08-17412

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARCIANO PLATA, et al.,

Plaintiffs and Appellees,

v.

ARNOLD SCHWARZENEGGER, et al.,

Defendants and Appellants.

On Appeal From the United States District Court
for the Northern District of California
No. 3:01-cv-01351-TEH
The Honorable Thelton E. Henderson, Judge

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INTRODUCTION

In his brief, the Receiver makes two fundamental errors. First, he ignores the distinction between what a State may do when exercising its sovereign power, and what a federal court may do in exercising its equitable authority under the Prison Litigation Reform Act (PLRA). When the Receiver operates with the full cooperation and consent of the State, as he was required to do through the condition that he use lease revenue bonds to finance the construction of his prison healthcare facilities, he posses additional authority to implement reforms that the State determines are necessary as part of its plenary power over the State's prison system. When, however, he acts solely through the authority of a federal court as he seeks to do here, he is restricted to that which is required by the U.S. Constitution and permitted by federal law. His construction plan, however, goes well beyond what the Constitution requires and violates the PLRA, such that the district court's order that State Defendants fund it was unlawful. Second, recognizing the excess of his $8 billion request, the Receiver attempts to distance himself from it, completely recharacterizing the nature and scope of his request, as well as rewriting the district court's order. As the record shows, however, the Receiver's construction plans, involving seven new

facilities occupying the space of 70 Wal-Marts and involving 63,000 new state jobs, is in fact a massive construction plan that violates the PLRA and exceeds any notion of the proper balance of authority between the State and a federal court.

The legal errors of the district court's order are clear, and warrant reversal by this Court. As he did in opposing the State Defendants' Petition for a Stay and their Petition for Writ of Mandamus, the Receiver fails to defend the substance of his construction plan, but rather asserts numerous meritless procedural objections to State Defendants' appeal. At the outset, the Receiver argues that this Court lacks appellate jurisdiction over the appeal, principally claiming that the district court's action is a contempt proceeding. To the contrary, however, the district court's order is an order requiring the State Defendants to make a down-payment of $250 million toward the Receiver's $8 billion construction plans. The fact that the district court expressly contemplated contempt proceedings if the State Defendants did not comply does not strip this Court of jurisdiction over an otherwise appealable order. Since there are numerous bases for appellate jurisdiction, this Court may consider the merits of the appeal.

Further, this Court is not prohibited from considering the merits of whether the Receiver's construction plan complies with the requirements of the PLRA. As all of the prior court orders authorizing the Receiver to proceed with his construction project required him to use lease revenue bonds, the State Defendants did not waive any arguments under the PLRA where the Receiver now seeks to go forward without that funding and against the State's consent. Nor is this an enforcement action such that State Defendants must file a motion to terminate prospective relief; the Order Appointing Receiver (OAR) does not confer the authority to unilaterally undertake an $8 billion prison construction plan, and the district court's order requiring its funding constitutes prospective relief that must comply with the PLRA. Even if the OAR could be read in the expansive way suggested by the Receiver, the construction plan is such a new and different form of relief than that contemplated at the time the OAR was entered that it constitutes prospective relief that must comply with the PLRA.

On the merits, it is clear that the Receiver's construction plans are beyond the scope of the targeted, narrow relief authorized by the PLRA. Ignoring the plain language of the PLRA, which expressly limits courts' "exercising their remedial powers," the Receiver argues that Congress did

not intend to limit courts' equitable authority to order the construction of prisons. The text and legislative history of the PLRA, however, shows that Congress fully intended to do precisely that. Even if courts had such authority, the Receiver's specific plan does not comply with the PLRA's requirements for prospective relief, as is clear from the now public Facility Program Statement. Nor does the district court's order comply with the PLRA's requirements governing the waiver of state law. Finally, the district court's order to pay $250 million out of the State Treasury—a down-payment on the $8 billion requested by the Receiver—violates California's sovereign immunity. Supreme Court case law requires that regardless of how relief is labeled, where it strikes at the core of the Eleventh Amendment's protections effect must be given to its provisions. An $8 billion monetary demand, made at the time of extreme fiscal crisis, strongly implicates California's sovereign immunity, and the protections of the Eleventh Amendment apply in this case.

