No. 08-17412

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARCIANO PLATA, et al.,

Plaintiffs-Appellees,

v.

ARNOLD SCHWARZENEGGER, et al.,

Defendants-Appellants.

On Appeal From the United States District Court
for the Northern District of California

No.3:01-cv-01351 TEH
The Honorable Thelton E. Henderson, Judge

BRIEF OF APPELLANTS

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INTRODUCTION

In its decision below, the district court ordered appellants, Governor Arnold Schwarzenegger and Controller John Chiang (collectively, State Defendants), to pay $250 million to a court-ordered Receiver as a down-payment on a $8 billion prison construction project, in violation of the Prison Litigation Reform Act (PLRA) and the Eleventh Amendment. This case raises fundamental issues regarding federalism and the separation of powers between the California Legislature and the federal judiciary. In ordering the State to fund the Receiver's massive prison construction program, while also preventing any meaningful public review of the Receiver's construction plans, the district court clearly violated federal law and its decision must be reversed.

The PLRA absolutely bars district courts from ordering a state to fund the construction of prisons against its will. Nonetheless, the district court ordered the State to pay the Receiver $250 million to fund a construction project, and for that reason alone its decision should be reversed. Even if, contrary to the text of the PLRA, a district court had some authority to order prison construction, it must still make specific findings required by the PLRA before ordering any prospective relief. Contrary to these

requirements, the district court held no hearings, took no evidence, and made no findings as to whether the Receiver's construction program met the PLRA's requirements governing prospective relief or whether the district court should waive California law in requiring the State to pay for the project. Moreover, the available evidence suggests that if the district court had engaged in the inquiry mandated by the PLRA, it would have been unable to make the required findings. The district court's bare order requiring the State to pay the court-appointed Receiver $250 million, the first installment of a larger $8 billion request, also violates California's sovereign immunity. Finally, illustrating the district court's failure to provide any meaningful review of the Receiver's construction plan, the court also erred in denying State Defendants' motion to make public a draft of the Receiver's construction plans, which represented the most detailed justification of his funding request at the time it was made.

I. STATEMENT OF JURISDICTION

The complaint in this case sought declaratory relief under 28 U.S.C. §§ 1343, 2201, and 2202, 29 U.S.C. § 794a, and 42 U.S.C. § §1983 and 12101 *et seq.* The district court had federal question jurisdiction under 28 U.S.C. §§ 1331 and 1343.

As discussed more fully at p. 15–19, this Court has jurisdiction over the district court's Order for Payment as a post-judgment order under 28 U.S.C. § 1291. In the alternative, this Court has jurisdiction under the collateral order doctrine, *United States v. Ray*, 375 F.3d 980, 985–86 (9th Cir. 2004), 28 U.S.C. §§ 1292(a)(1), or in the alternative, the *Forgay-Conrad* rule, *Matter of Hawaii Corp.*, 796 F.2d 1139, 1143 (9th Cir. 1986). The district court entered its Order for Payment on October 27, 2008. (ER 72.)[1] State Defendants filed their Notice of Appeal on October 31, 2008. (ER 70.) On November 7, 2008, the district court denied State Defendants' motion for a stay pending appeal. (ER 2.) The district court subsequently denied appellant's motion to remove the confidential-material designation from the Receiver's Facility Program Statement, Second Draft on November 20, 2008. (ER 1.)

II. ISSUES PRESENTED

This appeal presents the following issues:

1. Does this Court have jurisdiction over the district court's October 27, 2008 Order requiring State Defendants to pay $250 million to a federally-appointed Receiver?

[1] ER refers to the Excerpts of Record filed by appellants.

2. Does the PLRA, 18 U.S.C. § 3626, permit a district court to order the State to fund a court-appointed Receiver's construction of prisons?

3. Did the district court fail to make the findings required by the PLRA in ordering any prospective relief or in ordering state officials to act in violation of state law?

4. Does the district court's order that California pay $250 million now, while holding out the possibility that the State will be ordered to pay a total of $8 billion in the future, violate California's sovereign immunity?

5. Did the district court err in denying as moot State Defendants' motion to make public the Receiver's Facility Program Statement, Second Draft?

III. STATEMENT OF THE CASE

In 2001, plaintiffs brought a class action suit on behalf of inmates of the California Department of Corrections and Rehabilitation (CDCR) alleging that state officials were providing inadequate healthcare that violated the Eighth Amendment and the Americans with Disabilities Act. (ER 435.) Following the entry of two consent decrees, the district court

appointed a Receiver, "with the goals of restructuring day-to-day operations and developing, implementing, and validating a new, sustainable system that provides constitutionally adequate medical care to all class members as soon as possible." (ER 327.)

On August 13, 2008, the Receiver filed a Motion for an Order Adjudging Defendants in Contempt for Failure to Fund Receiver's Remedial Projects and/or for an Order Compelling Defendants to Fund Such Projects (Motion for Funding) in which he sought "the Court's assistance in securing payment by the State of California of the $8 billion in funding necessary for the Receiver's construction program." (ER 161.) After briefing and argument, the district court issued an Order for Further Proceedings "to determine the availability of, and the procedures for transferring to the Receiver for the purpose of continuing his capital projects, $250 million in unencumbered funds appropriated by [Assembly Bill 900 (Stats. 2007, ch. 7, eff. May 3, 2007)]." (ER 100.) Although AB 900 authorized the State to issue up to $7.4 billion in bonds to fund the construction of new prison facilities, including $1.4 billion for medical, mental health, and dental beds, it also contained an appropriation of $300 million to expand infrastructure capacity at existing institutions, $250 million of which remains

unencumbered. This $250 million appropriation was the focus of the Order for Further Proceedings. In a supplemental filing, State Defendants informed the district court that the Receiver's $8 billion construction project, involving the construction of 7 new facilities, did not fall within the language of the appropriation such that State Defendants could not, consistent with state law, provide those funds to the Receiver. Following another hearing, the district court issued a Second Order re Contempt Proceedings (Order for Payment), directing State Defendants to transfer $250 million to the Receiver, without specifying the source of the funds, and setting a hearing on an order to show cause why State Defendants should not be held in contempt if they failed to comply with the Order for Payment. (ER 72.)

During the briefing of the Receiver's Motion for Funding, State Defendants sought to remove the confidential-material designation from the Receiver's Facility Program Statement, second draft, pursuant to the provisions of the protective order governing discovery between the parties to the action. After seeking the Receiver's consent to use the materials in their opposition to his Motion for Funding without filing them under seal, which the Receiver denied, State Defendants filed an administrative motion to

remove the confidential-material designation so that those documents could be made available for public inspection. The Receiver opposed the motion. Two months later, on November 20, 2008, the district court denied the motion as moot, citing the fact that the Receiver had released a revised third draft of the Facility Program Statement two days earlier. (ER 1.) No party had filed a supplemental brief discussing the differences between the second and third drafts or even advising the district court of the existence of the third draft, and no party suggested that State Defendants' request was moot.

State Defendants appealed the district court's Order for Payment on October 31, 2008. (ER 70.) After the district court denied State Defendants' request for a stay, this Court granted an Emergency Application for a Stay in an order dated November 7, 2008, staying both payment of the $250 million and the anticipated contempt hearings. In that same order, this Court expedited the briefing schedule. On November 21, 2008, State Defendants filed a Petition for Writ of Mandamus raising the same issues as this appeal regarding the Receiver's construction program. On November 24, 2008, this Court issued an order requiring appellees to file a response to that Petition for Writ of Mandamus within 14 days, and calendaring the Petition with this appeal.

IV. STATEMENT OF FACTS

This case involves the district court's appointment of a Receiver to oversee the provision of medical care in California's prisons and the Receiver's subsequent decision to undertake an $8 billion prison construction program. In response to the complaint filed by plaintiffs alleging that they were being provided unconstitutional medical care, state officials agreed to a consent decree styled as Stipulation for Injunctive Relief, whereby those officials agreed to institute new Policies and Procedures aimed bringing CDCR medical care into compliance with the Eighth Amendment. (ER 471.) This first consent decree required, for instance, that registered nurses staff emergency clinics 24 hours per day, that CDCR establish a priority ducat system consistent with regulations promulgated by the Centers for Disease Control, and that patients with liver and kidney end-stage organ failure be provided with a special diet. (ER 420.) The second consent decree, entered into after state officials were unable to comply with the first consent decree, required CDCR to evaluate the competency of physicians and provide training to physicians found to be deficient. (ER407.)

