

Appeal No. 0817412

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

MARCIANO PLATA, ET AL.,

Plaintiffs and Appellees,

vs.

ARNOLD SCHWARZENEGGER, ET AL.,

Defendants and Appellants.

On Appeal 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)

APPELLEES' BRIEF

MORRISON & FOERSTER LLP
James J. Brosnahan
George C. Harris
Stuart C. Plunkett
Eva K. Schueller
425 Market Street
San Francisco, California 94105-2482
Telephone: 415.268.7000

*Attorneys for Receiver
J. Clark Kelso*

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INTRODUCTION

Governor Schwarzenegger and Controller Chiang (“Appellants” or the “State”), and their predecessors, have conceded that California’s prison medical care system provides unconstitutional care resulting in preventable suffering and deaths. On that basis, they have agreed to dozens of remedial orders in this case and in related proceedings in three other federal class actions. But over a period of many years the State has proven itself incapable of implementing those orders.

Following extensive evidentiary hearings in late 2005, the District Court in this case found 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.” (Appellants’ Excerpts of Record (“ER”) 336.) 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 Appellants to fund the Receiver’s work. (ER 327, 332-33.)

Appellants did not oppose or appeal the District Court’s order appointing the Receiver; nor have they sought to modify or terminate it or other consent orders underlying and implementing it. On the contrary, Appellants have expressly and repeatedly supported and consented to the Receiver’s detailed plans, including plans for facility upgrades and expansions, which the District Court has approved

as necessary to correct the constitutional deficiencies in prison medical care. Indeed, Appellants have relied on the Receiver's plans in the three other federal court proceedings. The four courts have sought to coordinate implementation of their remedial orders through the Receiver's offices.

In early 2008, the Receiver produced a comprehensive Turnaround Plan of Action ("TPA") that, when implemented, will bring about constitutional compliance and resolve this class action and likely those in the other three district courts. The TPA includes a schedule for completion over the next four to five years and estimated costs of completion. It was approved by the District Court in a June 2008 order that found it "necessary to bring California's medical health care system up to constitutional standards." (ER 259.) The State agreed to the TPA and to the District Court's order approving it, no doubt because the TPA provides the only cost-effective plan that anyone has produced for securing timely compliance with prior court orders in this case and in the three related actions.

Since sometime after June 2008, however, Appellants have reversed their support of the Receivership and refused to fund the Receiver's continued implementation of facility upgrades and expansions that were approved with their consent by the District Court. Given the State's agreement to court orders in the four class actions over a period of years — including appointment of the Receiver, the Receiver's implementation of coordinated construction plans, and adoption of the TPA — Appellants' sudden reversal is nothing short of remarkable.

In search of some way to explain their sudden abandonment of support for the Receiver's projects, Appellants attempt to rewrite history in their submissions

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 claims are palpably false. Indeed, the Governor's top appointees — including the Director of the Department of Finance — had communicated to the Receiver the Administration's agreement to secure financing for the Receiver's construction plans, either through legislative processes or, if legislative processes failed, through a public-private transaction involving the State's "Infrastructure Bank."

When Appellants reversed course and refused to provide necessary funding, the Receiver reluctantly initiated contempt proceedings to compel that funding. The Receiver and the District Court have proceeded cautiously in this matter. The Receiver did not seek, and the Court did not grant, full funding for the construction projects outlined by the TPA. The Receiver sought only allocation to the Receiver's construction program of \$250 million that had already been appropriated by the legislature for prison infrastructure.

Faced with this straightforward request, the Governor and the Attorney General have launched a premature appeal and a broadside attack on the District Court's orders and the Receiver's plans. They appeal from the District Court's October 27 "Second Order for Further Proceedings Re: Receiver's Motion for Contempt" (the "October 27 Order"), a procedural, show-cause order that required payment of the already appropriated \$250 million or appearance at a scheduled evidentiary hearing to demonstrate why that payment is not called for. That order is not appealable. Moreover, the legal grounds for the State's appeal —

noncompliance with the Prison Litigation Reform Act (the “PLRA”) and sovereign immunity under the Eleventh Amendment — are procedurally barred and without substantive merit. These arguments were raised for the first time in opposition to the Receiver’s contempt motion after years of litigation.

This politically driven game of “flip flop” not only harms the California inmates who continue to suffer from constitutionally inadequate medical care, but also constitutes a serious affront to the authority of four district courts. It must be firmly rejected if court orders against public entities are to be meaningful. This Court should send a strong signal to the State that the federal courts will not lightly tolerate continued obfuscation or thwarting of the remedial process. Progress toward constitutional compliance, hard-won in these cases, should not be so easily sacrificed at the altar of political expediency.

JURISDICTIONAL STATEMENT

The Receiver agrees with Appellants’ statement of the District Court’s federal question jurisdiction. As discussed below, the Receiver disputes Appellants’ claim that this Court has jurisdiction to review the District Court’s October 27 Order or its November 20, 2008 order denying their motion to unseal a draft Facility Program Statement (the “November 20 Order”).

STATEMENT OF ISSUES

1. Does this Court have jurisdiction over the October 27 Order, an interim show-cause order issued during ongoing civil contempt proceedings to enforce prior, unappealed orders of the District Court that were entered with Appellants’ consent?

2. Are Appellants' PLRA challenges properly raised in this appeal prior to their bringing a motion to terminate or modify the underlying consent orders under 18 U.S.C. § 3626(b)? If so, have Appellants (a) waived their PLRA claims by consenting to the Receiver's plans, or (b) failed to meet their burden of showing that the October 27 Order violates the PLRA in light of the District Court's extensive findings in support of the underlying consent orders?

3. Does the October 27 Order, a procedural step in enforcement of prior orders to bring California prison medical care into federal constitutional compliance, violate California's sovereign immunity under the Eleventh Amendment? If so, have Appellants waived immunity by consenting to those orders?

4. Does this Court have pendent jurisdiction over the November 20 Order denying Appellants' motion to unseal a draft of the Receiver's Facility Program Statement? If so, is the appeal moot because the Receiver has since posted that draft on his website?

STATEMENT OF THE CASE

This case began in 2001 with a class action complaint alleging that the State was providing constitutionally inadequate medical care at California prisons. (ER 435-502.)¹ On June 13, 2002, and September 17, 2004, the District Court entered stipulated orders intended to remedy these violations. (ER 407-12, 417-34.)

¹ This case is one of four pending, coordinated cases addressing health care in California state prisons. *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P (E.D. Cal.) (mental health care); *Perez v. Tilton*, No. C 05-05241 JSW

(Footnote continues on next page.)

Following six days of evidentiary hearings, the District Court issued findings in October of 2005 detailing the long history of constitutional violations and Appellants' failure to comply with remedial orders. (ER 336-39.) Based on those findings, the District Court appointed a Receiver on February 14, 2006, conferring on the Receiver all of the powers of the Secretary of the California Department of Corrections and Rehabilitation ("CDCR") with respect to delivery of medical care. (ER 326-35.) Appellants did not oppose or appeal the Order Appointing Receiver ("OAR"). (Supplemental Excerpts of Record ("SER") 740-80; ER 377.)

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 orders Appellants to fully cooperate with the Receiver and pay all costs of implementing the Receiver's policies, plans, and decisions. (ER 327, 332-33.) As required by the OAR (ER 328), the Receiver has filed reports detailing his remedial plans and numerous updates of his Plan of Action ("POA"), which have discussed his construction plans. (SER 308-614, 640-73, 699-739; ER 257-304.) The most recent plan, the TPA, was approved by the District Court in June 2008. (ER 257-60.) The Receiver has also submitted

(Footnote continued from previous page.)

(N.D. Cal.) (dental care); *Armstrong v. Schwarzenegger*, No. C94-2307 CW (N.D. Cal.) (Americans with Disabilities Act).

seven applications for state law waivers, in part to facilitate his construction plans. (*See, e.g.*, SER 1-14, 24-27, 53-64, 277-303, 678-98.)

In July 2008, the Receiver requested \$204.6 million needed to continue implementation of the TPA. When Appellants refused to comply with this request, and further negotiations failed, the Receiver, on August 13, 2008, filed a motion for an order holding Appellants in contempt for failure to fund the Receiver's remedial projects. That motion was heard by the District Court on October 6, 2008.

