

Appeal No. **08-74778**

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

IN RE ARNOLD SCHWARZENEGGER, *ET AL.*,
Petitioners,

v.

**UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA ,**
Respondent,

MARCIANO PLATA, *ET AL.*; J. CLARK KELSO, RECEIVER,
Real Parties in Interest.

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

RECEIVER'S ANSWER TO PETITION FOR WRIT OF MANDAMUS

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INTRODUCTION

Beginning with stipulated consent orders entered by the District Court in 2002 and 2004, the State of California, through Petitioners and their predecessors, has conceded that medical care in California prisons is constitutionally inadequate. Following extensive evidentiary hearings in 2005, the District Court found, among other things, that: (1) “the California prison medical care system is broken beyond repair”; (2) the “Court has given [the State] every reasonable opportunity to bring its prison medical system up to constitutional standards, and it is beyond reasonable dispute that the State has failed”; and (3) “it is an uncontested fact that, on average, an inmate in one of California’s prisons needlessly dies every six to seven days due to constitutional deficiencies in the CDCR’s medical delivery system.” (Exs. to Pet. for Writ of Mandamus (“Pet. Ex.”), Ex. 6 at 1.) In February 2006, the District Court appointed a Receiver “to effectuate the restructuring and development of a constitutionally adequate medical health care delivery system” and ordered Petitioners to fund the Receiver’s work. (Pet. Ex. 7 at 2, 7.)

Contrary to their representation to this Court, Petitioners did not object to the District Court’s order appointing the Receiver; nor did they appeal it; nor have they sought to modify or terminate it or the underlying consent orders. Quite the opposite: Petitioners have expressly and repeatedly supported and consented to the Receiver’s detailed plans for facility upgrades and expansions required to bring prison medical care up to constitutional standards. These plans have been approved by the District Court, most recently in a June 2008 order.

Since sometime after June 2008, however, Petitioners have reversed their support of the Receivership and refused to fund the Receiver's capital projects. In response to the Receiver's August 2008 motion for an order finding Petitioners in contempt for failing to fund the projects, Petitioners argued for the first time that the previously approved plans failed to comply with the Prison Litigation Reform Act ("PLRA") and violated the Eleventh Amendment. In search of some way to explain this sudden reversal, Petitioners attempt to rewrite history in their submission to this Court, claiming that they opposed the Receivership from the outset and that their consent to the Receiver's plans has been conditioned on approval of the California legislature. These factual claims are palpably false.

Petitioners have filed an interlocutory appeal, and they now file this writ of mandamus from the district court's October 27 "Second Order for Further Proceedings Re: Receiver's Motion for Contempt" ("the October 27 Order"). As its title suggests, that order was an interim step in contempt proceedings — a show cause order that directed Petitioners to either make a payment of \$250 million in unencumbered funds already appropriated by the California Legislature or appear at a hearing to show cause "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." (Pet. Ex. 16 at 3.)

This Court issues a writ of mandamus only for "usurpation of judicial power or a clear abuse of discretion." *Cordoza v. Pacific States Steel Corp.*, 320 F.3d 989, 998 (9th Cir. 2003). It has identified five "objective principles" to guide its determination of whether that standard has been met: whether (1) the petitioner

has adequate means, such as direct appeal, to attain the relief; (2) the petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) the district court's order is clearly erroneous as a matter of law; (4) the district court's error is oft-repeated or manifests a persistent disregard of the federal rules; and (5) the district court's order raises new and important problems or legal issues of first impression. *Id.* None of these principles supports issuing a writ in this case:

1. Though this Court lacks jurisdiction over Petitioner's attempted appeal of the October 27 Order, Petitioners could appeal an order of the District Court issuing contempt sanctions, if and when the court enters such an order; and Petitioners could properly raise their legal challenges in an order to modify the consent decree, as specifically provided for in the PLRA, 18 U.S.C. § 3626(b), and in an appeal should that motion be denied;

2. Petitioners will suffer no prejudice from denial of the writ since the District Court's order addresses only funds already appropriated by the California legislature for purposes to which Petitioners have consented;

3. The District Court's October 27 Order is not clearly erroneous; indeed, Petitioners' PLRA and Eleventh Amendment objections are procedurally barred and lack any substantive merit;

4. The District Court's procedural, show cause order applies only to specifically appropriated funds and compliance with the court's prior orders and, therefore, does not present recurring issues; and

5. The legal issues raised by the Petition are not relevant to the District Court's show cause order, which is only a procedural step in enforcing the court's

prior orders, involves only funds already appropriated by the California legislature, and does not involve any construction of prisons.

BACKGROUND

A. Petitioners' Consent to Appointment of Receiver

This case began in 2001 when plaintiffs filed a class action complaint alleging that Petitioners were providing constitutionally inadequate medical care at California prisons. (Pet. Ex. 1.) On June 13, 2002, and September 17, 2004, the District Court entered two stipulated orders intended to remedy these violations. (Pet. Exs. 2 & 3.) On May 10, 2005, the District Court issued an order to show cause why Petitioners should not be held in civil contempt for failing to comply with the stipulated orders and why a receiver should not be appointed. (Pet. Ex. 4.)

The order states:

The problem of a highly dysfunctional, largely decrepit, overly bureaucratic, and politically driven prison system . . . is too far gone to be corrected by conventional methods. ***The prison medical delivery systems is in such blatant state of crisis that in recent days defendants have publicly conceded their inability to find and implement on their own solutions that will meet constitutional standards.*** The State's failure has created a vacuum of leadership, and utter disarray in the management, supervision, and delivery of care in the Department of Corrections' medical system.

(*Id.* at 1 (emphasis added).)

