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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

GEORGE THOMAS, et al.,	
Plaintiffs,	
v.	CIVIL ACTION NO. CV 77-P-0066-S
TOM GLOOR, et al.	
Defendants.	

WILLIE ROY STUBBS, et al.	
Plaintiffs,	
.	CIVIL ACTION NO. CV 77-P-0132-S
TOM GLOOR, et al.	
Defendants.	

RESPONSE OF THE UNITED STATES OF AMERICA TO THE STATE DEFENDANTS' MOTION TO TERMINATE PREVIOUSLY GRANTED RELIEF

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The United States of America respectfully submits this response to the State Defendants' "Motion to Terminate Injunction Pursuant to the Prison Litigation Reform Act," along with an affidavit of penologist Steven J. Martin (attachment A). The United States responds as intervenor with respect to the constitutionality (and related interpretive issues) of challenged provisions of the Prison Litigation Reform Act ("PLRA" or "Act"), and as amicus curiae with respect to other issues.

SUMMARY

In 1978, this Court entered an injunction binding on the members of the Jefferson County Commission (the "County defendants"), the Sheriff of Jefferson County, the State Commissioner of Corrections and the members of the State Board of Corrections (the State defendants). Based on the Court's finding that conditions of confinement at the Jefferson County Jails were unconstitutional, the injunction imposed modest corrective measures. In 1991, the Court modified the injunction. Faced with a threat by the State to end prompt transfer of state inmates, the Court superceded the paragraph of the injunction relating to the State's obligation to transfer state inmates, and required the State to take such prisoners within seven days of their eligibility for transfer.

Now, the State defendants seek to terminate the previously entered orders in this case pursuant to the PLRA; the plaintiffs argue that the PLRA is unconstitutional; and the County defendants and the Sheriff argue that the relief remains necessary in light of current conditions.

The United States submits that the PLRA is constitutional. On the appropriate resolution of the State defendants' motion, as briefed below, because the challenged relief may have been supported by the requisite findings of liability and appropriate tailoring, the State's motion may be premature under the PLRA. In any event, even if the relief is eligible for termination, the United States respectfully suggests that the Court should hear evidence, and based on that evidence, refuse to terminate the challenged relief, which remains necessary and appropriately tailored under current conditions.

STATEMENT OF INTEREST

Pursuant to 28 U.S.C. § 2403(a), the United States is authorized to intervene as of right whenever the constitutionality of an Act of Congress affecting the public interest is called into question. In addition to the United States' general interest in any suit in which the constitutionality of an Act of Congress is challenged, the judicial construction of certain provisions of the PLRA may affect the Attorney General's enforcement of the Civil Rights of Institutionalized Persons Act, 42 U.S.C. §§ 1997 et seq., as well as the responsibilities of the Bureau of Prisons under current and future court orders. Moreover, as the Court is aware, the United States has been amicus curiae in this lawsuit for many years.

STATUTORY BACKGROUND

On April 26, 1996, the President signed the PLRA into law. Section 802 of the Act, which consists of amendments to 18 U.S.C. § 3626, establishes standards for the entry and termination of prospective relief in civil actions concerning conditions in prisons, jails, and juvenile detention facilities.[1/] With regard to the entry of such relief, Section 3626(a)(1)(A) provides:

> Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the

1/ Section 802 of the PLRA does not apply to habeas corpus proceedings challenging "the fact or duration of confinement in prison." 18 U.S.C. § 3626(g)(2).

> violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

Termination of relief is governed by several sections of the Act. In general, defendants are entitled to request the termination of prospective relief according to a time schedule set out in Section 3626(b)(1)(A), which provides:

> In any civil action with respect to prison conditions in which prospective relief is ordered, such relief shall be terminable upon the motion of any party . . . –
>
> (i) 2 years after the date the court granted or approved the prospective relief;
>
> (ii) 1 year after the date the court has entered an order denying termination of prospective relief under this paragraph; or
>
> (iii) in the case of an order issued on or before the date of enactment of the Prison Litigation Reform Act, 2 years after such date of enactment.

Section 3626(b)(2), however, provides for the immediate termination of relief that was entered without the findings required by Section 3626(a)(1):

> In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a

> finding by the court that the 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.

When termination is sought under either subsection (b)(1) or (b)(2), the standard applicable to the termination decision is set out in Section 3626(b)(3), which provides:

> Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current or ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

Procedures for motions to terminate prospective relief are set out in Section 3626(e):

> (1) Generally. – The court shall promptly rule on any motion to modify or terminate prospective relief in a civil action with respect to prison conditions.
>
> (2) Automatic Stay. – Any prospective relief subject to a pending motion shall be automatically stayed during the period--
>
> (A)(i) beginning on the 30th day after such motion is filed, in the case of a motion made under paragraph (1) or (2) of subsection (b); [and]
>
> * * *
>
> (B) ending on the date the court enters a final order ruling on the motion.

For all of these provisions, "relief" includes "all relief in any form that may be granted or approved by the court, and includes consent decrees but does not include private settlement agreements," 18 U.S.C. § 3626(g)(9), and "prospective relief" means "all relief other than compensatory monetary damages," 18 U.S.C. § 3626(g)(7). The Act contains a provision concerning retroactivity, which provides that "IN GENERAL" its amendments to 18 U.S.C. § 3626 "shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of the [PLRA's enactment]." Pub. L. No. 104-134, § 802(b). Finally, the Act contains a severability provision that preserves the remainder of the Act if any portion is held to be unconstitutional. Id., § 810.

Taken together, these provisions reflect Congress's concern that relief in prison reform cases be narrowly drawn to address violations of federal rights. See H.R. Rep. No. 21, 104th Cong., 1st Sess. at 24 n.2, 26 (1995). As applicable to relief entered after the PLRA's effective date, the Act is designed to establish a uniform remedial structure, and to provide for periodic review of individual decrees to determine whether they remain necessary to remedy violations of federal rights. As applicable to decrees entered before the PLRA's passage, the Act seeks to ensure that continuing relief comports with present legal standards.

PROCEDURAL BACKGROUND

This case was brought in 1977 as a class action by inmates in the Jefferson County Jails, in Birmingham and Bessemer Alabama, alleging unconstitutional conditions of confinement. The class was certified in 1978. The defendants included county and state officials with responsibilities for conditions at the jail, and for transferring sentenced inmates from the jail to the state's facilities. (Inmates ready to be transferred are referred to herein as "state-ready.") The United States sought and was granted permission to appear as amicus curiae, with rights to file briefs, argue, "examine witnesses called or deposed by the parties, and generally assist the parties, as it may choose, in the preparation for and conduct of the trial." Order of December 1, 1977 (attachment B).

From the very beginning of the case, the pleadings have highlighted the role of the State as a contributor to unconstitutional conditions. In his Answer to the Complaint, the Sheriff stated that "the jails are overcrowded due to the failure and refusal of the Board [of Corrections] to perform its legal duties to accept for confinement prisoners sentenced to imprisonment in the penitentiaries of the State of Alabama." Answer of defendant Mel Bailey at 2, ¶ 17 (attachment C). The Sheriff cross-claimed against the State defendants, noting their obligation under Alabama law to aid in managing county jails, and to remove prisoners once they became state-ready. The cross-claim stated that the State's failure to remove state-ready prisoners had caused a

> backlog of convicts awaiting removal to the penitentiary [which] has resulted in seriously overcrowded and dangerous conditions at the Jefferson County Jails, which conditions are exacerbated by the fact that said jails are designed primarily as holding facilities, rather than for long term confinement. Said overcrowding poses a very real threat of violence and harm to both the inmates and staff of the Jefferson County Jails.

Id. at 5-6, ¶ 9(a). In his cross-claim, the Sheriff asked the Court to require the State defendants to take custody of all the state-ready inmates in the jails, and to fulfill its other obligations under state and federal law. The State defendants sought to be dismissed from the action, but the court denied their motions.

In 1978, all of the parties (including the State defendants), and also amicus United States, entered into a stipulation of facts. The stipulation (attachment D) set out a description of conditions at the jails, along with certain legal conclusions. It stated that on a recent date, 370 of 675 inmates held in the jails were state-ready and that this figure was representative of typical conditions. The stipulation also set out certain minimum "reasonable and necessary health standards," including light and ventilation at stated levels, running water, flush toilets, and fire safety plans. It stated, further, that "a jail is not an appropriate place for the long-term incarceration of a person who is mentally retarded or who is psychologically disturbed . . . . The housing of such persons in a jail also represents a threat to the safety of other prisoners." As for remedy, the parties attached a proposed injunction, but did not agree to its imposition. Instead, they stipulated as follows: "The form of injunction attached hereto has been examined by the parties. While the injunction is not agreed to by each party, it is consistent with the facts agreed to herein and with prior decisions of this Court in similar cases. Each party hereto reserves the right to appeal."

The proposed injunction included provisions relating to population levels, outdoor recreation, light, ventilation, plumbing, fire safety, transfer of inmates with mental illness or mental retardation, direct supervision of inmates, medical records, and dispensing of prescription drugs. The provisions on population are particularly relevant in the current proceeding. First, the proposed injunction set a limit on the number of inmates who could be housed at the Jails, specifying the number of inmates appropriately housed in each existing type of cell, and the number of square feet of living space required for each inmate. (This part of the injunction seems intended to apply to the Jails then operating, on top of the Birmingham and Bessemer courthouses, not to the new Jails, built in the 1980s.) Second, the proposed injunction provided that if the County defendants were housing more prisoners in each cell than the preceding paragraph permitted, "the County Defendants shall notify the Board of Corrections which shall take the excess into the penal system or transfer them under the provisions of Ala. Code. § 14-6-87 et seq." The Court entered an injunction substantially similar to that submitted with the stipulation. Order of Aug. 28, 1978 (attachment E). There was no appeal.