On October 8, 2008, the District Court issued an Order for Further Proceedings Re: Receiver's Motion for Contempt, as an "intermediate step short of a contempt finding." (ER 100-01.) That order set a further hearing for October 27, 2008, and directed Appellants to "inform the Court of their specific plans to transfer \$250 million of previously appropriated and unencumbered AB 900 funds to the Receiver." (*Id.*)

On October 24, 2008, Appellants filed a supplemental brief in response to the October 8 order, stating that Appellants "are unable to provide any of the unencumbered Section 28 funds to the Receiver." (SER 148.) Following the October 27 hearing, the District Court issued a Second Order for Further Proceedings, which directed Appellants "to transfer \$250 million to the Receiver no later than November 5, 2008," or to show cause starting 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." (ER 72-74.)

Appellants filed a notice of appeal of the October 27 Order on October 31, 2008 (ER 70-71), and sought a stay from the District Court. The District Court denied the stay motion after a hearing on November 7, 2008. (ER 2-17.) That same day, this Court granted Appellants' Emergency Motion for a Stay, and set an expedited appellate briefing schedule. On November 21, 2008, Appellants filed a Petition for Writ of Mandamus. The Writ was fully briefed on December 15, 2008, and is calendared to be heard with this appeal.

On September 18, 2008, the District Court granted the Receiver's motion to file under seal the second draft of the Receiver's Facility Program Statement. (ER 1.) Appellants filed a motion to unseal the draft on September 26, 2008. (*Id.*) On November 17, 2008, the Receiver released the third draft of the Facility Program Statement for public comment. (*Id.*) The District Court denied Appellants' motion to unseal the second draft as moot on November 20, 2008. (*Id.*) Appellants have not filed a notice of appeal from the November 20 Order, but argue in their opening brief that it should be reversed. (Op. Br. at 56-62.)

STATEMENT OF FACTS

1. Inaction by the State Following the 2002 and 2004 Consent Orders Led to a Crisis Requiring the Appointment of a Receiver

Despite the 2002 and 2004 consent orders, prison medical care had deteriorated by 2005 to the point where the District Court issued an order to show cause why a Receiver should not be appointed. (ER 389-406.) That 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 system is in such a 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.*

(ER 389 (emphasis added).)

The District Court held six days of evidentiary hearings, with testimony from medical experts as well as state officials, to determine whether a Receivership was warranted and appropriate under the PLRA. During the hearings, the plaintiffs presented substantial evidence of the need for additional clinical space and infrastructure improvements to remedy the constitutional violations in medical care. (SER 781-803.) One expert explained at length the inadequacy of California prison intake facilities and testified that the Receiver would have to address infrastructure immediately. (SER 781-88; *see also* SER 789, 794-96.) Another expert provided further details about inadequate clinical space, noting, for example, that some nurses were conducting examinations in “broom closets” and hallways and others had to walk through the men’s showers, often while they were in use, to reach an examination area. (SER 791-93.) A third expert described how the lack of facilities for adequate monitoring of very sick prisoners had resulted in an inmate’s death. (SER 797-99.) When asked the reason that the CDCR had been unable to ensure proper delivery of care, another expert testified that the constitutional violation was caused, in part, “by an absence of medical facilities to treat prisoners.” (SER 800-01.) The acting deputy director of CDCR’s health services, Dr. Renee Kanan, testified that one of the department’s “major struggles”

was having “enough licensed beds at the right level . . . to ensure that patients that require [a certain] level of care get that level of care.” (SER 802-03.)

Following those hearings, on October 3, 2005, the District Court issued a 55-page Findings of Fact and Conclusions of Law. (ER 336-88.) The introduction states:

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.***

(ER 336-37 (emphasis added).)

The District Court considered all possible alternatives to the appointment of a Receiver in applying the mandates of the PLRA with regard to prospective relief (*see* 18 U.S.C. § 3626(a)(1)(A); ER 367-85) and concluded that

the relevant factors and considerations weigh heavily in favor of the imposition of a Receivership in this case. While this is a step that no court takes lightly, the Court concludes that the record in this case compels this result and offers no realistic alternative. The Court further finds that the establishment of a Receivership, along with those actions necessary to effectuate its establishment, are narrowly drawn to remedy the constitutional violations at issue, extend no further than necessary to correct a current and ongoing violation of a federal right, and are the least intrusive means necessary to correct these violations.

(ER 384.) It found further that “[t]he Receiver necessarily will have to engage in wholesale systemic reform given the polycentric and pervasive nature of the problems afflicting the CDCR.” (ER 386.) The District Court entered the OAR on February 14, 2006, without objection or appeal by Appellants. (ER 326-35.)

2. Pursuant to the OAR, the Receiver Has Filed Detailed Reports, Plans, and Motions Describing Infrastructure Improvements and Construction, Without Objection from Appellants

In September 2006, the Receiver filed his Second Bi-Monthly Report, as required by the OAR, notifying the District Court of meetings he had held with State officials to discuss the need for, and his plans to begin a program to construct, “up to 5,000 beds of dedicated medical facilities to be operational within the next three-to-five years.” (SER 730-31, 733-36.) Subsequent reports offered

further details of his 5,000-bed construction project and collaboration with State officials on the project. (SER 598-609, 702-04, 713-20.)

In January 2007, the Receiver issued a Request for Qualifications (the “RFQ”) seeking a Program Manager to “advise and consult with the Receiver and to provide capital facilities development expertise for the renovation of existing facilities and the design, construction and commissioning of new facilities.” (SER 82-83.) The RFQ detailed the Receiver’s capital improvement plans. The Receiver’s Chief of Staff initiated bi-weekly meetings which included representatives of the Governor’s Office, the Department of Finance, the Attorney General, and CDCR, to discuss the construction of up to seven medical facilities, each accommodating approximately 1,500 beds. (*Id.*)

On April 17, 2007, the Receiver applied for an Order Waiving State Contracting Statutes to enable him to proceed with his already publicized construction plans. In his Application, the Receiver stated:

There is currently an insufficient quantity and quality of space to care for the chronically ill and aging inmate population. The problem will quickly deteriorate further if left unaddressed. . . . One of the Receiver’s major goals is the design and construction of healthcare facilities to accommodate the thousands of inmates with chronic illness, frailty, and/or functional impairments. . . . The Receiver anticipates constructing a facility or facilities with beds to accommodate 5,000 inmates.

(SER 686-87.) Appellants filed a statement of non-opposition. (SER 674-77.) In granting the Receiver’s Application on June 4, 2007, the District Court noted that it was “undisputed that the projects described in the Receiver’s Application are

integral to developing the different facets of a constitutionally adequate medical health care system within the [CDCR],” and waived state laws, including those “governing plans, specifications and procedures for major capital projects.” (SER 55, 63.)

On May 10, 2007, the Receiver filed a preliminary POA describing “plans for fast-tracking construction of up to 5,000 new medical beds and 5,000 new mental health beds.” (SER 640-73.)² In response, Appellants 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.” (SER 616.) Appellants also joined the Receiver’s motion requesting that the District Court modify the Stipulation for Injunctive Relief and other orders in light of the changed circumstances reflected by the need for his appointment, and in order to facilitate implementation of the POA. (SER 618-20.) In granting that motion on September 6, 2007, the District Court noted:

[O]ne of the reasons the State was incapable of implementing the original stipulated remedy is that the CDCR either completely lacked the basic infrastructure necessary to implement the remedy, or where such infrastructure was in place, it was wholly dysfunctional.

² The 5,000 mental health beds were added to the POA as part of coordination with other pending class actions. Deficiencies in mental health care are the focus of the class action in *Coleman v. Schwarzenegger*, *supra*. (See SER 687.)

The Receiver must now create a functional infrastructure in virtually every key area of operations.

(SER 38.)

On November 15, 2007, the Receiver filed a second draft of the POA, which detailed the Receiver's construction plans and included several voluminous appendices of supporting documentation for those plans. (SER 308-593.)

Appellants made no objections.

On March 11, 2008, the Receiver released a draft TPA for public comment. (ER 258.) 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. (*Id.*) After receiving public comment and input from an advisory working group and all stakeholders — *including Appellants* — the Receiver finalized the TPA and filed it on June 6, 2008. (ER 258-261.)