On October 3, 2005, following six days of evidentiary hearings, the District Court issued findings detailing the long history of constitutional violations and Petitioners' failure to comply with remedial orders:

By all accounts, the California prison medical care system is broken beyond repair. The harm already done in this case to California's prison inmate population could not be more grave, and the threat of future injury and death is virtually guaranteed in the absence of drastic action. ***The Court has given defendants every reasonable opportunity to bring its prison medical system up to constitutional standards, and it is beyond reasonable dispute that the State has failed. Indeed, it is an uncontested fact that, on average, an inmate in one of California's prisons needlessly dies every six to seven days due to constitutional deficiencies in the CDCR's medical delivery system. This statistic, awful as it is, barely provides a window into the waste of human life occurring behind California's prison walls due to the gross failures of the medical delivery system.***

It is clear to the Court that this unconscionable degree of suffering and death is sure to continue if the system is not dramatically overhauled. Decades of neglecting medical care while vastly expanding the size of the prison system has led to a state of institutional paralysis. The prison system is unable to function effectively and suffers a lack of will with respect to prisoner medical care.

Accordingly, through the Court's oral ruling and with this Order, ***the Court imposes the drastic but necessary remedy of a Receivership in anticipation that a Receiver can reverse the entrenched paralysis and dysfunction and bring the delivery of health care in California prisons up to constitutional standards.***

(Pet. Ex. 6 at 1-2 (emphasis added).) On February 14, 2006, the court issued an Order Appointing Receiver (OAR), conferring on the Receiver all of the powers of the Secretary of the CDCR with respect to delivery of medical care. (Pet. Ex. 7.)

Petitioners assert that the District Court issued the OAR “[o]ver the objection of the State” (Petition for Writ of Mandamus (“Pet.”) at 2). But nowhere

in the document they cite, a “Response” to the order to show cause regarding contempt, did Petitioners object to the Receivership. (Pet. Ex. 5.) As the District Court stated, Petitioners “have proposed no alternative measures to resolve the crisis and *have not opposed appointment of a Receiver.*” (Pet. Ex. 6 at 42 (emphasis added).) Nor did Petitioners appeal the OAR; rather, they publicly supported the Receiver’s appointment. (Exs. to Receiver’s Answer to Pet. for Writ of Mandamus (“Ex.”) 13 at ¶ 2, Ex. A.)

B. Petitioners’ Consent to the Receiver’s Plan of Action

The OAR requires the Receiver to develop and implement a plan “to effectuate the restructuring and development of a constitutionally adequate medical health care delivery system” and provides that Petitioners shall fully cooperate with the Receiver and pay all costs incurred in the implementation of the Receiver’s policies, plans, and decisions. (Pet. Ex. 7 at 2, 7-8.) On November 15, 2007, the original Receiver filed a Plan of Action (POA), which included, among other things, a plan for the construction of additional medical beds. (Ex. 5 at Objective F.) On March 11, 2008, the current Receiver released a draft Turnaround Plan of Action (TPA) for public comment. (Pet. Ex. 10 at 2.)¹ The draft plan included improvement to health care facilities at the 33 existing CDCR facilities and expansion for up to 10,000 new medical and mental health beds. (Pet. Ex. 9 at 25-28.) After receiving public comment and receiving input from all

¹ A new Receiver was appointed on January 23, 2008. The Order Appointing New Receiver provides that all powers and responsibilities outlined in the OAR remain in effect. (Ex. 7.)

stakeholders — *including from Petitioners* — the Receiver finalized the TPA and filed it on June 6, 2008. (Pet. Ex. 10 at 2-3 (reciting facts regarding public comment and participation of Petitioners).) The District Court approved the TPA and entered it as an order on June 16, 2008. (Pet. Ex. 10.)

Petitioners have never objected to either the POA or the TPA. To the contrary, Petitioners have supported the Receiver's plans on numerous occasions in filings with the District Court. For example, in response to a May 10, 2007 preliminary POA describing "plans for fast-tracking construction of up to 5,000 new medical beds and 5,000 new mental health beds," Petitioners stated that they "support[ed] the Receiver's Plan of Action to deliver medical care in California's prisons" and "remain[ed] committed to working with the Receiver and to helping him implement the Plan of Action." (Ex. 4 at 2.) When the Receiver applied to the District Court on April 17, 2007 for an order waiving state contracting statutes to enable him to proceed with his plans to construct 5,000 medical beds, Petitioners filed a statement of non-opposition. (Ex. 2.) When the Receiver filed another application on June 16, 2008, providing further details about the construction plans and their status, the District Court set a briefing schedule, with objections to the application due on June 30, 2008; Petitioners again made no objections. (Ex. 8 at 1:27-28.)

Petitioners have also supported the Receiver's plans in related proceedings. On November 13, 2007, judges in four actions addressing unconstitutional health care in California prisons jointly issued an Order to Show Cause why the courts should not adopt a Construction Coordination Agreement. Petitioners filed a

response stating that they “do not object to the [Construction Coordination] agreement which provides that the *Plata* Receiver ‘will assume leadership responsibility’ for three construction projects,” including the “construction of approximately 5,000 medical and approximately 5,000 mental health beds.” (Ex. 6 at 2.) In a May 16, 2007 report to a three-judge panel proceeding convened in this action, Petitioners stated:

- “This comprehensive, historic plan for prison reform will directly assist the Receiver in his efforts to provide constitutional medical care [Petitioners] will continue to support the Receiver’s efforts.” (Ex. 2 at 1)
- “The Receiver should work to implement his Plan of Action” (*Id.* at 1-2)
- “Referral to a three-judge panel will not provide immediate overcrowding relief A far better course is to allow the State and the Receiver to implement their comprehensive reform plans.” (*Id.* at 4)
- *See also* Ex. 10 at ¶ 21 (voicing support for Receiver’s plan to construct 5,000 prison medical beds statewide).

Defendants have also filed declarations in the related case addressing prison mental health care, *Coleman v. Schwarzenegger*, No. 90-0520 (E.D. Cal.), acknowledging that the State intends to follow the Receiver's construction plans to bring prison health care up to constitutional standards. (Pet. Ex. 13, Dodd Supp. Decl. at Exs. D-1 to F.)

Petitioners have not moved to modify or terminate any of the prospective relief ordered in this case, including the appointment of the Receiver or the approval of the Receiver's TPA.