The injunction was modified slightly several months after entry, and there were numerous rounds of contempt motions, in the late 1970s and early 1980s, each related to the population provisions set out above. The State and County defendants were at various points found in contempt. In the course of deciding the contempt motions, this Court discussed its 1978 order, explaining that the injunction had been "designed to correct unconstitutional conditions at the jails." Order of October 22, 1981 at 1 (attachment F). The Court explained that "pursuant to a stipulation of facts with suggested decree, the court on August 28, 1978, found that conditions in both jails were unconstitutional and directed that in one year the populations be reduced to constitutional limits." Id. at 7. The Court continued by "not[ing] that the court's determinations as to the maximum permissible population levels at the . . . jails were made by taking into account the totality of conditions at those jails, the approach that has subsequently been approved by the Supreme Court in Rhodes v. Chapman [452 U.S. 337] (1981)." Id. at 7-8. The Court expressed its opinion that "implementation of [the] injunctions . . . has been . . . difficult and frustrating," id. at 1, and stated that it "has, moreover, by repeated extension of time given attention to the difficulties experienced by the defendants in meeting the constitutional standards." Id. at 9. After finding the State and County defendants in contempt in 1980 and again in 1981, and giving them an opportunity to purge the contempt, the Court imposed a fine of several hundred thousand dollars (some of which was remitted to the defendants after they remedied the contempt in 1982).

The next significant proceedings were in 1991, and were started by the Sheriff and the County defendants in response to a notice received from the State that the Board of Corrections intended to greatly reduce the rate at which it removed state-ready prisoners from the jails. By motion, the Sheriff and the County defendants asked the Court to modify the injunction to clarify that it required the State to remove state-ready prisoners promptly. Motion to Modify Injunction, May 1, 1991 (attachment G). In response, the Court entered an order modifying its injunction and requiring the State defendants to remove prisoners within seven days of their becoming state-ready. Order of May 20, 1991 (attachment H).

Pursuant to the PLRA, the State defendants now seek to terminate all relief in the case, but focus especially on the 1991 order. In response to this filing the plaintiffs have challenged the constitutionality of the PLRA. The County defendants and the Sheriff also have opposed the motion to terminate by arguing that the challenged relief is ineligible for termination because the requisite findings regarding liability and appropriate remedial scope have already been made, and because the challenged relief remains necessary under current conditions. The County defendants and the Sheriff are not seeking to terminate those parts of the injunction that apply to them.

ARGUMENT

I. THE STATE MAY NOT CHALLENGE RELIEF TO WHICH IT IS NOT BOUND.

The State defendants' motion is unclear, but appears to seek to terminate not only the 1991 order, but also the other parts of the injunction, which are operative not against the State defendants, but against the County defendants and the Sheriff. But the County defendants and the Sheriff are not seeking termination of their previously ordered obligations, and the State defendants are not entitled to use Section 3626(b)(2) as a way of making decisions for other defendants. The Court should hold that the State defendants may not seek to terminate prospective relief to which they are not bound, where the parties who are bound are not seeking termination, and should limit the State defendants' Motion to Terminate to the State's own obligations.

II. THE IMMEDIATE TERMINATION PROVISIONS MAY NOT APPLY.

Defendant's motion to terminate the injunction in this case relies on 18 U.S.C. § 3626(b)(2), which — limited by the following subsection, (b)(3) — provides for the immediate termination of any relief granted or approved "in the absence of a finding by the court that the 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." Where findings that meet the standards of (b)(2) have been made in support of challenged relief, the relief is ineligible for immediate termination under the PLRA, though a defendant may in the future be able to move to terminate such relief under Section 3626(b)(1), which (again, limited by subsection (b)(3)) provides for termination starting two years after the date of the Act, April 26, 1998.

The statutory standard for findings set out in (b)(2) is fully consistent with the pre-enactment limitations on remedies in institutional reform cases. See Smith v. Arkansas Dep't of Corrections, 103 F.3d 637, 645-47 (1996). Even before the PLRA was enacted, it was settled law that in constitutional cases "the nature of the violation determines the scope of the remedy." Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971). The "remedy must therefore be related to 'the condition alleged to offend the Constitution.'" Milliken v. Bradley, 433 U.S. 267, 280 (1977) (citation omitted). See also McLendon v.

Continental Can Co., 908 F.2d 1171, 1182 (3d Cir. 1990) ("[i]n granting injunctive relief, the court's remedy should be no broader than necessary to provide full relief to the aggrieved plaintiff"); Ruiz v. Estelle, 679 F.2d 1115, 1145 (5th Cir. 1982) ("[r]eparative injunctive relief must be targeted at elimination of the unconstitutional conditions. . . . Therefore, a court can order only relief sufficient to correct the violation found"), vacated in part on other grounds, 688 F.2d 266 (1982), cert. denied, 460 U.S. 1042 (1983); Toussaint v. McCarthy, 801 F.2d 1080, 1087 (9th Cir. 1986) ("our goal is to cure only constitutional violations"), cert. denied, 481 U.S. 1069 (1987).

Congress was well aware of the state of the law in this area when it enacted the PLRA. As noted in the House Judiciary Committee Report on the provisions that ultimately became the PLRA, the "dictates of the provision are not a departure from current jurisprudence concerning injunctive relief." H.R. Rep. No. 21, 104th Cong., 1st Sess. at 24 n.2 (citing McLendon, Milliken, and Toussaint). Thus where relief was imposed in litigation, rather than by consent, such relief may already have been tested against the standards now reflected in subsection (b)(2). If a court previously made findings with respect to the challenged prospective relief that meet the substance of subsection (b)(2)'s requirements, then the relief is ineligible for "immediate termination."

A court need not have anticipated and used the precise language of the PLRA for its prior findings to satisfy the standard set forth by subsection (b)(2). Otherwise, it is unlikely that any decree would qualify for the alternative procedures set out in Section 3626(b)(1)(A), intended by Congress to govern court review of decrees entered before enactment of the PLRA, but supported by the requisite findings. As the District Court for the Eastern District of North Carolina recently held, "[t]he PLRA does not require that the court, in entering an injunction, use the magic words [of Section 3626(b)(2)] of the statute." Smith v. Freeman, Nos. 3052, 4277, 790, slip op. at 3 (E.D.N.C. March 25, 1997) (attachment I). In Smith, the court held that "this court and the Fourth Circuit made these required findings in substance, if not in the precise form prescribed, years ago." Id. at 4.

Thus, a court, in evaluating whether a previously entered order meets the requirements of Section 3626(b)(2), must assess whether prior to the filing of a motion to terminate, the order was supported by findings that substantively tracked the requirements of (b)(2). Only where a defendant has established that prospective relief regarding prison conditions is unsupported by such prior findings[2/] should the court proceed to test the challenged relief against the remedial criteria in subsection (b)(3), and decide whether the relief currently satisfies those criteria. See Smith, supra. Cf. Battle v. Fields, Civ-72-095-B (E.D. Okla. June 28, 1997) (attachment J).

The passages from this Court's prior orders, cited above, demonstrate that the Court made a finding of unconstitutional conditions in this case in 1978. Moreover, it may be that the Court made findings of appropriate tailoring, though such findings were not explicit. Such findings would certainly have been appropriate, in light of the record and the proposed injunction. The injunction and the 1991 order are highly focused remedial orders, tied to the specific problems identified in the stipulation and in the Sheriff and County defendant's 1991 motion. Both the original injunction and the 1991 order comply with the remedial requirements of narrow tailoring contained in the PLRA, even though there are no explicit findings relating to

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2/ The structure and language of subsection (b)(2) indicate no congressional intention to reverse the general rule that moving parties bear the burden of persuasion. See, e.g., Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992) (party seeking to modify a judgment has the burden of justifying modification).

the appropriateness of the remedy. The Court's comment that it had "by repeated extension of time given attention to the difficulties experienced by the defendants in meeting the constitutional standards," Order of October 22, 1981 at 9, seems to indicate both that the Court had determined the challenged relief to be necessary and that it was proceeding with an appropriate level of deference to the defendants. Moreover, the parties' stipulation that the injunction was "consistent with the facts agreed to herein and with prior decisions of this Court in similar cases" indicates that appropriate remedial scope was a subject considered by the Court and the parties.

In sum, the United States respectfully suggests that the requisite finding of liability is clear in the record, and that the Court should analyze the 1978 injunction, the 1991 modification, and the record, to see if defendants have established that the challenged relief is unsupported by prior judicial findings that it was "narrowly drawn, extends no further than necessary to correct the [proven] violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." Only if defendants have made the requisite showing should the Court continue, by analyzing under 18 U.S.C. § 3626(b)(3) whether the relief should be terminated.