The TPA outlines six “Goals and Objectives.” (ER 261-304.) “Goal 6” is to “Provide for Necessary Clinical, Administrative and Housing Facilities,” and includes three objectives: (1) “Upgrade administrative and clinical facilities at each of CDCR’s 33 prison locations to provide patient-inmates with appropriate access to care”; (2) “Expand administrative, clinical and housing facilities to serve up to 10,000 patient-inmates with medical and/or mental health needs”; and (3) “Complete Construction at San Quentin State Prison.” (ER 296-300.) With regard to the second objective, the TPA notes:

As a core component of the plan to bring the level of prison health care services up to constitutional standards as quickly as practicable, the Receiver will supervise the creation of expanded prison health care facilities and

housing for approximately 6% of CDCR's existing inmate population (i.e., approximately 10,000 inmates) whose medical and/or mental condition requires separate housing to facilitate appropriate, cost-effective access to necessary health care services.

CDCR does not have adequate clinical, administrative and housing facilities to support constitutionally adequate health care. Reports by ABT Associates Inc. and Lumetra on chronic and long-term care needs in California's prisons and by Navigant Consulting on mental health needs demonstrate the inadequacy of current facilities and document the need for expanded facilities to serve both present and future populations. Based on these reports, the Receiver will supervise construction of facilities at existing institutions to serve 10,000 inmates with medical and/or mental health needs.

(ER 298.) The planned expansions of facilities will be “on up to seven sites at existing CDCR institutions.” (*Id.*) Appendix A to the TPA provides estimated costs, metrics, and a timeline for implementation. (ER 301-04.)

The District Court approved the TPA “as a reasonable and necessary strategy to address the constitutional deficiencies in California’s prison health care system” in an order entered on June 16, 2008. (ER 257.) It noted that the TPA “does not present a complete vision of how to operate California’s entire correctional health care system” but “[i]nstead, . . . as it should — focuses more narrowly on bringing the delivery of health care in California’s prisons up to constitutional standards.” (ER 259.) The District Court found that “the plan’s six strategic goals [are] necessary to bring California’s medical health care system up to constitutional standards.” (ER 259-60.) Appellants did not object to, or appeal from, the order approving the TPA.

On June 16, 2008, the Receiver filed a sixth supplemental application for waiver of state law

necessary for the design, construction and related project delivery services for the Receiver's project to construct facilities to house and treat 10,000 inmates whose medical and/or mental health condition requires separate housing during the provision of necessary health care services ('10,000 Bed Program') with the understanding that the Receiver will submit a further application prior to commencing any actual construction.

(SER 285.) The District Court set a briefing schedule, with objections to the application due on June 30, 2008. (SER 1.) Appellants again made no objections.

(*Id.*) In granting the application, the District Court found that

the identified activities relating to the 10,000 Bed Program are critical to establishing a constitutional system of medical care delivery in California's prisons, and . . . failure to obtain waiver of state law would prevent the Receiver from achieving that goal in a timely fashion. Moreover, no party has identified any alternatives to the requested waiver that would achieve a constitutional remedy in this instance, nor does any party oppose the requested waiver.

(SER 2.)

3. Appellants Have Supported and Relied on the Receiver's Plans in Related Class Action Proceedings

In a May 16, 2007 report to a three-judge panel proceeding convened in this action, Appellants stated:

- "This comprehensive, historic plan for prison reform will directly assist the Receiver in his efforts to provide constitutional medical care [Appellants] will continue to support the Receiver's efforts." (SER 634.)
- "The Receiver should work to implement his Plan of Action" (SER 634-35.)

- “It is undisputed that California’s prisons are overcrowded, and that the overcrowding has created emergency conditions in at least 20 California prisons. But as this response shows, the State and the Receiver are already aggressively addressing the medical care and overcrowding issues.” (SER 635.)

Appellants have also asserted in declarations filed in *Coleman v. Schwarzenegger*, No. 90-0520 (E.D. Cal.), which addresses mental health care, that the State intends to follow the Receiver’s construction plans to bring prison health care up to constitutional standards. (SER 172-240.)

On November 13, 2007, judges in the four actions addressing unconstitutional health care in California prisons jointly issued an Order to Show Cause why they should not adopt a Construction Coordination Agreement. (SER 28-32.) Appellants 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.” (SER 305.) The four district courts jointly approved the Receiver’s construction plans on February 26, 2008. (SER 19-23.)

4. Appellants’ Consent to the Receiver’s Plans Has Never Been Conditioned on Legislative Action

Appellants assert in their opening brief that their consent was subject to an “important limitation: that the Legislature approve any financing for the construction project.” (Op. Br. at 11.) Appellants do not, however, cite any statements in the record supporting this assertion. Though they cite documents

mentioning legislative funding (*id.* at 11-12), nothing in those documents indicates that Appellants' consent was dependent on legislative approval.

When they opposed the Receiver's contempt motion just four months ago, Appellants did not say that legislative funding was a condition of their agreement; rather, they described legislative funding as "the *preferred* funding method." (SER 251 (emphasis added).) Appellants acknowledged 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')." (*Id.*; *see also* SER 152-54, 242; Ex. A to Declaration of J. Clark Kelso in Support of Motion to Supplement Record, filed herewith (7/11/08 email from Mike Genest, California's Director of Finance, to the Receiver with copy to 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").)

The \$250 million that is the subject of the October 27 Order and the pending contempt proceedings in the District Court has been appropriated by the California Legislature from the State's General Fund "for capital outlay to renovate, improve, or expand infrastructure capacity at existing prison facilities" (AB 900, § 28(a)) and is unencumbered. (ER 100; SER 144.) It will be used solely to upgrade existing CDCR clinical facilities, as described in TPA Goal 6, Objective 6.1 (ER 296-97), and to complete planning and design of facility expansions at up to seven

sites at existing CDCR institutions, as described in TPA Goal 6, Objective 6.2 (ER 298; SER 67, 80, 88.) The state law waivers necessary for this work have all been obtained. (SER 80.)

SUMMARY OF THE ARGUMENT

This appeal is premature and therefore procedurally barred in two ways: (1) because the scheduled evidentiary hearing has not yet been held, Appellants have not been held in contempt, and no sanctions have been imposed, the October 27 Order is a non-appealable, interlocutory order; and (2) Appellants challenge the order based on alleged noncompliance with the PLRA without having moved to terminate or modify the underlying consent orders as required by the PLRA.

Appellants' arguments for overruling the October 27 Order — noncompliance with the PLRA and sovereign immunity under the Eleventh Amendment — are also without substantive merit. Both were raised for the first time in response to the contempt motion, after years of proceedings.

Particularly in light of the State's repeated consent to the District Court's prior orders approving the Receiver's construction plans and finding them necessary to achieve constitutional compliance, Appellants have not carried and cannot carry their burden of showing noncompliance with the PLRA. Their argument that the PLRA categorically prohibits courts from ordering prison construction projects is contrary to the plain language of the statute and would strip federal courts of their inherent authority to remedy constitutional violations. Such a prohibition would not, in any event, invalidate the October 27 Order since the

funds at issue will be spent only on improvement of *existing* medical facilities and *planning* for expanded medical facilities at *existing* State prison sites.

Appellants' Eleventh Amendment defense is foreclosed by controlling precedent and waived because untimely. It is well-settled that the Eleventh Amendment does not bar a federal court from ordering relief against a state official if the relief is to bring an end to an ongoing violation of the Constitution — even when that relief requires the expenditure of state funds. And the State waived any assertion of sovereign immunity by consenting to prior orders of the District Court requiring the State to fund the Receiver's efforts to bring medical care at California prisons into constitutional compliance.

ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER THE OCTOBER 27 ORDER

A. The October 27 Order Is a Show-Cause Order for Further Proceedings on a Civil Contempt Motion, Not an Appealable Contempt Order.

The October 27 Order is an interim step in ongoing civil contempt proceedings. It does not meet any of the applicable standards for appeals from civil contempt orders.

Contempt orders issued prior to final judgment are generally not appealable. *Stone v. City & County of San Francisco*, 968 F.2d 850, 854 (9th Cir. 1992). A post-judgment contempt order — which can include a contempt order issued after entry of a consent decree — may be appealable, but only if the order finally adjudicates the contempt issue and imposes sanctions. *Id.* at 854-55; *SEC v.*

Hickey, 322 F.3d 1123, 1127 (9th Cir. 2003) (“an adjudication of civil contempt is not appealable *until sanctions have been imposed*”) (quoting *Donovan v. Mazzola*, 761 F.2d 1411, 1417 (9th Cir. 1985)) (emphasis in original).

