANTS-APPELLANTS

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INTRODUCTION

Defendants have raised a litany of errors in this appeal that demonstrate why the Court should reverse and vacate the district court's preliminary injunction ruling.

In response, Plaintiffs' lead argument is that the appeal should be dismissed as moot because the preliminary injunction will expire soon after oral argument, under the PLRA's 90-day automatic expiration provision. Doc. 156 at 16 (citing 18 U.S.C. § 3626(a)(2)).[1] Mootness is not that simple. It presents more complicated legal issues, requiring the Court to undergo a multi-step analysis:

- First, as even Plaintiffs admit, the preliminary injunction has not expired, will not be expired at the time of oral argument, and will not expire for at least several days after oral argument.
- This appeal has been prepared on an expedited basis. If there is any risk of mootness due to the injunction's future expiration, the Court should rule before any such argument vests. To do so, the Court must decide the operative expiration date of the injunction, which is disputed by the Parties.
- If the injunction might expire before the ruling, the Court must analyze and decide whether a live Article III case or controversy will remain. As explained *infra*, Defendants fervently contend that it will.

[1] Page numbers to appellate docket entries refer to the printed page numbers on the document.

- If the Court believes expiration of the injunction will moot the appeal (which Defendants deny), the Court must analyze the potential application of an exception to mootness, *i.e.*, whether the injunction is capable of repetition yet evading review.

Ultimately, if the Court finds the preliminary injunction is moot and vacates the injunction, this would only return the case to the lower court for a third trial to determine the propriety of a permanent injunction and would likely give rise to a second appeal on the issues already presented here.

The law provides a better resolution. Under the Supreme Court's decision in *Sinochem*[2] and its progeny, the Court can (and should) avoid the complexities of mootness and, instead, should first decide the straightforward threshold issue of PLRA exhaustion. Because no Plaintiff in this case properly exhausted administrative remedies, this Court should dismiss the entire action with prejudice.

In this case, the exhaustion issue is straightforward because the district court's ruling represents a drastic and obvious departure from long-held PLRA jurisprudence. Specifically, the district court held the PLRA exhaustion requirement was satisfied when Plaintiff Alex A. attempted to "pre-grieve," on behalf of all youth, prison conditions in a yet-to-be opened facility based on speculation that such conditions might someday exist and that he might someday be housed there. The

[2] *See Sinochem Intern. Co. Ltd. v. Malaysia Intern. Shipping Corp.*, 549 U.S. 422 (2007).

law provides zero support for this interpretation of PLRA exhaustion. The ruling eviscerates the purposes of the PLRA and creates an end-run around the exhaustion requirement for future cases. This Court should correct it.

Exhaustion is key to this appeal and is dispositive. If no Plaintiff properly exhausted, the preliminary injunction is infirm, the class must be dissolved, and this lawsuit must be dismissed in full.

Exhaustion is also a critical legal issue for all cases governed by the PLRA, for all courts presiding over those cases, and for all prisons administering grievance programs. Because the district court's ruling dismantles the PLRA exhaustion requirement, if the ruling stands, prison administrators can expect a wave of prisoner litigation, claiming administrative remedies were exhausted through speculative, anticipatory grievances. This Court should prevent that result.

ARGUMENT

1. The Court Should Reverse and Render on the Threshold Issue of Exhaustion.

A. The Court should address exhaustion first, before mootness.

Plaintiffs' Response asserts that Defendants' appeal is moot, so the Court lacks jurisdiction,[3] cannot review the merits, and must dismiss the appeal. Doc. 156 at 14.

[3] *See Valenzuela v. Silversmith*, 699 F.3d 1199, 1204 (10th Cir. 2012) (explaining mootness is an issue of subject matter jurisdiction).

This is incorrect. Regardless of any mootness argument, the Court can and should address the threshold issue of exhaustion first. As the Supreme Court has explained, while federal courts generally "may not rule on the merits of a case without first determining that it has jurisdiction" over the suit, "there is no mandatory 'sequencing of nonmerits issues.'" *Sinochem*, 549 U.S. at 430-31 (citing and quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 93-102 (1998) and *Ruhrgas AG v. Marathon Oil Co*., 526 U.S. 574, 584 (1999)). Courts have "leeway 'to choose among threshold grounds for denying audience to a case on the merits." *Id.* at 413. "It is hardly novel for a federal court to choose among threshold grounds" that need to be adjudicated before reaching the merits. *O'Hara v. Donahoe*, 595 Fed.Appx. 367, 370 (5th Cir. 2014) (quoting *Ruhrgas*).