A year after the district court entered the second consent decree, it issued an order to show cause regarding the appointment of a receiver. (ER 389.) Over the State's objection, Judge Henderson ultimately found that the appointment of a receiver was warranted. (ER 371.) In its Order Appointing Receiver (OAR), the district court granted the Receiver "all powers vested by law in the Secretary of the CDCR as they relate to the administration, control, management, operation, and financing of the California prison medical healthcare system." (ER 329.) It also ordered that "[a]ll costs incurred in the implementation of the policies, plans, and decisions of the Receiver relating to the fulfillment of his duties under this Order shall be borne by Defendants." (ER 332.) Finally, in apparent recognition of the requirements of the PLRA, the OAR required the Receiver to comply with applicable state law unless he requested that the district court waive state law. (ER 330.)

As detailed in his Eighth and Ninth Quarterly Reports, the Receiver has had much success in improving the quality of healthcare at CDCR institutions. The Receiver is on track to have 90 percent of all nursing and physician positions filled by January 2009, up from 50 percent when he was appointed. (ER 25, 29.) He has begun altering the process by which

inmates are assessed when they enter the prison (ER 196), and has changed the protocols by which inmate patients are treated. (ER 210.) Each of these address the deficiencies identified in the two consent decrees that led to the appointment of the Receiver.

In addition to making changes regarding personnel and treatment protocols that were the subject of the two consent decrees that preceded the appointment of the Receiver, the Receiver has embarked on an ambitious prison construction program. The program has two components: the construction of seven new prison healthcare facilities that will house and provide health care to approximately 10,000 prisoners, and the improvement of healthcare facilities at the 33 existing CDCR prisons. (ER 296–300.) The scope of the construction projects is tremendous. As stated the Receiver acknowledged in his Motion for Funding, the Facility Improvement project will touch virtually every prison in the state and the 10,000 bed project will involved the construction of 7 million square feet of new medical facilities — "the equivalent of 70 Wal-Mart stores." (ER 164.) The 10,000 bed construction project is estimated by the Receiver to cost $6 billion, and the improvement project is estimated at $2 billion. (ER 174, 177.)

At that time, the Facility Program Statement, Second Draft, at over 900 pages, was the most detailed description of the Receiver's construction plans, and was the principal evidence available as to whether the Receiver's construction plan met the requirements of the PLRA. When the Receiver provided the Facility Program Statement to State Defendants, he stated that it was subject to the protective order governing discovery between the parties. (ER 147, 149.) Accordingly, state officials were not permitted to share those plans with the public, even after the Receiver sued the State to seize $8 billion from the State Treasury to implement them.

Since the Receiver first decided to embark on this construction program, the State has participated in his planning as ordered by the district court, with a variety of low and mid level officials participating in the development of the draft Facility Program Statement. That participation, however, came with an important limitation: that the Legislature approve any financing for the construction project. Accordingly, all of the court-approved plans have provided for bond financing, either using the financing contemplated by Assembly Bill 900, which provided $1.4 billion for construction of beds for medical, mental health, and dental care (plus an

additional $6 billion for general population beds), or through legislation pursued by the Receiver. (ER 301, 309.)

Despite having previously agreed to use bond financing, the Receiver filed his Motion for Funding in which he requested that the Governor and Controller be held in contempt or, in the alternative, that the district court issue an order compelling the State to fund the Receiver's construction projects. The scope of the Receiver's Motion for Funding was, like his construction project, tremendous. As he stated in the first sentence of his Motion, the Receiver sought "the Court's assistance in securing payment by the State of California of the $8 billion in funding necessary for the Receiver's construction program." (ER 161.) The Motion for Funding requested $3.5 billion in this fiscal year alone, with the remainder of the $8 billion coming due in the next three years. (ER 177.) The State vigorously opposed the Motion. After two hearings, the court below ordered the State to make a $250 million down-payment to the Receiver by November 5, 2008. (ER 74.) If the State failed to make the payment, the district court scheduled a hearing on whether the Governor and Controller should be held in contempt. (*Id.*) This appeal followed.

V. SUMMARY OF ARGUMENT

The decision below, ordering State Defendants to pay $250 million as a down-payment on an $8 billion construction project, ignores important principles of federalism and separation of powers, and is a blatant violation of the PLRA. Recognizing the institutional limitations of federal courts' ability to oversee a state's prison system, the PLRA places significant limits on federal courts' authority over state prisons, limits that were completely ignored in this case. First, the PLRA bars courts from ordering a state to fund the construction of prisons, as the district court did in this case. Although the district court held that it retains some inherent equitable authority to order their construction, the PLRA notwithstanding, the plain text of the PLRA and its legislative history show that Congress meant what it said: no court shall order the construction of prisons.

In addition, the PLRA requires that before ordering any prospective relief, a district court must make findings, based on current evidence, that such "relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A). Not only did the district court fail to make any of these findings, it did not

even take any evidence regarding the propriety of constructing these new prison healthcare facilities, even assuming it had the authority to order the State to fund their construction in the first instance. Similarly, the district court failed to make any of the findings required to order a state official to act in violation of state law, 18 U.S.C. § 3626(a)(1)(B), as the Controller and Governor would have been required to do in order to comply with the district court's order. Moreover, the district court's conclusion that the State has waived any objection under the PLRA is wrong as a matter of law and as a point of fact. Not only are the PLRA's requirements not subject to waiver, but state officials have always conditioned their approval of the Receiver's construction plans on legislative authorization, which would obviate the need to comply with the PLRA's requirements. Finally, the same separation of powers concerns that motivated passage of the PLRA also illustrate why the district court's order violates California's sovereign immunity.

With respect to State Defendants' motion to remove the confidential-material designation from the Receiver's Facility Program Statement, Second Draft, the district court erred in concluding it was mooted by the Receiver's release of a third draft of that document. Simply because *another* document was publicly available does not mean that State Defendants did

not have a right to seek the public release of the second draft of the Receiver's construction plans. Moreover, given the tremendous public importance of this case, and the fact that the Receiver did not even attempt to argue that the vast majority of the material in the Facility Program Statement was confidential material as that term is defined in the relevant protective order, its release is warranted.

VI. STANDARD OF REVIEW

The district court's interpretation of the PLRA is a question of law and is reviewed *de novo*. *Beeman v. TDI Managed Care Servs.*, 449 F.3d 1035, 1038 (9th Cir. 2006). Immunity under the Eleventh Amendment presents questions of law and is also subject to *de novo* review. *See Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004). As mootness is a question of law, the district court's decision regarding the request to remove the confidential-material designation from the Receiver's Facility Program Statement is also reviewed *de novo*. *See Southern Oregon Barter Fair v. Jackson County, Oregon*, 372 F.3d 1128, 1133 (9th Cir. 2004). To the extent the district court made any findings of fact, those findings are reviewed for clear error. *Int'l Bhd. of Teamsters v. N. Am. Airlines*, 518 F.3d 1052, 1055 (9th Cir. 2008).

VII. ARGUMENT

A. The District Court's Order for Payment Is an Appealable Order

Contrary to the Receiver's assertion in its opposition to State Defendants' emergency motion for a stay pending appeal, the district court's Order for Payment is an appealable order. As the first consent decree in this case is treated as a final judgment, *see Jeff D. v. Kempthorne*, 365 F.3d 844, 850 (9th Cir. 2004), the district court's Order for Payment is a post-judgment order and is appealable under 28 U.S.C. § 1291. *United States v. State of Washington*, 761 F.2d 1404, 1406 (9th Cir. 1985) (noting that post-judgment orders do not implicate the same concerns of piecemeal litigation underlying the finality requirement of 28 U.S.C. § 1291 and that if they are not treated as final, there is little prospect of further proceedings that will make them final); *see also Nehmer v. United States Department of Veterans Affairs*, 494 F.3d 846, 856 n. 5 (9th Cir. 2007) (order involving clarification of prior consent decree was appealable order).