The District Court had not imposed sanctions on Appellants when they appealed; nor had it ruled finally on *any* aspect of the Receiver’s contempt motion. The October 27 Order, aptly titled “Second Order for Further Proceedings,” is a procedural order that required an evidentiary hearing at which Appellants were to show cause “why they should not be held in contempt.”

Under established Ninth Circuit authority, Appellants have no basis for appeal of an order concerning civil contempt until they can demonstrate that the court has finally adjudicated the contempt motion and imposed sanctions. *Gates v. Shinn*, 98 F.3d 463, 467 (9th Cir. 1996); *Shuffler v. Heritage Bank*, 720 F.2d 1141, 1145 (9th Cir. 1985). Appellants cannot make that showing with respect to the October 27 Order, and it is therefore not appealable.

B. The October 27 Order Is Not Appealable as a Final Decision.

Appellants argue that the October 27 Order is appealable under 28 U.S.C. § 1291 as a “final decision” of the District Court. This newly asserted basis for jurisdiction has no merit because the October 27 Order is not “final” within the

plain meaning of section 1291 or under any practical application this Court has given to that statute.³

This Court has held that an “order is final under section 1291 ‘if it (1) is a full adjudication of the issues, and (2) clearly evidences the judge’s intention that it be the court’s final act in the matter.’” *Way v. County of Ventura*, 348 F.3d 808, 810 (9th Cir. 2003) (quoting *Lower Elwha Band of S’Klallams v. Lummi Indian Tribe*, 235 F.3d 443, 448 (9th Cir. 2000)); *see also Montes v. United States*, 37 F.3d 1347, 1350 (9th Cir. 1994) (“[i]n determining whether the district court’s ruling was a final, appealable order, we focus on what effect the court intended it to have”).

The October 27 Order is not “final” under this standard because it does not fully adjudicate the issues or evidence any intention of finality by the District Court. It does not resolve the contempt motion, because it makes no findings regarding contempt and imposes no sanctions. It is clear on the face of the order that the District Court did not intend the order to be final but rather contemplated further proceedings — a show-cause, evidentiary hearing — if Appellants continued their refusal to fund the Receiver’s projects. That the District Court contemplated further action renders the October 27 Order non-final and precludes section 1291 as a basis for jurisdiction. *See Nat’l Distrib. Agency v. Nationwide*

³ Appellants did not include section 1291 as a basis for jurisdiction in the notice of appeal; nor did they mention it when arguing jurisdiction in their emergency motion to stay, filed in this Court.

Mut. Ins. Co., 117 F.3d 432, 434 (9th Cir. 1997) (order contemplating possible amendment by district court not final within meaning of section 1291).

Appellants contend that section 1291 applies *automatically* to the October 27 Order because it was issued “post-judgment” — i.e., after the District Court entered the first stipulated order in 2002. (Op. Br. at 16.) This contention is inherently flawed because it would support appellate jurisdiction over *any* order issued after a final judgment or consent decree. Section 1291 has never been construed that broadly. As discussed above, this Court considers whether the order fully adjudicated the issue and whether the District Court intended it to be final.

Appellants’ authority is inapposite. In *Jeff D. v. Kempthorne*, 365 F.3d 844 (9th Cir. 2002), a post consent decree order was appealable only because it related to a motion to vacate the consent decree. *Id.* at 850. The October 27 Order does not concern a motion to vacate a consent decree. Appellants fail to cite the one holding in *Kempthorne* that is relevant: that the portion of the order addressing a motion for contempt “was clearly not final” and therefore not appealable because the district court had not found the defendants in contempt: “*If and when the district court finds defendants in contempt, they can appeal the district court’s determination of the disputed provision.*” *Id.* (emphasis added). The same is true here.

Appellants’ other cases involve the appeal of post-judgment orders over which there could be no meaningful, later appellate review. *See United States v. State of Washington*, 761 F.2d 1404, 1406 (9th Cir. 1985) (post-judgment order treated as final only because finding of no jurisdiction “would eliminate any

opportunity for review”); *Gates v. Rowland*, 39 F.3d 1439, 1450 (9th Cir. 1994) (“review could be postponed for many years, if not granted now”). Those cases are inapplicable because meaningful review is available to Appellants when and if they are held in contempt.⁴

Finally, Appellants argue that “guidance from the Court at this time will greatly assist the district court as it goes forward in adjudicating the Receiver’s [contempt motion].” (Op. Br. at 18.) This argument bears no relation to the standard that governs the finality determination under section 1291. And it is a concession that the October 27 Order is not final because the District Court must conduct further proceedings to adjudicate the contempt motion.

C. The October 27 Order Is Not an Appealable Collateral Order.

Appellants also contend that the October 27 Order is appealable as a collateral order. (Op. Br. at 18-19.) “To fit within the narrow rule of *Cohen*, ‘the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively

⁴ Appellants also cite *Nehmer v. United States Dep’t of Veterans Affairs*, 494 F.3d 846 (9th Cir. 2007). That case is irrelevant because it held only that jurisdiction was proper under *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964), which created a narrow exception to section 1291. *Nehmer*, 494 F.3d at 856 n.5. Appellants do not argue that the *Gillespie* doctrine applies to the October 27 Order — nor could they, because *Gillespie* applies only where “the proceedings that remain pending before the court have little substance.” *Id.* The remaining proceedings before the District Court cannot be characterized as having “little substance.”

unreviewable on appeal from a final judgment.’” *SEC v. American Principals Holdings, Inc.*, 817 F.2d 1349, 1351 (9th Cir. 1987) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)); *see also Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949). Appellants satisfy none of these requirements.

First, the October 27 Order does not conclusively determine a disputed question. The District Court has not conclusively determined any issue with respect to the contempt proceedings. Appellants contend that the District Court has conclusively determined “whether the Receiver has authority under the PLRA and the district court’s prior orders to construct prison facilities.” (Op. Br. at 19.) Had Appellants not prematurely appealed in the course of the contempt proceedings, however, the District Court would have held the scheduled evidentiary hearing and on that basis made further factual findings and legal conclusions.

Second, the October 27 Order does not resolve an important question completely separate from the merits. On the contrary, Appellants’ PLRA and Eleventh Amendment arguments go directly to the merits of the District Court’s authority to remedy the constitutional violations in the California prison health care system and its ongoing supervision of the Receiver’s plans. This Court has denied application of the collateral order doctrine in a directly parallel context. *See SEC v. Capital Consultants LLC*, 453 F.3d 1166, 1172 (9th Cir. 2006) (order issued in context of receivership not appealable as collateral order where resolution of appeal “will directly affect the ongoing litigation”); *see also Jeff D.*, 365 F.3d at

849 (collateral order doctrine does not apply to orders addressing issues “intimately intertwined with the merits of the litigation”).

Third, the October 27 Order is not effectively unreviewable. Appellants will have the right to appeal after the District Court adjudicates the contempt motion and if and when it imposes sanctions.

D. The October 27 Order Is Not Appealable as an Affirmative Injunction.

Appellants also contend that the October 27 Order is appealable under 28 U.S.C. § 1292(a)(1) as an “affirmative injunction.” (Op. Br. at 19.) However, section 1292(a)(1) is limited to the appeal of interlocutory orders “granting, continuing, modifying, refusing or dissolving injunctions,” 28 U.S.C. § 1292(a)(1), and the October 27 Order does none of these things. It is a show-cause order for further proceedings on a contempt motion. The fact that it orders payment of money does not convert it into an injunction. As this Court has held, an order requiring a party to pay money to a receiver made pursuant to a previously unappealed order appointing the receiver “*does not constitute an ‘injunction’* within the meaning of 28 U.S.C. § 1292(a)(1).” *FTC v. Overseas Unlimited Agency, Inc.*, 873 F.2d 1233, 1235 (9th Cir. 1989) (emphasis added). That is precisely the situation here. The October 27 Order is an interim step in proceedings to enforce the OAR, which requires Appellants to fund the Receiver’s approved plans. Tellingly, Appellants fail to discuss *Overseas Unlimited*, which the Receiver cited it in opposition to the emergency stay motion. Indeed,

Appellants cite no authority to support their one-sentence argument that section 1292(a)(1) is a basis for jurisdiction.