In the face of this clear record of consent to the Receiver's plans, Petitioners now contend that their consent was subject to an "important limitation" — "that the Legislature approve any financing for the construction project." (Pet. at 4.) This supposed "limitation" is pure fiction. Indeed, Petitioners are unable to cite even one statement in the record to support it. They cite two documents mentioning legislative funding (Pet. at 4), but nothing in those documents indicates that the plans or Petitioners' approval was dependent on a vote of the legislature.

Petitioners' statements in the record leave no doubt that the asserted "important limitation" on their support was manufactured for this Court. When they opposed the Receiver's contempt motion just three months ago, Petitioners did not say that legislative funding was a condition of their agreement; rather, they described legislative funding as "the *preferred* funding method." (Pet. Ex. 12 at 8 (emphasis added).) Petitioners then went much further, acknowledging that "*the State has been working for months with the Receiver and his representatives to craft an alternative funding mechanism that would fund his prison healthcare facilities construction program . . .*" (*Id.* (emphasis added).) The "alternative funding mechanism" is a non-legislative solution: a "bond offering by California's Infrastructure and Economic Development Bank ('I-Bank')." ² (*Id.*; *see also*

² The I-Bank is authorized to issue tax-exempt bond financing for certain capital projects, and it was contemplated that bonds would be sold to finance the
(Footnote continues on next page.)

Ex. 13 at ¶ 2, Ex. B (7/11/08 email from Mike Genest, California’s Director of Finance, to the Receiver with copy to the Governor’s office, stating that “in the event the bill [*i.e.*, the legislation to fund the Receiver’s plan] is not passed in time,” the I-Bank transaction “is definitely administration policy . . . we want to proceed on this . . .”). Pursuit of the I-Bank transaction to fund the construction program is wholly inconsistent with Petitioners’ statements to this Court. (Pet. Ex. 12, LeLouis Decl. at ¶¶ 2-4; Pet. Ex. 13, Supp. Kelso Decl. at ¶¶ 10-13.)

C. Contempt Proceedings

In July 2008, the Receiver requested additional funds needed to continue implementation of the TPA. When this request was refused, and further negotiations failed, the Receiver filed a motion for an order adjudging Petitioners in contempt (“Contempt Motion”). The Contempt Motion was briefed by the parties and heard on October 6, 2008. On October 8, 2008, the District Court issued an Order for Further Proceedings Re: Receiver’s Motion for Contempt. (Pet. Ex. 14.) The District Court adopted the Receiver’s suggestion, “as an intermediate step short of a contempt finding,” that the District Court order further proceedings to determine the availability of and procedures for transferring \$250 million to the Receiver. (*Id.* at 1.) In an October 24, 2008 supplemental brief, Petitioners acknowledged that the \$250 million is funding that is *already appropriated* by the legislature and is *unencumbered*, but stated that they would

(Footnote continued from previous page.)

construction projects and secured through asset leases. (Pet. Ex. 13, Supp. Kelso Decl. at ¶¶ 11, 12.)

not provide the funds. (Pet. Ex. 15.) The District Court continued the hearing to October 27, at which time it directed Petitioners to “inform the Court of their specific plans to transfer \$250 million of previously appropriated and unencumbered AB 900 funds to the Receiver.” (*Id.* at 2.)

Following the October 27 hearing, the District Court issued a Second Order for Further Proceedings. (Pet. Ex. 16.) That order directed Petitioners to transfer the previously appropriated and unencumbered \$250 million to the Receiver “no later than November 5, 2008” or to show cause on November 12, 2008 “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.” (*Id.* at 3.) On October 31, 2008, prior to the commencement of the contempt hearing, Petitioners filed a notice of appeal of the October 27 Order. (Pet. Ex. 19.)

ARGUMENT

I. ISSUES RAISED BY THE DISTRICT COURT’S ORDER WILL BE REVIEWABLE AFTER THE DISTRICT COURT HAS HELD A CONTEMPT HEARING IF IT ISSUES CONTEMPT SANCTIONS.

Petitioners prematurely appealed the October 27 Order before the District Court ruled on the Contempt Motion. The October 27 Order is the second of two orders issued by the District Court following the initial hearing on the Contempt Motion, both ordering “further proceedings.” It set a hearing at which the Petitioners were to show cause “why they should not be held in contempt.”

Post-judgment contempt orders — including contempt orders issued after entry of a consent decree — are appealable when the order adjudicates the

contempt issue and imposes sanctions. *Stone v. City & County of San Francisco*, 968 F.2d 850, 854-55 (9th Cir. 1992); *see also SEC v. Hickey*, 322 F.3d 1123, 1127 (9th Cir. 2003). Thus, the October 27 Order will be reviewable when, and if, the District Court has held a contempt hearing and imposed sanctions on Petitioners.

II. PETITIONERS WILL SUFFER NO PREJUDICE SINCE THE ORDER ADDRESSES ONLY FUNDS ALREADY APPROPRIATED BY THE CALIFORNIA LEGISLATURE.

Petitioners argue that they will be prejudiced in a way not correctable on appeal if they are required to comply with the District Court's order. (Pet. at 7.) But the order on which Petitioners seek writ review is merely a show cause order requiring attendance at a contempt hearing. No sanctions have been ordered; and if they are, that order will be reviewable on appeal. (*See* Section I, *supra*.)

Even if Petitioners were required to make payment before appellate review of the order, it would not prejudice their interest. In considering the State's interest it is necessary to consider the public interest in constitutional compliance and prevention of preventable suffering and death resulting from the constitutional violations. *See Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983) ("In a broader sense . . . the government's interest is the same as the public interest. . . . Our society as a whole suffers when we neglect the poor, the hungry, the disabled, or when we deprive them of their rights or privileges."). The \$250 million subject to the court's order was specifically appropriated by the California legislature in AB 900 for improvement and expansion of prison facilities. (AB 900, § 28.) It would be used for improvements of existing facilities and planning for expanded

facilities, and all necessary state law waivers for those expenditures have been obtained without objection from Petitioners. (Ex. 12 at ¶¶ 2-7, 18-20; Ex. 11 at ¶ 11; Exs. 3, 8.) Having made no objection to the Receiver’s plans, Petitioners cannot credibly argue that the use of these funds will not serve the public interest in bringing California prison medical care up to minimal constitutional standards.