ARGUMENT

I. THIS COURT HAS APPELLATE JURISDICTION OVER THE APPEAL

A. State Defendants Are Appealing a Bare Order to Pay Money, Not a Contempt Order

The Receiver's primary argument as to why this Court lacks jurisdiction over the appeal of the district court's Order for Payment (Excerpts of Record (ER) 72–74) is that it is in fact a contempt proceeding, such that the State Defendants must refuse to comply with the district court's order and be held in contempt in order to appeal it. (Br. at 20.) The district court's order, however, is a bare order requiring the State Defendants to make a down-payment of $250 million. While the Receiver's argument may have surface appeal insofar as the district court's order contemplates future contempt proceedings, a closer examination reveals that the cases cited by the Receiver are inapplicable for the simple reason that Appellants are not challenging a contempt order. Rather, Appellants are challenging an order of the district court that they pay $250 million. The district court order provides:

> (1) Defendants are to transfer $250 million to the Receiver no later than November 5, 2008.
>
> (2) If Defendants fail to transfer $250 million to the Receiver by November 5, 2008, Defendants are hereby ORDERED TO SHOW CAUSE starting at 9:00 AM on

> November 12, 2008, or as soon thereafter as counsel may be heard, why they should not be held in contempt for failing to comply with this Order to continue funding implementation of the Receiver's previously approved plans. . . .

(ER 74.) Clearly, this is not a finding of contempt. While the Receiver's initial motion sought contempt, in the alternative he sought an "Order Compelling Defendants to Fund Such Projects" (ER 160). As the district court's Order for Payment makes clear, it was an order granting in part the Receiver's request for an order compelling State Defendants to fund his construction projects.

Paragraph 1 of the Order, which requires State Defendants to pay $250 million, is an appealable order. The fact that the district court went further in Paragraph 2 and set a hearing on an order to show cause as to whether failure to comply with Paragraph 1 constitutes contempt does not somehow render the entire order non-appealable. Contempt proceedings are *always* possible if a party fails to comply with a court order: the express mention of that possibility is irrelevant to whether the order to pay $250 million is an appealable order. Put simply, the presence of the word "contempt" in the district court's order does not transform it into an order that is not appealable. State Defendants have challenged an order for

payment of $250 million to fund the Receiver's construction projects. As they have not challenged anything related to a contempt proceeding that has not yet occurred, the cases regarding contempt cited by the Receiver at 20–21 are inapposite.

B. The Possibility of a Future Evidentiary Hearing Regarding Whether State Defendants Should be Held in Contempt Does not Render the Order for Payment Interlocutory

For the same reason that the Order for Payment is not an order related to contempt, the Receiver's arguments regarding finality should be rejected. The Receiver asserts that the district court's Order for Payment is not final for purposes of 28 U.S.C. § 1291 because further evidentiary hearings were contemplated.[1] (Br. at 22.) Those evidentiary hearings, however, would only occur if State Defendants refused to comply with the Order for Payment, and would only concern whether the standards for contempt were met. The State Defendants would not have been entitled to challenge the validity of the underlying Order for Payment, including the district court's

[1] The fact that section 1291 was not included as a basis of appeal in the Notice of Appeal is irrelevant. (Br. at 22 n.3.) *Compare* Fed. R. App. P. 3(c)(1) (requiring that notice of appeal "specify the party or parties taking appeal," "designate the judgment, order, or part thereof being appealed," and "name the court to which the appeal is taken") and Fed. R. App. P. 28(a)(4) (requiring jurisdictional statement to be included in the appellant's brief).

conclusions that its order complied with the PLRA and did not violate California's sovereign immunity. *United States v. Ayres*, 166 F.3d 991, 995 (9th Cir. 1999) ("It is a long-standing rule that a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy.") (citations omitted). Accordingly, the Receiver's suggestion that the State Defendants must wait until the evidentiary hearing to submit evidence regarding compliance with the PLRA is a trap, since no such evidence would likely be admissible. The fact that the court contemplated a further evidentiary hearing on a separate issue—whether non-compliance with the Order for Payment would subject State Defendants to contempt—is far different from an order contemplating amendment of the very order being appealed from. Accordingly, *National Distribution Agency v. Nationwide Mutual Insurance Company*, 117 F.3d 432, 434 (9th Cir. 1997), cited by the Receiver (Br. at 23), is inapposite. The Order for Payment was a final determination of the issues presented in this appeal, and jurisdiction is proper under section 1291.

The Receiver further argues that a post-consent decree order is only appealable where the order "substantially readjusts the legal relationship of

the parties," (Br. at 27, quoting *Feliciano v. Rullán*, 330 F.3d 1, 7 (1st Cir. 2004)), a requirement that is clearly met here. The Order gives the Receiver unilateral authority to construct massive new facilities that will require an untold number of new positions at CDCR, costing the State billions of dollars. It further contemplates allowing the Receiver to seize money directly from the State Treasury. While the consent decrees, and the OAR, were focused on the hiring and training of doctors and nurses and treatment protocols for high-risk inmates (Brief of Appellants at 8–9), the focus is now on a massive construction project. Clearly, the district court's order is not simply ordering "mere cooperation" with the Receiver, but is rather a wholesale change in the relationship between the Receiver and the State.