This Court has also held that post consent decree orders are appealable under section 1292(a)(1) only if they specifically modify the earlier consent decree. *See Thompson v. Enomoto*, 815 F.2d 1323, 1327 (9th Cir. 1987) (order not appealable under section 1292(a)(1) because it was issued “pursuant to” consent decree and thus did not modify it); *accord Feliciano v. Rullan*, 378 F.3d 42, 48 (1st Cir. 2004) (orders issued to aid district court’s duty to supervise ongoing process following consent decree are not appealable); *Feliciano v. Rullan*, 303 F.3d 1, 7 (1st Cir. 2002) (post consent decree order only appealable “if it substantially readjusts the legal relations of the parties . . . and does not relate simply to the conduct or progress of litigation”); *Gautreaux v. Chicago Housing Auth.*, 178 F.3d 951, 953 (7th Cir. 1999) (order not appealable where it merely reiterated receivership decree requiring “full cooperation” with receiver). The October 27 Order does not modify the earlier consent orders in this action or change the parties’ legal relationship. Rather, it is consistent with prior orders of the District Court approving the Receiver’s plans and requiring Appellants to pay the costs.

E. The October 27 Order Is Not Appealable Merely Because It Requires Payment of Money.

Appellants argue finally — again, in a single sentence — that the October 27 Order is appealable because it requires them to pay money to the Receiver. (Op. Br. at 19.) Appellants rely on *Forgay v. Conrad*, 47 U.S. 201 (1848), which held

that an order requiring the transfer of “lands and slaves” was appealable as a final order because it required the immediate transfer of property. *Id.* at 204.

The fact that the October 27 Order requires payment to the Receiver as an alternative to appearance at the scheduled show-cause, evidentiary hearing is not a basis for appellate jurisdiction. The appealability of interlocutory orders regarding receiverships is governed by 28 U.S.C. § 1292(a)(2). That section permits appeals only from orders “refusing . . . to take steps to accomplish the purposes of [winding up receiverships].” *American Principals*, 817 F.2d at 1350. In *American Principals*, the Ninth Circuit held that an order requiring payment to a receiver was not appealable under section 1292(a)(2), or on any other basis. *Id.* at 1350-51 (reviewing cases from courts of appeals and concluding that “circuits have held that orders requiring that funds be turned over to a receiver are nonappealable”); *see also Overseas Unlimited*, 873 F.2d at 1235 (order requiring party to turn over money to a receiver is not appealable under section 1292(a)(2)).

The *Forgay-Conrad* rule does not provide a basis for Appellants to avoid the holding of *American Pipeline*. In *Forgay*, the Court stated that its holding “does not extend to cases where money is directed to be paid into court, or property to be delivered to a receiver” 47 U.S. at 204. Later cases relying on *Forgay* have made it clear that the rule applies only where the appellant would suffer “irreparable harm” by waiting for an appeal after final judgment. *See In re Matter of Hawaii Corp.*, 796 F.2d 1139, 1143 (9th Cir. 1986). Here, the October 27 Order does not finally resolve any issue with respect to the contempt motion or the payment of \$250 million, let alone result in irreparable harm; and appellate review

will be available when and if the District Court imposes contempt sanctions after the hearing process is completed.

II. THIS COURT LACKS JURISDICTION OVER THE NOVEMBER 20 ORDER

This Court has no jurisdiction to review the November 20 Order, first of all, because it is not “inextricably intertwined” with the October 27 Order. Consistent with the Supreme Court’s decision in *Swint v. Chambers County Comm’n*, 514 U.S. 35 (1995), this Court interprets “very narrowly” its pendent jurisdiction over orders that are inextricably intertwined. *Cunningham v. Gates*, 229 F.3d 1271, 1284 (9th Cir. 2000). The applicable test is whether (1) “the legal theories on which the issues advance” are “so intertwined that [the Court] must decide the pendent issue in order to review the claims properly raised on interlocutory appeal” or (2) “resolution of the issue properly raised on interlocutory appeal necessarily resolves the pendent issue.” *Id.* at 1285. “Two issues are not ‘inextricably intertwined’ if [the Court] must apply different legal standards to each.” *Id.* (“more is required” for exercise of pendent jurisdiction “than that separate issues rest on common facts”); *accord Batzel v. Smith*, 333 F.3d 1018, 1023 (9th Cir. 2003); *United States v. Oakland Cannabis Buyers’ Coop.*, 190 F.3d 1103, 1113 (9th Cir. 1999).

Review of the November 20 Order does not come close to meeting this test. The issues raised by the two orders are entirely distinct, both legally and factually. Review of the October 27 Order would require the Court to address the PLRA and Eleventh Amendment issues raised by Appellants, whereas the November 20 Order

raises the completely separate issue of whether a document was properly labeled confidential such that it needed to be filed under seal.

Second, even if review of the two orders were inextricably intertwined, review of the November 20 Order, which denied release of the second draft of the Receiver's Facility Program Statement, is now unquestionably moot. That draft is now available on the Receiver's website. (*See* Decl. of John Hagar in Support of Motion to Supplement Record.)

III. APPELLANTS' PLRA ARGUMENTS ARE PROCEDURALLY BARRED AND WITHOUT MERIT

A. Appellants' PLRA Arguments Are Not Properly Before This Court.

The October 27 Order does not constitute "prospective relief" governed by PLRA section 3626(a); it merely requires Appellants to fund continued implementation of previous, valid orders. *See, e.g., Feliciano v. Rullan*, 378 F.3d 42, 50-52, 55-56 (1st Cir. 2004). The proper procedure for raising a PLRA challenge in this context is to bring a motion to terminate or modify the underlying orders 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). "If prospective relief has already been granted by a court, § 3626(b) controls." *Gilmore v. California*, 220 F.3d 987, 999 (9th Cir. 2000).

In *Jones-El*, for example, the underlying consent decree required the defendants to "cool" inmates' cells, and to enforce that decree the district court entered an order requiring installation of air conditioning. The defendants argued

that this costly remedy violated the limitations in PLRA section 3626(a). *Jones-El*, 374 F.3d at 543. The Seventh Circuit held that the PLRA challenges could be raised only by a motion to terminate or modify under section 3626(b):

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 (citations omitted).

In the underlying consent orders here,⁵ Appellants have agreed to remedy the unconstitutional level of medical care provided to California inmates, and the District Court has appointed a Receiver and approved the Receiver’s plans for improvement and expansion of medical care facilities with Appellants’ consent. (*See Stmt. of Facts*, pts. 2-3, *supra.*) Appellants have had ample opportunity to seek to terminate or modify those consent orders but have not done so.

⁵ As defined by the PLRA, “the term ‘consent decree’ means any relief entered by the court that is based in whole or in part upon the consent or acquiescence of the parties but does not include private settlements.” 18 U.S.C. § 3626(g)(1).

The similarly long and difficult history of the federal courts' efforts to bring Puerto Rico's prison medical care up to constitutional standards is instructive. *See Feliciano*, 378 F.3d at 45-48. After over a decade of failed remedial efforts, the district court considered appointment of a receiver but, at the parties' suggestion and with their consent, instead supervised privatization of Puerto Rico's prison medical care and charged a private corporation with the task of remedying "massive and systematic" health care failures. *Feliciano v. Rullan*, 300 F. Supp. 2d 321, 324 (D.P.R. 2004); *see also Feliciano v. Rullan*, 13 F. Supp. 2d 151, 213-16 (D.P.R. 1998). The corporation was required to undertake significant construction of new facilities and improvements to existing facilities to remedy the constitutional violations. *See Feliciano*, 300 F. Supp. 2d at 326-27; *Feliciano*, 378 F.3d at 47.

The defendants in *Feliciano* cooperated with the corporation for several years, until a new administration took office. *Feliciano*, 378 F.3d at 45. When the court issued an order assigning the defendants several specific duties, including the "installation of electronic and telephonic equipment" and the "reorganization of work areas," the defendants appealed from that order, arguing that it failed to comply with the PLRA. *Feliciano*, 303 F.3d at 5. The First Circuit held that it lacked jurisdiction over this PLRA challenge to the order, because the order merely implemented the defendants' duty to "cooperate fully in the privatization process" under the prior order. *Id.* at 8; *see also Feliciano*, 378 F.3d at 50-52 (procedures established under section 3626(b) apply to "any existing prospective relief," and

the only avenue for challenging an order's compliance with the PLRA is to bring a motion under 3626(b)).