III. THE DISTRICT COURT’S ORDER IS NOT CLEARLY ERRONEOUS AS A MATTER OF LAW.

A. Petitioners’ PLRA Claims Are Procedurally Barred and Without Merit.

Petitioners’ argument that the October 27 Order is invalid under the PLRA fails for at least the four reasons discussed below.

1. Petitioners’ PLRA Arguments Are Not Properly Before This Court.

Orders enforcing valid consent decrees are not the type of “prospective relief” governed by section 3626(a). The proper procedure for raising a PLRA challenge is to bring a motion to terminate or modify the underlying consent decree under section 3626(b). *See Jones-El v. Berge*, 374 F.3d 541, 545 (7th Cir. 2004); *see also Hallett v. Morgan*, 296 F.3d 732, 743 (9th Cir. 2002).

In *Jones-El*, for example, the consent decree required defendants to “cool” inmates’ cells. The only practical way to cool the cells was to install air conditioning, and defendants argued that the consent decree did not require this costly remedy. *Jones-El*, 374 F.3d at 543. The Seventh Circuit upheld the district court’s order requiring the installation:

The enforcement of a valid consent decree is not the kind of “prospective relief” considered by § 3626(a). So long as the underlying consent decree remains valid — and the defendants here have not (yet) made a § 3626(b) motion to terminate or modify the decree — the district court must be able to enforce it. The district court’s enforcement order on its face is valid, and the defendants offer no proper argument (i.e. one that does not rest upon the PLRA) to the contrary. Challenges to the appropriateness of the November order requiring the installation of air conditioning based upon the PLRA can only be properly brought as a § 3626(b) motion to terminate or modify the decree. By this route, both parties will be offered an equal opportunity to argue the facts and substantive merits with respect to the consent decree’s provision requiring the cooling of cells at Supermax.

Id. at 545 (internal citations omitted).

In the underlying consent orders here, Petitioners agreed to remedy the unconstitutional level of medical care provided to California inmates. The Receiver has presented detailed plans for improvements and expansion of medical care facilities necessary to achieve minimal constitutional standards, and the District Court has entered orders approving of those plans without objection by Petitioners. (Pet. Exs. 8-10; Ex. 6.) Petitioners have had ample opportunity to seek to terminate or modify the consent orders, or the OAR, and have not done so. Because the October 27 Order simply enforces previous orders approving the Receiver’s plans to effect the consent decree, Petitioners’ PLRA arguments are not properly before this Court.³

³ The consent decree itself is not required to specify the details of the remedial plans subsequently ordered to effectuate the decree. *See Feliciano v. Rullan*, 378 F.3d 42, 50, 55-56 (1st Cir. 2004) (upholding order requiring cooperation with private company charged with overhauling Puerto Rico’s prison
(Footnote continues on next page.)

2. Petitioners Have Waived Their PLRA Claims by Consenting to the Receiver's Construction Plans.

Petitioners have also waived their PLRA arguments by consenting repeatedly and expressly to the District Court's orders concerning the Receiver's construction plans. (*See* Background, *supra*; Pet. Ex. 13 at 12:6-14:14.) As noted by the District Court, Petitioners "never objected" to the Receiver's POA or TPA, "but instead consented to them after receiving them, reviewing them, and participating directly and indirectly in planning and informational meetings regarding the plans." (Pet. Ex. 16 at ¶ 7.) Petitioners have thus conceded that the Receiver's capital improvement plans, which are an integral part of the TPA, satisfy the requirements of section 3626(a)(1)(A).

Petitioners appear to argue that the court has no authority to enforce its orders, despite their consent, to the extent that the orders go beyond the constitutional minimum. (Pet. at 14.) Petitioners are wrong. As the court in *Lancaster v. Tilton*, No. C 79-01630 WHA, 2007 U.S. Dist. LEXIS 48403 (N.D. Cal. June 21, 2007), explained:

Defendants' contention — that the terms of the consent decree are unenforceable to the extent they exceed the constitutional minimum — lacks merit. . . .

The law on this point is well-settled, and defendants cite no contrary authority. "The *enforcement* of a valid consent decree is not the kind of 'prospective relief' considered by § 3626(a).

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medical care, including construction of new facilities); *see also Jones-El*, 374 F.3d at 545.

As long as the underlying consent order remains valid — neither party has made a 3626(b) motion to terminate — the court must be able to enforce it.” Thus, while the consent decree is still valid and binding, defendants must comply with its terms, and this Court retains the power to hold them in contempt for any violations. In this posture, it is irrelevant whether the consent decree provides protections above the constitutional minimum.

Lancaster, 2007 U.S. Dist. LEXIS 48403, *11-13 (internal citations omitted).

If Petitioners wish to challenge the orders to which they have repeatedly consented, they must bring a motion to terminate or modify those orders. The hearing on such a motion would determine whether the orders require remedies that exceed constitutional minimums. Through their pending appeal and this companion writ petition, Petitioners request that this Court rule on whether the Receiver’s plans exceed constitutional minimums without the benefit of a section 3626(b) hearing. This is contrary to the PLRA and should be rejected.

Petitioners’ argument that the Receiver’s capital improvement plans do not satisfy the requirements of section 3626(a)(1)(A) is also precluded by the doctrine of judicial estoppel, which “precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position.” *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 600 (9th Cir. 1990). In the course of related proceedings, Petitioners have opposed convening a three-judge panel, and any prisoner release by such panel, on the ground that the Receiver’s capital improvement plans represent a more narrow and less intrusive means necessary to correct violations of federal law flowing from

California's prison overcrowding crisis. (Ex. 10 at ¶¶ 19, 20.) Petitioners are estopped from now "taking an incompatible position." *Rissetto*, 94. F.3d at 600.

