UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Janet Malam, et al.

Petitioner-Plaintiffs,

v.

Rebecca Adducci, et al.,

Respondents-Defendants.

_____/

Civil No. 20-10829

Honorable Judith E. Levy
Mag. Judge Anthony P. Patti

DEFENDANTS' MOTION TO AMEND JUDGMENT PURSUANT TO FED. R. CIV. P. 59(e)

Defendants, through their attorneys, Matthew Schneider, United States Attorney for the Eastern District of Michigan, and Jennifer L. Newby, Assistant United States Attorney, move this Court to amend the order entered June 28, 2020 (ECF No. 127) pursuant to Fed. R. Civ. P. 59(e), and deny preliminary injunctive relief in light of the Sixth Circuit's intervening decision in *Cameron v. Bouchard*, No. 20-1469, 2020 WL 3867393 (6th Cir. July 9, 2020), and the Court's clear error in finding the deliberate indifference standard does not apply.

The undersigned counsel certifies that in accordance with E.D. Mich. LR 7.1(a), counsel requested concurrence in the relief requested, and concurrence was denied.

In support of their motion, defendants rely on the accompanying brief and documents on file with this Court.

MATTHEW SCHNEIDER
United States Attorney

By: /s/ Jennifer L. Newby
Jennifer L. Newby (P68891)
Assistant United States Attorney
Attorneys for Defendants
211 W. Fort Street, Suite 2001
Detroit, Michigan 48226
(313) 226-0295
Jennifer.Newby@usdoj.gov

Dated: July 27, 2020

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DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION TO AMEND JUDGMENT PURSUANT TO FED. R. CIV. P. 59(e)

STATEMENT OF ISSUE PRESENTED

Should this Court amend its order granting a preliminary injunction (ECF No. 127) due to the intervening Sixth Circuit decision in *Cameron v. Bouchard*, and this Court's clear error in finding the deliberate indifference standard inapplicable?

MOST CONTROLLING AUTHORITY

Cameron v. Bouchard, No. 20-1469, 2020 WL 3867393 (6th Cir. July 9, 2020)

Roberts v. City of Troy, 773 F.2d 720 (6th Cir. 1985)

Wilson v. Williams, 961 F.3d 829 (6th Cir. 2020)

I. INTRODUCTION

This Court entered a preliminary injunction for the release of six immigration detainees based on a finding that under the punishment standard articulated in *Bell v. Wolfish*, their continued detention at Calhoun County Correctional Center was unconstitutionally excessive under the Fifth Amendment. Since the Court's order, an intervening decision of the Sixth Circuit in *Cameron v. Bouchard* held that under the Fifth Amendment, where reasonable steps are taken to mitigate the risk posed by COVID-19 to pretrial detainees, constitutional requirements are met and the defendant is not deliberately indifferent. In *Cameron*, the court relied on *Wilson v. Williams* where the Sixth Circuit found the defendant acted reasonably to protect inmates from COVID-19 by implementing precautions similar to those at Calhoun, and thus, was not deliberately indifferent. In light of *Cameron's* application of *Wilson* to pretrial detainees, and by analogy, immigration detainees, defendants ask this Court to amend the order granting a preliminary injunction (ECF No. 127), and find that plaintiffs do not have a likelihood of success on the merits and are not entitled to preliminary injunctive relief.

II. BACKGROUND

Defendants incorporate the fact section from their response to plaintiffs' motion for preliminary injunction regarding the detainees at issue in this motion

and the precautions implemented at Calhoun. (Resp., ECF No. 101, PageID.3568-76). On June 28, 2020, the Court entered an opinion and order granting a preliminary injunction for the release of the six detainees. (Order, ECF No. 127). On July 9, 2020, the Sixth Circuit issued its decision in *Cameron v. Bouchard*, No. 20-1469, 2020 WL 3867393 (6th Cir. July 9, 2020), reversing the district court's finding of a likelihood of success on the merits of deliberate indifference and vacating a preliminary injunction granted in favor of inmates and pretrial detainees. In light of *Cameron*, defendants seek amendment of the order entered by this Court, to deny preliminary injunctive relief.