The same is true here. If Appellants wish to challenge the orders that the October 27 Order expressly seeks to enforce (and to which they have repeatedly consented) as non-compliant with the PLRA, they must bring a motion to terminate or modify those orders under section 3626(b).⁶ Because the October 27 Order simply enforces the OAR and previous orders approving the Receiver's plans, Appellants' PLRA arguments are not properly before this Court.

B. Appellants Have Waived Their PLRA Claims by Consenting to the Receiver's Construction Plans and Relying on Those Plans to Gain an Advantage in Related Proceedings.

Appellants have also waived their PLRA arguments by consenting repeatedly and expressly to the District Court's orders approving the Receiver's construction plans. (*See* Stmt. of Facts, pts. 2-3, *supra*.) As found by the District Court, Appellants "never objected" to the Receiver's POA and TPA, "but instead consented to them after receiving them, reviewing them, and participating directly

⁶ The October 27 Order is based not only on the Appellants' duties to fund and cooperate with the Receiver under the OAR, but also on Appellants' consent to the Receiver's POA and TPA and the February 26, 2008 Order whereby four federal judges approved a Construction Coordination Agreement for the construction of 10,000 beds under the Receiver's leadership. (ER 72-73.) It expressly provides that it is intended to "continue funding implementation of the Receiver's previously approved plans." (ER 74.) As in *Feliciano*, a "combination of orders composing the status quo" is the relevant underlying "consent decree" at issue here for PLRA purposes. *Feliciano*, 303 F.3d at 7.

and indirectly in planning and informational meetings regarding the plans.” (ER 73; *see also* SER 168-69.)

Faced with this overwhelming record of consent, Appellants argue that the requirements of the PLRA cannot be waived. (Op. Br. at 39-41.) Therefore, presumably, the District Court is without power to enforce prior consent orders if they exceed the constitutional minimum mandated by the PLRA or otherwise fail to meet the requirements of the PLRA.

Appellants cite no case, however, holding that the provisions of the PLRA are not subject to waiver. And their argument ignores the procedural requirement that a PLRA challenge to prior consent orders must be made as a motion to modify or terminate under section 3262(b). As explained in *Lancaster v. Tilton*, No. C 79-01630 WHA, 2007 U.S. Dist. LEXIS 48403 (N.D. Cal. June 21, 2007), in ruling on a motion for contempt and enforcement of a consent decree regarding conditions for death row inmates:

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). 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.” *Essex County Jail Annex Inmates v. Terffinger*, 18 F. Supp. 2d 445, 462 (D.N.J. 1998) (emphasis added); *Jones-El v. Berge*, 374 F.3d 541, 545 (7th Cir. 2004) (same); *see also Hallett v. Morgan*, 296 F.3d 732, 743 (9th Cir. 2002). 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.

Id. at *11-13; *see also Feliciano*, 303 F.3d at 7-9 (“While these changes constituted a dramatic modification of the status quo ante, the Secretary certainly cannot complain about them; they were introduced with the consent and active cooperation of his predecessor in office and, thus, bind the Secretary now.”).

In arguing that the PLRA requirements are not subject to waiver, Appellants rely on a district court’s duty under the PLRA in approving a consent decree to determine that it “complies with the limitations on relief set forth in subsection (a).” 18 U.S.C. § 3626(c). That provision, however, does not contradict the procedural requirement that a PLRA challenge must be made in the form of a motion to modify or terminate the underlying consent order.

Appellants’ 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, Appellants 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 to correct violations of federal law resulting from California’s

prison overcrowding crisis. (SER 622-23.) Appellants are estopped from now “taking an incompatible position.” *Rissetto*, 94 F.3d at 600.

Finally, Appellants assert that even if they did agree to implement the Receiver’s plans, that consent was always premised on legislative authorization. (Op. Br. at 45.) That assertion is false. (*See* Stmt. of Facts pt. 4, *supra*.) Moreover, there *is* legislative authority for transfer of the funds subject to the October 27 Order. 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). Appellants do not dispute that \$250 million of that appropriation remains unencumbered. (SER 144.)

In any event, no state may condition compliance with constitutional standards on legislative authority or financial constraints. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 392 (1992); *see also Stone v. City & County of San Francisco*, 968 F.2d 850, 858 (9th Cir. 1992) (“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.”).

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

Appellants argue that PLRA section 3626(a)(1)(C) “prohibits the construction of the healthcare facilities contemplated by the Receiver that form the

basis for the district court’s Order” (Op. Br. at 22.) This argument rests on a strained and unsupported interpretation of that section which is at odds with its plain language and would render it unconstitutional on separation-of-powers grounds.

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.

18 U.S.C. § 3626(a)(1)(C) (emphasis added). Its plain language 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 the ordering of such construction. Appellants’ contrary interpretation is flawed 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. This Court rejected that argument, holding that a statutory provision disclaiming a grant of authority does not constitute a prohibition of such authority. *Id.* The same

principle defeats Appellants' 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).

Appellants argue that because the statute at issue in *Cabazon* was not "described as a 'limitation on relief'" but was overall an affirmative grant of authority, its reasoning should not apply. (Op. Br. at 26.) This is a distinction without a difference as regards the proper interpretation of the parallel language in the two statutes. Congress could just as easily seek to guide courts about a statute's scope regardless of whether the overall statutory scheme is an affirmative grant of power or, as in the case of the PLRA, a limiting statute that prescribes numerous complex procedures for remedying unconstitutional prison conditions. Moreover, section 3262(a)(1)(C) goes on to state that it shall not be construed to "repeal or detract from otherwise applicable limitations on the remedial powers of the courts." 18 U.S.C. § 3626(a)(1)(C). There would be no reason to include this language unless Congress was concerned that the section could be interpreted as an unintentional, affirmative grant of authority. Section 3626(a)(1)(C) is simply an effort to guide the courts' interpretations of the PLRA, not a radical stripping of courts' well-established equitable powers.

That the PLRA does not work a sea change in federal courts' equitable powers by absolutely forbidding orders that contemplate construction is also evidenced by the fact that the legislative history makes no mention of a ban on

prison construction. On the contrary, the legislative history states that the “dictates” of section 3626(a) “are not a departure from current jurisprudence concerning injunctive relief.” H.R. 104-21 at 24, fn.2; *see also Gomez v. Vernon*, 255 F.3d 1118, 1129 (9th Cir. 2001) (PLRA “has not substantially changed the threshold findings and standards required to justify an injunction”).⁷

Moreover, section 3626(b)(2), which requires termination or modification of a remedial order that does not meet the standard enunciated for prospective relief under section 3626(a)(1)(A), makes no mention of orders requiring prison construction. If Congress had intended section 3626(a)(1)(C) to be an affirmative ban on ordering prison construction, despite its plain language, it would presumably also have provided in 3626(b) for immediate termination of orders requiring prison construction.

Appellants’ interpretation of section 3626(a)(1)(C) also violates the “cardinal principle” that courts have a duty to avoid construing a statute in a way that raises “doubtful constitutional questions,” or “displace[s] courts’ traditional equitable powers.” *Gilmore v. California*, 220 F.3d 987, 997-98 & n.12 (9th Cir. 2000). This Court has held that Congress is free to alter the permissible scope of

⁷ Appellants cite a single passage from the House Report stating that the PLRA was intended to “stop judges from imposing remedies intended to effect an overall modernization of local prison systems or provide an overall improvement in prison conditions.” (Op. Br. at 23.) This passage is irrelevant, because the funds at issue are not intended for “overall modernization of local prison systems” or for “overall improvement in prison conditions,” but are targeted at improvements deemed necessary to correct constitutional deficiencies.

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 it is necessary to correct a proven constitutional violation — would contravene that principle and overstep the bounds of Congress’s authority.

The cases Appellants 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 only in reference to section 3626(a), which prohibits courts from ordering states to “do more than the constitutional minimum.” 220 F.3d at 998-99. Under Appellants’ construction, the PLRA would bar courts from ordering prison construction even when construction is required to meet (not exceed) the constitutional minimum.