Faced with the overwhelming record of consent, Petitioners now assert that their consent was always premised on legislative authorization. (Pet. at 18-19.) As demonstrated above, that assertion is contradicted by the record. (Background, *supra*.) Petitioners' newly manufactured argument fails for at least two additional reasons. First, there *is* legislative authority for transfer of the funds subject to the October 27 Order. That order requires the State to transfer only unencumbered funds that have been validly appropriated by the legislature for the purpose of funding improvements to prison infrastructure. The legislature has appropriated \$300 million from the State's General Fund "for capital outlay to renovate, improve, or expand infrastructure capacity at existing prison facilities." Assembly Bill 900, § 28(a). Such funds may be used "for land acquisition, environmental services, architectural programming, engineering assessments, schematic design, preliminary plans, working drawings, and construction." *Id.* And Petitioners have conceded that the \$250 million that was the subject of the Court's October 27 Order remains unencumbered. (Pet. Ex. 15 at 1.)

Second, no state may condition compliance with constitutional standards on legislative authority or financial constraints. Unconstitutional conditions cannot be allowed to persist unless or until the legislature provides sufficient funding to remedy the violations. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 392 (1992); *see also Stone v. City and County of San Francisco*, 968 F.2d 850, 858 (9th Cir. 1992) ("The City argues that it faces a financial crisis that prevents it from

funding these programs, but federal courts have repeatedly held that financial constraints do not allow states to deprive persons of their constitutional rights.); *Ancata v. Prison Health Serv., Inc.*, 769 F.2d 700, 705 (11th Cir. 1985) (“Lack of funds for facilities cannot justify an unconstitutional lack of competent medical care and treatment for inmates.”); *Gates v. Collier*, 501 F.2d 1291, 1320 (5th Cir. 1974) (“Where state institutions have been operating under unconstitutional conditions and practices, the defenses of fund shortage and the inability of the District Court to order appropriations by the state legislature, have been rejected by the federal courts.”).

3. The PLRA Does Not Prohibit Courts from Ordering Prison Construction.

Although, as shown above, the Court need not reach Petitioners’ PLRA arguments, the Receiver addresses them briefly. Petitioners argue that section 3626(a)(1)(C) “expressly prohibits courts from ordering the construction of prisons.” (Pet. at 10.) This argument rests on a strained and unsupported interpretation of section 3626(a)(1)(C) that is at odds with its plain language and that would render the section unconstitutional on separation of powers grounds.

This section of the statute 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.

18 U.S.C. § 3626(a)(1)(C) (emphasis added). As is clear from its plain language, this section does not prohibit a court from ordering prison construction where necessary to correct violations of federal law; rather, it merely provides that nothing in section 3626 shall be construed to authorize such construction. Petitioners' contrary interpretation is flawed, among other reasons, because it "equates the failure to confer authority . . . with a prohibition [of such authority]," a statutory construction expressly rejected by this Court. *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 433 (9th Cir. 1994).

In *Cabazon*, the plaintiffs argued that a provision in the federal Indian Gaming Regulatory Act, stating that "nothing in this section shall be interpreted as conferring upon a State . . . authority to impose any tax . . . upon an Indian tribe," constituted an "express[] prohibit[ion]" of taxation on Indian tribes. *Id.* at 432-33. The court rejected this argument, holding that a statutory provision disclaiming a grant of authority does not constitute an express prohibition of such authority. *Id.* The same principle defeats Petitioners' unsupported assertion that section 3626(a)(1)(C) "expressly prohibits" courts from ordering prison construction projects. *See also Bullcreek v. Nuclear Reg. Comm.*, 359 F.3d 536, 542 (D.C. Cir. 2004) (similar statutory provision "contain[ed] no prohibitory language" and thus left untouched any independent source of authority).

Petitioners' interpretation of section 3626(a)(1)(C) also violates the "cardinal principle" that courts have a duty to avoid construing a statute in such a way as to raise "doubtful constitutional questions," or "displace courts' traditional equitable powers." *Gilmore v. California*, 220 F.3d 987, 997-98 & n.12 (9th Cir.

2000) (internal quotations and citation omitted). This Court has held that Congress is free to alter the permissible scope of prospective relief for unconstitutional prison conditions only “so long as the restrictions on the remedy do not prevent vindication of the right.” *Id.* at 1002-03. Stripping courts of authority to order “construction of prisons” — irrespective of whether such a remedy might be strictly necessary to correct a proven constitutional violation — would contravene that principle and overstep the bounds of Congress’ authority. *Cf. Dickerson v. United States*, 530 U.S. 428, 437 (2000) (Congress cannot overrule prophylactic remedy designed by courts to prevent violation of constitutional rights).

The cases Petitioners cite in support of their interpretation of section 3626(a)(1)(C) do not help them. This Court’s observation in *Gilmore* that section 3626(a) “operates . . . to restrict the equity jurisdiction of federal courts” was in reference to the provisions of section 3626(a) that prevent courts from ordering states to “do more than the constitutional minimum.” 220 F.3d at 998-99. Under Petitioners’ construction, the PLRA would bar courts from ordering prison construction even where such construction would be required to meet (not exceed) the constitutional minimum. *Miller v. French*, 530 U.S. 327 (2000), is similarly inapposite. In *Miller*, the Court rejected an interpretation of a separate provision of the PLRA that would have “subvert[ed] the plain meaning of the statute, making its mandatory language merely permissive.” *Miller*, 530 U.S. at 337. Here, it is Petitioners’ interpretation of section 3626(a)(1)(C) that would “subvert the plain meaning of the statute” by transforming language that merely disclaims any grant

of authority into a prohibition of such authority, despite the absence of any prohibitory language.⁴

In any event, even if Petitioners were correct that section 3626(a)(1)(C) prohibits the Court from ordering the “construction of prisons,” such a prohibition would not pose an obstacle to the Court’s October 27 Order. Contrary to Petitioners’ assertions, the \$250 million will not be used for “construction of prisons” but for (1) planned improvements to existing health care facilities and (2) continued planning for expansion of health care facilities pursuant to the TPA. (Ex. 12 at ¶ 19; Ex. 9 at ¶ 11.)