C. The Order for Payment is an Appealable Collateral Order

Even if this Court concludes that the Order for Payment is not a final order for purposes of section 1291, it is appealable under the collateral order doctrine. The Order for Payment conclusively determines whether the Receiver's construction plans comply with the PLRA: as discussed above, any future evidentiary hearing would not concern the merits of the underlying order but rather only whether the State Defendants had complied with it. Moreover, the scope of a court's equitable authority under the

PLRA is separate from the merits of whether the State has violated prisoners' Eighth Amendment rights, an issue that was settled in the consent decrees issued years ago. Unlike a typical receivership instituted by the SEC, such as that in *SEC v. Capital Consultants LLC*, 453 F.3d 1166, 1172 (9th Cir. 2006), the appointment of the Receiver and the scope of his authority is separate from the merits of the underlying litigation, which concerns the Eighth Amendment rights of inmates in CDCR custody.

D. Even if it is not Appealable as a Final Order or a Collateral Order, the Order for Payment is an Injunction or, Alternatively, an Order Requiring Immediate Payment

Further, the district court's Order for Payment is appealable as an injunction under 28 U.S.C. § 1292(a)(1) or, in the alternative, as an order requiring immediate payment under the *Fogay-Conrad* rule, 46 U.S. 201 (1848). As stated in State Defendants' reply brief in support of their petition for an emergency stay, the cases cited by the Receiver involving receivers appointed to oversee the administration of funds are distinguishable, as the funds here are going to be spent by the Receiver on planning for an illegal prison construction project and are not recoverable. The Receiver does not dispute that he intends to spend the money he seeks on his prison construction projects that State Defendants are challenging by way of this

appeal. Accordingly, this case involves much more than the "mere administrative turnover" of funds at issue in *F.T.C. v. Overseas Unlimited Agency, Inc.*, 873 F.2d 1233, 1234 (9th Cir. 1989). Accordingly, in addition to being a post-judgment collateral order, the district court's Order for Payment is appealable under 28 U.S.C. § 1292(a)(1) or alternatively, the *Forgay-Conrad* rule.[2]

II. WHETHER THE DISTRICT COURT'S ORDER FOR PAYMENT COMPLIES WITH THE PLRA IS PROPERLY BEFORE THIS COURT

A. State Defendants Need Not Bring a Motion to Terminate to Challenge the Receiver's Compliance with the PLRA

Because the Motion for Funding is not rightly conceived of as an enforcement action, the arguments related to the district court's compliance with the PLRA are properly before this Court. The Receiver's principle argument is that the Order for Payment is not a form of prospective relief that must comply with the requirements of 18 U.S.C. § 3626(a), but rather is the enforcement of the earlier consent decrees and the OAR. To the contrary, however, the OAR does not contemplate prison construction, and

[2] As the public release of the Facility Program Statement, Second Draft, is inconsistent with the claim that it is confidential material, State Defendants agree that their appeal of the district court's decision denying their administrative motion to remove the confidential material designation from that document is now moot. (Br. at 30.)

the Receiver makes no serious effort to argue otherwise. Moreover, the cases cited by the Receiver illustrate why his request is not an enforcement action but rather prospective relief that must meet the requirements of section 3626(a).

Jones-El v. Berge, 374 F.3d 541 (7th Cir. 2004) involved an order to cool prisoners' cells. After it became clear that the only way to comply with that order would be to air condition prisoners' cells, the plaintiffs brought a motion to compel the defendants to provide air conditioning, which the district court granted. The Seventh Circuit concluded that the court's order providing air conditioning was an enforcement action, not "prospective relief" that triggered the requirements of section 3626(a). *Id*. at 545.

Similarly, *Feliciano v. Rullan*, 303 F.3d 1(1st Cir. 2004) involved an order that was a simple application of earlier-entered prospective relief. There, the court had previously ordered, with the consent of all parties, that a nonprofit entity provide healthcare to inmates in Puerto Rico. As part of that order, the court required Puerto Rico's Chief Health Care Coordinator (CHCC), who had previously overseen the provision of inmate healthcare, to cooperate with the nascent corporation. In resolving a dispute over the proper role of the CHCC with the non-profit corporation, the district court

specified precise areas in which CHCC would cooperate with the corporation. It was this order requiring specific cooperation that the Secretary appealed. "The stipulation obligated the parties, in effect, to cooperate fully in the privatization process. The assignment of specific duties to the CHCC—the part of the May 23 order that rankles the Secretary—is simply another way of expressing what is reasonably to be expected from the stipulated promise of full cooperation." *Id*. at 9. Indeed, the First Circuit referred to the order as "a procedural measure that constitutes an exercise of the district court's housekeeping powers," and is a far-cry from an order authorizing the construction of prison facilities at a cost to the State of $8 billion over the next four years.