III. THE PLRA'S TERMINATION PROVISIONS DO NOT VIOLATE THE CONSTITUTION.

Plaintiffs argue that the PLRA's termination provisions violate the Constitution. If it is necessary for the Court to reach this challenge, it should reject it. See Plyler v. Moore, 100 F.3d 365, 370-75 (4th Cir. 1996) (rejecting constitutional challenges to the PLRA's termination provisions); Benjamin v. Jacobson, 935 F. Supp. 332 (S.D.N.Y. 1996) (same), appeal pending, No. 96-7957 (2d Cir.) (argued Nov. 15, 1996) (same); Jensen v. County of Lake, 958 F. Supp. 397 (N.D. Ind. 1997) (same); James v. Lash, Nos. S 73-5; AS, 3687 (N.D. Ind., May 15, 1997) (same); Battle v. Fields, supra (attachment B) (same). But see Dougan v. Singletary, No. 81-11-Civ-J-10 (M.D. Fla., May 29, 1997) (attachment K); Hadix v. Johnson, 947 F. Supp. 100 (E.D. Mich. 1996), appeal pending, Nos. 96-2463, -2582 (6th Cir.); Gavin v. Ray, No. 4-78CV70062 (S.D. Iowa, Sept. 18, 1996) (attachment L), appeal pending Nos. 96-3747, -3748 (8th Cir.).

A. Requiring Courts To Apply The PLRA's Standards To Existing Decrees and Orders Does Not Violate Separation Of Powers Principles.

The PLRA's termination provisions do not violate the constitutional requirement of separation of powers. The doctrine of separation of powers flows from the Constitution's division of the federal government into three branches. See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 57-58 (1982). Under the Constitution's division of power, the Legislature is to enact laws of general application and the courts are to decide particular cases arising under those laws, exercising their exclusive authority to "say what the law is" in particular cases. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). "[I]t remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." Loving v. United States, 116 S. Ct. 1737, 1743 (1996) (citations omitted). For example, the separation of powers doctrine prevents Congress from assigning core Article III powers to non-Article III entities. See Northern Pipeline Constr. Co., supra; CFTC v. Schor, 478 U.S. 833, 850-56 (1986). The separation of powers doctrine also prohibits Congress from itself assuming the role assigned by the Constitution to the Judicial Branch. Accordingly, it is established that Congress may not itself decide cases. See United States v. Klein, 80 (13 Wall.) U.S. 128 (1871). Although Congress may amend law applicable to pending cases, see Robertson v. Seattle Audubon Society, 503 U.S. 429 (1992), such amendments must "set out substantive legal standards for the Judiciary to apply." Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447, 1453 (1995).

Although the doctrine of separation of powers is a "structural safeguard" that establishes "high walls" between the three branches of government, see id. at 1463, the Constitution itself creates an interrelationship and interdependence among the branches. Consistent with the structural safeguards erected by the Constitution, Congress possesses and exercises broad authority over federal court jurisdiction and procedure. Under the Constitution, it is the role of Congress to create and structure the inferior courts, and to establish the confines of the jurisdiction of those courts (within the outer limits set out in Article III). See U.S. Const. art. I, § 8, cl. 9; art. III, §§ 1-2; see also Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938) ("[t]here can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States"). Moreover, Congress not only establishes the substantive federal law to be applied by the federal judiciary, it has the constitutional authority to establish the procedural rules and evidentiary standards to apply in proceedings before the federal courts. See Hanna v. Plumer, 380 U.S. 460, 472

(1965) ("the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts"); Sibbach v. Wilson & Co., 312 U.S. 1, 9 (1941) ("Congress has undoubted power to regulate the practice and procedure of federal courts").

It is well established that, in carrying out these constitutional powers, Congress has the authority to regulate and restrict the injunctive powers of the federal courts. See, e.g., Yakus v. United States, 321 U.S. 414, 442 n.8 (1944) (setting out examples where Congress has restricted the power of federal courts to grant injunctions).[3/] The entire practice for the

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3/ The seven examples cited by the Court in Yakus are:

> 1. Section 16 of the Judiciary Act of 1789, . . . 28 U.S.C. § 384, denying relief in equity where there is adequate remedy at law. 2. Section 5 of the Act of March 2, 1793, . . . 28 U.S.C. § 379, prohibiting injunction of state judicial proceedings. 3. Act of March 2, 1867, . . . 26 U.S.C. § 3653, prohibiting suits to enjoin collection or enforcement of federal taxes. 4. The Johnson Act of May 14, 1934, . . . 28 U.S.C. § 41 (1), restricting jurisdiction to enjoin orders of state bodies fixing utility rates. 5. Act of Aug. 21, 1937, . . . 28 U.S.C. § 41 (1), similarly restricting jurisdiction to enjoin collection or enforcement of state taxes. 6. Section 17 of the Act of June 18, 1910, . . . 28 U.S.C. §§ 380 and 380 (a), requiring the convening of a three-judge court for the granting of temporary injunctions in certain cases and allowing a temporary restraining order by one judge only to prevent irreparable injury. 7. The

(continued...)

issuance of an injunctive order by a federal court is subject to standards, procedures, and timing rules, and other limitations established through Congress's Article I powers. For example, the rules set forth by Congress: dictate the standards to be applied by a federal district court in issuing a temporary restraining order, and limit the duration of such orders to ten days, absent specified findings, Fed. R. Civ. P. 65(b); prohibit the issuance of an injunction absent the posting of a adequate security, Fed. R. Civ. P. 65(c); require a court issuing injunctive relief to set forth the reasons for the issuance of the injunction and to describe the terms of the decree in reasonable detail, Fed. R. Civ. P. 65(d); mandate specific findings for the issuance of class-wide injunctive relief, Fed. R. Civ. P. 23(b)(2); provide that, unlike other forms of judgments, injunctive orders are not automatically stayed by the filing of an appeal, Fed. R. Civ. P. 62(a); and for original jurisdiction agency review cases, provide the standards and

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(...continued)
Norris-LaGuardia Act, . . . 29 U.S.C. §§ 101-15, regulating the issue of injunctions in labor disputes and prohibiting their issue "contrary to the public policy" declared in the Act.

321 U.S. at 442 n.8.

procedures to be applied by the courts of appeals in deciding whether to issue an interlocutory injunction, 28 U.S.C. § 2349.

In enacting the PLRA, Congress has properly exercised its Article I authority to prescribe rules and standards for courts to follow when issuing prospective relief. In the PLRA, Congress has established standards for the courts to apply in deciding whether to grant or continue in effect a prospective order regarding prison conditions, and has required that a court make specific types of findings when issuing such relief. See 18 U.S.C. § 3626(a)-(b). Congress also established timetables for periodic review of such prospective orders to determine whether they are still warranted under the standards articulated by the PLRA. See 18 U.S.C. § 3626(b). Some of the PLRA's provisions formalize existing standards applied by the courts; others establish new requirements and procedures for the courts to apply. The PLRA's provisions regarding the entry and termination of prospective relief at issue here do not, however, unduly encroach upon the judiciary's core Article III powers. As demonstrated below, although the PLRA imposes standards and procedures to be followed by the courts, the courts retain the power to resolve the cases before them challenging prison conditions and to issue injunctive relief necessary to remedy any violation of federal law.

Plaintiffs argue that applying the PLRA's termination standard to the relief challenged in this case is contrary to the separation of powers principles announced in Plaut v. Spendthrift Farm, Inc., supra. The Court of Appeals for the Fourth Circuit recently considered and correctly rejected that precise argument. See Plyler, 100 F.3d at 370-72. As explained by the Fourth Circuit, the rationale of Plaut has no application to the PLRA provisions speaking to prospective orders. Plyler, 100 F.3d at 370-72. See also Benjamin v. Jacobson, 935 F. Supp. 332, 343-49 (S.D.N.Y. 1996) (same), appeal pending, No. 96-7957 (2d Cir.).

In Plaut v. Spendthrift Farm, Inc., supra, the Supreme Court overturned an effort by Congress to force courts to apply new law to existing final monetary judgments. At issue in Plaut was legislation that retroactively allowed plaintiffs in certain securities fraud suits to revive actions that had been previously dismissed as time barred as a result of the statute of limitations rule announced and applied by the Supreme Court in Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991). In Plaut, the Court held that the legislation represented an attempt by Congress to "set aside the final judgment of an Article III court by retroactive legislation," 115 S. Ct. at 1458, and thus violated separation of powers principles.

Plaut involved suits for monetary damages. In that context, the Court stated that "[h]aving achieved finality, . . . a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to that very case was something other than what the courts said it was." Plaut, 115 S. Ct. at 1457 (emphasis in original). The termination provisions of the PLRA do not violate the principles announced in Plaut because a prospective order issued by a court, whether in the form of a litigated judgment or a consent decree, does not similarly represent the "the last word of the judicial department with regard to a particular case or controversy." Ibid.

It is true that injunctive orders are "final" for certain purposes, see, e.g., Rufo, 502 U.S. at 378; United States v. Michigan, 18 F.3d 348, 351 (6th Cir.), cert. denied, 115 S. Ct. 312 (1994), such as appeal rights. But unlike a final money judgment, the issuance of a "final" prospective order does not end the district court's role once the appeal rights of the parties are exhausted (or expire). A district court continues to play an active role in the interpretation, enforcement, and supervision of its prospective orders.