In March 2023, this Court relied on *Sinochem* to hold that certain threshold issues can and should be decided before jurisdictional issues like mootness. *Daves v. Dallas Cty., Tex.*, 64 F.4th 616, 624-34 (5th Cir. 2023) (addressing abstention before mootness; citing principles of judicial economy, federalism, comity). The Court's leeway to rule on these threshold grounds is "appropriate" where, like here, jurisdictional issues are "difficult to determine, and dismissal on another threshold ground is clear." *Id.* at 655 (J. Higginson, Stewart, Dennis, Haynes, concurring). Courts are to give priority to an issue that may relieve parties of unnecessary expense or delay or may best serve judicial economy. *Sinochem*, 549 U.S. at 435-36. Where

one issue may involve a more "arduous inquiry," courts should instead decide the issue that presents "the less burdensome course." *Id.*

Exhaustion of administrative remedies is a "threshold ground" that can (and in this case should) be ruled upon prior to jurisdictional issues. *O'Hara*, 595 Fed.Appx. at 370, n.2. (failure to exhaust administrative remedies was a threshold, non-merits issue that avoided "arduous inquiry" into subject matter jurisdiction). *See also Gonzalez v. Crosby*, 545 U.S. 524, 532 n.4 (2005) (denial of habeas petition for failure to exhaust remedies was a "ruling which precluded a merits determination"); *Pacheco v. Mineta*, 448 F.3d 783, 795 (5th Cir. 2006) (failure to exhaust remedies is a prerequisite to suit); *Valenzuela*, 699 F.3d at 1205 (exhaustion is a threshold, non-merits issue).

This Court and other circuit courts have consistently determined that exhaustion should be decided before other threshold questions, including mootness:

- In *O'Hara*, this Court refused to consider the appellant's subject matter jurisdiction argument where she had failed to exhaust administrative remedies. 595 Fed.Appx. at 370, n. 2.
- In *Valenzuela*, the Tenth Circuit "avoid[ed] th[e] difficult issues" of determining whether a party's appeal was moot by "disposing" of the appeal on the threshold issue of failure to exhaust tribal court remedies. 699 F.3d at 1204-06.

- In *Allen v. Falk*, though defendants raised several jurisdictional issues, the Tenth Circuit resolved the prisoner-plaintiff's appeal based on two threshold inquiries: whether plaintiff timely appealed and whether plaintiff exhausted his administrative remedies under the PLRA—because those two issues were "sufficient to fully dispose" of the case. 624 Fed.Appx. 980, 985-86, n.3 (10th Cir. 2015).[4] *See also Chegup v. Ute Indian Tribe of Uintah and Ouray Reservation*, 28 F.4th 1051 (10th Cir. 2022) (acknowledging courts have "discretion to choose among multiple threshold grounds for dismissing a case" but "not all grounds for dismissal are created equal, and some matters are properly resolved before others"; noting the purpose for administrative tribal exhaustion illustrates the "comparative importance" of exhaustion and "underscores why the district court should have started with it in a case that so clearly presented the issue").
- In *Hardin v. Hunt*, the Fourth Circuit found it "need not reach the mootness question" presented by the defendant prison officials because the court elected to "consider certain threshold issues, like exhaustion of remedies, before considering Article III jurisdictional issues, like mootness." No. 21-

[4] Relevant here, the plaintiff in *Allen* attempted to rely on grievances filed long before the incidents for which he complained in the lawsuit; the court found "these stale grievances cannot serve to exhaust his remedies for later incidents." *Id.* at 986.

7195, 2023 WL 3969989, at *1, n.1 (4th Cir. Apr. 12, 2023) (quoting *K.I. v. Durham Pub. Schs. Bd. of Educ.*, 54 F.4th 779, 788 n.3 (4th Cir. 2022) (citing *Sinochem* to first consider exhaustion before allowing arguments on standing or mootness)).

The Court should rely on *Sinochem* to first consider the threshold inquiry of PLRA exhaustion—an important and dispositive legal issue—before looking to Plaintiffs' mootness arguments, which are presently premature and only seek to avoid appellate review and return the case to the district court. Exhaustion is dispositive of the entire case—if no Plaintiff properly exhausted, the preliminary injunction is infirm, the class must be dissolved, and this lawsuit must be dismissed.

B. Plaintiffs failed to properly exhaust administrative remedies under the PLRA, and the district court's exhaustion ruling was an abuse of discretion.

The PLRA requires exhaustion of all available administrative remedies before bringing a federal lawsuit about prison conditions. Its well-known purpose is to give the prison system notice and an opportunity to resolve disputes internally before they escalate to litigation.

Plaintiffs do not address the primary question: whether the PLRA exhaustion requirement can be satisfied by Alex A.'s attempt to "pre-grieve," on behalf of all youth, prison conditions in a yet-to-be opened facility based on speculation that such conditions might someday exist and that he might someday end up there. Alex A.

filed his grievance months before BCCY-WF opened, stating fear of future exposure to adult inmates, excessive confinement as a means to avoid such exposure, and lack of youth programming—all based expressly on the fact that BCCY-WF is located on the grounds of the Louisiana State Penitentiary, which traditionally houses adult inmates. This class action lawsuit and the preliminary injunction at bar rest entirely on Alex A.'s speculative "pre-grievance."