III. LAW AND ANALYSIS

A. Defendants seek amendment of the order pursuant to Rule 59(e).

Fed. R. Civ. P. 59(e) provides that a party may move "to alter or amend a judgment" within "28 days after the entry of the judgment." An order granting a preliminary injunction is a judgment for purposes of Rule 59(e), because it is an order from which an appeal lies. *See* Fed. R. Civ. P. 54(a); and 28 U.S.C. § 1292(a)(1). *See also Wong-Opasi v. Haynes*, 8 Fed. App'x 340, 342 (6th Cir. 2001); and *Smith & Nephew, Inc. v. Nw. Ortho Plus, Inc.*, No. 12-02476, 2013 WL 557269, at *3 (W.D. Tenn. Feb. 12, 2013) (citing cases).

"The purpose of Rule 59(e) is 'to allow the district court to correct its own errors, sparing the parties and appellate courts the burden of unnecessary appellate

proceedings.'" *Howard v. United States*, 533 F.3d 472, 475 (6th Cir. 2008) (citation omitted). "A court may grant a Rule 59(e) motion to alter or amend if there is: (1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice." *Intera Corp. v. Henderson*, 428 F.3d 605, 620 (6th Cir. 2005). Defendants assert that *Cameron* is intervening law that supports amendment of the order, and that this Court committed clear error in deviating from established Sixth Circuit precedent when it held that the *Bell* punishment standard, rather than the deliberate indifference standard this Court applied previously, is the applicable standard under which to assess the claims in this case.

B. This Court should amend its grant of preliminary injunctive relief in light of the intervening decision in *Cameron*.

Since this Court issued its order granting a preliminary injunction, the Sixth Circuit has made clear, albeit in an unpublished decision, that the appropriate constitutional standard for a Fifth Amendment due process claim for failure to adequately protect pretrial detainees from COVID-19 is deliberate indifference. *See Cameron*, 2020 WL 3867393, at *4. *See also Swain v. Junior*, 961 F.3d 1276, 1285 (11th Cir. 2020) (holding that pretrial detainee claims related to COVID-19 are "evaluated under the same standard as a prisoner's claim of inadequate care under the Eighth Amendment."). In *Cameron*, the court held the pretrial detainees' Fifth Amendment condition of confinement claim, was to be "assessed under the

'deliberate indifference' framework." *Cameron*, 2020 WL 3867393, at *4. In this case, plaintiffs similarly raise a Fifth Amendment condition of confinement claim. (Order, ECF No. 127, PageID.4201-02). Thus, under *Cameron*, the appropriate standard to assess their claim is deliberate indifference.

Cameron is not distinguishable from this case on the basis that it involved criminal pretrial detainees and this case involves civil immigration detainees. First, this Court has already held, as advocated by plaintiffs, that immigration detainees are analogous to criminal pretrial detainees where it held the due process standard articulated in *Bell v. Wolfish*, 441 U.S. 520 (1979), a case involving criminal pretrial detainees, applies to the immigration detainees in this case. (Order, ECF No. 127, PageID.4210). *See also E.D. v. Sharkey*, 928 F.3d 299, 306-07 (3d Cir. 2019) (analogizing immigration detainees to pretrial detainees for purposes of applying the same due process standard). Second, immigration detainees are *a fortiori* not entitled to any greater due process than pretrial detainees. *See, e.g.*, *Demore v. Kim*, 538 U.S. 510, 521-22 (2003) (listing cases); *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976) ("Congress regularly makes rules that would be unacceptable if applied to citizens"); *Zadvydas v. Davis*, 533 U.S. 678, 718 (Kennedy, J., dissenting) ("The liberty rights of the aliens before us here are subject to limitations and conditions not applicable to citizens").