Moreover, the fact that the $250 million was simply the first "down-payment" toward the Receiver's $8 billion request supports the exercise of appellate jurisdiction. *See Gates v. Rowland*, 39 F.3d 1439

(9th Cir. 1994). *Gates* involved a class-action challenge to conditions at two California prison facilities, which was resolved by a consent decree. The parties cross-appealed an order of the district court regarding attorneys fees for monitoring the State's compliance with the consent decrees. *Id*. at 1448. This Court concluded that it possessed appellate jurisdiction over the district court's order under 28 U.S.C. § 1291. First, the Court noted that the order came "after the entry of the consent decree, which is a final judgment on the merits. . . ." *Id*. at 1450. Second, the Court noted that "[l]egal issues determined at this stage will smooth the process for future awards. The fees orders are final, and the defendants must pay the plaintiff's counsel." *Id*. Accordingly, this Court concluded it was appropriate that it review the district court's order.

These same factors illustrate the propriety of appellate jurisdiction over the district court's order. As in *Gates*, the district court's order follows entry of a consent decree, which is a final judgment. The $250 million payment ordered by the district court was the first payment in a series of payments toward the $8 billion requested by the Receiver. In his Motion for Funding, the Receiver included a table detailing his monetary requirements

over each of the next four years. (ER 177.) At the October 27, 2008 hearing, Judge Henderson indicated his desire to proceed with the Receiver's request for the full amount of funds:

> And let me say that in light of today's proceedings, it's clear to me that we must move forward to adjudicate the Receiver's original contempt motion with all due haste. Despite progress been made [sic], the health care system remains in a state of crisis, and we cannot afford yet more delays in this case of the nature we are seeing. So I'm instructing you, Mr. Kelso, and Mr. Brosnahan, to proceed full speed ahead.

(ER 97–99.) At a minimum, it appears that Judge Henderson is contemplating future proceedings to determine whether more funds should be made available to the Receiver. Accordingly, guidance from the Court at this time will greatly assist the district court as it goes forward in adjudicating the Receiver's original Motion for Funding seeking $8 billion to fund his prison construction projects. As *Gates* shows, the district court's Order for Payment is an appealable order under 28 U.S.C. § 1291.

Even if the Order for Payment was not a post-judgment order, it is an appealable collateral order. *Will v. Hallock*, 546 U.S. 345, 247 (2006). The collateral order doctrine applies to "those district court decisions [1] that are conclusive, [2] that resolve important questions completely separate from the merits, and [3] that would render such important questions effectively

unreviewable on appeal from final judgment in the underlying action." *State of Alaska v. United States*, 64 F.3d 1352, 1353 (9th Cir. 1995) (quoting *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994)). Those requirements are met here. The Order for Payment conclusively determines a disputed question: whether the Receiver has authority under the PLRA and the district court's prior orders to construct prison facilities. This is an important question of law separate from the merits of whether there has been an Eighth Amendment violation, and also presents an issue of first impression. No court has considered the language of the PLRA barring construction of prisons, and the $8 billion price tag of the construction project clearly warrants this Court's review. Moreover, as this is a post-judgment order, there is no possibility of appeal from any other final order.

Additionally, the district court's order is an affirmative injunction, requiring state officials to immediately transfer $250 million from the State Treasury to the Receiver. As such, it is appealable under 28 U.S.C. § 1292(a)(1). In the alternative, it is an order for the immediate payment of funds, and is appealable under the *Forgay-Conrad* Rule. *Matter of Hawaii*, 796 F.2d 1139, 1143 (9th Cir. 1986).

Finally, the district court's order denying as moot State Defendants' motion to remove the confidential-material designation from the Receiver's Facility Program Statement, Second Draft is inextricably intertwined with the district court's Order for Payment, giving this Court appellate jurisdiction over that decision as well. Jurisdiction is proper because the issues presented in the denial of the motion to remove the confidential-material designation are "inextricably intertwined" with the district court's order directing State Defendants to pay $250 million as a down-payment on the Receiver's $8 billion prison construction project. The details of the Receiver's construction plan at the time the district court issued the Order for Payment were set forth in the second draft of the Facility Program Statement at issue in State Defendants' motion to remove the confidential-material designation. Review of the denial of the that motion is necessary to ensure meaningful review of the district court's payment order, as such motion sought to lift the confidentiality of the very plan the district court ordered State Defendants to fund. *Clinton v. Jones*, 520 U.S. 681, fn. 41 (1997); *Swint v. Chambers County Commission*, 514 U.S. 35, 51 (1995); *Billington v. Smith*, 292 F.3d 1177, 1191 (9th Cir. 2002); see also 16 Fed. Prac. & Proc., Jurisdiction 2d, § 3921.1.

B. The District Court's Order for Payment Requires the Construction of Prisons in Violation of the PLRA

The district court's order requiring the State to fund the Receiver's project is beyond the authority of this Court, as it involves the court-ordered construction of prisons and violates the PLRA. In 1996, Congress passed the PLRA, which restricts the ability of courts to order prospective relief with respect to prison litigation. *See* 18 U.S.C. § 3626. The intent of the PLRA was to limit federal court oversight of state prisons. *See Gilmore v. California*, 220 F.3d 987, 996-97 (9th Cir. 2000). The PLRA accomplishes this goal in part by limiting the ability of federal courts to provide certain injunctive relief, and expressly prohibits courts from ordering the construction of prisons. Section 3626(a)(1)(C) provides:

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

(Emphasis added.) The PLRA defines a prison as "any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law." 18 U.S.C. § 3626(g)(5).

On its face, the PLRA prohibits the construction of the healthcare facilities contemplated by the Receiver that form the basis for the district court's Order for Payment. The purpose of the Receiver's Motion for Funding was to allow him to construct "new CDCR health facilities to house approximately 6% of CDCR's existing inmate population (approximately 10,000 inmates. . . ." (ER 163.) While these facilities are intended to provide healthcare to inmates, there can be no doubt that they will incarcerate and detain adults convicted of violations of the criminal law, and are thus prisons for purposes of the PLRA. 18 U.S.C. § 3626(g)(5). As explained in the Receiver's Turnaround Plan of Action, the majority of the facilities to be constructed by the Receiver will consist of open dormitory quality housing, *i.e.*, will be the place these prisoners are incarcerated. (ER 296.) It cannot seriously be maintained that these facilities, while also providing healthcare to inmates, are not also prisons as that term is defined in the PLRA. Accordingly, the district court, and by extension the Receiver, lacks authority to order their construction and cannot require the State to pay their multi-billion dollar price tag.

The PLRA removes any inherent equitable authority the district court might otherwise have to order the construction of these prison healthcare

facilities. The district court held that section 3626(a)(1)(C) does not prohibit a court from ordering prison construction where necessary to correct violations of federal law; rather, it merely provides that nothing in section 3626 shall be construed to authorize such construction.[2] (ER 11.) The district court's ruling ignores the intent of Congress in passing the PLRA: "to restrict the equity jurisdiction of federal courts. . . ." *Gilmore v. California*, 220 F.3d 987, 999 (9th Cir. 2000). An interpretation of section 3626(a)(1)(C) as limiting the equitable authority of district courts to order prison construction also comports with Congressional intent to limit federal courts' involvement in state prison systems. *See Miller v. French*, 530 U.S. 327, 340 (2000) ("curbing the equitable discretion of district courts was one of the PLRA's principal objectives.") The House Report accompanying the original version of the PLRA further notes that subsection (a) 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." *See Plyler v. Moore*, 100 F.3d 365, 369 (4th Cir. 1996)

[2] The order being appealed from, the Order for Payment entered on October 27, 2008, contains little explanation of the basis of the court's decision. Its order denying State Defendants' application for a stay, entered after the Notice of Appeal was filed, contains a fuller justification for its decision. (ER 2–17.)

(quoting H.R. Rep. No. 21, 104th Cong., 1st Sess. 24 n.2 (1995)). Mandating the construction of new prison facilities would, of course, be completely contrary to this intent. It stands to reason that in enacting the provision barring the construction of prisons, Congress meant actually to curb federal courts' power, not simply to provide interpretative guidance.