Instead of addressing the real question, Plaintiffs only cite to PLRA cases addressing the exhaustion requirement as to existing conditions, not hypothetical or future conditions. Plaintiffs cite to *Helling v. McKinney*, 509 U.S. 25 (1993), which held a prisoner did not have to wait for harm or injury to occur before grieving his exposure to existing second-hand smoke. *See* Doc. 156 at 38. Plaintiffs cite to two cases holding prisoners do not always have to re-grieve an existing condition every time it affects them. *See* Doc. 156 at 39 (citing *Moussazadeh* (inmate not required to re-grieve state's ongoing failure to provide a Kosher diet); *Yankton* (inmate not required to re-grieve ongoing religious objection to every subsequent application of prison's hair length policy)). These are inapposite. Plaintiffs' subject grievance attempted to grieve conditions that do not yet exist, at a facility that was not yet open.

Setting aside these inapplicable citations, courts have universally held that a plaintiff cannot do what Plaintiffs wish to do here—preemptively grieve and exhaust remedies for claims based on future events that have not yet occurred. *See*, *e.g.*, *Ross*

v. Cty. of Bernalillo, 365 F.3d 1181, 1188 (10th Cir. 2004). "It is axiomatic that Petitioner cannot grieve a wrong that has not yet occurred[.]" *Pasion v. McGrew*, No. 10-00443 HG-LEK, 2010 WL 3184518, at *2 (D. Haw. Aug. 11, 2010). For example, in *Adams v. Fochee*, the court found that the plaintiff did not exhaust his administrative remedies where the filing of a grievance in 2010 "predate[d] not only the alleged incidents of May 22, 2012, but also the earliest alleged contact that plaintiff had with [the individual defendant]." No. 12-CV-01076-PAB-CBS, 2013 WL 3093479, at *1 (D. Colo. June 18, 2013).[5]

The PLRA allows prisoners to grieve actual, existing conditions of confinement. This means a prisoner[6] must be subject to an existing condition before grieving that condition in the administrative process. Indeed, one cannot exhaust remedies based on fear of conditions that do not exist because there is no action within the prison's administrative grievance system to challenge, and no condition for which the prison can take notice and cure.

[5] *See also Barnes v. Allred*, 482 Fed.Appx. 308, 310-12 (10th Cir. 2012) (inmate's 2009 grievance about abdominal pain did not exhaust claim for delayed medical treatment involving a 2011 hepatitis C infection); *London v. Evans*, No. CV 19-559 (MN), 2020 WL 4748065, at *3 (D. Del. Aug. 17, 2020) ("anticipatory" grievance about alleged conduct that has not yet occurred is ineffective to exhaust claim).

[6] Whether the prisoner subject to the condition must also be the plaintiff is not an issue presently before the Court. At the time when Alex A. filed his grievance, no youth offender was subject to any conditions at BCCY-WF because BCCY-WF did not yet exist.

The PLRA's exhaustion requirement must be linked to existing or past prison conditions. *Toenniges v. Ammons*, No. 1:09-CV-165 WLS, 2014 WL 66589, at *1 (M.D. Ga. Jan. 8, 2014) ("grievance must address a past or existing matter, not anticipate one that has not yet occurred."), *aff'd sub nom.* 600 Fed.Appx. 645 (11th Cir. 2015). Prisoners must wait until a condition exists before seeking relief through the administrative process as a precursor to filing suit. Otherwise, the PLRA could be perfunctorily "pre-exhausted" by all offenders as to all potential problems at all present and future prison facilities. This eviscerates the very purpose of the exhaustion requirement.

2. Mootness Does Not Shield This Case from Appellate Review.

A. The appeal is not moot.

Plaintiffs claim the appeal should be dismissed now because the preliminary injunction will expire on December 7 under the PLRA's 90-day time limit, which they argue will moot the appeal. Doc. 156 at 16 (citing 18 U.S.C. § 3626(a)(2)). Even if this were correct (and it is not), the preliminary injunction is not expired now (much less moot) and will not be expired (or moot) when this Court hears oral argument. Plaintiffs cite no case where any appellate court prospectively dismissed an appeal because the case would become moot in the future. There is no such case.[7]

[7] Plaintiffs' cited cases involved injunctions that had already expired; none held an appeal should be dismissed because the injunction would soon expire. *See* Doc. 156 at 17 (citing *Yates*, *Ahlman*, *Norbert*, *Victory*, *Fla. DOC*).