4. The Order Complies with 18 U.S.C. § 3626(a)(1)(A) and (B).

Petitioners also argue that the October 27 Order is improper because the District Court failed to make the findings required by section 3626(a)(1)(A) and (B). This argument ignores the express language of the October 27 Order, which

⁴ As Petitioners concede, no court has held that an order requiring prison construction is prohibited by the PLRA. Numerous courts have upheld orders enforcing remedial plans requiring prison construction since the PLRA’s passage. *See, e.g., Feliciano*, 378 F.3d at 45, 47, 56 (upholding consent decree privatizing prison medical care and remedial relief including construction of new medical facilities); *Marion County Jail Inmates v. Anderson*, 270 F. Supp. 2d 1034, 1037 (S.D. Ind. 2003) (finding defendant in contempt for failure to provide adequate prison bed space and make other facilities improvements, and imposing fines to pay for the improvements in the event of legislative inaction); *Harris v. City of Philadelphia*, Civ. No. 82-1847, 1999 U.S. Dist. LEXIS 19846, at *5-7, 51-56 (E.D. Pa. 1999) (upholding consent decrees requiring extensive construction of new facilities); *Goff v. Harper*, 59 F. Supp. 2d 910, 921-24 (S.D. Iowa 1999) (finding that construction of 200 bed facility will remedy unconstitutional medical care).

states that the Court has “determined . . . that the implementation of the TPA is necessary to bring the prison healthcare system to constitutional standards.” (Pet. Ex. 16 at ¶ 10.)⁵ The Order also specifically identified prior Orders of the Court, including, *inter alia*, the October 3, 2005 Findings of Fact and Conclusions of Law, the February 14, 2006 OAR, and the June 16, 2008 Order adopting the TPA, whose findings the Court thus incorporated into the October 27 Order. (*Id.* ¶¶ 1-10.) These and other prior orders in this case contain the findings required by section 3626(a)(1)(A). (Ex. 10 at ¶ 21.) Petitioners have never challenged, disputed, appealed from, or sought to modify or terminate any of these explicit findings, all of which were made on the basis of an extensive record. Accordingly, Petitioners’ contention that the Court has failed to make the requisite findings is wholly inconsistent with the record.

Petitioners’ argument is also incorrect on the law. Petitioners’ suggestion that the October 27 Order is invalid because it does not contain findings explicitly tracking the language of section 3626(a)(1)(A) is inconsistent with this Court’s holding in *Gilmore* that such explicit findings are not required, so long as the

⁵ Petitioners do not dispute that the court has found that additional medical and mental health beds must be added to bring medical and mental health care up to minimum constitutional standards. The record shows that expanding existing facilities is the least intrusive alternative because adding 10,000 beds to existing, overcrowded, and currently in-use buildings with exhausted infrastructure is far more intrusive and expensive than building separate medical facilities on CDCR property. (Ex. 11 at ¶ 6; Ex. 12 at ¶ 9.)

record in fact supports compliance with the PLRA requirements. *See Gilmore*, 220 F.3d at 1008 & n.25. That is clearly the case here.⁶

Petitioners also argue that the Court erred by “requiring State Petitioners to act in violation of state law without making the findings required by section 3626(a)(1)(B).” (Pet. at 14-17.) According to Petitioners, California law does not permit Petitioners to transfer \$250 million to the Receiver other than pursuant to a valid legislative appropriation. (*Id.*) This argument fails for at least four reasons. First, as explained above, there has been a valid legislative appropriation authorizing Petitioners to transfer the \$250 million to the Receiver, and, in any event, constitutional compliance cannot be dependent on legislative authorization. (*See* Section III(A)(2), *supra.*) Second, even if section 3626(a)(1)(B) findings were necessary, the Court has made such findings, as explained above. (Ex. 10 at ¶ 21.) Third, the Controller may draw a warrant on the State Treasury pursuant to a valid court order without legislative authorization, even in the absence of a state law waiver. *See White v. Davis*, 108 Cal. App. 4th 197, 223 (2002); *see also*

⁶ Nor, as demonstrated above, are Petitioners correct in their assertion that the District Court’s findings are somehow lacking in the required specificity, or based on a record that is insufficiently “current.” Petitioners’ cite *Cason v. Seckinger*, 231 F.3d 777, 784 (11th Cir. 2000), but in *Cason* the court was reviewing a motion pursuant to section 3626(b) for termination of a consent decree entered long before enactment of the PLRA. *Id.* By contrast, the consent decree and ensuing orders issued in this case have from their inception been governed by the PLRA, and the court has repeatedly found that the current record continues to support maintenance of those orders. Petitioners’ citation to *Castillo v. Cameron County*, 238 F.3d 339, 354 (5th Cir. 2001), fails for the same reason. *See* 238 F.3d at 354 (deciding motion to terminate decree entered prior to enactment of PLRA).

Spain v. Mountanos, 690 F.2d 742, 745 (9th Cir. 1982). And fourth, the Governor has declared a state of emergency in California prisons, which authorizes the funding at issue here. (Pet. Ex. 11 at ¶ 5, Ex. 1.)⁷

B. Petitioners' Sovereign Immunity Argument Is Without Merit.

Since the Supreme Court's ruling in *Ex parte Young*, 209 U.S. 123 (1908), it has been well-settled that the Eleventh Amendment does not bar a federal court from ordering relief against a state official that serves directly to bring an end to an ongoing violation of federal law — even when that relief requires the expenditure of state funds. *Papasan v. Allain*, 478 U.S. 265, 277-278 (1986); *Milliken v. Bradley*, 433 U.S. 267, 289 (1977); *Edelman v. Jordan*, 415 U.S. 651, 667-68 (1974); *Goldberg v. Ellett*, 254 F.3d 1135, 1138 (9th Cir. 2001).⁸ The *Ex Parte Young* exception to the Eleventh Amendment applies when the violation of federal law is ongoing and the relief against the state official will end the violation. *Papasan*, 478 U.S. at 277-78; *Milliken*, 433 U.S. at 280, 289.

