No. 99-20228

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DAVID R. RUIZ, et al.,

Plaintiffs-Appellees-
Cross-Appellants-Appellees

v.

UNITED STATES OF AMERICA,

Intervenor-Plaintiff-Appellee-
Cross-Appellant

v.

GARY L. JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION; et al.,

Defendants-Appellants-
Cross-Appellees

REPRESENTATIVE JOHN CULBERSON; SENATOR J.E. "BUSTER" BROWN,

Intervenor-Defendants-
Appellants-Cross-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

REPLY BRIEF FOR THE UNITED STATES AS
INTERVENOR-PLAINTIFF-APPELLEE-CROSS-APPELLANT

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1. In our opening brief (pp. 10-18), the United States argued that the termination provision of the Prison Litigation Reform Act (PLRA), 18 U.S.C. 3626(b), does not violate the principle of Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995). Although Plaut establishes that the separation of powers doctrine forbids Congress from enacting retroactive legislation requiring an Article III court to set aside a money judgment, the

Court in Plaut distinguished decisions approving statutes "that altered the prospective effect of injunctions entered by Article III courts." 514 U.S. at 232, citing Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1855).

Echoing the district court's decision, plaintiffs-appellees-cross-appellants David R. Ruiz, et al. (plaintiffs), argue that the termination provision does not fit within the Wheeling Bridge exception to Plaut. They argue (Br. 18)[1/] that the injunction in Wheeling Bridge "merely enforced a federal statute that Congress had the power to enact, modify, or repeal," whereas the injunction at issue in this case is based upon violations of the Eighth and Fourteenth Amendment rights that "are not of congressional creation" (Br. 19).

The relevant underlying law that has been changed by Congress is not the Eighth Amendment, but rather the "district court's authority to issue and maintain prospective relief absent a violation of a federal right." Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649, 657 (1st Cir. 1997), cert. denied, 524 U.S. 951 (1998); see also Imprisoned Citizens Union v. Ridge, 169 F.3d 178, 185 (3d Cir. 1999), and Plyler v. Moore, 100 F.3d 365, 372 (4th Cir. 1996), cert. denied, 520 U.S. 1277 (1997). Plaintiffs attempt to undercut reliance on these cases, cited by the United States (Br. 16) and defendants-appellants (Appellants' Br. 16-19) in our opening briefs, by arguing (Br. 21, n.5) that

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[1/] The designation "Br.__" refers to the Brief for Plaintiffs-Appellees and Cross-Appellants unless otherwise noted.

all of those cases involved consent decrees which, unlike the decree in this case, were not supported by findings of constitutional violations.

Before the PLRA, however, even litigated judgments were subject to motions under Federal Rules of Civil Procedure 60(b) to modify or terminate relief without a change in law where the court finds that "it is no longer equitable" that the ruling have "prospective application." In the PLRA, Congress has provided a structured timetable for motions to modify or terminate relief, see 18 U.S.C. 3626(b)(1), and has codified the standards that a court should apply in ruling on such a motion.

Moreover, since the PLRA affects only the prospective effect of a decree in a prison conditions case, the presence or absence of past findings of constitutional violations is irrelevant.[2/] Under the limitation on termination contained in 18 U.S.C. 3626(b)(3), a court's authority to continue relief prospectively depends not on whether a constitutional violation was found in the past, but on whether the evidence now establishes a "current and ongoing" violation. And the contours of that relief in both consent decrees and court-ordered judgments must conform to the tailoring principles articulated in Subsection 3626(b)(3), i.e., relief must be "narrowly drawn, extend[] no further than

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[2/] The presence or absence of such findings was relevant only to whether a defendant could move for "immediate termination" of a pre-existing decree, pursuant to 18 U.S.C. 3626(b)(2), or had to wait until two years after the enactment of the PLRA to do so, pursuant to 18 U.S.C. 3626(b)(1)(A)(iii). In April 1998, all pre-PLRA decrees became subject to periodic review.

necessary to correct the violation of the Federal right, and [be] the least intrusive means necessary to correct the violation of the Federal right." These standards apply to consent decrees and litigated judgments alike.

2. Plaintiffs argue (Br. 20) that under Wheeling Bridge, Congress has no power to alter a judgment adjudicating "plaintiff's 'private rights' under the Final Judgment enforcing the Eighth and Fourteenth Amendment" but may only affect "public rights of all under the law." Plaintiffs' argument is based on the following language from Wheeling Bridge:

> [I]t is urged, that the act of congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby in favor of the plaintiff. This, as a general proposition, is certainly not to be denied, especially as it respects adjudication upon the private rights of parties. When they have passed into judgment the right becomes absolute, and it is the duty of the court to enforce it.
>
> The case before us, however, is distinguishable from this class of cases, so far as it respects that portion of the decree directing the abatement of the bridge. Its interference with the free navigation of the river constituted an obstruction of a public right secured by acts of congress.