The Sixth Circuit's application of the deliberate indifference standard in

Wilson v. Williams, 961 F.3d 829, 833 (6th Cir. 2020), applied to pretrial detainees in *Cameron*, precludes a finding of a likelihood of success on the merits in this case. In *Wilson*, the court found precautions similar to those at Calhoun precluded a finding of deliberate indifference. *Id*. at 834 (noting the prison suspended social visitation, implemented a 14-day quarantine procedure, isolated symptomatic prisoners, used a screening tool and temperature check on incoming prisoners, enhanced cleaning, provided education, provided PPE, and made testing available based on applicable guidelines). The court vacated entry of a preliminary injunction, finding the respondent had "responded reasonably" to the risk of the spread of COVID-19, even though 59 inmates and 46 staff tested positive, and 6 inmates died. *Id*. at 841. *See also Cameron*, 2020 WL 3100187, *2 (citing *Wilson* and finding no deliberate indifference where the facility stopped visitation, screened incoming detainees, released some inmates, quarantined and monitored incoming detainees for 14-days, provid[ed] masks, provid[ed] prepackaged food, increased cleaning, promoted social distancing and provided access to testing). The *Wilson* court held that, "an official will likely not be found to be deliberately indifferent if they took some action, even if that action was inadequate." *Id*. at 843 (citation omitted).

The *Wilson* court also cited recent decisions from the Eleventh and Fifth Circuits that likewise vacated a preliminary injunction where the district court

found deliberate indifference on the basis of allegedly inadequate precautions. *Id*. at 842. The *Wilson* court noted that in *Swain v. Junior*, 958 F.3d 1081, 1090 (11th Cir. 2020), the court found no deliberate indifference where the facility had "adopted extensive safety measures such as increasing screening, providing protective equipment, adopting physical distancing when possible, quarantining symptomatic inmates, and enhancing cleaning procedures." *Wilson*, 961 F.3d at 842. The *Wilson* court also cited with approval *Valentine v. Collier*, 956 F.3d 797, 799 (5th Cir. 2020), where the court found no deliberate indifference where the facility provided "access to soap, tissues, gloves, and masks, implement[ed] regular cleaning, quarantin[ed] new prisoners, and ensur[ed] physical distancing during transport." *Wilson*, 961 F.3d at 842.

In this case, Calhoun took reasonable measures to protect detainees, like those implemented at the facilities in *Wilson*, *Cameron*, *Valentine*, and *Swain*. Calhoun's precautions track recommendations for detention facilities from the CDC, including suspending visitation, quarantining and monitoring incoming detainees for 14-days, isolating those with confirmed cases, testing all incoming detainees before placing them in general population, educating staff and detainees on hygiene and social distancing, increasing cleaning, providing cleaning products effective against COVID-19 to detainees, providing masks, providing voluntary mass testing through the Michigan National Guard for detainees, inmates, and

staff, and making additional testing available in accordance with recommendations. (Resp., ECF No. 101, PageID.3568-76).

As in *Wilson*, because Calhoun has taken action, even if the action is below the standards of plaintiffs' experts, the response was reasonable and defendants are not deliberately indifferent. *Wilson*, 961 F.3d at 843. Accordingly, in light of the intervening decision in *Cameron*, which applies *Wilson* to pretrial detainees, this Court should amend its order and deny preliminary injunctive relief because there is no likelihood of success on the merits.