B. The preliminary injunction expires on December 13, 2023.

Plaintiffs miscalculate the injunction's expiration date. A preliminary injunction under the PLRA automatically expires "90 days after its entry…." 18 U.S.C. § 3626(a)(2) (emphasis added). Courts construe "entry" as the date the written order granting the injunction is entered. *See Laube v. Campbell*, 255 F. Supp. 2d 1301, 1303-04 (M.D. Ala. 2003) (stating court "entered" injunction on date of written order); *Farnam v. Walker*, 593 F. Supp. 2d 1000, 1018-19 (C. D. Ill. 2009) ("[T]his preliminary injunction expires 90 days from the entry of this [written] order."); *Alloway v. Hodge*, 72 Fed.Appx. 812, 817 (10th Cir. 2003) (injunction expired 90 days after court entered written order); *Dodge v. Cty. of Orange*, 282 F. Supp. 2d 41, 50 & n.13 (S.D.N.Y. Sept. 9, 2003) (noting court "entered a preliminary injunction," citing written order).

Here, the district court entered its written order on September 14, 2023. ROA.5341. Accordingly, the preliminary injunction expires December 13, 2023.

Plaintiffs count 90 days from September 8, the date when the district court orally announced its decision. Doc. 156 at 16, n.6. But announcement is not "entry." The Rules expressly distinguish the two. *See* Fed. R. App. P. 4(a)(2) ("A notice of appeal filed after the court announces a decision or order—but before the entry of

the judgment or order—is treated as filed on the date of and after the entry.") (emphasis added).[8]

Plaintiffs misrepresent *Ueckert v. Guerra*, the lone case they cite for using the oral announcement as the operative date. Doc. 156 at 16, n.6. *Ueckert* does not concern a PLRA injunction but instead whether a defendant timely appealed after the trial court orally denied his summary judgment motion. 38 F.4th 446, 449-51 (5th Cir. 2022). The *Ueckert* court never issued a written order, only a minute entry "memorializing [its] oral order." *Id.* at 448. The defendant argued the oral ruling was not appealable. *Id.* at 449. This Court disagreed, finding the oral ruling was final and appealable because the judge clearly intended it to be "effective immediately" and "intended to have nothing further to do" with the motion. *Id.* at 449-50. Importantly, "the fact that the court never issued a written memorandum or opinion erased any doubt that it intended its first word to be its last." *Id.* at 451.

Here, in contrast, the district court's oral announcement was not its final or only ruling on the preliminary injunction. Unlike *Ueckert*, the oral ruling was not "effective immediately" but went into effect on September 15 (ROA.8092:15-17). Also unlike *Ueckert*, the district court announced it would "issue a written ruling" (ROA.8092:18) and entered a written order on September 14 (ROA.5341).

[8] Rule 4 also dispels Plaintiffs' argument that Defendants' date of filing the notice of appeal indicates the 90 days should run from the oral announcement. Doc. 156 at 16.

Under § 3626(a), because the preliminary injunction was entered on September 14, 2023, the preliminary injunction expires on December 13, 2023.[9]

C. The transfer of youth from BCCY-WF did not moot the appeal.

Plaintiffs claim Defendants mooted the appeal by "fully compl[ying] with the [preliminary injunction]" when Defendants transferred the youth from BCCY-WF. Doc. 156 at 15. This Court already rejected this argument when it denied Plaintiffs' Motion to Dismiss Appeal in Part as Moot (Doc. 94). *See* Doc. 121-1 at 2.

D. Expiration of the preliminary injunction will not moot the appeal; a live controversy remains.

The law on mootness is well-established. "'[F]ederal courts may adjudicate only actual, ongoing cases or controversies,' and do not have 'the power to decide questions that cannot affect the rights of litigants in the case before them.'" *Texas v. Biden*, 578 F. Supp. 3d 849, 856-57 (S.D. Tex. 2022) (quoting *Lewis v. Cont'l Bank Corp*., 494 U.S. 472, 477 (1990)). "[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Id.* (quoting *Arizonans for Off. English v. Arizona*, 520 U.S. 43, 67 (1997)). "A case becomes moot…when the issues presented are no longer 'live' or the parties lack a legally

[9] Under near identical circumstances concerning a PLRA injunction facing expiration four days after oral argument, at least one appellate court has "deemed it prudent to issue [an] opinion before the injunction is set to expire." *Swain v. Junior*, 961 F.3d 1276, 1280 n.1 (11 Cir. 2020) (noting the "uncertainties surrounding the mootness issue"). While the Court is not required to address mootness at all (*see Sinochem* discussion, *supra*), thus relieving the Court of the December 13 deadline, Defendants respectfully request that the Court account for such deadline in determining how and when to rule in this matter.

cognizable interest in the outcome." *Id.* (quoting *Already, LLC v. Nike, Inc*., 568 U.S. 85, 91 (2013)).