That Congress intended to sharply limit the scope of courts' equitable authority is confirmed by the Supreme Court's decision in *Miller*. There, the Supreme Court interpreted similar language to bar a court from exercising its inherent equitable authority beyond that provided in the PLRA. *Miller*, 530 U.S. at 340. At issue was section 3626(e)(2), which provides that "[a]ny motion to modify or terminate prospective relief made under subsection (b) shall operate as a stay," such that while a motion to terminate prospective relief is pending, that relief is stayed. The Supreme Court rejected the Government's argument that the district court retained traditional equitable authority to stay the operation of the stay, concluding that the language "shall operate" in section 3626(e)(2) removed any such equitable authority. *Miller*, 530 U.S. at 340.

Here too, it is clear that in enacting section 3626(a)(1)(C), Congress intended to restrict the scope of courts' equitable powers to order the

construction of prisons. Unlike in *Miller*, subsection (a)(1)(C) expressly references courts' remedial powers, indicating Congress fully intended to limit courts' equitable authority. The fact that Congress intended to restrict the ability of courts to order the construction of prisons "in exercising their remedial powers" is thus even an clearer indication of Congress's intent to restrict courts' equitable authority than was the provision at issue in *Miller*. Moreover, as in *Miller*, the fact that Congress intended to strip courts of their equitable powers to order construction of prisons is clear from the statutory scheme. It would be nonsensical for Congress to provide requirements for injunctive relief in subsection (a)(1)(A)–(B) but to nevertheless contemplate that courts retained some additional equitable authority not limited by those subsections. Such an interpretation should be avoided. *Garcia v. Brockway*, 526 F.3d 456, 463 (9th Cir. 2008).

Cabazon Band of Mission Indians v. Wilson, 37 F.3d 430 (9th Cir. 1994), cited by the district court (ER 12), does not support the conclusion that the language in the PLRA is merely advisory. *Cabazon Band* interpreted a section of the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(4), which provides that "nothing in this section shall be interpreted as conferring upon a State . . . authority to impose any tax, fee, charge, or

other assessment upon an Indian tribe. . . ." The Ninth Circuit concluded that the statute's failure to confer the authority to tax on the State did not amount to a prohibition on the State. *Id*. at 433.

The fact that the phrase "nothing in this section" did not amount to a prohibition in the context of Indian gaming law does not mean similar language in the context of the PLRA has the same effect. *See Commerce-Pacific, Inc. v. United States*, 278 F.2d 651, 655 (9th Cir. 1960) ("[T]he same word may have different meanings when used in different statutes. This is especially true where the statutes differ in form and substance, as is the situation here."). First, unlike 25 U.S.C. § 2710(d), which is an affirmative grant of authority to states to regulate certain types of Indian gaming, 18 U.S.C. § 3626(a) is described as a "limitation on relief." *See* 18 U.S.C. § 3626(c)(1). Moreover, unlike section 2710(d), the text of section 3626(a)(1)(C) expressly limits courts' exercise of their equitable powers, the precise powers that the district court asserts it retains despite passage of the PLRA. (ER 11.) Finally, the legislative history of the PLRA clearly indicates it was intended to limit courts' authority; no such legislative history is mentioned in *Cabazon Band*. Contrary to the district court's conclusion, the PLRA means what it says: courts cannot order the

construction of prisons, and the district court here erred in ordering the State, against its will, to fund their construction by a court-appointed Receiver.

C. The District Court Failed to Make Any of the Findings Required by the PLRA

In addition, the district court failed to make any of the findings required by the PLRA, both with respect to the tailoring of the prison construction plan and the district court's order that State Defendants act contrary to state law governing appropriations. Even if the Court were to conclude that the PLRA permits the construction outlined in the Receiver's Turnaround Plan of Action, the construction of the prison healthcare facilities contemplated by the Receiver's Motion does not satisfy the PLRA's requirements for injunctive relief insofar as the Receiver has not established that such construction is "narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A). These findings must be made based on the *current* record, and cannot be based on prior findings. *See Cason v. Seckinger*, 231 F.3d 777, 784 (11th Cir. 2000). Conclusory statements that the PLRA's requirements are met are likewise insufficient; "[p]articularized findings, analysis, and explanations should be made as to the application of each

criteria to each requirement" imposed by the PLRA. *Id.* at 784–85; *see also Castillo v. Cameron County*, 238 F.3d 339, 354 (5th Cir. 2001). The Receiver bears the burden of proof in making these showings. *See, e.g.*, *Olagues v. Russoniello*, 770 F.2d 791, 799 (9th Cir. 1985). Here, the district court did not properly make the findings required by the PLRA. Nor was this a simple oversight by the district court. Despite repeated objections by State Defendants, no evidentiary hearings were held, no analysis undertaken, and no questions were asked regarding the Receiver's construction plans in the proceedings on the Receiver's Motion for Payment.

1. The District Court's Order Approving the Turnaround Plan of Action Did Not Include the Findings Required by the PLRA

In its order denying State Defendants' application for a stay, the district court belatedly suggested that it had made such findings in its order approving the Receiver's Turnaround Plan of Action. (ER 13.) In that order, the district court stated that:

> Additionally, the Court finds the plan's six strategic goals to be necessary to bring California's medical health care system up to constitutional standards, and the Court is satisfied that the objectives and action items identified in the plan will help the Receivership achieve those six goals.

(ER 259.) This cursory statement has nowhere near the particularity or analysis required by the PLRA. Nor could the district court have made the findings required by the PLRA on the basis of the Turnaround Plan of Action, as the discussion of the Receiver's construction plan takes up a mere four pages. (ER 296–300.) Moreover, as the district court itself acknowledged, the Turnaround Plan of Action "does not contain every level of detail required for implementation" and was "never intended to be a detailed set of policies and procedures," but rather, "the plan should be a higher-level view of the Receivership and its goals. . . ." (ER 260.) Accordingly, the district court's conclusory statement that the Turnaround Plan of Action as a whole is "necessary" is insufficient to satisfy the PLRA's requirements, particularly where the State is being ordered to pay for a massive prison construction project with an $8 billion price tag. Even if the district court's cursory statement that the Turnaround Plan of Action is "necessary" were sufficient, the district court made absolutely no mention of the PLRA's actual requirements: that the relief be narrowly drawn, extend no further than necessary to correct the violation of the

Federal right, and be the least intrusive means necessary to correct the violation of the Federal right. 18 U.S.C. § 3626(a)(1)(A).

2. The Evidence in the Record Illustrates that the Receiver Cannot Make the Showing Required by the PLRA

Further, evidence in the record strongly suggests that the PLRA's requirements are not met. Given the numerous improvements to the prison healthcare system in California since the appointment of the Receiver, as well as those contemplated in the near future, the Receiver has not shown that his request for an $8 billion prison healthcare facilities construction program is narrowly drawn, extends no further than necessary, and is the least restrictive means to improve prison healthcare. As detailed in his Eighth and Ninth Quarterly Reports, the Receiver has already made substantial progress in improving the health care provided to inmates, with many more improvements scheduled to be implemented in the near future. For instance, the pilot program for the Receiver's Access Unit for Health Care Operations at San Quentin Prison came online April 1, 2008. (ER 205.) The results as described by the Receiver were encouraging: 66% of inmates received a priority consultation for either medical, dental, or mental healthcare, of which 91% were seen by a clinical provider. (*Id.*) This

program has also been instituted at the California Medical Facility, and "has also greatly reduced the number of missed appointments due to a lack of correctional officers or vehicles and increased the ability for more inmates to access care." (ER 206). As Health Care Access Units are established at other prisons, further gains in access to care are expected.

Further, the Receiver has been successful at recruiting health care professionals, which also promises to improve prison health care. Currently, 88% of nursing positions are filled. The Receiver's goal of 90% has been met at 22 institutions, 10 of which have less than 5% of their nursing positions vacant. (ER 152.) Moreover, 85% of physician positions have been filled, including 100% of the chief medical officer positions and 85% of the physician and surgeon positions. (ER 156.) These improvements have certainly had a positive impact on the level of care being provided to prisoners. Indeed, the last time the district court issued formal findings of fact, in October 2005, the court found 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 systems." (ER 336.) In the most recent review, however, a court-appointed expert concluded that in 2007 there were only *three* preventable deaths. (ER 51.)

These figures reflect that the Receiver's efforts are having a significant effect on the quality of care California prisoners, and strongly suggests that an $8 billion construction project may not be needed.