The proceeding requiring officials to install air conditioning to fulfill a consent decree requiring cells to be cooled is a straight-forward application of the lower court's prior order, as is a decision directing the level of cooperation between officials whose cooperation had previously been ordered. These cases have no bearing on an attempt to force a State to expend billions of dollars on a massive construction program on the basis of a generic order to pay the "costs" of a Receiver appointed to remedy a State's failure to follow treatment protocols and hire a sufficient number of

qualified doctors and nurses. The difference between the OAR and the district court's Order for Payment on the one hand, and those orders at issue in *Jones-El* or *Feliciano* on the other, show that the district court's order is clearly prospective in nature, regardless of whether the language of the OAR can be stretched so far as to theoretically cover the Receiver's massive construction project.

B. The State Defendants Have Not Waived the Protections of the PLRA By Agreeing to Prior Orders that Required the Receiver to Use Funds Necessitating Legislative Approval

Reiterating his previous briefs, the Receiver once again argues that the State Defendants waived any argument under the PLRA by failing to object to prior orders of the district court that contemplate the construction of the Receiver's prison healthcare facilities. However, despite the opportunity to do so before this Court and the district court, the Receiver has still not explained why the court-ordered requirement that he obtain funding through legislatively authorized means does not apply. (ER 301 (construction projects "will be funded through lease revenue bonds over a 25 year period"); ER 309 ("The State has determined that funding for an 8,000 bed construction project will be provided through AB 900 funds."). Clearly, these orders contemplated state consent to the method of funding by either

using pre-existing legislation (AB 900) or new legislation that would support the Receiver's projects (such as SB 1665).

This is not a mere technicality. By approving legislation that would have provided the Receiver with funds for his construction project, the State would have put the imprimatur of its sovereign authority on the Receiver's projects. The State is certainly free to agree to allow the Receiver to construct prison healthcare facilities as part of the State's plenary power over its prison systems. To do so would appear to make sense: as the individual in charge of the provision of healthcare to inmates, the Receiver would have the knowledge of what needs should be addressed in any expansion of the prison healthcare facilities, either pursuant to AB 900 or any other effort to add additional bedspace for the provision of medical, mental health, and dental care. Moreover, the requirement that the Receiver seek lease revenue bonds reflects the realities of how construction projects are funded in California. It also reflects the fact that it is the Legislature, not the Governor or Controller, that decide how funds are appropriated in California. (Cal. Const. art. XVI, § 7; Cal. Gov. Code, § 12440.)

Having failed to convince the Legislature of the merits of his $8 billion construction program and having refused to use the funds

appropriated by AB 900, however, the Receiver must now rely, not on the authority given to him by the State, but rather solely upon the district court's equitable authority as limited by the PLRA. The State's earlier agreement to construct prison facilities, conditioned as it was on the full consent of the State and the California Legislature, is no bar to State Defendants' challenge to the plans on the basis that they do not comply with the PLRA now that the Receiver has determined to rely not on state legislative authority, but rather on that of a federal court.[3]

C. State Defendants Are Not Judicially Estopped from Raising the PLRA as a Defense

[3] The Receiver claims that a suggestion in July 2008 to obtain lease revenue bonds through the California Infrastructure and Economic Development Bank (I-Bank) shows that legislative approval was not in fact required for the Receiver to undertake his construction projects. The I-Bank operates pursuant to the Bergeson-Peace Infrastructure and Economic Development Bank Act (Gov. Code §§ 63000 *et seq.*), and is overseen by a five-person board that includes the Secretary of the Treasury and the Director of Finance. <http://www.ibank.ca.gov/AboutUs/members.html> (last visited January 12, 2009). The fact that the State was pursing an alternative method to obtain bond financing pursuant to state law simply shows that they were complying with the OAR's requirement that State Defendants cooperate with the Receiver to the fullest extent possible. (ER 333.) It does not change the fact that the orders contemplating prison construction require that they be funded with lease revenue bonds, which are ordinarily obtained through legislative action.

Finally, State Defendants are not estopped from challenging the validity of the Receiver's construction plans because they have discussed them in other pending cases. The Receiver notes that the State Defendants have referenced the fact that they were moving forward with the Receiver's construction plans in filings before the district court in *Coleman v. Schwarzenegger*, 09-0520 (E.D. Cal.) and before the three-judge panel convened pursuant to 18 U.S.C. § 3626(a)(3)(B). In order for judicial estoppel to apply, a party must take "clearly inconsistent" positions before a court. *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001). However, when the State Defendants represented to the three-judge panel that new medical, mental health, and dental beds would be built, the State Defendants reasonably believed that the Receiver would be able to gain support for legislation authorizing lease revenue bonds to fund his construction program. That this was a reasonable belief is demonstrated by the fact that SB 1665, the Receiver's legislative vehicle, came within 2 votes of passage in the State Senate. (*See* Current Bill Status, S.B. 1665, available at <http://leginfo.ca.gov/pub/07-08/bill/sen/sb_1651-1700/sb_1665_bill_20080602_status.html> (last visited January 20, 2009).)