In appeals involving injunctive relief, the Supreme Court has several times determined that a case was not moot after the underlying injunctive orders expired, such that the Court adjudicated the live controversies on appeal. *See Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175 (1968) (injunction expired years earlier, but court's decisions continued to play substantial role in defendants' response to activities of plaintiff political party members); *Div. 1287 of the Amalgamated Ass'n of St., Elec., R. & Motor Coach Emps. of Am. v. Missouri*, 374 U.S. 74 (1963) (where labor dispute led to state seizure of business, case was not moot after seizure terminated because labor dispute remained unresolved; there was more than speculative possibility that seizure law would be involved in future labor disputes); *S. Pac. Terminal Co. v. Interstate Com. Comm'n*, 219 U.S. 498 (1911) (declining to moot appeal where underlying cease and desist order had expired because the expired orders presented continuing questions).

Here, a live controversy remains after the injunction expires, including PLRA exhaustion and Plaintiffs' request for a permanent injunction.[10] Exhaustion is the only threshold inquiry that disposes of the case entirely. The exhaustion

[10] Among other issues presented by this appeal.

determination directly affects both parties' rights and legally cognizable interests. If the district court's holding on exhaustion is reversed, it will provide meaningful (and complete) relief to Defendants. With this actual controversy pending, this appeal is not moot, regardless of the injunction's expiration.

E. Even if the injunction expires, the issue is capable of repetition but will evade review.

A PLRA preliminary injunction expires 90 days after entry; this duration "is simply too short for an appeal to run its course." *Where Do We Go Berkeley v. Cal. Dep't of Transp.*, 32 F.4th 852, 858 (9th Cir. 2022) (finding six-month injunction too brief for appeal to be fully litigated and thus would evade review for purposes of mootness exception).

Not only will a future injunction evade review, but injunctions against the Defendants are also capable (and likely) of repetition. The PLRA grants the district court the authority to extend and re-issue preliminary injunctions and to convert the preliminary injunction to a permanent injunction. *See* 18 U.S.C. § 3626(a)(2); *Mayweathers v. Newland*, 258 F.3d 930, 935 (9th Cir. 2001) (district court had jurisdiction to enter second preliminary injunction while first was on appeal). Plaintiffs also may move to extend the injunction. *See* 18 U.S.C. § 3626(b)(4). While this preliminary injunction has not yet been extended, that could happen at any time before or after December 13.

Indeed, injunctions against Defendants in this case are more than just likely. Plaintiffs have already filed one motion for temporary restraining order, filed two motions for preliminary injunction, and seek a permanent injunction. *Berkeley*, 32 F.4th at 858 (finding "more than a reasonable likelihood that [an injunction] would recur where it had already happened in the subject case; "nothing prevents Plaintiffs from seeking a new injunction with the same practical effect").[11]

In sum, this appeal survives any mootness argument because the injury to Defendants—interference in the State's autonomy by enjoining its juvenile justice system—is capable of repetition yet evading review. *See U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 398 (1980) (where party has personal stake at outset of the lawsuit and where claim may arise again with respect to that party, litigation may continue despite absence of current stake).[12]

[11] Courts have held that "any number of scenarios" may satisfy the "capable of repetition" exception, such as new plaintiffs joining the subject suit, new injunctions by existing or new parties, or new lawsuits filed by new plaintiffs. *Id.* at 859.

[12] Plaintiffs' claim "defendants … assert they will not use [BCCY-WF] in the future." Doc. 156 at 16 (citing ROA.5615). Defendants have never made that assertion; Plaintiffs' citation is to Deputy Secretary Nelson's testimony about the construction of a new facility and the renovations to an existing OJJ facility. OJJ has repeatedly urged the Court not to shutdown BCCY-WF. *See, i.e.*, Sec'y Neslson's Decl., Doc. 114-2 ¶ 11.

F. Alternatively, if the Court finds the appeal becomes moot and no mootness exception applies (which Defendants submit would be incorrect), the proper course is to vacate the underlying preliminary injunction.

Plaintiffs argue, based on mootness, the appeal should be dismissed. Doc. 156 at 14-15. But if this Court concludes the appeal is moot due to expiration of the preliminary injunction, the Court should vacate the district court's order issuing the preliminary injunction. *See Yates v. Collier*, 677 Fed.Appx. 915, 918 (5th Cir. 2017) ("Having determined that [defendant's] appeal [of preliminary injunction] is moot [after expiring under PLRA], we now vacate the district court's order" entering the injunction.); *U.S. v. Sec'y, Fla. Dep't of Corr.*, 778 F.3d 1223, 1229-30 (11th Cir. 2015) (dismissing appeal from preliminary injunction as moot and vacating preliminary injunction order); *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1129 (10th Cir. 2010) (explaining "ordinary course" is to vacate underlying injunction).[13]

[13] Plaintiffs' cited case, *Ahlman v. Barnes*, further suggests that the Court also should vacate the underlying class certification order: "To the extent the provisional class certification was proper under [Rule] 23, we vacate it because it 'depended on, and was in service of, its preliminary injunction. If the preliminary injunction is infirm, the class certification necessarily fails as well, regardless of whether class certification was otherwise proper…' … Thus, the provisional class certification expired along with the preliminary injunction." 20 F.4th 489, 495 (9th Cir. 2021) (citation omitted).