Moreover, district courts have always possessed the authority to modify or terminate their prospective orders to accommodate changes in the facts or legal principles supporting the decree. Unlike with a money judgment, a court always has the power – indeed the obligation – to revisit continuing injunctive orders in light of the evolving factual or legal landscape, and to modify or terminate the relief accordingly. See Plaut v. Spendthrift Farm, Inc., 1 F.3d 1487, 1495 (6th Cir. 1993), aff'd, 115 S. Ct. 1447 (1995); System Federation No. 91 v. Wright, 364 U.S. 642, 647 (1961) ("sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed"); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 437-39 (1976) (application of Wright), Board of Educ. of Oklahoma City Public Schools v. Dowell, 498 U.S. 237 (1991) (setting out standard for termination of a school desegregation injunction based on defendants' claim of compliance). Obviously, then, the relief defendants challenge here is quite different from a final money judgment like that at issue in Plaut. The prospective orders here present a live matter, and this Court plays an active role in monitoring, enforcing, and deciding whether to modify or terminate its prior orders. In that context, it does not offend constitutional separation of powers principles to require a court, when addressing this live case, to apply the currently applicable federal law – the PLRA. See Plyler, 100 F.3d at 371-72.

In Plaut itself, the Court explained that its ruling regarding a final monetary judgment was distinguishable from decisions approving statutes "that altered the prospective effect of injunctions entered by Article III courts." 115 S. Ct. at 1459 (citing Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1855)). See also Mount Graham Coalition v. Thomas, 89 F.3d 554, 556 (9th Cir. 1996) ("Plaut was careful . . . to point out that cases like . . . Wheeling & Belmont Bridge Co. . . . in which congressional legislation 'altered the prospective effect of injunctions entered by Article III courts' were different"). In Wheeling & Belmont Bridge Co., the Court had earlier declared that a bridge across the Ohio River unlawfully impeded navigation, and ordered that the bridge be raised or removed. Soon after the injunction issued, an Act of Congress declared the bridge to be a "lawful structure," designated the bridge as a United States post-road, and authorized the bridge's owners to maintain it at the same height. See Wheeling & Belmont Bridge Co., 59 U.S. at 429. The Supreme Court upheld the legislation, against a separation of powers challenge, as a lawful exercise of congressional power and held that the legislation mandated termination of the court's prior injunctive order. In so holding, the Court drew an explicit distinction between the prospective relief and monetary awards. The Court held that although the prospective relief previously entered in a final judgment must be vacated in light of the new legislation, the court costs awarded to the plaintiff could not be affected by the subsequent change in the law. Id. at 436.

The rule of Wheeling & Belmont Bridge Co. is that, where Congress validly alters the law, courts have a responsibility to prospectively modify existing injunctive orders to take into account the changed legal circumstances. See Mount Graham Coalition, 89 F.3d at 556-57. That rule was reaffirmed in Landgraf v. USI Film Products, 511 U.S. 244, 273-74 (1994), where the Court explained, "[w]hen the intervening statute authorizes or affects the propriety of prospective relief," a court must apply the newly-enacted law and the "application of the new provision [to a prospective order] is not [considered] retroactive."

Plaintiffs would superimpose on Plaut, Wheeling Bridge and the other related caselaw a distinction those cases do not support. They would hinge the analysis on the statutory or constitutional nature of the claim, and would have this Court hold that Congress may require courts to apply new law in statutory but not constitutional injunction cases. Neither Wheeling Bridge nor the cases plaintiffs cite support their attempt to divide constitutional from statutory rights. In Wheeling Bridge, the Court's holding was clearly based on the nature of the relief granted – not the nature of the claim. See The Clinton Bridge, 77 U.S. 454, 462 (1870) (Nelson, J.) (the distinction between damages and injunctions was dispositive in Wheeling Bridge); Benjamin v. Jacobson, 935 F. Supp. at 347-49; Plyler v. Moore, 100 F.3d at 371 (under Plaut and Wheeling Bridge "[a] judgment providing for injunctive relief . . . remains subject to subsequent changes in the law"). Similarly, Plaut does not hint that Congress has any more authority with respect to statutory cases than with respect to constitutional ones. Indeed, the Court overturned the statute in Plaut notwithstanding the fact that it regulated a statutory cause of action. Thus, the fact that the statutory change applicable here involves a restriction on the remedial powers of the courts rather than a change in the underlying substantive law that was a predicate for relief, as in Wheeling & Belmont Bridge Co., is of no moment.[4] As discussed above, the authority of Congress to regulate and restrict the injunctive powers of the federal courts is well-established. There is no question that this Court maintains jurisdiction to determine whether to modify or terminate its prospective orders here. The question is what legal standards and timetables the Court should apply when rendering those decisions today. Given that Congress has authority to prescribe the standards and timetables established by the PLRA, it is the duty of a court to apply the law enacted by Congress to the prospective orders before it. See Plyler 100 F.3d at 371-72; Benjamin, 935 F. Supp. at 343-49. The rule articulated by the Supreme Court more than 140 years ago in that case is directly

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4/Plaintiffs rely on Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 83-84 (1982), in support of a different rule for injunctive judgments relating to statutory rights and those relating to constitutional rights. Northern Pipeline is simply not relevant here. It concerned the limits on Congress's control of adjudication of constitutional versus statutory rights, holding that Article I tribunals could not have final authority over litigation of constitutional rights. Northern Pipeline said nothing about congressional authority to require courts to modify their prospective judgments to reflect valid statutory changes in remedial law.

applicable here. As "[a] judgment providing for injunctive relief . . . [the decree here] remains subject to subsequent changes in the law." Plyler, 100 F.3d at 371. Hence, it does not offend separation of powers principles to require a court to apply the PLRA's standards when reviewing and examining this prospective order. Id. at 371-72.

B. The PLRA Termination Provisions Do Not Prescribe Impermissible Rules Of Decision.

As recently explained by the Fourth Circuit in Plyler v. Moore, 100 F.3d at 372, the termination provisions of the PLRA, Sections 3626(b)(2) and (b)(3), do not impermissibly "prescribe rules of decision to the Judicial Department . . . in cases pending before it." Plaut, 115 S. Ct. at 1452 (citing United States v. Klein, 80 U.S. at 146). The Supreme Court's decision in United States v. Klein is plainly distinguishable.

In Klein, the President pardoned, among others, V.F. Wilson for giving aid and comfort to officers of the rebel confederacy during the Civil War on the condition that he take an oath of allegiance. Wilson took the oath of allegiance and, thereafter, died. Wilson's estate sued the United States under a federal statute permitting loyal citizens to obtain compensation from the U.S. Treasury for cotton seized or destroyed during the war. The Court of Claims ruled in the estate's favor. United States v.

Klein, 80 U.S. at 130-33. While the case was on appeal to the Supreme Court, Congress passed a new statute mandating that presidential pardons be considered not as evidence of loyalty, but as conclusive evidence of disloyalty. Id. at 133-34, 143-44. The Supreme Court struck down the new statute. The Court held that Congress could not compel courts to discount the legal or evidentiary effect of a presidential pardon and impose a rule of decision in a pending case. Id. at 146-48.

"Klein has been interpreted to hold that Congress may not prescribe a rule of decision for the courts to follow without any independent exercise of their judicial powers." Benjamin, 935 F. Supp. at 349. Thus, Congress may not usurp the judicial function and dictate the outcome of a specific case or cases. 935 F. Supp. at 349. Congress may, however, always amend the applicable law and require the courts to apply the amended law to a case before it. See Robertson, 503 U.S. at 441. As explained by the Supreme Court in Plaut, "[w]hatever the precise scope of Klein, . . . later decisions have made clear that its prohibition does not take hold when Congress 'amend[s] applicable law.'" Plaut, 115 S. Ct. at 1452 (quoting Robertson, 503 U.S. at 441).

In enacting the PLRA, Congress has done just that. Congress has properly invoked its legislative authority to establish standards and procedural rules for the courts to apply when deciding whether to grant or continue in effect a prospective order regarding prison conditions. Congress has enacted standards, leaving to the courts the judicial function of determining "what the law is," Marbury v. Madison, 5 U.S. at 177, and of applying that law to the facts of each case. As in Robertson, Congress has "replaced the [original] legal standards . . . without directing particular applications under either the old or the new standards." 503 U.S. at 437.

While Section 3626(b)(2) "requires a district court to terminate prospective relief that was approved in the absence of a finding that the relief is no greater than necessary to correct the violation of a federal right, it does not purport to state how much relief is more than necessary." Plyler, 100 F.3d at 372. See also Benjamin, 935 F. Supp. at 350. Moreover, under Section 3626(b)(3), even in the absence of such findings supporting an existing prospective order, a court may continue a prospective order if it finds that the relief is "necessary to correct a current or ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and . . . is narrowly drawn and the least intrusive means to correct the violation." 18 U.S.C. § 3626(b)(3). As the Fourth Circuit held in Plyler:

> In short, [the PLRA termination provisions provide] only the standard to which the district court must adhere, not the result they must reach.

100 F.3d at 372. Thus, Congress has not imposed an arbitrary outcome or an improper "rule of decision." See Plaut, 115 S. Ct. at 1452.