Moreover, the Eighth Quarterly Report details numerous improvements to health care that are due to be implemented in the near future. The Receiver has created an inter-disciplinary reception model at eight core reception facilities. (ER 202–203.) There will be an automated system for tracking medical appointments, as well as a new utilization management system, both of which will ensure that prisoners receive timely care. The Receiver has planned an overhaul of the manner in which prescription medications are delivered, including an update of the procedures manual, changes to the formulary, and implementation of the Guardian RX operating system. (ER 225–229.) The Receiver has hired Navigant Consulting to improve laboratory services and McKenzie Stephenson, Inc. to audit radiology services. (ER 231–232.) Numerous information technology improvements include a standardized health records practice and a clinical information system that will store key patient information. (ER 233.)

Each of these improvements represents a much less intrusive means of improving the healthcare provided by CDCR, and must be given a chance to function before the district court embarks on the drastic step of ordering the seizure of billions of dollars from the State Treasury to construct 7 million square feet of space for new prison healthcare facilities and remodel existing healthcare clinics in the 33 prisons operated by CDCR.

3. There is No Evidence in the Record Regarding the Constitutional Standard of Care

Moreover, the Receiver has not established that $8 billion is necessary to bring the State into compliance with the dictates of the Eighth Amendment. It is important to note that the district court may authorize only that which is necessary to bring the State into compliance with the Eighth Amendment. Thus, 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 to prisoners' serious medical needs. *Hallett v. Morgan*, 296 F.3d 732, 743 (9th Cir. 2002). That, of course, is the constitutional standard. That standard, however, appears nowhere in the Receiver's prison healthcare facilities construction plan or in any of the pleadings filed below.

Without any reference to that constitutional standard, it is not surprising that the construction plan envisions projects far in excess of constitutional requirements. Even a cursory look at the Facility Program Statement (Second Draft, Revised on July 22, 2008) reveals that the construction plan is not simply designed to prevent "deliberate indifference," but rather will provide prisoners with health care and quality of life better than that received by most law-abiding Californians. The portions of the Facility Program Statement filed below in support of appellants' opposition to the Receiver's Motion for Funding starkly illustrate that fact. (ER 619, 691, 703, 705.) It is incredible to believe that the amenities discussed in the Facility Program Statement, Second Draft are required to provide the minimum constitutional level of health care. Yet that is precisely what the district court was required to find—and did not—before ordering the State to fund the Receiver's construction project.

4. The State Has Already Authorized the Issuance of $7.4 Billion in Bonds to Fund Prison Construction

The district court's Order for Payment also fails to address the fact that funds have already been appropriated that will address the alleged constitutional violations. In 2007, the Legislature enacted AB 900, which authorized $7.4 billion in prison construction, and authorized and provided

for lease-revenue bond financing in that amount. That amount, of course, reflects almost as much money as is being sought by the Receiver. Of that amount, $1.14 billion is allocated for prison construction projects "to provide medical, dental, and mental health treatment or housing." (Id. §§ 15819.40(c), 15819.403(a), 15819.41(b), 15819.413(a).) Having already been allocated those funds, the Receiver should be required to exhaust those funds before seeking yet more money from the State. There is no evidence in the record addressing whether the $7.4 billion in projects already authorized will remedy at least a significant part of the constitutional deficiency. Clearly, it will have some effect, and may well reduce or obviate the need for further construction. There is no evidence in the record addressing whether the Receiver has attempted to utilize the lease-revenue bond funds authorized by AB 900 to fund any of his prison healthcare construction projects. The Receiver simply has not met his burden to justify why the State should spend another $8 billion in order to provide constitutionally adequate medical care.

5. The Receiver's Request Presents a Moving Target that Has No Basis in Law

Finally, there is no indication that this $8 billion is the Receiver's total request, and that more requests will not be forthcoming. As noted

above, there has been no determination as to what level of care is constitutionally sufficient. Absent that determination, the State has no way of knowing when, in the district court's view, it has complied with the dictates of the Eighth Amendment. The fact that the Receiver's plans to provide constitutionally adequate healthcare have changed so dramatically over time indicates that the standard has not been established.

The initial Stipulation for Injunctive Relief, which was "designed to meet or exceed the minimum level of care necessary to fulfill the defendants' obligation to plaintiffs under the Eighth Amendment to the United States Constitution" (ER 418–419), focused on staffing of emergency clinics by registered nurses, protocols for inter-institution transfers and treatment, a priority ducat system, and outpatient diets. (ER 410.) Those policies and procedures, which were intended to be sufficient to remedy any constitutional violation, are a far cry from the Receiver's request to seize $8 billion for his prison healthcare facilities construction program. So too does the Patient Care Order contemplate a much less invasive method of improving prison health care than the Receiver's massive construction program. That Order provided for the training of physicians (ER 408), the development of criteria and methods for identifying and treating high-risk

patients (ER 410), and the appointment of regional medical directors and regional directors of nursing to supervise line physicians and nurses (ER 410–411). As described above, substantial progress has been made in developing new treatment criteria and hiring both nurses and physicians. The fact that the Receiver is now planning much more confirms that the Receiver's concept of constitutionally adequate healthcare is a moving target that has no basis in law.

6. The District Court Failed to Make the Findings Required by the PLRA in Ordering State Defendants to Act in Contravention of State Law

Similarly, the district court erred in requiring the State Defendants to act in violation of state law without making the findings required by section 3626(a)(1)(B). "The court shall not order any prospective relief that requires or permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law, unless – (i) Federal law requires such relief to be ordered in violation of State or local law; (ii) the relief is necessary to correct the violation of a Federal right; and (iii) no other relief will correct the violation of the Federal right." *Id.* Under California law, funds can only be provided to the Receiver by the Controller drawing a warrant on

the State Treasury pursuant to a valid legislative appropriation. *See* Cal. Const. Art. XVI, Sec. 7 and Gov. Code § 12440, (authorizing the Controller to draw warrants only pursuant to a Legislative appropriation). The district court has not waived state law requiring that the Controller withdraw money from the treasury only pursuant to a valid appropriation. Rather, the district court's order simply instructs the Governor and Controller to transfer $250 million to the Receiver's accounts, something neither of them are permitted to do under state law absent a valid legislative appropriation.

While a court order might be sufficient in another situation to permit the Controller to draw a warrant in contravention of California law, the PLRA requires that a court make specific findings before it waives state law, including state law regarding appropriations. The failure to do so here is fatal to the district court's $250 million funding order. Although the district court referenced findings it made in the context of issuing other orders waiving state contracting law as justifying its Order for Payment, none of those other orders waived state law regarding appropriations. (ER 13, citing ER 180–193, ER 310–325.) Moreover, since federal law affirmatively bars the district court

from ordering the State to pay for the Receiver's construction project, and because the requirements of section 3626(a)(1)(A) have not been met, the project is neither required by federal law nor is it the only relief that would bring the State into compliance with the Eighth Amendment. Accordingly, the PLRA's requirements to waive state law have not been satisfied.

D. The State Has Not Waived the PLRA's Requirements

Finally, contrary to the Receiver's contentions below, State Defendants have not waived the PLRA's restrictions on the power of courts to order the construction of prisons or its other requirements for prospective relief. The text and legislative history of the PLRA show that its provisions cannot be waived, as the law was intended as a limitation on federal courts' interference with the operation of state prisons, even where state officials desired the involvement of federal courts. Even if the PLRA's provisions were subject to waiver, state officials never waived their protections. Rather, whenever state officials agreed to the Receiver's construction plans, they did so with an important proviso: that they be financed through vehicles requiring legislative approval. (ER 301, 309.)

1. The Text of the PLRA Shows its Provisions Are Not Subject to Waiver

The text of the PLRA makes clear that its provisions regarding prospective relief cannot be waived. Section 3626(c)(1) bars courts from approving a consent decree "unless it complies with the limitations on relief set forth in subsection (a)," 18 U.S.C. § 3626(c)(1), including the limitation on the court's ability to order the construction of prisons and the findings required to order prospective relief and to waive state law. 18 U.S.C. § 3626(a)(1)(A)–(C). If the restrictions on the court's authority contained in subsection (a)(1)(A)–(C) were waiveable, the restriction on the ability of a court to approve a consent decree that contained a provision requiring the court to oversee the construction of prison facilities or in approving prospective relief that was not constitutionally required or violated state law would have no effect, since the parties could simply waive application of subsection (a) in its entirety.