3. The District Court Abused Its Discretion When It Held Plaintiffs Had Established a Substantial Likelihood of Success on the Merits.

A. The district court's exhaustion finding was an abuse of discretion.

For the reasons above and in Defendants' opening brief, the district court's finding that Plaintiffs exhausted administrative remedies was an abuse of discretion.

B. The district court erred in finding Plaintiffs had a substantial likelihood of success on their constitutional claims.

Plaintiffs incorrectly contend that "Defendants do not argue the legal determinations were an abuse of discretion." Doc. 156 at 17. This is directly contrary to the record. *See* Doc. 128-1 at 29-47 (detailing district court's abuses of discretion).

i. Plaintiffs never address the incongruity in the district court's findings on objective harm and subjective awareness.

The district court found there was an objective risk of harm caused by youth simply being housed in a former adult facility but that OJJ was subjectively aware of and indifferent to another risk, "confining adolescents in their cells."[14] This

[14] The district court never found that the use of cell restriction creates an objectively intolerable risk of harm. Plaintiffs do not dispute this. Instead, Plaintiffs argue the district court's finding that solitary confinement can have a "negative effect" is supported by case law. Doc. 156 at 22. But these cases do not change the fact that the district court never found that the harm allegedly caused by cell restriction presented an objectively intolerable risk in this case.

Furthermore, Plaintiffs' cases do not support the finding of an objective risk of intolerable harm. Rather, the cases (1) address the question of whether solitary confinement was excessive under particular circumstances, *see J.H. v. Williamson Cnty., Tenn.*, 951 F.3d 709, 718-19 (6th Cir. 2020) (applying *Bell*'s balancing test); *Milonas v. Williams*, 691 F.2d 931, 942-43 (10th Cir. 1982) (same); (2) address whether compensatory damages can be awarded for injuries caused by prolonged solitary confinement, *see H.C. v. Jarrard*, 786 F.2d 1080, 1088 (11th Cir. 1986); or (3) provide no meaningful analysis of the asserted constitutional claim, *see Doe v. Hommrich*, No. 3-

incongruity constitutes legal error. Having applied the wrong legal standard to the deliberate indifference claim, the district court's finding of a substantial likelihood of success on the merits should be reversed.

In their response brief, Plaintiffs provide no law to excuse this legal error. Instead, Plaintiffs double-down, recognizing the incongruity of the district court's analysis but offering no argument or authority explaining how it can pass muster. *See* Doc. 156 at 21.

ii. Plaintiffs never address the district court's impermissible stacking of conditions.

The district court's preliminary injunction cited an incorrect legal standard when it declared that "[t]he cumulative effect of different deficiencies can demonstrate the subjective component of deliberate indifference," misinterpreting *Wilson v. Seiter*, 501 U.S. 294 (1991). It appears from the order that the district court stacked disparate conditions of confinement to conclude that the subjective prong of the deliberate indifference standard was satisfied. This was legal error.

Plaintiffs do not address the district court's impermissible stacking. If anything, Plaintiffs' response actually supports Defendants' position that stacking is indeed improper. *See* Doc. 156 at 19 (acknowledging conditions can be considered

16-0799, 2017 WL 1091864 (M.D. Tenn. Mar. 22, 2017); *Jensen v. Thornell*, No. CV-12-00601-PHX-ROS, 2023 WL 2838040 (D. Ariz. Apr. 7, 2023).

in combination only when such conditions have "a mutually enforcing effect that produces the deprivation of a single, identifiable human need.").

iii. Plaintiffs never address the district court's failure to apply the Bell standard to Plaintiffs' excessiveness claims.

Plaintiffs are essentially silent as to the standard that should apply to their excessiveness claims. The district court identified the proper standard but failed to apply the standard (or any standard), which was legal error. *See* Doc. 128-1 at 34.

Though Plaintiffs never analyze the standard, they do cite a case applying the proper standard to excessiveness claims. *See* Doc. 156 at 22 (citing *J.H. v. Williamson Cty., Tenn.*, 951 F.3d 709 (identifying the *Bell v. Wolfish* standard; noting solitary confinement used in response to disciplinary infraction serves legitimate governmental interests of "maintaining institutional security and preserving internal order and discipline"; weighing facts to determine whether, under "the totality of [these] circumstances," use of solitary confinement was excessive relative to its legitimate purposes).