C. This Court should amend its grant of preliminary injunctive relief based on a clear error of law.

In addition to being intervening law, *Cameron* also demonstrates this Court's clear error in interpreting Supreme Court cases, contrary to Sixth Circuit precedent, to implicitly hold that the deliberate indifference standard does not apply to conditions of confinement claims involving pretrial detainees. (Order, ECF No. 127, PageID.4214-16). The constitutional standard that applies to prove a due process violation varies with the "differences in the kind of conduct" alleged to be a violation, not whether it involves a condition of confinement. *See Whitley v. Albers*, 475 U.S. 312, 320 (1986); *accord. J.H. v. Williamson Cty.*, 951 F.3d 709 (6th Cir. 2020) (applying different standards to pretrial detainee claims based on conduct). This case involves whether the conditions at Calhoun, in light of the precautions taken, are sufficient to provide for detainees' reasonable safety from

harm from COVID-19. The Court held that because this action involves conditions of confinement in the civil detention context, regardless of the conduct at issue, the proper standard is the punishment standard articulated in *Bell v. Wolfish*, 441 U.S. 520 (1979). (Order, ECF No. 127, PageID.4210). Because the conditions at issue in this case indisputably go to whether Defendants have adequately provided for detainees' "reasonable health and safety," the proper standard is deliberate indifference. *Id*. at PageID.4181, 4220, 4224-26.

Where a claim involves the alleged failure to provide for a pretrial detainees' reasonable "health and safety," the deliberate indifference standard applies. *See Brown v. Chapman*, 814 F.3d 436, 444 (6th Cir. 2016) (applying deliberate indifference standard to pretrial detainee claim to determine whether "the defendants knew of and disregarded a substantial risk of serious harm to the pretrial detainee's health and safety."); and *Watkins v. City of Battle Creek*, 273 F.3d 682, 686 (6th Cir. 2001) ("Deliberate indifference requires that the defendants knew of and disregarded a substantial risk of serious harm to [a pretrial detainee's] health and safety."). *See also Winkler v. Madison Cty*., 893 F.3d 877, 890 (6th Cir. 2018) (applying "deliberate indifference to serious medical needs" standard to pretrial detainee claim); and *Rouster v. Cty. of Saginaw*, 749 F.3d 437, 446 (6th Cir. 2014) (same).

The same deliberate indifference standard that applies to Eighth Amendment

cases involving prisoners applies to pretrial detainees in the context of claims related to medical needs. *See Villegas v. Metropolitan Gov't of Nashville*, 709 F.3d 563, 568 (6th Cir. 2017) ("Pretrial detainee claims, though they sound in the Due Process Clause…rather than the Eighth Amendment, are analyzed under the same rubric as Eighth Amendment claims brought by prisoners."); *Richmond v. Huq*, 885 F.3d 928, 937 (6th Cir. 2018) (citing *Villegas*) ("This Court has historically analyzed Fourteenth Amendment pretrial detainee claims and Eighth Amendment prisoner claims 'under the same rubric,'" that a constitutional right is violated when prison officials "are deliberately indifferent to the prisoner's serious medical needs."); *Richko v. Wayne Cty*., Mich., 819 F.3d 907, 915 (6th Cir. 2016) ("The [deliberate indifference analysis], although rooted in the Eighth Amendment, therefore applies with equal force to a pretrial detainee's Fourteenth Amendment claims.").

In *Bell*, the Court recognized an additional due process protection for criminal pretrial detainees. There, the Court addressed "the detainee's right to be free from punishment" during pretrial confinement. *Bell*, 441 U.S. at 534. The Court held "[i]n evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment of the detainee." *Id*. at 535. Since *Bell*, the Sixth

Circuit has drawn a distinction among pretrial detainee claims challenging the government's failure to provide for a detainee's medical needs, including reasonable health and safety, which are evaluated under a deliberate indifference standard, and challenges to affirmative acts of prison officials, which are evaluated under *Bell*'s punishment standard.