Plaintiffs also argue that Congress violates the rule set forth in Klein unless it amends the underlying substantive law upon which relief was sought in their complaint – here the Eighth Amendment. That argument is refuted by the Supreme Court's decision in Plaut. In Plaut, the Court held that Klein has no application where Congress amends the applicable law. Plaut, 115 S. Ct. at 1452. The Court then held that the amendment before it in Plaut did not implicate Klein because it "indisputably . . . set out substantive legal standards" for the courts to apply. 115 S. Ct. at 1453. The amendment at issue in Plaut altered the statute of limitations for federal securities fraud cases and attempted to apply the new limitations period to cases that had already been dismissed as time barred. It did not alter the underlying substantive standards for securities fraud. Yet, the Court held that it was a change in the "substantive legal standards," and, hence, did not implicate Klein. Here, while Congress has not amended the underlying substantive rights upon which plaintiffs sought relief in their complaint, it has changed applicable law that is within its power to change. Thus, likewise, the PLRA "indisputably does set out substantive legal standards for the Judiciary to apply," 115 S. Ct. at 1453. Because the PLRA "compel[s] changes in law, not findings or results under old law," Robertson, 503 U.S. at 438, it does not violate the separation of powers principles established in Klein. See Plyler, 100 F.3d at 372; Benjamin, 935 F. Supp. at 350.

C. The PLRA's Limitations On the Equity Powers Of the Courts Do Not Violate Separation Of Powers Principles.

Nor does the PLRA violate separation of powers doctrine by improperly circumscribing the power of the federal courts to enter equitable relief to remedy constitutional violations in the prison setting. Having granted the inferior courts jurisdiction over constitutional and statutory challenges to prison conditions, Congress may not deprive the courts of the ability to actually and effectively decide those challenges. Plaut v. Spendthrift Farm, Inc., 115 S. Ct. at 1453 (the Article III power is "not merely to rule on cases, but to decide them") (emphasis in original). The power to decide constitutional claims and render equitable relief to remedy a constitutional violation by an executive official is one of the core federal judicial powers. See, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). Here, Congress has not deprived the courts of the authority to decide constitutional challenges to prison conditions. As the PLRA's plain language demonstrates, courts continue to have the authority to decide constitutional and statutory challenges and to grant or continue equitable relief to remedy any found violations of federal rights.

The PLRA requires that prospective relief regarding prison conditions 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), (b)(2), (b)(3). As already discussed, in enacting Section 3626(a)(1), Congress attempted to ensure that courts adhere to the already-existing standards governing the imposition of injunctive relief (and directed that the standards were to be applied equally to both litigated and consent judgments). By requiring courts to make particularized findings as to the necessity of prospective relief, the PLRA ensures that all future orders will comply with current remedial standards. Thus, while the statutory requirement that such findings appear on the record is a new feature of equity practice that has been introduced by the PLRA, the substance of what a court must find in fashioning relief for constitutional violations is very much in keeping with pre-PLRA judicially derived limitations on the scope of such relief in litigated judgments. See supra, pp. 12-13. It follows necessarily that Congress has not stripped federal courts of their authority under Article III to remedy constitutional violations.

Nor do the PLRA's provisions for periodic review of prospective relief, 18 U.S.C. § 3626(b), unduly impair a court's equitable powers and ability to redress violations of federal rights. Irrespective of the PLRA, parties are free to seek relief from a prospective order or judgment at any time, and a court may grant a party relief from the prospective ruling where "it is no longer equitable" that the ruling have "prospective application." Fed. R. Civ. P. 60(b)(5). The PLRA provides a structured timetable for such requests, see 18 U.S.C. § 3626(b)(1), while also requiring that relief be kept in place if it continues to meet the remedial criteria established by Section 3626(b)(3). In formalizing periodic review of prospective relief, in order to ensure that relief that does not satisfy the Act's legal standards can be modified or terminated, Congress has effected no radical reworking of the courts' powers.

Rather, it has exercised its prerogative to establish a remedial mechanism, and has left to the courts the task of applying that mechanism in particular cases. See Robertson, 503 U.S. at 441. As long as the mechanism chosen is not inadequate to remedy unconstitutional conduct, it withstands constitutional challenge.

Section 3626(b)(2) provides that where prospective relief regarding prison conditions is unsupported by prior findings required by the PLRA (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"), a movant is entitled to the immediate termination of that relief unless the court finds, under subsection (b)(3), that the relief currently satisfies the Act's remedial criteria. As with the provisions for periodic review, the immediate termination provisions do not deprive the courts of their core equitable power to redress constitutional violations. Sections 3626(b)(2) and (b)(3) do not require the termination or modification of relief that a court finds necessary, and narrowly drawn, to remedy constitutional or statutory violations. Rather, only those portions of a prior order that do not remain necessary to remedy such violations are affected. If a court determines that an existing decree is too broadly drawn in view of current conditions, but that _some_ measure of relief remains necessary, the Act does not prohibit the court from imposing new or revised relief that complies with narrow-tailoring requirements, while affording an effective remedy.

Pursuant to subsection (b)(3), a court must terminate its decree (if that decree is unsupported by the requisite prior findings) unless it finds, now, that prospective relief, _inter alia_, "remains necessary to correct a current or ongoing violation of the Federal right." A serious constitutional question would be raised if the PLRA were read to require a court to terminate relief upon a finding that unconstitutional conduct has halted, notwithstanding the court's additional finding that the violation has not been fully remedied, or that the defendant is poised to resume the unconstitutional conduct; such a reading might interfere with the court's ability to effectively redress constitutional violations. A court's traditional equitable authority is not limited to ordering the cessation of unconstitutional conduct, but includes the power to restore the victims of that conduct "to the position they would have occupied in the absence of such conduct." _Milliken_ v. _Bradley_, 418 U.S. 717, 746 (1974) (_Milliken I_). _See also_ _Missouri_ v. _Jenkins_, 115

S. Ct. 2038, 2048 (1995) (same).[5] Indeed, courts have "not merely the power but the duty to render a decree which will so far as possible eliminate the [unconstitutional] effects of the past as well as bar like [unconstitutionality] in the future." Louisiana v. United States, 380 U.S. 145, 154 (1965). Moreover, as the Fifth Circuit held in Ruiz v. Estelle, 679 F.2d 1115 (5th Cir. 1982), the requirement that courts fashion "the least intrusive remedy that will still be effective," id. at 1145, does not conflict with the

> well-settled [rule] that, under the fourteenth amendment, a court may require remedial measures that the Constitution does not of its own force initially require. Injunctive relief need not be confined to an order to cease an illegal practice. [Rather,] the court may, if necessary, exert its equitable power to prevent repetition of the violation, not only by the force of the contempt sanction but also by commanding measures that safeguard against recurrence.

5/ Milliken and Missouri v. Jenkins are school desegregation cases. The Supreme Court has admonished, however, that "a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution." Freeman v. Pitts, 503 U.S. at 487 (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15-16 (1971)). Courts in prison litigation cases have applied the remedial principles of school desegregation cases. See, e.g., Grubbs v. Bradley, 821 F. Supp. 496, 503 (M.D. Tenn. 1993).

Id. at 1155-56. "Fundamental limitations on the remedial powers of the federal courts to restructure the operation of local and state governmental entities," Hills v. Gautreaux, 425 U.S. 284, 293 (1976), require "a federal court . . . to tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional violation.'" Ibid. Nonetheless, a court may enter a "comprehensive order to insure against the risk of inadequate compliance." Hutto v. Finney, 437 U.S. 678, 687 (1979).

Thus a better reading of the Act — and one that clearly comports with Article III[6/] — is that the "current or ongoing violation of the Federal right," for purposes of the Act, encompasses not only unlawful conduct actually in progress at the very moment the court rules, but also the failure to remedy the proximate effects of past unlawful acts and the present danger of imminent recurrence of a violation of the Constitution or federal statutory right.[7/] (The present danger of imminent recurrence of

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6/ "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the courts'] duty is to adopt the latter." United States ex. rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909).

7/ Under the PLRA, once a court finds a "current or ongoing (continued...)

a found or admitted constitutional or statutory violation plainly points to the existence of a "current or ongoing violation of the Federal right" because it demonstrates a failure to remedy the violation.) Where a court has found the existence of a constitutional or statutory violation and ruled certain action necessary to remedy that violation (either under the PLRA or prior to the new statute's enactment), noncompliance with a previous remedial order may represent a failure to remedy the underlying violation and hence a "current or ongoing violation of the Federal right."

This reading of the Act comports with the accepted understanding of what constitutes an "ongoing" constitutional violation, and respects the courts' inherent authority to remedy constitutional violations. See Freeman v. Pitts, 503 U.S. 467, 486-89 (1992); see also Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946) ("Unless a statute in so many words, or by a

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(...continued)
violation of the Federal right," the court must go on to ensure that continued prospective relief "extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation." 18 U.S.C. § 3626(b)(3). Thus, even after finding that some relief is necessary, because there exists a "current or ongoing violation," as that term is construed above, a court may have to modify an order or decree going forward to ensure that its scope satisfies the PLRA standards.

necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.").