Moreover, the statements made before the three-judge panel are not inconsistent with the position taken before this Court. The "comprehensive and historical plan for prison reform" that "will directly assist the Receiver in his efforts to provide constitutionally adequate healthcare" referred to by the Receiver in his Brief (p. 16) is none other than AB 900. (SER 634.) Then, as now, the State asserted that the medical beds to be constructed would be those authorized by AB 900. This same document relied upon by the Receiver specifically specifies that "AB 900 provides for medical beds needed by the Receiver, who recently submitted his Plan of Action for providing constitutional medical care." (SER 634.) Far from being inconsistent with the State Defendant's opposition to the Receiver's *unilateral* attempt to construct those beds, that filing is entirely consistent with the State Defendants' assertion that the State's agreement to the Receiver's plan was premised on the use of lease revenue bonds, such as those authorized by AB 900. The fact that this filing occurred in May 2007 shows that far from being an *post hoc* requirement, State Defendants' insistence that the Receiver use lease revenue bonds to fund his construction plans has been a long standing one. Accordingly, State Defendants' statements before the three-judge panel are not "clearly inconsistent" with

the arguments made before this Court, and the defense of judicial estoppel does not apply.

III. THE RECEIVER'S CONSTRUCTION PLANS VIOLATE THE PLRA'S BAR ON CONSTRUCTION

On the merits, it is clear that the prison construction plan violates the PLRA's prohibition on the construction of prisons. Section 3626(a)(1)(C) provides:

> Nothing in this section shall be construed to authorize the courts, in exercising their remedial powers, to order the construction of prisons or the raising of taxes, or to repeal or detract from otherwise applicable limitations on the remedial powers of the courts.

Section 3626(a) is a limitation on courts' equitable powers. *Gilmore v. California*, 220 F.3d 987, 999 (9th Cir. 2000). In subsection (a)(1)(A), the PLRA sets forth the basic requirements for prospective relief, which mirrors that required for prospective relief generally. *Gomez v. Vernon*, 255 F.3d 1118, 1129 (9th Cir. 2001) ("Although the PLRA significantly affects the type of prospective injunctive relief that may be awarded, it has not substantially changed the threshold findings and standards required to justify an injunction."). In subsection (a)(1)(B), Congress went further, requiring specific findings where prospective relief would require a waiver of contrary state law. Finally, in subsection (a)(1)(C), Congress indicated that even

where the requirements set forth in subsection (a)(1)(A) governing preliminary relief generally are met, courts are nevertheless still barred from ordering prison construction (or an increase in taxes).

The Receiver's principal argument that the language "in this section" indicates that there is some equitable authority outside of the PLRA ignores the language of subsection (a)(1)(C) and would render subsection (a)(1)(A) meaningless. Subsection (a)(1)(C) expressly references a court's exercise of its equitable powers in barring the construction of prisons. If the Receiver were correct that there was some inherent equitable authority outside of the PLRA that could give the court authority to order the construction of prisons, subsection (a)(1)(C) notwithstanding, then the reference to equitable powers would have no meaning. Rather, that phrase shows Congress fully intended to limit courts' equitable authority to order the construction of prisons.

Moreover, section 3626(a) represents the full complement of equitable authority available to the district court in a prison litigation suit. There is simply no equitable authority available to a district court outside this section. That conclusion is compelled by the fact that subsection (a)(1)(A) codifies the pre-existing standards for when a court may issue prospective, injunctive

relief. *Gomez*, 255 F.3d at 1129. Had Congress not intended section 3626(a) to represent the full extent of a court's equitable authority, there would have been no reason to codify the standards for equitable relief in section 3626(a)(1)(A). Accordingly, the "nothing in this section" language reflects the fact that section 3626(a) governs the issuance of injunctive relief in cases related to prison conditions, and that even if the requirements of that section are met, ordering prison construction is still not within the district court's authority.