59 U.S. at 431

This position was recently considered and rejected in Imprisoned Citizens Union v. Ridge, 169 F.3d 178 (3d Cir. 1999), which involved the constitutionality of the termination provision of the PLRA. In that case, the court stated that although this language appears "[a]t first glance" to support plaintiffs' argument, Imprisoned Citizens Union, 169 F.3d at 186, "a more

careful analysis shows that the Court's holding in Wheeling Bridge did not hinge on the distinction between public and private rights," but rather "focused on the difference between prospective injunctive relief and judgments for damages." Ibid. Thus, the court in Imprisoned Citizens Union quoted the following passage from Wheeling Bridge that demonstrates that the decision in that case "turned on the nature of the relief, not the source of the right." 169 F.3d at 186, quoting Wheeling Bridge:

> [I]f the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the power of congress. It would have depended, not upon the public right of the free navigation of the river, but upon the judgment of the court. The decree before us, so far as it respect the costs adjudged, stands upon the same principles, and is unaffected by the subsequent law. But that part of the decree, directing the abatement of the obstruction, is executory, a continuing decree, which requires not only the removal of the bridge, but enjoins the defendants against any reconstruction or continuance. Now, whether it is a future existing or continuing obstruction depends upon the question of whether or not it interferes with the right of navigation. If, in the mean time, since the decree, this right has been modified by the competent authority, so that the bridge is no longer an unlawful obstruction, it is quite plain the decree of the court cannot be enforced.

59 U.S. (18 How.) at 431-432

In nineteenth-century cases such as Wheeling Bridge, the "public rights" versus "private rights" language does not refer to the substantive basis for the suit. Rather, it was used to distinguish between a remedy at law and an equitable remedy. See In re Clinton Bridge, 77 U.S. (10 Wall.) 454, 463 (1870). Wheeling Bridge and In re Clinton Bridge involved private tort

actions to remove a bridge as a nuisance. In both cases, it was the type of relief at issue that was critical to the separation of powers analysis. In both, the Court held that a monetary judgment issued by the Court could not be undone by Congress, but that the Court's executory, continuing injunctive decree was subject to subsequent legislation. Wheeling Bridge, 59 U.S. at 429-436; In re Clinton Bridge, 77 U.S. at 463.

Plaintiffs' reliance (Br. 19) on language in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 83 (1982), does not add anything to their argument. That case involved a separation of powers challenge to the Bankruptcy Reform Act, 28 U.S.C. 1471 (Supp. IV 1976), which granted broad jurisdiction to non-Article III bankruptcy judges over "all civil proceedings * * * arising in or related to cases under title 11" of the United States Code.[3/] Northern Pipeline, 458 U.S. at 50. In connection with the United States' defense of the constitutionality of the statute, the Court contrasted matters involving "public rights," which arise "between the Government and others" and which "historically could have been determined exclusively by" the executive or legislative departments, 458 U.S. at 68-69 (citation omitted), with "private rights," involving disputes over the "liability of one individual to another under the law as defined." Id. at 69-70. Suits that could be brought at common law, or in equity or admiralty would

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[3/] Title 11 of the United States Code is the Bankruptcy title.

fall within the class of private rights. See Murray v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1855). The Court in Northern Pipeline stated that only controversies involving public rights "may be removed from Art. III courts and delegated to legislative courts or administrative agencies for their determination." 458 U.S. at 70. "Private rights," which are "inherently * * * judicial," must be determined by an Article III court. Id. at 68 (citation omitted). Since the Bankruptcy Reform Act permitted bankruptcy judges to adjudicate state law claims, for example, it was held to have intruded on the judicial function of Article III courts and violated separation of powers principles. Id. at 84.

Northern Pipeline thus uses the terms "public rights" and "private rights" in a different way from the manner employed by the Court in Wheeling Bridge. As explained by the district court in Benjamin v. Jacobson, 935 F. Supp. 332, 348 (S.D.N.Y. 1996),[4/] both the award of costs to the plaintiff and the injunction in the Supreme Court's first decision in Wheeling Bridge,[5/] were "predicated on the fact that the bridge violated the public right of free navigation." But in the subsequent decision in Wheeling

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[4/] The district court's decision was affirmed in part and reversed in part by Benjamin v. Jacobson, 124 F.3d 162 (2d Cir. 1997). The court of appeals subsequently vacated the panel opinion on rehearing en banc, and the district court decision was affirmed insofar as it upheld the constitutionality of 18 U.S.C. 3626(b). Benjamin v. Jacobson, 172 F.3d 144, 166 (2d Cir.), cert. denied, 120 S. Ct. 72 (1999).