In *Roberts v. City of Troy*, 773 F.2d 720 (6th Cir. 1985), the plaintiff brought a due process claim for failure to implement procedures to identify suicide risks and prevent suicide. The trial court gave a deliberate indifference instruction to the jury, which the plaintiff claimed was error in light of *Bell*. *Id*. at 723. The court held that suicide in custody was analogous to failure to provide medical care. *Id*. at 724. The court noted that *Bell* "deals with actions rather than the failure to act," but even if the court applied *Bell* to failures to act, "we would also arrive at a deliberate indifference requirement." *Id*. at 724-25. "If a failure to act is reasonably related to a legitimate governmental objective, the failure to act cannot have the purpose of punishment unless the failure to act was deliberate." *Id*. *See also Thompson v. Cty. of Medina, Oh.*, 29 F.3d 238, 242, 244-45 (6th Cir. 1994) (declining to apply *Bell* in favor of the deliberate indifference standard to a condition of confinement claim regarding inadequate medical care and inadequate mental health treatment).

Because this case involves an alleged failure to act, i.e. an alleged failure to

implement sufficient measures at Calhoun to protect detainees from COVID-19, under *Roberts*, deliberate indifference should apply. This Court declined to apply *Roberts*, finding that the Sixth Circuit "misconstrue[d] *Bell*." (Order, ECF No. 127, PageID.4211). This Court is bound to follow *Roberts*, despite its disagreement with the court's construction of *Bell*. *See Timmreck v. United States*, 577 F.2d 372, 374, n.6 (6th Cir. 1978) ("The district courts in this circuit are, of course, bound by pertinent decisions of this Court."), *rev'd on other grounds*, *United States v. Timmreck*, 441 U.S. 780 (1979). The Court committed clear error by declining to apply *Roberts'* holding that deliberate indifference is the appropriate standard to assess a claim, like this one, involving an alleged failure to act to provide for plaintiffs' reasonable health and safety from COVID-19.

In addition to *Roberts*, this Court also ignored Sixth Circuit precedent in interpreting *Youngberg v. Romeo*, 457 U.S. 307 (1982) to hold that deliberate indifference does not apply to conditions of confinement claims. (Order, ECF No. 127, PageID.4214-15). In *Youngberg*, the Court addressed whether a person involuntarily committed to a mental health institution had a due process right under the Fourteenth Amendment to safe conditions, freedom from restraint, and training to improve function. *Id*. at 309. The Court held that the Eighth Amendment deliberate indifference standard did not apply to a plaintiff who was involuntary committed and who alleged a right to personal security, freedom from bodily

restraint, and a right to training that would reduce the threat to personal security. *Id*. at 312, 315-17.

Youngberg did not hold that due process claims by pretrial detainees cannot be judged by the deliberate indifference standard. Contrary to this Court's interpretation of *Youngberg*, the Sixth Circuit is replete with cases post-*Youngberg* applying the deliberate indifference standard to cases involving the obligation to provide for health and safety of pretrial detainees. *See Winkler*, 893 F.3d at 890; *Brown*, 814 F.3d at 444; *Rouster*, 749 F.3d at 446; and *Watkins*, 273 F.3d at 686. Further, the Sixth Circuit has expressly rejected a broad reading of *Youngberg*. In *Danese v. Asman*, 875 F.3d 1239, 1244 (6th Cir. 1989), pretrial detainees argued that under *Youngberg*, officers must detect suicidal prisoners and put them into suicide-proof facilities to protect their personal security. The court declined to extend *Youngberg* and stated that "[a]ll *Youngberg* says is that involuntarily committed individuals have a right to safe confinement…[b]eyond this general statement, it offers no guidance as to the duty of an officer concerning suicide detection and prevention." *Id*. at 1244. This Court did not address *Danese* in arriving at its interpretation extending *Youngberg*.

Nor does *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), reject the use of the Eighth Amendment deliberate indifference standard in evaluating due process claims. (Order, ECF No. 127, PageID.4215). In *Kingsley*, the Court addressed

whether a pretrial detainee alleging excessive force had to establish that officers were subjectively aware their force was excessive, or whether an objective standard applied to determine whether the force used was excessive. *Kingsley*, 576 U.S. at 396-97. *Kingsley* referenced the Eighth Amendment only to note that because pretrial detainees cannot be punished at all, Eighth Amendment cases requiring a subjective intent to maliciously or sadistically cause harm were inapplicable. *Id*. at 400-01. Further, the Court appeared to limit its holding in *Kingsley* by emphasizing that it was only deciding that courts must use an objective standard for "*this*" question. *Id*. at 396.