More specifically, section 3626(a)(1)(C) is not framed as an affirmative defense directed at the parties, but is rather directed at the *court's authority* to order construction of prisons. *See* 18 U.S.C. § 3626(a)(1)(C) ("Nothing in this section shall be construed *to authorize the courts*. . . .") (emphasis added); *see also id.* § 3626(c)(1) ("*[T]he court shall not enter or approve* a consent decree unless it complies with the limitations on relief set

forth in subsection (a).") (emphasis added). Similarly, with respect to findings needed to waive state law, a court may not even *permit* state officials to act contrary to state law unless it makes the findings required by section 3626(a)(1)(B). Accordingly, even if, contrary to fact, State Defendants had agreed to fund the Receiver's construction projects in violation of state law, the district court was still required to make findings that federal law required the Receiver to undertake the construction projects in violation of state law, that the construction projects were necessary, and that no other relief would provide prisoners with constitutionally adequate healthcare—findings the district court never made.

2. The PLRA's Legislative History Shows Congress Did Not Intend for States to Be Able to Waive its Protections

That Congress did not intend for states to be able to waive the protections of the PLRA is confirmed by the legislative history. As numerous commentators have noted, the PLRA was enacted in part "to curtail district courts' micro-management of state run prisons." *The Prison Litigation Reform Act of 1995*, 63 Brook. L. Rev. 320, 328 (1996). Not only was this out of a desire to protect states, but it was also to protect the courts from the costs associated with overseeing numerous state prison systems.

See The End of the Prison Law Firm?: Frivolous Inmate Litigation, Judicial Oversight, and the Prison Litigation Reform Act of 1995, 29 Rutgers L.J. 362, 369 (1997–1998) (noting that Congress intended to "curb the abuses" of the federal judiciary in "seiz[ing] control of entire state correctional systems" and noting the number of prisons overseen by the federal judiciary). That is why Congress, in enacting the restriction on a court's ability to order prison construction, was primarily concerned with the use of consent decrees, which Congress felt were being used to "intrude into a state criminal justice system and seriously undermine the ability of the local justice system to dispense any true justice." H.R. Rep. 104-21 at 9. Notably, Congress still permitted parties to pursue whatever relief they felt was justified in private settlement agreements, *see* § 3626(c)(2), but cautioned that "they cannot expect to rely on the court to enforce the agreement." H.R. Rep. 104-21 at 25. It is clear that Congress was concerned, not just about the rights of defendants, but rather about the burden on courts from overseeing broad-based consent decrees.

Those concerns are evident here. The Receiver would have the district court oversee an $8 billion construction project that is so large that the Receiver has hired hundreds of architects and engineers to design the

new prison healthcare facilities. (ER 89.) Moreover, each of these facilities are to be self-sufficient (ER 298), such that in addition to running seven facilities responsible for 10,000 prisoners, the Receiver (and the district court) will presumably be responsible for overseeing the infrastructure for those facilities. The $8 billion cost and the fact that the 10,000 bed construction plan takes up 960 pages detailing even the most minute detail of the plan shows just how massive the Receiver's project is.

The Supreme Court's concern in *Lewis v. Casey*, 518 U.S. 343, 362 (1996) regarding federal court oversight of state prison facilities is particularly relevant here. In that case, the district court had entered an injunction governing prisoners' right to access the prison law library, detailing the hours the library was to be open, the contents of the library, and the educational requirements for librarians, among other details. *Id*. at 347. The Supreme Court concluded that the injunction regarding access to legal materials "was inordinately—indeed, wildly—intrusive." *See also id.* at 384 (Thomas, J., concurring) ("The District Court's order vividly demonstrates the danger of continuing to afford federal judges the virtually unbridled equitable power than we have for too long sanctioned. We have here yet another example of a federal judge attempting to direct or manage the

reconstruction of entire institutions and bureaucracies, with little regard for the inherent limitations on his authority.") (Citations omitted.) If the regulation of access to library materials at issue in *Lewis* is in excess of a federal court's authority, it is clear that the district court's Order for Payment—to begin to fund an $8 billion, 10,000 bed construction project as detailed in the Receiver's 960-page Facility Program Statement, Second Draft—also implicates the separation of powers and federalism concerns reflected in the PLRA.

3. Even if the State Could Legally Waive the PLRA's Protections, It Has Not Done So in this Case

Finally, the district court's assertion that the State has somehow waived its objections under the PLRA, in addition to being legally wrong, is also factually incorrect. The Receiver has asserted on many occasions that by failing to object to his Turnaround Plan of Action, which contemplated the prison construction program, the State has now waived any objection to it. That argument ignores the fact that while the Turnaround Plan of Action did allow the Receiver to construct prison facilities, it required him to use lease revenue bonds to finance it. (ER 301 ["The one-time capital cost for the Healthcare Improvement and Healthcare Facility Expansion projects is

estimated to be $7 billion. These projects will be funded through lease revenue bonds over a 25 year period."].) Similarly, in a coordination agreement allowing the Receiver to oversee the construction of beds for related class-actions, to which the state defendants did not object, the agreement specifically provides that AB 900 funds were to be used. (ER 309.) Accordingly, the State's consent to funding was conditioned on the use of legislatively authorized funding sources, not court orders. Having now concluded that state funding is inadequate, the Receiver cannot simply ignore those portions of the orders calling for legislative funding while attempting to hold the State to the parts of the orders that contemplate some sort of construction program.

Moreover, the OAR does not foreclose the arguments under the PLRA, since the OAR should not be interpreted to authorize prison construction. The OAR must be interpreted in light of the circumstances of its entry. *See Reno Air Racing Ass'n Inc v. McCord Inc.*, 452 F.3d 1126, 1133 (9th Cir. 2006). The OAR was entered in response to the State's alleged failure to meet the requirements of the Stipulation for Injunctive Relief entered into on June 13, 2002, and the Stipulated Order re Quality of Patient Care and Staffing entered into on September 17, 2004. (ER 407–

412, 417–434.) These consent decrees were designed to address staffing, treatment protocols, and other administrative issues. They neither identify nor contemplate prison construction. Nor do any of the Court's Findings of Fact adopted in connection with the appointment of the Receiver make any mention of prison construction. (ER 336–388.) Rather, the Receiver's office was conceived of as implementing policy and personnel changes to bring medical care to a constitutional level; not to undertake a massive prison construction program designed to improve overall prison living conditions. Accordingly, neither the OAR's provision governing the powers of the Receiver nor the provision that the State pay for the Receiver's expenses can be stretched so far as to cover an $8 billion construction program. Since the OAR does not permit the Receiver to undertake his prison construction program, State Defendants should not be required to provide him with a first installment of $250 million to fund that program.

E. The District Court's Order Violates California's Sovereign Immunity

Even if it were permitted under the PLRA, the relief requested by the Receiver—an order ultimately compelling the State to pay $8 billion from the State Treasury—is barred by principles of sovereign immunity reflected in the Eleventh Amendment. The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Eleventh Amendment, and the concept of sovereign immunity inherent in it, "largely shields States from suit in federal court without their consent, leaving parties with claims against a State to present them, if the State permits, in the State's own tribunals." *Hans v. Louisiana*, 134 U.S. 1, 13 (1890). An individual may, in limited circumstances, sue a state official for prospective injunctive relief under the *Ex Parte Young* exception to the Eleventh Amendment. *See Edelman v. Jordan*, 415 U.S. 651, 664–65 (1974) (describing the scope of the *Young* exception). This exception, however, does not apply to the relief being sought here. Even if it did, the principles underlying the Eleventh Amendment and sovereign immunity would not be served by its rigid application, and accordingly, Supreme Court precedent bars its use in this case. Moreover, although the State has agreed to a consent decree, it did so only with respect to non-monetary injunctive relief. For the first time, the Receiver has sought monetary relief that does not fall within the *Ex Parte Young* exception, and accordingly, the State's assertion of sovereign immunity is appropriate and timely.