D. The PLRA Does Not Violate Plaintiffs' Equal Protection Rights.

Sections 3626(b)(2) and (b)(3) also pass muster under the equal protection guarantees of the Fifth and Fourteenth Amendments. Legislation is presumed to be valid, and will be sustained against an equal protection challenge "if the classification drawn by the statute is rationally related to a legitimate state interest," and the statute does not classify individuals by race, alienage, national origin, gender, or illegitimacy, or impinge upon a fundamental right. See City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440-41 (1985); see also City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

1. Heightened scrutiny does not apply to review of the PLRA

There is no basis for heightened scrutiny in examining the PLRA's termination provisions. See Plyler, 100 F.3d at 373. The PLRA does not target a suspect class. It is well established that inmates are not members of a suspect class supporting heightened equal protection scrutiny. See Scher v. Chief Postal Inspector, 973 F.2d 682, 683-84 (8th Cir. 1992); Moss v. Clark, 886 F.2d 686, 689-90 (4th Cir. 1989); Pryor v. Brennan, 914 F.2d 921, 923 (7th Cir. 1990); Zipkin v. Heckler, 790 F.2d 16, 18 (2d Cir. 1986) ("incarcerated felons are not a suspect classification").

Nor do the PLRA provisions at issue substantially burden a fundamental right. Plyler, 100 F.3d at 373. The right of access to the courts "assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." Wolff v. McDonnell, 418 U.S. 539, 579 (1974). That capability is not unconstitutionally impaired, however, by Sections 3626(b)(2) or (b)(3). Under those provisions, prisoners continue to have an opportunity to establish current or ongoing violations of their constitutional rights. See Plyler, 100 F.3d at 373.

2. The PLRA satisfies rational basis review

Under the rational basis standard, a legislative classification "must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." Heller v. Doe, 509 U.S. 312, 320 (1993) (citation omitted). The "'burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it' . . . whether or not the basis has a foundation in the record." Id. at 320-21 (citation omitted). See also Plyler, 100 F.3d at 373-74. Sections 3626(b)(2) and (b)(3) clearly satisfy that deferential standard.

In enacting the PLRA's remedial and termination provisions, Congress sought to promote principles of federalism, security, and fiscal restraint in the unique context of detention and correctional institutions. "The PLRA was prompted by criticism that the federal courts have overstepped their authority in overseeing prison reform litigation. The PLRA now attempts to return control of the prisons to state and municipal bodies which are democratically accountable as soon as court supervision becomes unnecessary to remedy a demonstrated ongoing constitutional violation." Jensen v. County of Lake, 958 F. Supp. 397, 404 (N.D. Ind. 1997). See also Benjamin, 935 F. Supp. at 354.

Section 3626(b)(2) "is an eminently rational means of accomplishing" Congress' legitimate interest "in preserving state sovereignty by protecting states from overzealous supervision by the federal courts in the area of prison conditions litigation." Plyler, 100 F.3d at 374. The PLRA "addresses the problem of overbearing court supervision by forbidding courts to intrude to any degree greater than that required by federal law." Plyler, 100 F.3d at 374.

Finally, because Congress found both frequent abuses and heightened dangers in the context of prison conditions litigation, see H.R. Rep. No. 21 at 24 & n.2, its decision to legislate in that area provides a rational basis for the PLRA and is distinguishable from statutes that single out disfavored groups based on a punitive or discriminatory animus. Compare James v. Strange, 407 U.S. 128, 142 (1972); Romer v. Evans, 116 S. Ct. 1620 (1996).

E. Sections 3626(b)(2) and (b)(3) Do Not Violate Plaintiffs' Due Process Rights.

Sections 3626(b)(2) and (b)(3) of the PLRA plainly do not violate plaintiffs' due process rights under the Fourteenth Amendment. Prospective relief, including relief provided under a consent decree, is subject to modification or termination to accommodate changes in pertinent law or fact, or where there are other equitable considerations supporting modification. As a result, prospective orders in prison conditions suits are clearly not protected "property" interests under the Due Process Clause. See Board of Regents v. Roth, 408 U.S. 564, 576-78 (1972).

For the same reason, plaintiffs do not have any vested rights in the prospective relief afforded under the prospective relief ordered here. See Plyler, 100 F.3d at 374-75; Benjamin, 935 F. Supp. at 356. But see Hadix v. Johnson, 933 F. Supp. 1362 (W.D. Mich. 1996). A final money judgment entered by a court creates a "vested right" and a constitutionally protected property interest. See McCullough v. Virginia, 172 U.S. 102, 123-24 (1898). But a prospective decree or order, which is always subject to modification based upon subsequent legislative enactments, changed facts, or other equitable considerations, creates no such vested right. See United States v. Locke, 471 U.S. 84, 104 (1985); see also Fleming v. Rhodes, 331 U.S. 100, 107 (1947).

Nor do Sections 3626(b)(2) and (b)(3) deprive parties of prior judgments without an opportunity to be heard. To the contrary, existing relief is preserved where a court finds on the record that the relief meets applicable remedial standards. No greater process is due in this context.

IV. IF SECTION 3626(b)(2) APPLIES, THE COURT SHOULD HEAR EVIDENCE UNDER SECTION 3626(b)(3) PRIOR TO TERMINATION TO DETERMINE WHETHER RELIEF REMAINS NECESSARY.

If this Court determines that Section 3626(b)(2) applies to the 1978 Injunction and subsequent orders, before the Court terminates its jurisdiction over these Orders, the Court should take evidence under Section 3626(b)(3) to determine the ongoing necessity of the challenged relief at the Jefferson County Jails.

Section 3626(b)(3) limits the scope of Section 3626(b)(2). Section (b)(3) provides:

> LIMITATION.-- Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a <u>current or ongoing violation of the Federal right</u>, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

18 U.S.C. § 3626(b)(3) (emphasis added). Section 3626(b)(3) is, therefore, intended to preserve the inherent power of a court, presented with a motion for immediate termination under Section 3626(b)(2), to retain relief that is necessary, and narrowly drawn, to remedy constitutional violations. If the Court finds a current or ongoing violation of a Federal right, prospective relief shall continue, narrowly tailored to meet the ongoing violations.

There is no indication in the statute that the PLRA's instruction to the court to "make[] written findings based on the record" was intended to limit the court to the record that existed prior to the filing of the motion to terminate.

Rather, the statute's requirement that a court deciding a defendant's motion to terminate must inquire into the existence of "a current or ongoing violation of the Federal right" necessarily gives the district court the authority to examine current conditions.

Accordingly, the appropriate course of action for the Court to take, if it decides that the relief challenged by the State defendants is eligible for termination under Section 3626(b)(3), is to hear evidence on the current need for such relief. See Jensen v. Lake, 958 F. Supp. 397, 404 (N.D. Ind. 1997); United States v. Michigan, 1:84 CV 63 (W.D. Mich., Sept. 12, 1996) (attachment M).

V. THE CHALLENGED RELIEF REMAINS NECESSARY UNDER CURRENT CONDITIONS.

A. The Challenged Relief Applies to the New Jails.

As the Court is aware, when this case began, the jails in both Birmingham and Bessemer were located on top of the county courthouses there. In 1984, a new jail was opened in Birmingham, and in 1988, a new jail was opened in Bessemer. As required by state law, both jails remain attached to the county courthouses. Both jails were complete and occupied at the time the Court issued its 1991 order requiring the State to remove state inmates from the Jails seven days after they become eligible for transfer.

Notwithstanding the new buildings, the challenged injunction and other orders remain applicable. The injunction granted by the court does contain one site-specific paragraph; the provision on permissible jail population referred to the old jails' architecture and cell design in setting limits for cell occupancy, and specified that its limits applied to "[t]he population of the Jail at the Birmingham Courthouse," and [t]he population of the Jail at the Bessemer Courthouse." Those specific limits are inapplicable to the new buildings. But the other paragraphs of the proposed injunction are more general; they do not reference particular jail sites or features, and they are applicable whatever the jails' address or architecture.

Thus it is apparent from the injunction itself that the court's order applies to defendants' conduct, policies, and practices — not simply to the operation of a particular building. Indeed, the Court has already implicitly decided this issue, by issuing its 1991 modification to the injunction (the very order the State defendants challenge) after construction of the new jails. Cf. Camden County Jail Inmates v. Parker, 123 F.R.D. 490, 499 (D. N.J. 1988) ("the pleadings assert constitutional claims with respect to, inter alia, the practices of the defendants. A modification in the situs where such conduct occurs does not rob this court of jurisdiction"). Reported prison and jail cases contain frequent examples of application of old orders in new facilities. See, e.g., Plyler v. Evatt, 846 F.2d 208 (4th Cir. 1988) (modifying consent decree to suit its application to new facilities).

In addition, although construction of a new jail certainly can improve conditions, such improvement is not inevitable. See Jones v. Wittenberg, 330 F. Supp. 707, 712 (N.D. Ohio 1971) ("if a beautiful brand new jail were built and operated the way the present jail is operated, there would be little improvement in the difficulties at first, and what improvement there was would very rapidly disappear"); Palmigiano v. Garrahy, 443 F. Supp. 956, 984 (D. R.I. 1977) ("this is not simply a case where, if a new jail is built, all will be well"). Notwithstanding the new facilities, the Court must evaluate the ongoing necessity for the injunction in light of its scope and current conditions.

B. The Challenged Relief Remains Necessary to Correct a Current or Ongoing Violation of the Federal Right, and Is Appropriately Tailored.

As already briefed, the State defendants have standing to challenge only those orders that impose obligations on them; in this case, only the 1991 order requiring the State to accept state-ready inmates within seven days of their eligibility for transfer. Consequently, our evaluation of current conditions has focused on the current impact and need for this particular provision.