For this reason, *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 433 (9th Cir. 1994) is inapposite. The Receiver argues that this Court should ignore the fact that the statute at issue in *Cabazon Band* was an affirmative grant of authority, rather than a restriction of a court's authority as is the case with the PLRA. (Br. at 38.) Context, however, is vital in interpreting a statutory provision, as the meaning of a phrase in one statute may be completely different than the meaning of the same phrase in another. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Where a statute involves an affirmative grant of authority and contemplates that other provisions of law may apply, it stands to reason that "nothing in this section" should not be interpreted as a limitation on authority. Where, however, as in

this case, a statute is aimed at restricting authority and the text indicates it is the sole provision governing an area of law, the language "nothing in this section" should be interpreted to be a limitation on authority. *See, e.g.*, *Dickinson v. Office of Personnel Management*, 828 F.2d 32, (D.C. Cir. 1987) (construing language in 5 U.S.C. § 552a(g)(5), which provides that "[n]othing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975," to "expressly prohibit[ ] actions for disclosure of a record made prior to September 27, 1985"). Accordingly, *Cabazon Band* does not support the Receiver's construction of section 3626(a)(1)(C).

Finally, the Receiver cites several cases that he argues involve the construction of prison facilities since the passage of the PLRA. As he acknowledges, "the parties in those cases did not even raise section 3626(a)(1)(C) as a bar on such construction," (Br. at 41), and accordingly, the courts had no occasion to consider the scope of section 3626(a)(1)(C). The Receiver argues those cases are an illustration that courts have continued to order prison construction even in the face of the PLRA. In fact, they show no such thing. *Feliciano v. Rullán*, 378 F.3d 42 (9th Cir. 2004) dealt with the termination of a prior consent decree that had required

privatization of the provision of healthcare; while some construction had occurred before the motion to terminate was brought, it was not construction that was challenged, but rather privatization. *Marion County Jail Inmates v. Anderson*, 270 F.Supp.2d 1034 (S.D. Ind. 2003), concerned contempt proceedings for a court order requiring prisoners to be provided with bed space above the floor. *Id.* at 1036. The contempt order simply required that Marion County "contract for and utilize all *available bed space* in Marion County Jail II to house prisoners. . . ." *Id*. at 1037. No construction is mentioned in the court's order. Similarly, while the pre-PLRA consent decree in *Harris v. City of Philadelphia*, 2000 WL 1978 (E.D. Pa. December 23, 1999) required Philadelphia to construct prison space, the contempt motion in that case did not relate to prison construction, but rather related to the city's agreement to provide a mattress to inmates within 24 hours, assign them to permanent housing within 72 hours, and maintain certain physical standards in the housing. *Id*. at *9. Indeed, the court specifically stated that "[i]n imposing relief, the court neither orders the construction of a prison nor raises taxes for that purpose. *See* 18 U.S.C. § 3626(a)(1)(C)." *Id.* at 17.

For the one case the Receiver cites that actually involves prison construction, *Goff v. Harper*, 59 F.Supp.2d 910 (S.D. Iowa 1999), the state

legislature passed legislation funding construction, and the court did not rely on its equitable powers in finding their construction to be a suitable remedy to the lawsuit. (*Id*. at 913.) As noted above, while the PLRA bars the court from ordering prison construction, nothing prohibits a legislature from undertaking construction in response to a lawsuit challenging prison conditions. Accordingly, none of the cases cited by the Receiver (Br. at 41) suggest that a court has power under the PLRA to order the construction of prisons, and indeed, suggest the precise opposite.

The Receiver's claim that his construction program does not involve construction of prisons in the first place contradicts the description of his program in his briefs below and in documents filed with the district court. The PLRA defines prisons as any state facility that incarcerates or detains individuals convicted of or sentenced for violations of criminal law. *See* 18 U.S.C. §3626(g)(5). The construction of 7 million square feet of new facilities that will house 10,000 inmates clearly meets this definition. The Receiver claims that because he intends to build these new facilities at existing institutions, they are not in fact prisons. However, there is no savings clause in the prohibition on prison construction for prisons constructed at existing institutions. And for good reason. The Receiver's

new healthcare facilities will "be constructed as a stand-alone institution and will be self-sufficient in terms of staffing, food, infrastructure, clothing, and other prison needs." (p. 4, Ex. 18 to Petition for Writ of Mandamus, 08-74778.) Simply because they are built on the same grounds as other prison buildings does not somehow convert these massive structures—intended to incarcerate individuals convicted of violations of criminal laws—into something other than prisons.

Finally, if the court cannot order the State to fund the construction of the facilities in question, surely it cannot require the State to pay for their planning. Planning is the first part of any capital outlay, such as construction projects. As federal law prohibits construction, that prohibition necessitates barring all parts of construction, including the planning, scope, site selection, environmental reviews, such as it bars the actual laying of foundation and raising the four walls of the prison facility.