1. The Relief Sought Does Not Fit Within the *Ex Parte Young* Exception

Under the Supreme Court's decision in *Young*, a state official may, in limited circumstances, be sued for prospective injunctive relief without running afoul of the Eleventh Amendment. The district court's order, however, does not involve injunctive relief for purposes of the Eleventh Amendment. Rather, it is a bare order to pay the Receiver, an agent of the district court, $250 million from the State Treasury. Even though the $250 million, and ultimately the $8 billion sought by the Receiver, will be used to fund the construction of prison healthcare facilities under the purported authority of the OAR, it does not change the fact that the district court ordered payment of cash to the Receiver, and as such, is not the sort of ancillary effect on the treasury contemplated by *Edelman*, 415 U.S. at 667–68, but is a direct effect on the treasury.

The Supreme Court has cautioned that the *Young* exception should not be interpreted in such a manner as to eviscerate the underlying protections of the Eleventh Amendment and state sovereign immunity. Even where state officials are being sued, "the State itself will have a continuing interest in the litigation whenever state policies or procedures are at stake." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269 (1997). As a result, the

Supreme Court has cautioned that "[t]o interpret *Young* to permit a federal-court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism. . . ." *Id.* The proper application of *Young* in this case must recognize that it is one thing to order something to be done that would necessarily cost money; it is another thing to order the direct payment of money as is being sought here.

The fact that the district court's order involves the direct payment of money from the State Treasury weighs heavily in favor of a finding that California's sovereign interests are implicated. "Courts of Appeals have recognized the vulnerability of the State's purse as the most salient factor in Eleventh Amendment determinations." *Hess*, 513 U.S. at 48; see also *id*. at 49 ("[T]he state treasury factor is the most important factor to be considered . . . and, in practice, [courts] have generally accorded this factor dispositive weight."). In this case the district court ordered a direct levy on the State Treasury. Unlike in *Hess*, if the Receiver's motion is granted in full, which appears likely given that there is no legal difference between the first $250 million and the remainder requested by the Receiver, California will be forced to make mandatory payments totaling $8 billion, a significant

percentage of the State's General Fund. If there are any doubts as to whether this type of relief is contemplated by the *Ex Parte Young* line of cases, *Hess* makes clear that the direct impact on the State's Treasury should resolve those doubts in favor of finding that the State is protected by its sovereign immunity.

Consequently, the suit should properly be viewed as against the State, not the Governor or the Controller, and is thus barred by the Eleventh Amendment and California's sovereign immunity. "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Ford Motor Co. v. Dep't. of Treasury of Indiana*, 323 U.S. 459, 464 (1945). Accordingly, even though the relief sought is framed as injunctive, prospective relief, the fact remains that it is the State's interests, not that of the officer, that are paramount in this case. "The general rule is that a suit is against the sovereign if the judgment sought would expend itself on the public treasury…" *Pennhurst*, 465 U.S. at 101 n. 11. To "adher[e] to an empty formalism" in this case would render the Eleventh Amendment ineffective, and contravene the Supreme Court's instruction "that Eleventh

Amendment immunity represents a real limitation on a federal court's federal question jurisdiction." *Coeur d'Alene*, 521 U.S. at 270. The *Young* exception does not apply to district court's order requiring the State to pay the Receiver $250 million.

2. The Relief Sought by the Receiver Implicates "Special Sovereignty Interests"

Because of the unprecedented amount being sought, the Receiver's Motion for Funding also implicates "special sovereignty interests" that strongly weigh in favor of recognizing California's sovereign immunity. In *Coeur d'Alene*, the Supreme Court dismissed a suit against the State of Idaho despite its acknowledgment that"[t]he Tribe has alleged an ongoing violation of its property rights in contravention of federal law and seeks prospective injunctive relief," which "is ordinarily sufficient to invoke the *Young* fiction." 521 U.S. at 281. Citing the "special sovereignty interests" of a State in its lands and navigable waterways, however, the Court nevertheless concluded that the suit was barred by principles of sovereign immunity. *Id.* at 287. Courts have recognized that *Coeur d'Alene* created an exception to *Young* for suits that implicate a state's "special sovereignty interests." *See, e.g., ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178, 1191 (10th Cir. 1998). This Court has suggested that *Coeur d'Alene* bars

injunctive relief that would otherwise fall under the *Young* exception where "the relief requested would be so much of a divestiture of the state's sovereignty as to render the suit as one against the state itself." *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1048 (9th Cir. 2000). Making this determination "requires an assessment of the intrusion on state sovereignty of the specific relief requested by the plaintiff." *In re Ellett*, 254 F.3d 1135, 1144 (9th Cir. 2001).

Examining the specific relief requested by the Receiver, it is clear that his request implicates special sovereignty interests such that *Young* should not apply even if, contrary to Supreme Court case law, its requirements were technically met. The relief sought in this case is unprecedented: an $8 billion levy on the State's Treasury over a period of three years. While the district court's order "only" involved $250 million, still a substantial sum, every indication is that the court will order the State to make future payments as required by the Receiver to fund his construction project. Indeed, the district court suggested as much at the final hearing on State Defendants' application for a stay. (ER 98–99.)

The usurpation of the State's finances that would result from an $8 billion payment is clearly a divestiture of California's sovereignty and

implicates the Eleventh Amendment, the primary purpose of which was "the prevention of federal-court judgments that must be paid out of a State's treasury." *Hess*, 513 U.S. at 39. Moreover, given the amount of money at stake, the Receiver's Motion for Funding and the district court's Order for Payment is tantamount to completely reordering the State's financial priorities in contravention of California's democratic processes. The Receiver's attempt to bypass the normal legislative process of appropriating funds, particularly funds on such a massive scale, plainly implicates special sovereignty interests. California faces a fiscal crisis that has only grown worse since the Receiver filed his Motion. Adding a $8 billion liability on top of the fiscal issues already facing the State would "place unwarranted strain on the State's ability to govern in accordance with the will of [its] citizens." *Alden*, 527 U.S. at 750–51.

By bypassing the Legislature, the Receiver and the district court would insert themselves in a process that is one of the most basic decisions a State makes, as "[t]he allocation of the state's financial resources among competing needs and interests lies at the heart of the political process." *Id.* at 751. As the founders recognized, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a

few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47, at 307–08 (James Madison) (Modern Library ed., 2000). The State thus has a special sovereign interest in the disposition of the money being sought by the Receiver, particularly given the magnitude of his request. As the Supreme Court noted in *Alden*:

> If the principle of representative government is to be preserved to the States, the balance between competing interests [for scarce resources] must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen.

Id. These decisions are precisely the sort of special interest the Court contemplated in *Coeur d'Alene* as requiring application of the Eleventh Amendment, even were this Court to conclude that the formal requirements of *Young* are met.

3. Because the Prior Consent Decrees Only Provide for Injunctive Relief, the State Has Not Waived its Sovereign Immunity with Respect to the Receiver's Request for Monetary Relief

As the Receiver's Motion for Funding was the first attempt to directly attach funds from the State's Treasury, the State's invocation of the Eleventh Amendment before the district court was timely, and the State has not

waived its sovereign immunity. The "test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Bd.*, 527 U.S. 666, 675 (1999). For a state to have waived its sovereign immunity, there must be "unequivocal evidence of the state's intention to subject itself to the jurisdiction of the federal court." *Hill v. Blind Indus. and Serv. of Maryland*, 179 F.3d 754, 758–59 (9th Cir. 1999). The State has not unequivocally waived its sovereign immunity in this case, either by statute, *Atascadero*, 473 U.S. at 241, or through any pleading in this litigation.

The State has similarly not constructively waived its sovereign immunity. *Hill*, 179 F.3d at 756. While the State signed a consent decree, it did so only with respect to non-monetary injunctive relief; in no way did it agree to the monetary relief being sought by the Receiver. Until the Receiver's Motion for Funding, all of the relief requested by the plaintiffs and the Receiver has been injunctive in nature, and thus fallen within the *Young* exception to the Eleventh Amendment. Accordingly, the State did not have occasion to raise the defense until the Motion was filed and the Receiver went beyond the *Young* exception and sought to directly levy the State's Treasury. So long as a state raises a sovereign immunity defense

when it appears clear that defense applies, it is timely even if the defense is raised for the first time relatively late in the proceedings. *See Baird v. Kessler*, 172 F. Supp. 2d 1305, 1313–14 (E.D. Cal. 2001) ("Because it was not obvious from the face of the complaint whether they were effectively being sued in their official or individual capacity, it was not until the close of discovery that defendants felt they could support a defense of sovereign immunity. Thus, defendants have not unambiguously waived their right to assert the defense of sovereign immunity under the Eleventh Amendment."). Here, it was only when the Receiver filed his Motion for Funding did the State have a valid sovereign immunity defense. Moreover, given the enormous sum of money sought by the Receiver, all inferences should be drawn against waiver. Having raised the defense at the first occasion where it was implicated, California has not unequivocally waived the defense.