In this case, the district court did not consider the disciplinary infractions committed by the youth that led to the imposition of the challenged conditions. This error is repeated throughout each of the challenged conditions—cell restriction, chemical agent, mechanical restraint, and denial of family visitation. The district court recognized that the *Bell* balancing test called for the court to weigh whether these conditions were excessive when compared to the legitimate governmental

interests for imposing the conditions; the court simply failed to employ this standard (or any standard) when reaching its excessiveness determination. This court erred when it looked only at the condition (the "what") without any information as to the reason that the condition was imposed in any particular instance (the "why").

a. Cell restriction

Plaintiffs' argument that "Defendants use isolation as punishment" (Doc. 156 at 23) misses the point entirely. The question is not whether cell restriction is ever used as punishment, *i.e.*, in the disciplinary sense; the question is whether cell restriction is used to punish the youth because of their status as youth offenders. OJJ is undisputedly entitled by law to apply tactics to enforce internal rules and to maintain order in its facility.

For their part, Plaintiffs recognize that OJJ imposed cell restrictions for legitimate governmental interests, such as youth's failure to attend programming or behavioral infractions. *See* Doc. 156 at 23. The uncontested evidence at trial was that cell restriction was only imposed to serve legitimate governmental interests. *See* Doc. 128-1 at 37.

But on the question of excessiveness, the district court should have asked whether the use of cell restriction was excessive in relation to those legitimate governmental interests. The district court refused to do so. Plaintiffs now ask this Court to commit the same error, as they provide the Court with arguments about the

frequency and duration of cell restrictions but refuse to tell this Court (as they did with the district court) why youth were on cell restriction.

For example, Plaintiffs argue OJJ placed one youth on cell restriction for 19 days, but Plaintiffs say nothing about why. During that 19-day period, this particular youth assaulted staff members on eight separate occasions. ROA.5344; ROA.11398-451. *Bell* required the district court to consider this evidence; the district court would not.

As another example, Plaintiffs contend OJJ placed four youths on cell restriction for five consecutive days for "behavior issues," but Plaintiffs refuse to explain. *See* Doc. 156 at 24. During this time period, youth were on cell restriction for incidents including: youth-on-youth assault (ROA.10708-12): youth-on-staff assault (ROA.10831-74), including assault with a weapon (ROA.10733-44); attempted escape (ROA.10716-17); and attempted stabbing of staff with broken glass (ROA.10750-55).[15] *Bell* required the district court to consider this conduct in determining whether OJJ's use of cell restriction was excessive; the district court would not.

[15] Plaintiffs' argument that cell restriction is used as a means of suicide prevention in lieu of mental health care is an inaccurate representation of the record. The district court made no such finding. The undisputed evidence was that a youth who expressed suicidal ideations was placed on "constant watch" by the medical staff, meaning a staff member monitored the youth constantly. ROA.7461, 7469, 7474. After the youth was removed from "constant watch," he assaulted another youth and attempted to escape the facility, which constituted behavioral infractions that resulted in cell restriction. ROA.7451-55; ROA.11046-94.

b. Chemical agent

The district court again erred by failing to apply the *Bell* standard. Plaintiffs have no response to this legal error. Instead, Plaintiffs (like the district court) discuss a single incident involving the use of chemical agent they contend was excessive to argue that any use of chemical agent was excessive. This single incident is the only one for which Plaintiffs presented evidence regarding why chemical agent was deployed, and it is the only incident the district court examined. Based on the facts of this single incident and records demonstrating chemical agent was deployed four other times, the district court found that all use of chemical agent was excessive. The district court declined to examine any facts surrounding the other deployments upon which to base this conclusion. Had the district court engaged in the proper analysis, it would have discovered that the other uses of chemical agent at BCCY-WF furthered legitimate governmental interests and were not excessive. *See* Doc. 128-1 at 43.[16]

c. Mechanical restraints

The district court failed to apply *Bell*, failed to consider the evidence regarding the legitimate governmental interest served by the use of mechanical restraints, and

[16] Plaintiffs' cited cases recognize that chemical agent can be deployed for legitimate governmental interests. *See* Doc. 156 at 26 (citing *Morales v. Turman*, 364 F. Supp. 166 (E.D. Tex. 1973) (chemical agent permitted in situations posing "imminent threat to human life" or "imminent and substantial threat to property"); *Alexander S. v. Boyd*, 876 F. Supp. 773 (D.S.C. 1995) (chemical agent permitted "when a genuine risk of serious bodily harm to another exists").

failed to consider whether the use of mechanical restraints was excessive in relation to that legitimate governmental interest. Plaintiffs do not address these errors.

d. Family visitation

The district court failed to apply *Bell*, failed to consider the evidence regarding the legitimate governmental interest served by the denial of visitation, and failed to consider whether the denial of visitation was excessive in relation to that legitimate governmental interest. Plaintiffs do not address these errors.