With the permission of the County and the Sheriff, on July 22 and 23, 1997, Steve Martin, a penologist hired as a consultant by the United States, conducted a tour of the Jefferson County Jails, interviewing inmates and staff, and reviewing records. Mr. Martin's affidavit and resumé are attached. As the affidavit reveals, both the Birmingham and Bessemer facilities have a number of problems that pose a serious threat to inmate health and safety. The problems are most acute in the area of protection of inmates from harm by other inmates.

1. Applicable legal standards

Reiterating established law, the Supreme Court held in Farmer v. Brennan, 511 U.S. 825, 828 (1994), that "[a] prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment." The Court went on to give content to the term "deliberate indifference," holding that the standard is equivalent to a subjectively defined "recklessness": a prison official violates the Constitution when that official "knows of and disregards an excessive risk to inmate health or safety." Id. at 837. The Court stated:

> [A]n Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.

Ibid. The Court emphasized that "[a] prison official's duty under the Eighth Amendment is to ensure 'reasonable safety,'" ibid, and concluded with this summary: "A prison official may be held liable under the Eighth Amendment . . . if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." Id. at 847.

The Eighth Amendment imposes affirmative obligations upon prison officials to maintain inmate safety from inmate-on-inmate violence:

> The [Eighth] Amendment also imposes duties on [prison] officials, who must . . . 'take reasonable measures to guarantee the safety of the inmates' . . . In particular, as the lower courts have uniformly held, and as we have assumed, '[p]rison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners.'

Id. at 832-33. See also Toussaint v. McCarthy, 801 F.2d 1080, 1107 (9th Cir.1986) ("human needs that prison officials must satisfy include . . . personal safety"), cert. denied, 481 U.S. 1069 (1987).

The rationale for the Eighth Amendment's affirmative requirement that prison officials protect inmates from inmate-on-inmate violence is compelling: "[H]aving stripped prisoners of virtually every means of self-protection and foreclosed their access to outside aid," society may not simply lock away offenders and let "the state of nature take its course." Farmer, 511 U.S. at 833. "[G]ratuitously allowing the beating or rape of one prisoner by another serves no 'legitimate penological objectiv[e],' any more than it squares with 'evolving standards of decency.' Being violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'" Id. at 833-34 (internal citations omitted).

The Eighth Amendment protects inmates against deliberate indifference to risks of harm, as well as to actual harm. Inmates need not "'await the consummation of threatened injury in order to obtain preventive relief'" from unsafe conditions of confinement. Farmer, 511 U.S. at 845, quoting Pennsylvania v.

West Virginia, 262 U.S. 553, 593 (1923). Rather, "[f]or a claim . . . based on a failure to prevent harm, the [plaintiff] must show . . . conditions posing a substantial risk of serious harm." Id. at 834. And, "[p]rison authorities must protect not only against current threats, but also must guard against 'sufficiently imminent dangers' that are likely to cause harm in the 'next week or month or year.'" Horton v. Cockrell, 70 F.3d 397, 401 (5th Cir. 1995) (per curiam), quoting Helling v. McKinney, 509 U.S. 25, 34, 32 (1993). Moreover, it is not necessary that all prisoners suffer a pervasive risk of harm, if an identifiable prisoner or group of prisoners suffer such risk. Vosburg v. Solem, 845 F.2d 763 (8th Cir.), cert. denied, 488 U.S. 928 (1988). See Farmer, 511 U.S. at 843:

> Nor may a prison official escape liability for deliberate indifference by showing that, while he was aware of an obvious, substantial risk to inmate safety, he did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault. The question under the Eighth Amendment is whether, prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial risk of serious danger to his future health,' and it does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk.

Even where prison assaults, for example, are not generally "pervasive," a plaintiff may show that for "an identifiable group of prisoners . . . risk of . . . assault [is] a serious problem of substantial dimensions." Walsh v. Brewer, 733 F.2d 473, 476 (7th Cir. 1984). See Withers v. Levine, 615 F.2d 158, 161 (4th Cir. 1980) ("pervasive risk of harm . . . may be established by much less than proof of a reign of violence and terror in the particular institution"), cert. denied, 449 U.S. 849 (1980). In addition, the ability to implement appropriate housing decisions is vital to run an adequately safe jail. See Jensen v. Clarke, 94 F.3d 1191 (8th Cir. 1996) (Arnold, C.J.); Vosburg v. Solem, 845 F.2d 763 (8th Cir.), cert. denied, 488 U.S. 928 (1988).

2. The Jefferson County Jails Are Currently Dangerously Overcrowded and Understaffed, and the Problem Will Get Worse If the State's Motion Is Granted.

The Jefferson County Jails are understaffed and overcrowded, and inmates currently face dangerous living conditions. Fights and assaults are frequent, because with such a large population staff cannot manage and supervise inmates appropriately, separating likely predators from likely prey, and keeping enemies away from each other. There is inadequate capacity in isolation cells to meet the need, and protection is accordingly compromised.

The affidavit of Major Linn Moore shows that every week, the State removes some 28 inmates from the Jails. Thus just one month of failure to abide by this Court's 1991 order would boost inmate population by more than 100 people, past any safe capacity. The Jails simply cannot absorb so many more inmates. The Jefferson County Jails are currently over full capacity. As a result, as Major Moore himself acknowledges, they lack the housing flexibility they need to provide for inmate safety.

In sum, there remains an urgent need for the continuation of the 1991 order. Indeed, other measures are necessary as well; the County is considering constructing another building, which would greatly ease overcrowding. See Affidavit of Mary Buckelew, attached to County defendants' Opposition to Defendants' Motion to Terminate, at 2. If the State is allowed to end or slow transfers of state inmates, conditions will worsen.[8/] The Court should not allow this to happen; it should retain its 1991 order in effect, until the State, the County, and the Sheriff together succeed in stabilizing conditions at the Jails, bringing them

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8/As discussed above, pp. 33-36, "current or ongoing violation of the Federal right," for purposes of the Act, encompasses not only unlawful conduct actually in progress at the very moment the court rules, but also the failure to remedy the proximate effects of past unlawful acts and the present danger of imminent recurrence of a violation of the Constitution or federal statutory right.

into compliance with constitutional mandates and indicating their ability to maintain such compliance. The order "remains necessary to correct a current or ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and . . . [is] narrowly drawn and the least intrusive means to correct the violation." 18 U.S.C. § 3626(b)(3).

VI. SECTION 3626(e)(2), PROPERLY CONSTRUED, DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE.

Under a literal construction of the PLRA's "automatic stay" provision, 18 U.S.C. § 3626(e)(2), a stay would go into effect on August 1, the day this brief is filed. As briefed below, the United States interprets the statute, less literally, to direct that thirty days after a defendant makes a motion to terminate previously granted relief, the court should stay the relief — unless it finds a stay inappropriate in light of other statutory provisions. We respectfully suggest that the Court use the hearing on August 6 to evaluate whether or not to stay the challenged relief. If the Court is able to rule then on the motion for immediate termination, there will be no need for it to rule on the stay or its constitutionality.

Given a literal construction, the PLRA's "automatic stay" provision, 18 U.S.C. § 3626(e)(2), would apparently suspend the operation of an otherwise valid judgment, based solely on the defendant's submission of a motion and the court's failure to act on that motion within 30 days. So construed, the provision would appear to violate the separation of powers doctrine.

The United States does not agree that the statute is unconstitutional. Rather, in order to avoid constitutional doubts, we believe that the provision should be construed to preserve the courts' inherent authority to maintain their judgments until making a considered decision based on the application of law to pertinent facts to suspend, alter, or terminate them.

A. A Strict Construction Of the Automatic Stay Provision Would Violate the Separation of Powers Doctrine.

Section 3626(e)(2) provides in pertinent part that "[a]ny prospective relief subject to a pending motion [to terminate] shall be automatically stayed . . . beginning on the 30th day after such motion is filed." By its terms, the provision either independently suspends an existing judgment awarding prospective relief, or requires nondiscretionary judicial suspension of that relief. Either construction of the provision would appear to violate the separation of powers doctrine, because the statute would amount to a legislative suspension of a judgment, permitting no analysis by the courts of the relevant facts or applicable substantive law. See United States v. Klein, 80 U.S. (13 Wall.) 128 (1871).