⁷ Petitioners have failed to identify state laws they claim prevent them from complying with the October 27 Order. See *Feliciano*, 378 F.3d at 49, n. 4 (upholding district court's refusal to address defendants' argument that relief required them to act in contravention of local laws, because defendants had not specified the alleged local law violations adequately). Indeed, all state waivers necessary for the planned use of the appropriated funds subject to the October 27 Order have been obtained. (Ex. 12 at ¶ 20; see also Exs. 3, 8.)

⁸ *Ford Motor Co. v. Dep't. of Treasury of Indiana*, 323 U.S. 459 (1945), relied on by Petitioners, is inapposite. It involved a claim for retroactive relief in the form of a state tax refund and thus clearly fell outside the scope of *Ex Parte Young* regardless of whether the suit sought a payment of money from the state treasury. See, e.g., *Edelman*, 415 U.S. at 668-69.

The *Ex Parte Young* requirements are satisfied in this case. The District Court has found (and Petitioners have not disputed) that there is an ongoing federal constitutional violation. The District Court's order requiring Petitioners to fund the Receiver's project was for the purpose of bringing an end to this violation.

Ex Parte Young "permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and *substantial* impact on the state treasury." *Milliken*, 433 U.S. at 289 (emphasis added); *see also Papasan*, 478 U.S. at 278 ("relief that serves directly to bring an end to a present violation of federal law is not barred by the Eleventh Amendment even though accompanied by a substantial ancillary effect on the state treasury"); *Edelman*, 415 U.S. at 668 (where "fiscal consequences to state treasuries" are the "necessary result of compliance" with prospective decrees, there is no Eleventh Amendment issue). As this Court has noted, the Supreme Court "has repeatedly observed that prospective relief awarded pursuant to *Ex Parte Young* may have a substantial ancillary effect on a State's treasury but has nevertheless consistently held that this fact alone is insufficient to convert such actions into actions against the State for state sovereign immunity purposes." *Goldberg*, 254 F.3d at 1144 (internal citation omitted). There is no authority that limits the applicability of *Ex Parte Young* based on the magnitude of the financial impact. *See Fortin v. Comm'r of the Mass. Dep't of Public Welfare*, 692 F.2d 790, 797-98 (1st Cir. 1982)

(court's power to order compliance with law "does not evaporate when the cost of compliance is high").⁹

Contrary to Petitioners' argument, the Supreme Court's decision in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), has no applicability in this case. *Coeur d'Alene* had nothing to do with a federal court's inherent power to enforce its own orders. Rather, it addressed the unique situation where the claims asserted by a Native American tribe against a state official were the "functional equivalent" of a quiet title action and the relief sought would have divested the State of Idaho of substantially all regulatory power over the land at issue. *Id.* at 282; *see also Agua Caliente Band v. Hardin*, 223 F.3d 1041, 1049 (9th Cir. 2000). Under these very specific circumstances, the Supreme Court found that the Eleventh Amendment barred the suit. The circumstances of *Coeur d'Alene* are not present in this case. This case is not the functional equivalent of a quiet title action, and the District Court's order did not divest the state of regulatory power over any land.¹⁰

⁹ In 1977, the Supreme Court affirmed a federal court's order requiring Michigan to pay almost \$6 million to implement a desegregation order. *Milliken*, 433 U.S. at 289-290, 293. In *Flores v. Arizona*, 405 F. Supp. 2d 1112 (D. Ariz. 2005), *vacated on other grounds*, 204 Fed. Appx. 580 (9th Cir. 2006), the court imposed fines increasing to \$2 million for each day that the State failed to comply with the court's order. In neither case was the size of the financial impact a basis for finding sovereign immunity.

¹⁰ This Court has held that *Coeur d'Alene* was a "unique, narrow exception" to *Ex Parte Young* and has emphasized that the *Ex Parte Young* doctrine remains "alive and well" in the wake of that decision. *Agua Caliente*, 233 F.3d at 1048 ("We do not read *Coeur d'Alene* to bar all claims that affect state powers, or even important state sovereignty interests."); *Duke Energy Trading v. Davis*, 267 F.3d

(Footnote continues on next page.)

None of the authorities cited by Petitioners support the proposition, which Petitioners seem to advance, that *Coeur d'Alene* applies merely because the financial impact on the State treasury is significant. In *ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178 (10th Cir. 1998), the Tenth Circuit found that a state's power to assess and levy personal property taxes on property within its borders implicated "special sovereignty interests." *ANR Pipeline Co.* at 1193-94. The Tenth Circuit did not state anywhere in its opinion that a significant impact on a state treasury is sufficient to constitute a "special sovereignty interest" under *Coeur d'Alene*. *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994), which addressed whether a bi-state railway was protected by the Eleventh Amendment from a personal injury claim for damages, did not address the applicability of *Ex Parte Young* or *Coeur d'Alene*. Finally, *Alden v. Maine*, 527 U.S. 706 (1999), is unavailing because that opinion addresses whether Congress can subject non-consenting states to private suits in state courts and does not address the application of *Coeur d'Alene* to a claim brought in federal court to stop an ongoing constitutional violation.

Nor is there any merit to Petitioners' contention that the Controller has no relation to the underlying constitutional violation and thus does not fall within *Ex Parte Young*. (Pet. at 21.) For *Ex Parte Young* to apply, there need only be an ongoing violation of federal law and relief that halts that violation. *Papasan*,

(Footnote continued from previous page.)

1042, 1054 n.8 (9th Cir. 2001) ("The extent to which *Coeur d'Alene* is limited to its 'particular and special circumstances' cannot be overstated.").