Additionally, the legal error regarding denial of family visitation was compounded by the district court's clear error, finding there was a "systematic" denial of family interactions. *See* Doc. 128-1 at 44. Plaintiffs continue in this fallacy, claiming OJJ "denied visits" (plural). Plaintiffs (like the district court) cite to no record evidence in support of these alleged multiple instances of denial of family visits. *See* Doc. 156 at 44. There is no such evidence.

C. The district court abused its discretion to find that Plaintiffs had a substantial likelihood of success on their disability claims.

For the reasons discussed in Defendants' opening brief, the district court erred in finding Plaintiffs are substantially likely to prevail on their ADA/RA discrimination claims. *See* Doc. 128-1 at 54-47. In their response, Plaintiffs (like the district court) identify no particular service that was denied to Plaintiff Charles C.[17]

[17] Plaintiff Alex A. was never housed at BCCY-WF and thus could never have been denied at a service at BCCY-WF.

or any youth at BCCY-WF by reason of a disability. Likewise, Plaintiffs (like the district court) identify no accommodation that Defendants failed to provide for Plaintiff Charles C. or any other youth with a disability. Furthermore, Plaintiffs do not address the fact that at the time of trial there were only two youths at BCCY-WF with Individual Education Plans ("IEPs") and that OJJ, through its contract with the Special School District, provided special education to these two youths in full compliance with the youth's IEPs. *Compare* Doc. 128-1 at 45-47 *with* Doc. 156 at 29-32.

4. The District Court Abused Its Discretion to Find an Imminent Risk of Irreparable Harm.

Plaintiffs tacitly concede Defendants' argument that the Fifth Circuit has never found that psychological harm alone constitutes an irreparable harm. Plaintiffs cite to no case from this Court, or from any district court within the Fifth Circuit, finding that psychological harm alone constitutes an irreparable harm. *See* Doc. 156 at 47.

Instead, Plaintiffs direct the Court to three out-of-circuit cases, arguing that "solitary confinement constitutes irreparable harm." *See* Doc. 156 at 48. This is an oversimplification of those cases. Those three cases do not stand for the proposition that the act of solitary confinement is *per se* an irreparable harm. Rather, they stand for the proposition that, under the case-specific facts and circumstances (that differ

dramatically from the case at bar), the plaintiffs in those cases were at imminent risk of irreparable harm.[18]

Plaintiffs do not contest that the evidence provided by their expert, Dr. Stevens, was scant. Plaintiffs do not direct the Court to any additional evidence allegedly supporting the district court's finding of irreparable harm. Instead, Plaintiffs simply cite to the district court's order and to the legal arguments submitted by the Department of Justice in its statement of interest.

5. The Preliminary Injunction Is Not Narrowly Tailored or the Least Intrusive Means to Correct the Alleged Harms.

Plaintiffs' argument that the preliminary injunction was the least intrusive means to correct the alleged harm is disingenuous. Plaintiffs attempt to paint the preliminary injunction as a mere transfer order for a small number of youth. Doc. 159 at 45. Not so. The order mandated the complete shuttering and abandonment of BCCY-WF.

[18] *See Paykina v. Lewin*, 387 F. Supp. 3d 225 (N.D.N.Y. 2019) (finding irreparable harm based on fact-specific inquiry and expert testimony of psychiatrist who examined plaintiff and opined plaintiff was harmed and continued to be harmed by 75 days of solitary confinement); *V.W. v. Conway*, 236 F. Supp. 3d 554 (N.D.N.Y. 2017) (finding irreparable harm based on fact-specific inquiry and expert testimony of psychiatrist who examined juveniles and opined they had been harmed by solitary confinement that denied youth of all human contact for 23 hours per day); *Williams v. Sec'y of Penn. Dept. of Corrections*, 848 F.3d 549 (3d Cir. 2017) (citing *Johnson v. Wetzel*, 209 F. Supp. 3d 766 (M.D. Pa. 2016) (finding irreparable harm based on fact-specific inquiry and expert testimony of psychiatrist who examined adult inmate and opined inmate was struggling to maintain his sanity due to prolonged isolation where inmate was held in solitary confinement 23 hours per day for 36 years)).

Addressing the alleged violations identified by the district court would not have required the district court to "dictat[e] the day-to-day minutiae of what was needed to meet constitutional minimum conditions and programming," as Plaintiffs suggest. Doc. 156 at 45. Rather, the district court could have issued a preliminary injunction addressing the specific conditions it found to be violative—*e.g.*, do not withhold family visitation as a means of enforcing discipline; do not place a youth on cell restriction for more than a specified amount of time. Instead, the district court issued a broad, sweeping order that deprives Defendants of a significant tool to protect other youth and staff from the violent tendencies of high-risk youth and to provide individualized therapy to the high-risk youth.

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 December 1, 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 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 5,408 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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