IV. THE DISTRICT COURT'S ORDER AND THE RECEIVER'S CONSTRUCTION PLANS DO NOT COMPLY WITH THE REQUIREMENTS OF SECTION 3626(a)(1)(A) OR (a)(1)(B)

In attempting to show that the district court complied with the requirements of the PLRA regarding granting prospective relief and in waiving state law regarding how state funds are appropriated, the Receiver

points to cursory statements in the record by Judge Henderson that "implementation of the [Turnaround Plan of Action] is necessary to bring the prison healthcare system to constitutional standards." (Br. at 43, quoting ER 72–74.) That statement is clearly insufficient to meet the requirements of the PLRA: not only was there no evidentiary hearing to support that statement, it fails to even mention most of the criteria set forth in section 3626(a)(1)(A)–(B). There is no discussion of the Receiver's plan as the least intrusive means to bring the healthcare system to constitutional standards, or whether the plan goes no further than is necessary. Moreover, this burden is on the Receiver, not the State. *Gilmore*, 220 F.3d at 1008, cited by the Receiver (Br. at 42), concerns motions to terminate brought pursuant to 18 U.S.C. § 3626(b), and does not govern whether prospective relief is appropriate.

Even if the Receiver were correct that in some cases "explicit findings are not required so long as the record in fact supports compliance with the PLRA requirements," (Br. at 44), this is not such a case. First, the scope of the 7 million square foot project alone would certainly warrant at least an evidentiary hearing: before ordering a state to embark on an $8 billion construction project, a court should hear evidence to ensure that it meets the

requirements of federal law.[4] Second, given the significant evidence that the plan goes well beyond what is required by the Constitution and that there are other methods of addressing the healthcare needs of inmates, the district court had good reason to assure itself that the PLRA's requirements were met. As detailed in State Defendants' opening brief at 32, the Receiver has numerous other tools through which he can improve the quality of healthcare for inmates, many of which he has already started using to great success. He has increased the number of qualified doctors and nurses, changed treatment protocols, updated the pharmacy, and started implementing electronic record keeping, among other improvements. All of this suggests that the construction plan is not the only means available to meet a constitutional level of medical care for CDCR inmates. Moreover, the Facility Program Statement shows that it goes well beyond any constitutional requirement that prisoners not be subjected to "deliberate indifference of serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). (*See, e.g.*, ER 618,

[4] The Receiver once again invites the State Defendants to pursue an avenue that would have led to no relief: an evidentiary hearing in a contempt proceeding. (Br. at 42 n. 8.) As noted above, however, such an evidentiary hearing would have been limited to whether the State Defendants had violated the earlier court order, not whether the Receiver's plans were consistent with the PLRA. *Supra* at Section I.B.

691, 703, and 705.) Quite clearly, these amenities go well beyond what is required by the Eighth Amendment. The record does not "in fact support[ ] compliance with the PLRA requirements," (Br. at 44), but the precise opposite.[5]

V. THE DISTRICT COURT'S ORDER AND THE RECEIVER'S CONSTRUCTION PLAN DO NOT FALL WITHIN THE AUTHORIZED PURPOSES OF FUNDS APPROPRIATED BY SECTION 28 OF AB 900

As mentioned earlier, the district court's order requires the immediate payment of $250 million. Contrary to the Receiver's assertion (Br. at 45), the district court's order does not involve funds appropriated for the Receiver's construction plan. The Receiver's argument is based on his assertion that the Order is limited to funds appropriated by section 28 of AB 900. The Order for Payment, however, contains no such limitation. Rather, it is a bare order providing that "Defendants are to transfer $250 million to the Receiver no later than November 5, 2008." (ER 74.) The Court will

[5] The Receiver once again repeats the tired statement that there is a death once every 5.4 days, up from one every 6 days in 2005. (*Compare* Br. at 43, ER 336.) Of course, in 2005, that statement was based on preventable deaths, whereas now, the statement is based on preventable or *possibly* preventable deaths. Accordingly, he has changed the standard and is comparing apples and oranges. The Receiver has not stated by what metric a death is found to be "possibly" preventable. The fact of the matter is that healthcare has dramatically improved in CDCR facilities, as one would expect after years of court oversight.

search in vain for any reference to AB 900 in the Order for Payment. Moreover, the Receiver's construction project does not fit within the scope of that appropriation. Although the primary purpose of AB 900 is to provide for up to $7.4 billion in bond financing for various prison construction projects, including up to $1.14 billion for the construction of medical, mental health, and dental beds, section 28 of AB 900 also appropriates $300 million from the General Fund for "for capital outlay to renovate, improve, or expand infrastructure capacity at *existing* prison facilities. . . ." (Emphasis added.) As his Turnaround Plan of Action and subsequent filings make clear, the seven new prisons the Receiver intends to build are not at "existing facilities" as required by AB 900. Indeed, as explained in a subsequent order, "each facility will be constructed as a stand-alone institution and will be self-sufficient in terms of staffing, food, infrastructure, clothing, and other prison needs." (p. 4, Ex. 18 to Petition for Writ of Mandamus, 08-74778) The Receiver's attempt to fall within the purpose of appropriated AB 900 funds to avoid the requirements of the PLRA must be rejected.