F. The District Court Erred In Dismissing As Moot State Defendants' Motion to Make Public the Receiver's Construction Plans

Contrary to the district court's conclusion, the Receiver's public release of a third draft of his Facility Program Statement does not render moot State Defendants' request that the second draft, which formed the basis of the Receiver's $8 billion request, be made public. These are separate and

distinct documents; the fact that State Defendants and the public have access to one draft of the Receiver's construction plans does not alter the fact that the public does not have access to, and State Defendants cannot discuss publicly, the draft of the construction plans that was being considered at the time the Receiver filed his motion requesting $8 billion in state funds.

A dispute is moot only where "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Northwest Environmental Defense Center v. Gordon*, 849 F.2d 1241, 1244 (9th Cir. 1988). "The basic question is whether there exists a present controversy as to which effective relief can be granted." *Council of Ins. Agents & Brokers v. Molasky-Arman*, 552 F.3d 925, 933 (9th Cir. 2008). A court's denial of a request as moot is appropriate "only if it were absolutely clear that the litigant no longer had any need of the judicial protection that it sought." *Id*.

Here, there is still a live controversy as to whether State Defendants may release portions of the second draft of the Receiver's Facility Program Statement to the public. Currently, they may not. If the district court were to grant their motion, State Defendants would be able to do so. The existence of *another* draft of the document has no bearing on whether State

Defendants may publicly discuss the contents of the second draft of the Receiver's plans. In short, there is still effective relief available for the State Defendants, which would allow them to make the second draft of the Receiver's construction plans public.

The district court may have been confusing mootness with relevance, but in any event, the second draft of the Facility Program Statement remains relevant, and its relevance shows why State Defendants' request is not moot. The second draft, as opposed to the current (third) draft, was the document that state officials obtained when deciding whether to oppose the Receiver's funding request. It remains relevant insofar as the public is entitled to know why their elected officials took the position that the Receiver's construction plans should not be funded, particularly in such a high profile case. The public is entitled to see for itself whether the Receiver's construction plans warrant the $8 billion investment he is seeking. While those plans may have changed, the public is still entitled to examine them, since the Receiver apparently thought they were sufficiently concrete to warrant contempt proceedings against two of California's statewide elected officials. Moreover, in analyzing the Receiver's third draft, state officials, and presumably the public, would benefit from comparing the two drafts and

asking what has changed and how those changes affect the cost of the project. Keeping the second draft secret would force state officials to do this comparative analysis out of the public eye. These reasons for the public release of the Facility Program Statement, Second Draft illustrate the district court's error in dismissing as moot the State's request that the second draft of his plan be made public.

If this Court concludes that State Defendants' request that the district court remove the confidential-material designation from the Receiver's Facility Program Statement, Second Draft is not moot, it should proceed to rule on the merits of State Defendants' request. Given that the issue is a pure question of law, *i.e.*, whether the Facility Program Statement, Second Draft is "confidential information" as that term is defined in the protective order, this Court is in as good a position as the district court to resolve that issue. The protective order in place below defines confidential material as "'Department of Corrections' ('CDC') records that identify any inmate or parolee ('personal information') or that are designated by defendants as threatening prison safety and/or security if disclosed without protective conditions ('security information'), and which are produced by defendants in informal and/or formal discovery in this action." (ER 414.) The vast

majority of the Receiver's Facility Program Statement, Second Draft does not fall within this definition of confidential material. Most importantly, this second draft is not a record of CDCR. Even if it were, most of its contents do not meet the definition of confidential material. The Facility Program Statement, Second Draft contains no personal information. There is, however, some information that constitutes security information and that should be kept confidential, which was identified in the motion filed in the district court. (ER 1461–1485.) The great bulk of the Facility Program Statement, Second Draft, however, does not constitute information that, if released publicly, could be a threat to the security or safety of the prison system. Aside from material designated by CDCR as confidential, the Receiver's Facility Program Statement, Second Draft contains information regarding the generic layout, design, and amenities of the seven prison healthcare facilities sought to be built by the Receiver. None of that information is remotely specific enough to be considered a security risk. Certainly, the Receiver has not offered any justification for concluding that his Facility Program Statement, Second Draft as a whole constitutes security information.

The public's interest in learning the details of the Receiver's plans also warrants its release. There "is a strong presumption in favor of access to court records." *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003). That presumption can be overcome only by a showing of a "sufficiently important countervailing interest." *San Jose Mercury News, Inc. v. U.S. District Court, Northern District (San Jose)*, 187 F.3d 1096, 1102 (9th Cir. 1999). "This presumption of access may be overcome only 'on the basis of articulable facts known to the court, not on the basis of unsupported hypothesis or conjecture.'" *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995). The factors to be considered in making this determination include the "public interest in understanding the judicial process and whether disclosure of the material could result in improper use of the material for scandalous or libelous purposes or infringement upon trade secrets." *EEOC v. Erection Co., Inc.*, 900 F.2d 168, 170 (9th Cir.1990).

These factors strongly weigh in favor of public access to those parts of the Receiver's Facility Program Statement, Second Draft that do not constitute security information. The Facility Program Statement contains no trade secrets, nor does it involve any personal information that could be

misused. Moreover, as the document reflects the most detailed justification for the Receiver's request to seize $8 billion from the State Treasury at the time the request was made, there is a compelling reason for it to be disclosed to the public. Californians deserve to know how the Receiver intends to spend such an enormous sum of money, particularly given the State's precarious financial situation. The fact that he has issued another draft does not diminish the public's interest in understanding the process by which the Receiver arrived at his $8 billion figure. Moreover, it was the second draft, not the current draft, that formed the basis of the Receiver's Motion for Funding. Finally, the fact that the Receiver is acting under the authority of a federal court is yet another reason why his actions should be subjected to public scrutiny.

CONCLUSION

The district court's order requiring the State to make a $250 million down-payment on the $8 billion requested by the Receiver violates the PLRA's restriction on the construction of prisons, and was not accompanied by any of the findings required by the PLRA. Moreover, the court-ordered payment violates California's sovereign immunity. Accordingly, that decision should be reversed. So too should this Court reverse the district

court's decision denying State Defendants' request to remove the confidential-material designation from the Receiver's Facility Program Statement, Second Draft, as there remains a live controversy regarding whether that draft can be released to the public.

Dated: December 8, 2008

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CERTIFICATE OF COMPLIANCE

PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR 08-17412

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

[x] 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

[x] Proportionately spaced, has a typeface of 14 points or more and contains 13,189 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

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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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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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☐ 4. **Amicus Briefs**.

☐ 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 7,000 words or less,

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December 8, 2008
Dated

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

STATEMENT OF RELATED CASES
PURSUANT TO CIRCUIT RULE 28-2.6

Counsel hereby provides notice that two related cases, *Plata et al. v. Schwarzenegger et al.*, No. 08-17362, and *Plata et al. v. Schwarzenegger et al.*, No. 08-74778 are currently pending before this Court. Case No. 08-74778 is a Petition for Writ of Mandamus that raises the same issues as those raised in this appeal, and has been calendared with this appeal in an order dated November 24, 2008.

Case No. 08-17362 involves the appeal of a discovery order entered in the three-judge panel proceeding convened pursuant to 18 U.S.C. § 3262(a)(3)(B).

Dated: December 8, 2008

EDMUND G. BROWN JR.
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s/ Daniel J. Powell

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CERTIFICATE OF SERVICE

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

I hereby certify that on December 8, 2008, I electronically filed the following document(s) with the Clerk of the Court by using the CM/ECF system:

BRIEF OF APPELLANTS

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

I further certify that some of the participants in the case are not registered CM/ECF users. On December 8, 2008, I have mailed the foregoing document(s) by First-Class Mail, postage pre-paid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 8, 2008, at San Francisco, California.

Susan Chiang
Declarant

[redacted]
Signature

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