The Sixth Circuit does not interpret *Kingsley* as implicitly eliminating the use of the Eighth Amendment deliberate indifference standard in due process cases where it has noted that post-*Kingsley* there is disagreement on whether deliberate indifference requires the subjective component of the standard to be framed objectively when applied to pretrial detainees. *See Richmond*, 885 F.3d at 938, n.3 ("This Court has not yet considered whether *Kingsley* similarly abrogates the subjective intent requirement of a Fourteenth Amendment deliberate indifference claim."). *See also Cameron*, 2020 WL 3867393, at *5 (citing cases and noting that "[s]ince *Kingsley*, the circuits have split on whether deliberate indifference claims arising under the Fourteenth Amendment are still governed by *Farmer* (requiring a subjective inquiry for an officer's state of mind), or instead are governed by

Kingsley (requiring an objective inquiry for an officer's state of mind)."). Neither the Sixth Circuit, nor any other circuit, has made the broad finding that *Kingsley* implicitly eliminated the deliberate indifference standard for pretrial detainee claims altogether. Instead, contrary to this Court's interpretation, the Sixth Circuit has applied deliberate indifference to pretrial detainee claims post-*Kingsley*. *See Winkler*, 893 F.3d at 890; and *Brown*, 814 F.3d at 444.

Even though this Court interprets *Youngberg*, *Kingsley* and *Bell* differently than the Sixth Circuit, the Sixth Circuit has repeatedly applied the deliberate indifference standard to resolve pretrial detainee due process claims post-*Bell*, *Youngberg*, and *Kingsley*, and this Court is bound by the Sixth Circuit's application of Supreme Court precedents rather than its own interpretation. *See Durham v. Martin*, 388 F. Supp. 3d 919, 934 (M.D. Tenn. 2019), *aff'd sub nom. Durham v. McWhorter*, 789 Fed. App'x 533 (6th Cir. 2020) (the district court "is bound by the Sixth Circuit's interpretation of the Supreme Court's rulings."); and *Hall v. Eichenlaub*, 559 F. Supp. 2d 777, 781–82 (E.D. Mich. 2008) ("Absent a clear directive from the Supreme Court or a decision of the Court of Appeals sitting en banc, a panel of the Court of Appeals, or for that matter, a district court, is not at liberty to reverse the circuit's precedent.").

Cameron is another example where this Court's holding that the *Bell* punishment standard is the appropriate standard to assess the claims in this case is

at odds with Sixth Circuit precedent. In *Cameron*, the court held deliberate indifference is the proper standard to assess the claims raised in this case. *Cameron*, 2020 WL 3867393, at *4. This Court should correct its clear error and amend the order to deny preliminary injunctive relief. *See Intera Corp.*, 428 F.3d at 621 (finding clear error under Rule 59(e) where the district court ignored Sixth Circuit precedent that applied by "logical extension").

IV. CONCLUSION

For the above reasons, defendants respectfully request the Court grant relief under Fed. R. Civ. P. 59(e), and amend the order (ECF No. 127), to deny preliminary injunctive relief.

MATTHEW SCHNIEDER
United States Attorney

By: /s/ Jennifer L. Newby_____

Jennifer L. Newby (P68891)
Assistant United States Attorney
Attorneys for Respondents
211 W. Fort Street, Suite 2001
Detroit, Michigan 48226
(313) 226-0295
Jennifer.Newby@usdoj.gov

Dated: July 27, 2020

CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2020, the foregoing paper was filed with the Clerk of the Court using the ECF System which will give notice to all counsel of record.

/s/ Jennifer L. Newby