The fact that relief would not be automatically terminated, but merely automatically suspended, does not cure the potential constitutional defect. Under Articles I and III, the legislative authority includes the power to announce the law, and to set the standards by which courts render substantive and remedial decisions (including decisions to stay or alter prospective judgments). Thus Congress may, as it has done with the PLRA's "termination" provisions coupled with those provisions' "limitation," 18 U.S.C. § 3626(b)(1), (b)(2), (b)(3), set forth a standard for courts to apply in determining whether to continue relief. But Congress lacks the power to dictate absolutely that a judgment already rendered by an Article III court be altered or suspended, as the automatic stay might be read to require. See Plaut, 115 S. Ct. at 1456 ("judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government") (quoting Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948)); see also Hayburn's Case, 2 U.S. (2 Dall.) 408, 413 (1792) (opinion of Iredell, J., and Sitgreaves, D.J.) ("[N]o decision of any court of the United States can, under any circumstances, . . . be liable to a revision, or even suspension, by the legislature itself, in whom no judicial power of any kind appears to be vested.")[9/]

The PLRA does not require courts to rule on a defendants' motion to terminate within thirty days of its filing – the statute sets the more flexible requirement that a court rule "promptly" on such a motion. 18 U.S.C. § 3626(e)(1). Nonetheless, if it were always possible for a court to somehow avoid the stay, by ruling within 30 days, that might ameliorate the constitutional problem, by allowing courts to avoid it. Evasion is made more difficult, however, because it may in some cases simply be impossible for a court to decide the motion responsibly within thirty days. Under the standards set by the

9/ The conclusion that a strict construction of the PLRA's automatic stay provision would appear to render it unconstitutional does not cast doubt on the validity of the automatic stay of proceedings contained in the Bankruptcy Code, 11 U.S.C. § 362(a). The bankruptcy stay is necessary to maintain the status quo pending the judicial consolidation of proceedings on which the bankruptcy system depends, and it is accordingly authorized by the Constitution's express provision that Congress may act in the bankruptcy area. See U.S. Const. art. I, § 8, cl. 4; Kalb v. Feuerstein, 308 U.S. 433, 439 (1940) (Congress's plenary power over bankruptcy renders bankruptcy automatic stay provision constitutional). By contrast, the PLRA stay operates to alter the status quo by suspending an existing judicial order. See United States v. Michigan, No. 1:84 CV 63, slip op. at 11 n.3 (W.D. Mich. July 3, 1996) (distinguishing bankruptcy stay).

other provisions of the PLRA, the proper response to a motion to terminate an existing injunction is an orderly briefing and presentation of the factual and legal issues, sometimes including an evidentiary hearing, so that the court can determine whether the challenged relief "remains necessary to correct a current or ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and is narrowly drawn and the least intrusive means to correct the violation." 18 U.S.C. § 3626(b)(3).

"Once the jurisdiction of the court has been invoked, that court has an obligation to exercise its jurisdiction meaningfully." United States v. Michigan, 18 F.3d 348, 351 (6th Cir. 1995). Congress cannot abridge that judicial obligation by forcing the court into a schedule that makes it impossible for the court to consider the relevant factual and legal issues. "[T]he province and duty of the judicial department to say what the law is," Marbury v. Madison, 5 U.S. at 177, necessarily entails the authority and the duty to take enough time to consider fully the relevant issues, without a legislative alteration of the status quo.

A strict construction of the automatic stay provision would also appear to violate the separation of powers doctrine by restricting courts' Article III authority to remedy constitutional violations and to effectuate their prior decrees. If the stay provision were read to require suspension of relief that a court has entered in order to remedy a violation of federal law – irrespective of whether unconstitutional conduct continues, or whether relief remains necessary to address past conduct – it would purport to undo the judgment of a court based on factors wholly irrelevant to whether the underlying violation has been abated.[10] By suspending relief based on the pendency of a motion and the court's failure to act on it within 30 days, the stay provision clearly would impinge on the court's remedial authority.[11]

10/ In addition, if the practical effect of the automatic stay were to suspend relief that is necessary to remedy constitutional violations, it might result in a violation of the underlying substantive constitutional right, as well as a violation of separation of powers principles.

11/ Treating the stay provision as operating without allowing judicial evaluation of the circumstances would be inconsistent with (b)(3)'s requirement that necessary relief remain in effect. Subsection (b)(3) was apparently added to the PLRA in response to criticism of the earlier version of the proposed legislation as potentially unconstitutional. See, e.g., 142 Cong. Rec. S2296-S2300 (daily ed. Mar. 19. 1996) (discussing criticism). In that earlier version, the bill required automatic termination of judgments in prison cases after two years had passed, and directed courts to terminate a challenged judgment if it had been granted or approved without a finding of liability, without analysis of the current needs for injunctive relief.

(continued...)

A number of courts have interpreted the stay provision strictly and invalidated it under that interpretation. Gluth v. Arizona Dept. of Corrections, Civ. 84-1626 PHX-PGR (D. Ariz., Apr. 9, 1997) (attachment N); Glover v. Johnson, 957 F. Supp. 110 (E.D. Mich. 1997); Hadix v. Johnson, 933 F. Supp. 1360 (E.D. Mich. 1996); Hadix v. Johnson, 933 F. Supp. 1362 (W.D. Mich. 1996); Ruiz v. Scott, CA No. H-78-987 (S.D. Tex., Sept. 25, 1996) (attachment O); United States v. Michigan, No. 1:84 CV63 (W.D. Mich., July 3, 1996) (attachment P). We submit, however, that the provision can and should be construed to avoid such an outcome.

B. Properly Construed, Section 3626(e)(2) Does Not Violate the Separation of Powers Doctrine.

Because a contrary interpretation would appear to violate separation of powers principles, we believe that the stay provision must be read to preserve the courts' inherent authority to make considered decisions based on the application of law to

(...continued)
H.R. 667, § 301, 104th Cong., 1st Sess. (discussed in H.R. Rep. 104-21). The addition of the current subsection (b)(3) recognized that there would be times when courts should appropriately retain relief challenged by defendants. The addition of (b)(3) strengthens the reading of the stay provision we propose immediately following, which allows courts time to make the considered judgment required by (b)(3), without suspension of their prior orders.

pertinent facts. We read 18 U.S.C. § 3626(e)(2)(A) to direct that thirty days after a defendant makes a motion to terminate previously granted relief, the court should stay the relief — unless it finds a stay inappropriate in light of other statutory provisions. One reason that might justify a judicial refusal to enter a stay is that the complexity of the factual issues precludes the court from assuring itself within the thirty days that the relief is not necessary to remedy federal rights. In addition, if a court wishes to avoid a stay, it can do so in many circumstances by ruling on the motion to terminate. (Such a ruling could usually be rendered in a very short time where the motion is inappropriate under (b)(1) or (b)(2), or where the plaintiffs do not argue continuing necessity under (b)(3).) Under our reading of the provision, a defendant will not be free to violate with impunity the terms of a challenged order merely because the 30-day period has elapsed without a ruling by the district court. Rather, the relief remains in effect until the court either grants a stay under subsection (e)(2)(A), or terminates the relief.[12/]

12/ A refusal to enter an automatic stay would be an appealable order, as a refusal to enter an injunction.

Our reading accommodates three principles. First, only a court may suspend or alter prior court judgments. Thus, the stay provision may not be read to terminate previously ordered relief without judicial action. Second, a court's ruling suspending relief must be substantive rather than ministerial. In other words, the court must determine that suspension or termination of relief is appropriate, under applicable legal principles, rather than merely giving effect to a congressional suspension of its judgment. Third, a court's consideration of the merits of continued relief may not be so truncated as to prevent a deliberative decision.

Under Section 3626(b)(3), "[p]rospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current or ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation." Where a court has adequate time within the 30-day period to determine that relief remains necessary under the Act's standards (either in the form previously granted, or modified form), such relief will continue and the stay will not take effect. 18 U.S.C. § 3626(e)(2)(B).

Conversely, if a court affirmatively finds that no relief is necessary, the stay similarly will not take effect. With respect to cases in which, due to factual complexity or other factors, the 30-day period affords a court inadequate time in which to determine whether and what type of relief remains necessary, the Act should be interpreted to allow full maintenance of the judgment for such time as is required for a considered determination. Generally, courts may be expected to act as expeditiously as their dockets, and the practicalities of fact-intensive proceedings, will allow.[13/]

We acknowledge that the reading we propose is contrary to an literal interpretation of the language of the provision. The provision's use of the word "automatic" suggests that stays are to take effect without judicial discretion. Moreover, Section 3626(e)(2)(B)'s provision that the automatic stay ends "on the date the court enters a final order ruling on the motion [to

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13/ In those rare instances in which a court ignores the Act's admonitions that it promptly rule on a pending motion, a defendant may seek a writ of mandamus in the court of appeals requiring an immediate disposition by the district court. 28 U.S.C. § 1651(a); _see_, _e.g._, _McClellan_ v. _Young_, 421 F.2d 690, 691 (6th Cir. 1970) (issuing writ of mandamus directing district court to decide habeas petition); _United States_ v. _Lynd_, 321 F.2d 26, 28 (5th Cir. 1963) (Bell, J., concurring specially) (writ of mandamus is appropriate remedy where court fails to grant or deny relief), _cert. denied_, 375 U.S. 968 (1964).

terminate]" may indicate that Congress intended issuance of a final order to be the only method by which a court could avoid the automatic stay. However, as already set out, our reading gives full weight to Congress's recognition, embodied in subsection (b)(3), that relief challenged under the PLRA may well be necessary to remedy a constitutional violation, and to Congress's corresponding statutory requirement that courts leave such relief in place. In these circumstances, an over-literal reading should be avoided. Cf. Public Citizen v. Department of Justice, 491 U.S. 440, 454-55, 465-67 (1989). Where, as here, one reading of a provision would apparently render it unconstitutional, while an alternative reading exists under which the provision would clearly be valid, the applicable principle of construction "is a categorical one." Rust v. Sullivan, 500 U.S. 173, 190 (1991). The courts' "plain duty is to adopt that [reading] which will save the Act." Ibid. (quoting Blodgett v. Holden, 275 U.S. 142, 148 (1927)).

CONCLUSION

For the foregoing reasons, if it necessary for it to reach the constitutional issues at all, the Court should uphold the challenged provisions of the PLRA. In any event, the Court should leave the challenged relief in place, because it remains necessary under current conditions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the Response of the United States to the State Defendant's Motion to Terminate Previously Granted Relief, and Attachments, were served by overnight mail, this 1st day of August, 1997, upon the following:

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