VI. THE DISTRICT COURT'S ORDER VIOLATES CALIFORNIA'S SOVEREIGN IMMUNITY

Finally, the district court's order requiring the State to pay $250 million to the court-appointed Receiver violates the Eleventh Amendment and California's sovereign immunity. The Receiver ignores the fact that the district court's order is not injunctive relief that fits within the *Young* exception; to the contrary, it is a bare order requiring transfer of $250 million from the State Treasury to the Receiver.

Even if the technical requirements of *Young* are met, the Supreme Court's decision in *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997) bars the relief sought by the Receiver in this case. The Receiver attempts to limit *Coeur d'Alene* to its facts, and suggests it applies only to cases involving quiet title actions to state owned land. (Br. at 50.) As case law from this and other circuits make clear, however, *Coeur d'Alene* is not so limited. Rather, it applies whenever "the relief requested would be so much of a divestiture of the state's sovereignty as to render the suit as one against the state itself." *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1048 (9th Cir. 2000).

While the Receiver is correct that *Coeur d'Alene* presents a limited exception to *Young*, his $8 billion request is surely a case that fits within that

limited class of cases raising special sovereignty interests. The Receiver's attempt to distance himself from his $8 billion request contradicts the relief he actually sought in his Motion for Funding. Indeed, the Receiver included the following table in the briefing before the district court, suggesting when the State should deposit funds from the State Treasury into the Receiver's accounts:

Encumbrance Needs	**2008/09**	**2009/10**	**2010/11**	**2011/12**	**2012/13**	**Totals**
10,000 Bed Project	2,466,588,245	1,912,814,369	1,620,597,386			6,000,000,000
33 Prison Project	669,758,485	1,058,164,539	269,617,285	2,459,691		2,000,000,000
TOTAL	**3,136,346,730**	**2,970,978,908**	**1,890,214,671**	**2.459,691**		**8,000,000,000**
Cash Flow Needs						
10,000 Bed Project	213,969,815	1,681,635,423	2,028,583,445	1.576,846,590	498,964,727	6,000,000,000
33 Prison Project	148,132,134	987,771,354	845,854,293	18,242,219		2,000,000,000
TOTAL	**362,101,949**	**2,669,406,777**	**2,974,437,738**	**1,595,088,809**	**498,964,727**	**8,000,000,000**

(ER 177). Far from involving a request of $250 million, this case entails commandeering $8 billion from the State's General Fund.

As the table illustrates, the scope of the relief requested by the Receiver is quite literally unprecedented in this nation's history. The Receiver argues that the amount of funds requested is irrelevant, but the amount of money at issue in the cases he cites—$6 million and $2 million—show just how unique this case is. (Br. at 48, citing *Milliken v. Bradley*, 433 U.S. 267, 289 (1977) and *Flores v. Arizona*, 405 F.Supp.2d 1112 (D. Ariz. 2005), *vacated on other grounds*, 204 Fed. Appx. 580 (9th Cir. 2006).) An

$8 billion hit on the General Fund, whether ordered all at once or in piecemeal fashion, would truly threaten the State's fiscal health, which is the precise effect the Eleventh Amendment was designed to avoid. *See Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994) (citing W. Fletcher, A Historical Interpretation of the Eleventh Amendment, 35 Stan. L. Rev. 1033, 1129 (1983)). Given the tremendous amount of money at stake, the district court's order, which is the first in a series of orders requiring state officials to turn over billions of dollars to the Receiver, implicates California's special sovereignty interests. Accordingly, the *Young* fiction is inapplicable to this case.

Finally, the State did not waive the defense of sovereign immunity by agreeing to the consent decrees. The consent decrees, as well as the appointment of the Receiver, were injunctive relief that fell within the scope of *Ex Parte Young*. Accordingly, sovereign immunity was not a defense. Now that the district court has ordered a direct payment from the State Treasury, however, the protections of the Eleventh Amendment are applicable, and the State's assertion of the defense is timely.

CONCLUSION

For the foregoing reasons, the Court should reverse the October 27, 2008 decision of the district court.

Dated: January 21, 2009

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January 21, 2009
Dated

s/ Daniel J. Powell
Daniel J. Powell
Deputy Attorney General

CERTIFICATE OF SERVICE

Case Name: **Plata, Marciano et al. v. Arnold Schwarzenegger, et al.** No. **08-17412**

I hereby certify that on January 21, 2009, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

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Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 21, 2009, at San Francisco, California.

Susan Chiang
Declarant

Signature