Miller v. French, 530 U.S. 327 (2000), is similarly inapposite. In *Miller*, the Court held that the “automatic stay” provision in 3626(e)(2) (“Any motion to modify or terminate prospective relief made under subsection (b) shall operate as a stay . . .”) is mandatory and not subject to suspension by a district court exercising its equitable authority. The Court reasoned that allowing for suspension of this “automatic stay” 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 Appellants’ 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.

Finally, as Appellants concede, no court has held that an order requiring prison construction is prohibited by the PLRA. On the contrary, 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 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); *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 construction of 200-bed facility will remedy unconstitutional medical care). That parties in those cases did not even raise section 3626(a)(1)(C) as a bar to such construction further demonstrates that the plain language of that section will not support Appellants' strained interpretation.

D. The October 27 Order Does Not Order “Construction of Prisons.”

Even if Appellants were correct that section 3626(a)(1)(C) prohibits the District Court from ordering the “construction of prisons,” such a prohibition would not invalidate the October 27 Order. The \$250 million at issue 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. (SER 67, 80, 88; *see also* SER 285.) Indeed, the TPA does not call for

any construction of new prisons; rather, all expansions of health care facilities are to be constructed at *existing* CDCR institutions. (ER 298.)

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

Appellants argue that the October 27 Order is improper because the District Court failed to make the findings required by the PLRA. (Op. Br. at 27-39.) Citing a pre-PLRA case, *Olagues v. Russoniello*, 770 F.2d 791 (9th Cir. 1985), Appellants erroneously assert that the “Receiver bears the burden of proof in making these showings.” (Op. Br. at 28.) The October 27 Order merely implements prior, unchallenged orders of the District Court, and this Court has held that the burden of showing that an existing order exceeds constitutional minimums under the PLRA falls on the state. *Gilmore*, 220 F.3d at 1008.⁸

While the Receiver acknowledges that much progress has been made since the creation of a Receivership less than three years ago, Appellants have not come close to meeting their burden of showing that implementation of the Receiver’s previously approved plans is now unnecessary. (See Op. Br. at 30-33.) Appellants argue that the most recent death review found that only three preventable deaths occurred in 2007. (Op. Br. at 31.) But they ignore the fact that the Receiver’s “Analysis of Year 2007 Death Reviews” also showed *65 possibly preventable*

⁸ Appellants’ assertion that despite their “repeated objections” the District Court failed to hold any evidentiary hearings is outrageous. The District Court was about to hold an evidentiary hearing when Appellants filed their emergency motion to stay those proceedings. Moreover, if Appellants truly desired an evidentiary hearing, the proper procedure was to file a motion to terminate or modify the underlying consent orders as required by the PLRA. (See Sec. III.A, *supra*.)

deaths. (ER 51-57.)⁹ A preventable or possibly preventable death thus occurred every 5.4 days. In these 68 cases, there were 120 extreme departures from the standard of care. (ER 55-56; *see also* SER 69-75.)

Appellants also ignore the express language of the October 27 Order, which states that the District Court has “determined . . . that the implementation of the TPA is necessary to bring the prison healthcare system to constitutional standards.” (ER 72-74.)¹⁰ The October 27 Order also specifically identified prior orders of the District Court, including the October 2005 Findings of Fact and Conclusions of Law, the February 2006 OAR, and the June 2008 Order adopting the TPA, whose findings the District Court thus incorporated into the October 27 Order. (*Id.*) Appellants 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. These and other prior orders set forth findings that amply satisfy the requirements of section 3626(a)(1)(A). (ER 12-14.)¹¹ Moreover, as Appellants

⁹ The District Court took possibly preventable deaths into account in its original findings leading to the OAR. (ER 346-48.)

¹⁰ Appellants do not dispute that the District Court has found that additional medical and mental health beds must be added to bring prison 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. (SER 78, 83.)

¹¹ Appellants’ argument that there is a lack of evidence regarding the “constitutional standard of care” fails for the same reasons. (*See Op. Br.* at 33-34.) The District Court has found that the Receiver’s plans are required to bring prison

(Footnote continues on next page.)

concede (Op. Br. at 15), those findings are reviewed by this Court only for clear error.

Appellants' argument is also incorrect on the law. Their 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 record in fact supports compliance with the PLRA requirements. *See Gilmore*, 220 F.3d at 1008 & n.25. That is clearly the case here.

Nor, as demonstrated above, are Appellants 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." Appellants cite *Cason v. Seckinger*, 231 F.3d 777 (11th Cir. 2000), but in *Cason* the court was reviewing a section 3626(b) motion for termination of a consent decree entered long before enactment of the PLRA. *Id.* at 784. By contrast, the consent decree and ensuing orders issued in this case have from their inception been governed by the PLRA, and the District Court has repeatedly found that the current record continues to support

(Footnote continued from previous page.)

health care up to constitutional standards. (*See* ER 72-74, 336-88.) It is Appellants' burden to show otherwise. The Receiver is not obligated to recite the "constitutional standard" in his reports and plans. Appellants also argue that "the district court was required to find that the entire \$8 billion is necessary to ensure that the State is providing care such that officials are not deliberately indifferent;" but the October 27 Order is directed only at \$250 million needed to continue plans that the District Court has already found necessary to bring State prison medical care up to constitutional standards.

maintenance of those orders. Appellants' citation to *Castillo v. Cameron County*, 238 F.3d 339 (5th Cir. 2001), fails for the same reason. *See id.* at 354 (deciding motion to terminate decree entered prior to enactment of PLRA).

Appellants also argue that the District Court erred by “requiring the State Defendants to act in violation of state law without making the findings required by section 3626(a)(1)(B).” (Op. Br. at 37-39.) According to Appellants, California law does not permit Appellants 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, AB 900 is a valid legislative appropriation authorizing use of the \$250 million for construction of prison infrastructure.¹² Second, even if section 3626(a)(1)(B) findings were necessary, the District Court has made such findings. Third, as Appellants concede, the Controller may draw a warrant on the State Treasury, without legislative authorization, pursuant to a valid court order, even in the absence of a state law waiver. *See White v. Davis*, 108 Cal. App. 4th 197, 223 (2002); *see also 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. (SER 258, 270-76.)

¹² Appellants argue that the Receiver should “exhaust” \$7.4 billion in bond funds authorized by AB 900 before seeking “yet more money from the State.” (Op. Br. at 34-35.) This argument has no merit because, as Appellants conceded in a declaration filed in the District Court, the bond funds authorized by AB 900 are not available due to legal challenges. (SER 242-43.)

IV. APPELLANTS' SOVEREIGN IMMUNITY ARGUMENT IS WITHOUT MERIT

A. The *Ex Parte Young* Exception Applies.

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 if the relief serves directly to bring an end to an ongoing violation of the Constitution — even when that relief requires the expenditure of state funds. *Papasan v. Allain*, 478 U.S. 265, 277-78 (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). The *Ex Parte Young* exception to the Eleventh Amendment applies when the federal constitutional violation is ongoing and the relief against the state official will end the violation of federal law. *Papasan*, 478 U.S. at 277-78; *Milliken*, 433 U.S. at 280, 289 (affirming school desegregation order and allocating costs between state and local officials because order was “part of a *prospective* plan to comply with a constitutional requirement to eradicate all vestiges of de jure segregation”).

The *Ex Parte Young* requirements are satisfied in this case. The District Court has found (and Appellants have not disputed) that there is an ongoing federal constitutional violation. The District Court has ordered Appellants to fund the Receiver's Court-approved plans to bring an end to this violation. The October 27 Order, part of a contempt process to enforce the District Court's prior orders, therefore, falls squarely within the *Ex Parte Young* exception.

The fact that the District Court’s order requires an expenditure of state funds (even a substantial one) has no impact on this analysis. *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 277-78 (“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 667-68 (where “fiscal consequences to state treasuries” are the “necessary result of compliance” with prospective decrees, there is no Eleventh Amendment issue); *Goldberg*, 254 F.3d at 1144 (“substantial ancillary effect on a State’s treasury” does not convert action into one against the State for state sovereign immunity purposes); *Fortin v. Comm’r of Mass. Dept. of Pub. Welfare*, 692 F.2d 790, 798 n.10 (1st Cir. 1982) (“It is well established that the fiscal consequences of prospective orders to comply with the law do not offend the principles of sovereign immunity.”); *cf. Tennessee v. Lane*, 541 U.S. 509, 517 (2004) (Congress can abrogate Eleventh Amendment and allow actions for money damages where it does so to prevent unconstitutional conduct); *Nevada Dep’t of Human Resources v. Hibbs*, 538 U.S. 721, 726-27 (2003) (same).