[5/] Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 626-627 (1851).

Bridge, on which we rely here, the Court held that only the portion of the judgment awarding costs was immune from alteration by Congress. The prospective effect of the injunction could be altered through a change in the law that authorized it. 59 U.S. at 431.

In addition, Northern Pipeline's use of the terms "public rights" and "private rights" would be relevant if the termination provision actually withdrew from Article III courts the ability to adjudicate the continuing validity of the decree going forward. As we argued in our opening brief (pp. 18-22), however, the termination provision does not violate Article III because, rather than prescribing a decision, the PLRA both changes the underlying law and gives the district court the authority to make findings as to whether prospective relief remains necessary to correct a current or ongoing violation of the Federal right at issue and whether that relief meets the narrow tailoring standards established by the PLRA. 18 U.S.C. 3626(b)(3).

In any event, even if the public rights/private rights distinction were as plaintiffs contend, and the Wheeling Bridge exception to Plaut did not apply to a judgment resolving "private rights," that would not invalidate the termination provision of the PLRA. The judgment in a prison case affects not only the "private rights" of inmates but also a "public right" that Congress has the power to alter, i.e., the extent of relief permissible to remedy the violation of a federal right. See Imprisoned Citizens Union, 169 F.3d at 187. The federalism

concerns inherent in a federal court judgment affecting the operation of a state prison provide ample authority for Congress to alter the remedial standards applicable to a consent decree and to alter or codify the remedial standards applicable to a court-ordered decree.[6/]

3. Plaintiffs' due process argument (Br. 24-29) is unavailing for the reasons stated in our opening brief. Plaintiffs concede that the decision in Fleming v. Rhodes, 331 U.S. 100 (1947), "arguably supports the United States' position that executory injunctive decrees are subject to modification by subsequent legislation," but they discount the persuasive effect of Fleming by claiming that it is "basically a Supremacy Clause decision" (Br. 26). The proposition in Fleming that "[f]ederal regulation of future action based upon rights previously acquired," even by judgments, "is not prohibited by the Constitution" was supported, however, by earlier decisions of the Court involving rights under a federal statutory scheme. 331 U.S. at 107 & n.12, citing Paramino Lumber Co. v. Marshall, 309 U.S. 370 (1940) (private act of Congress curing a defect in compensation act did not deny due process in authorizing review

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[6/] On April 18, 2000, the Supreme Court of the United States held oral argument in United States v. French, No. 99-582 (consolidated with Miller v. French, No. 99-224). One of the issues in that case is whether the automatic stay provision of the PLRA, 18 U.S.C. 3626(e) (Supp. III 1997) violates constitutional separation-of-powers principles. While the constitutionality of the automatic stay provision involves issues not present with the termination provision, see Ruiz v. Johnson, 178 F.3d 385 (5th Cir. 1999), there is some overlap, since French, like this case, involves the proper interpretation of Plaut and Wheeling Bridge.

and alteration of prior award of compensation under the federal Longshoremen's and Harbor Workers' Compensation Act).

In any event, plaintiffs do not respond to our argument (Br. 23-24) that, even if they have vested rights in the injunctive relief in the 1992 Final Judgment, the termination provision of the PLRA affords them all of the due process to which they would be entitled.

CONCLUSION

For the foregoing reasons and for the reasons stated in our opening brief, the district court's judgment should be reversed insofar as it holds that the termination provision of the PLRA, 18 U.S.C. 3626(b), is unconstitutional.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies that this brief complies with the type-volume limitations of 5th Cir. R. 32.2.7(b). Exclusive of exempted portions in 5th Cir. R. 32.2.7(b)(3), the brief contains 2495 words in monospaced typeface. The brief has been prepared in monospaced typeface using Wordperfect 7.0, with Courier typeface at 10 characters per inch (12-point font). The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in 5th Cir. R. 32.2.7, may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

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CERTIFICATE OF SERVICE

I hereby certify that I have, on this day, served the foregoing Reply Brief for the United States as Intervenor-Plaintiff-Appellant on the parties to this case by mailing two copies to counsel of record, first-class, postage prepaid, at the following addresses:

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