478 U.S. at 277-78. No case requires that the state official enjoined by the court order must be the same official who first caused the violation. Petitioners cite *Snoeck v. Brussa*, 153 F.3d 984 (9th Cir. 1998), which states that an official cannot be sued based on the alleged unconstitutionality of a statute where that particular state official has no power or authority to enforce the statute at issue. That case is irrelevant here because the Receiver's claim is not based on the alleged unconstitutionality of a statute, but rather seeks compliance with the District Court's prior order granting injunctive relief. In this type of case, as long as the federal court's order ends the violation of federal law, *Ex Parte Young* applies. *Milliken*, 433 U.S. at 289.

Finally, even if there were any basis for Petitioners to assert sovereign immunity in this case, Petitioners waived that defense by failing to raise it earlier. *Hill v. Blind Indus.*, 179 F.3d 754, 758 (9th Cir. 1999), *amended by* 201 F.3d 1186 (9th Cir. 2000) (“[A] state may waive its Eleventh Amendment immunity by conduct that is incompatible with an intent to preserve that immunity.”); *see also In re Bliemeister*, 296 F.3d 858, 862 (9th Cir. 2002). Petitioners clearly waived any sovereign immunity defense six years ago when they signed a Stipulation for Injunctive Relief in which they consented to the continuing jurisdiction of the federal court. (Pet. Ex. 2 at ¶ 29.) Petitioners again waived the defense when they failed to raise it as an objection to the OAR. (Pet. Exs. 5, 7.) Petitioners' belated assertion of sovereign immunity *after* the District Court indicated its intent to compel Petitioners to fulfill their obligations under the Court's prior orders is an “improper manipulation of the judicial process.” *Hill*, 179 F.3d at 758.

IV. THE DISTRICT COURT’S ORDER APPLIES ONLY TO SPECIFIC, ALREADY APPROPRIATED FUNDS AND PRESENTS NON-RECURRING ISSUES.

Petitioners argue that the District Court is likely to repeat its alleged “error” because the \$250 million at issue is only “the first installment” on the larger amount needed to fund the Receiver’s capital projects and “further requests are sure to follow.” (Pet. at 26.) The writ presents, however, unique and premature circumstances for review by this Court. Petitioners seek review of an interim show cause order that concerns only specified funds already appropriated by the California legislature and unencumbered. The narrow issues presented by the District Court’s October 27 Order are unlikely to recur.

V. THE LEGAL ISSUES THAT THE PETITION SEEKS TO RAISE ARE NOT RELEVANT TO THE DISTRICT COURT’S ORDER.

Petitioners argue that the District Court’s October 27 Order raises important issues of first impression — including whether the PLRA prohibits a court from requiring prison construction when necessary for compliance with the federal constitution and issues of separation of powers and federalism. (Pet. at 27.) As demonstrated above, however, none of these issues is properly raised by the District Court’s show cause order, which was merely a procedural step in enforcing compliance with the court’s unchallenged prior orders. As provided by the statute, this Court should address the PLRA compliance issues Petitioners seek to raise only after a proper motion to modify or terminate the prior consent orders with a resulting evidentiary hearing, and only on the full record that would result from following that statutory procedure. Moreover, the specific funds implicated by the

District Court's show cause order do not raise the issues that Petitioners seek to engage. Petitioners argue that a federal court cannot order prison construction, but the funds at issue will not be used for prison construction, only for improvement of existing facilities and planning that will be subject to further processes of approval by the court (Ex. 12 at ¶ 19); and Petitioners argue that they can and have conditioned their consent to the court's orders on legislative approval, but the funds at issue here have already been appropriated by the legislature.

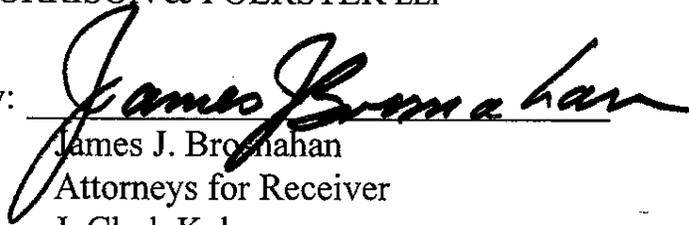
CONCLUSION

For all of the reasons cited above, the Petition for Writ of Mandamus should be denied.

Dated: December 8, 2008

MORRISON & FOERSTER LLP

By:


James J. Brosnahan
Attorneys for Receiver
J. Clark Kelso

Form 8. Certificate of Compliance Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number 08-74778

(see next page) Form Must Be Signed By Attorney or Unrepresented Litigant *and attached to the back of each copy of the brief*

I certify that: (check appropriate option(s))

1. Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is

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2. The attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because

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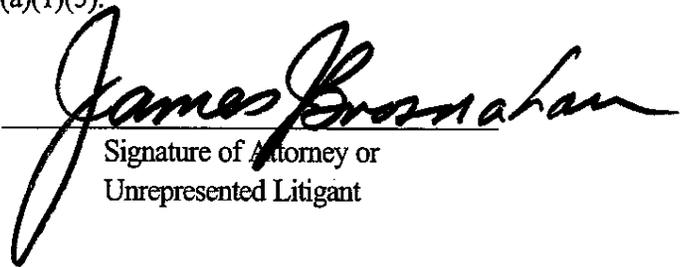
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12/8/08

Date


Signature of Attorney or
Unrepresented Litigant

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3 is 425 Market Street, San Francisco, California 94105-2482; I am not a party to the within cause;
4 I am over the age of eighteen years.

5 I further declare that on the date hereof I served a copy of:

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7 MANDAMUS**

8 **EXHIBITS TO RECEIVER'S ANSWER TO PETITION FOR
9 WRIT OF MANDAMUS**

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Clerk of the U.S. District Court
Northern District of California
450 Golden Gate Avenue, 16th Floor
San Francisco, CA 94102

Case Name: *Plata et al v. Schwarzenegger et al.*
Case No.: 3:01-cv-1351

I declare under penalty of perjury that the above is true and correct.

Executed at San Francisco, California, this 8th day of December, 2008.

Mary E. Land

(typed)

(signature)