Indeed, there is no authority that limits the applicability of *Ex Parte Young* based on the magnitude of the financial impact. *Fortin*, 692 F.2d at 797-98 (court’s power to order contempt fines “is ancillary to its power to order compliance with the law” and its “power does not evaporate when the cost of compliance is high”);

Goldberg, 254 F.3d at 1144 (sovereign immunity does not apply even where relief has a “substantial” effect on a state’s treasury). In 1977, the Supreme Court affirmed a federal court’s order requiring the State of Michigan to pay almost \$6 million to implement a desegregation order. *Milliken*, 433 U.S. at 289-90, 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 on the state treasury a basis for finding sovereign immunity. The financial impact of the District Court’s order in this case thus does not remove it from the *Ex Parte Young* exception or provide Appellants a sovereign immunity defense.

Appellants’ argument that the October 27 Order falls outside the scope of *Ex Parte Young* because it requires Appellants to pay money — as opposed to requiring Appellants to do something that costs money — has been rejected by the Supreme Court. In *Milliken v. Bradley*, 433 U.S. 267, 288-89 (1977), state defendants argued that the district court’s order compelling them to pay the cost of a judicially mandated desegregation program violated the Eleventh Amendment because it mandated the payment of money. The Supreme Court rejected this argument, explaining that an order to pay the costs of desegregation “fits squarely within the prospective-compliance exception” originated in *Ex Parte Young*. *Id.* at 289. Here, the District Court’s underlying orders, and the October 27 Order enforcing those orders, do no more than require Appellants to pay the cost of the

Receiver’s work to eliminate an ongoing constitutional violation.¹³ Thus, they are covered by the *Ex Parte Young* exception.

Ex Parte Young permits federal courts to go further than merely ordering injunctive relief and allows them to impose monetary penalties and sanctions for a state official’s refusal to comply with the federal court’s order. *See Hutto v. Finney*, 437 U.S. 678, 690 (1978) (“[F]ederal courts are not reduced to issuing injunctions against state officers and hoping for compliance. Once issued, an injunction may be enforced. Many of the courts’ most effective enforcement weapons involve financial penalties.”); *Fortin* at 797-98 (“sovereign immunity does not bar remedial or coercive fines that are actually incurred, though theoretically avoidable”). The District Court was thus not barred by the Eleventh Amendment from requiring Appellants to fund the Receiver’s projects or from initiating proceedings to impose monetary penalties based on Appellants’ failure to comply with the its prior orders.

B. The District Court’s Order Does Not Implicate “Special Sovereignty Interests” Under *Coeur d’Alene*.

Appellants contend that this case implicates “special sovereignty interests” that preclude application of *Ex Parte Young*, based on the Supreme Court’s

¹³ Appellants’ cited cases on this point are inapposite because they address claims for retroactive monetary relief that necessarily fall outside the scope of *Ex Parte Young* regardless of the effect on the state treasury. *See Ford Motor Co. v. Dep’t of Treasury of Indiana*, 323 U.S. 459 (1945) (claim for retroactive relief in the form of a state tax refund); *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994) (addressing whether bi-state railway was protected from personal injury claim for damages).

decision in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997).

Appellants' attempt to stretch *Coeur d'Alene* to apply to the circumstances in this case is unsupported by logic or precedent.

Coeur d'Alene is inapplicable because it did not address a federal court's inherent power to enforce its own orders. Rather, it addressed the unique situation where 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 those very specific circumstances, the Court found that the Eleventh Amendment barred the suit. The circumstances of *Coeur d'Alene* are not present in this case.

Moreover, 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 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."). Thus, in a case seeking to enjoin the State of California from collecting certain taxes, this Court rejected the argument that the State's interest in protecting the treasury meant that the suit was barred by the Eleventh Amendment under *Coeur d'Alene*. *Goldberg*, 254 F.3d at 1143-44.

None of the cases cited by Appellants supports their argument that *Coeur d'Alene* should apply 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." *Id.* at 1193-94. Nothing in *ANR Pipeline* suggests that a significant impact on a state treasury is sufficient to constitute a "special sovereignty interest" under *Coeur d'Alene*. Appellants' reliance on out-of-context language from *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994), is even less helpful because the *Hess* opinion does not address the applicability of *Ex Parte Young* or *Coeur d'Alene*. Finally, *Alden v. Maine*, 527 U.S. 706 (1999), is irrelevant because it 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.

This Court has already specifically acknowledged — several years after the *Coeur d'Alene* decision — that even a substantial financial impact on the State's treasury does not change the *Ex Parte Young* analysis: "The [Supreme] Court has repeatedly observed that prospective relief awarded pursuant to *Ex Parte Young* may have a substantial ancillary effect on the 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 (citations omitted). There is no basis to depart from this controlling authority.

C. Appellants Waived Any Sovereign Immunity Defense.

Even if there were a basis for Appellants to assert sovereign immunity in this case, Appellants waived that defense by failing to raise it earlier in the seven-year course of this litigation. *Hill v. Blind Indus.*, 179 F.3d 754, 758 (9th Cir. 1999), as amended, 201 F.3d 1186 (9th Cir. 2000) (“state may waive its Eleventh Amendment immunity by conduct that is incompatible with an intent to preserve that immunity”).

Appellants 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. (ER 430 (“The Court shall have the power to enforce the Stipulation through specific performance and all other remedies permitted by law.”).) Appellants again waived the defense when they failed to raise it as an objection to the OAR (ER 332), or to the District Court’s order approving the TPA (ER 257-60).

Appellants have no basis for their contention that they were not required to raise this defense earlier because the earlier orders were merely for “injunctive relief” and did not impose any monetary burden on them. (Op. Br. at 55.) The OAR specifically required Appellants to bear “[a]ll costs incurred in the implementation of the policies, plans, and decisions of the Receiver.” (ER 332.) Appellants cannot now rely on a purported distinction between the Court’s prior “injunctive” orders and its current “monetary” order because the October 27 Order merely enforces prior orders to which Appellants consented.

Appellants' belated assertion of sovereign immunity *after* the District Court indicated its intent to compel Appellants to fulfill their obligations under its prior orders is nothing more than an attempted "improper manipulation of the judicial process." *Hill*, 179 F.3d at 758, 763; *see also In re Bliemeister*, 296 F.3d 858, 862 (9th Cir. 2002) ("To allow a state to assert sovereign immunity after listening to a court's substantive comments on the merits of a case would give the state an unfair advantage when litigating suits."). Appellants thus waived any possible sovereign immunity defense.

CONCLUSION

For all of the reasons stated above, the Court should dismiss this appeal for lack of jurisdiction. Alternatively, the Court should affirm the October 27 Order and remand this action to the District Court for further proceedings on the contempt motion.

Dated: January 7, 2009

MORRISON & FOERSTER LLP

By: /s/ James J. Brosnahan
James J. Brosnahan

/s/ George C. Harris
George C. Harris

Attorneys for Receiver
J. Clark Kelso

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, the Receiver states that he agrees with the Appellants' statement of related cases.

Dated: January 7, 2009

MORRISON & FOERSTER LLP

By: /s/ James J. Brosnahan

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 08-17412

(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

- Proportionately spaced, has a typeface of 14 points or more and contains 13,927 words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words),

or 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

- This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;
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3. *Briefs in Capital Cases*

- This brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4 **and is**
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- Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less,

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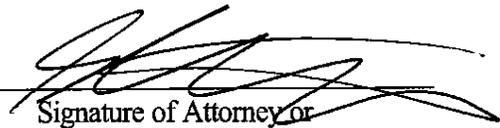
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1-7-09

Date



Signature of Attorney or
Unrepresented Litigant

CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2009, I electronically filed:

APPELLEES' BRIEF

with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

I further certify that one of the participants in the case is not registered CM/ECF users. I have dispatched it via UPS for overnight delivery, to the following non-CM/ECF participant:

Michael William Bien
Rosen Bien & Galvan, LLP
315 Montgomery Street, 10th Floor
San Francisco , CA 94104

/s/ Mary E. Land
MARY E. LAND