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

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

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JURISDICTIONAL STATEMENT

This suit was brought by plaintiffs-appellees, a class of inmates confined in various institutions operated by the Texas Department of Corrections, pursuant to 42 U.S.C. 1983, to challenge the conditions of their confinement. The jurisdiction of the district court was based upon 28 U.S.C. 1343.

This appeal was taken from the March 3, 1999, order of the district court finding unconstitutional the termination provisions of the Prison Litigation Reform Act (PLRA), 18 U.S.C. 3626(b), as amended (R. 8892). A timely motion to alter and amend the judgment pursuant to Fed. R. Civ. P. 59(e) was denied on July 27, 1999 (R. 8934). The United States' notice of appeal was filed on August 31, 1999 (R. 8940). This is an appeal from a final judgment of the district court, and therefore this Court has jurisdiction pursuant to 28 U.S.C. 1291.

ISSUES PRESENTED FOR REVIEW

Whether the termination provision of the PLRA, 18 U.S.C. 3626(b), as amended, is unconstitutional, because it:

(1) violates separation-of-powers principles, or

(2) deprives petitioners of vested property rights without due process of law.

STATEMENT OF THE CASE

In 1974, the district court consolidated a number of separate actions by individual inmates alleging that conditions of their confinement by the Texas Department of Corrections (TDC) violated the Eighth and Fourteenth Amendments to the Constitution. The district court certified the action as a class action on behalf of more than 33,000 inmates of the TDC. The United States intervened in December 1974.

Following a lengthy trial, the district court found that the conditions of confinement in prisons operated by the TDC violated the Constitution. Ruiz v. Estelle, 503 F. Supp. 1265 (S.D. Tex.

1980), rev'd in part, 679 F.2d 1115 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983). This Court affirmed "the district court's finding that TDC impose[d] cruel and unusual punishment on inmates in its custody as a result of the totality of conditions in its prisons" and that some of TDC's practices deny inmates due process. Ruiz v. Estelle, 679 F.2d 1115, 1126 (1982), cert. denied, 460 U.S. 1042 (1983). It narrowed the scope of the relief ordered by the district court on the grounds that some of that relief was not "demonstrably required to protect constitutional rights" and was overly intrusive. Ibid.

In 1990, defendants filed a motion to terminate the district court's jurisdiction (R. 5962). As a result of negotiations ordered by the court, the parties submitted a proposed comprehensive final judgment that relieved the defendants of obligations in certain areas and, as to other areas, provided permanent injunctions that "erected permanent edifices for the protection of the prisoners' rights" to constitutional conditions into the future. Ruiz v. Collins, No. 78-987 (S.D. Tex. Dec. 14, 1992), slip op. 3, 31. The court entered the order as a final judgment, and the defendants withdrew their motion to terminate the court's jurisdiction as part of the proposed order. Id. at 3.

2. On March 25, 1996, the defendants filed a motion to vacate the December 11, 1992, Final Judgment pursuant to Fed. R. Civ. P. 60(b)(5). The parties contemplated the development of a factual record and an evidentiary hearing as to the Rule 60(b)(5)

motion. On September 5, 1996, the defendants filed a supplemental motion to vacate the Final Judgment, pursuant to Section 802(b)(2) of the PLRA, 18 U.S.C. 3626(b)(2).[1/]

On September 23, 1996, the district court entered an order finding that "[i]t is impossible for the Court to resolve defendants' motions within the 30-day period specified in 18 U.S.C. sec. 3626(e)(2)(A)(i)* * *."[2/] Finding that the PLRA's "Automatic Stay" provision violated the Separation of Powers doctrine and due process of law, the court determined that the "status quo should be preserved pending the resolution of defendants' motions." Finally, the court stated that it would "proceed to give due consideration to both of defendants' motions [the Rule 60(b) motion and the PLRA motion] when the parties are ready for a hearing on them."

[1/] 18 U.S.C. 3626(b)(2) states:

> 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.

[2/] 18 U.S.C. 3626(e)(2)(A)(i) states:

> Any motion to modify or terminate prospective relief made under subsection (b) shall operate as a stay during the period * * * 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).

Defendants appealed and sought mandamus as to the district court's refusal to rule immediately on their motion to terminate relief. This Court denied mandamus and dismissed the appeal for lack of jurisdiction. Ruiz v. Scott, Nos. 96-21118, 97-20068 (Aug. 6, 1997).

On January 28, 1998, the district court ruled that the automatic stay provision of the PLRA, as amended, is unconstitutional. On appeal, however, this Court held that the automatic stay provision, as construed to permit a court to "stay the stay" under general equitable principles, is constitutional. Ruiz v. Johnson, 178 F.3d 385 (1999).

On May 6, 1998, defendants filed an additional motion to terminate the relief in the 1992 Final Judgment, this time pursuant to Section 802(b)(1) of the PLRA, 18 U.S.C. 3626(b)(1). That subsection provides that prospective relief in a prisons condition action that was issued before the PLRA's date of enactment is "terminable" two years after the date of enactment (i.e., April 26, 1998).[3/]

[3/] On July 21, 1998, the court deferred a ruling on defendants' motion for termination pursuant to 18 U.S.C. 3626(b)(1). The court noted that both the motion under Section 3626(b)(1) and the previously-filed motion under Section 3626(b)(2) are subject to the "savings clause" of the PLRA, pursuant to which a district court cannot terminate prospective relief that "remains necessary to correct a current or ongoing violation of the Federal right" and is narrowly tailored to remedy such violation. It ruled, therefore, that a decision on the Section 3626(b)(1) motion, like the determination on the Section 3626(b)(2) motion, would be deferred until the factual inquiry required by Section 3626(b)(3) was completed.

In October 1998, the defendants again petitioned this Court for a writ of mandamus to compel the district court to rule immediately on the pending motions for termination. Based upon the fact that, on November 4, 1998, the district court had set a hearing date of January 21, 1999, to address the PLRA motions, this Court denied the writ of mandamus but ordered the district court to rule on these motions within 31 days of the evidentiary hearing or no later than March 1, 1999.

On remand, the district court limited each side to 50 hours of testimony.[4/] On March 1, 1999, the district court entered an order finding that both of the PLRA's termination provisions violate the Separation of Powers doctrine and deny plaintiffs due process under the Fifth Amendment. It therefore denied the motions to terminate. In addition, the court found that the systemic conditions of confinement in administrative segregation, the failure to provide reasonable safety for assaulted and abused inmates, and the excessive use of force by correctional officers in Texas prisons "violate the Constitution of the United States." Ruiz v. Johnson, 37 F. Supp. 2d 855, 861 (S.D. Tex. 1999). The court also entered an alternative order to be entered "[i]f, on appeal, it is adjudged that the PLRA is constitutional." That order terminated the sections of the 1992 Final Judgment pertaining to access to courts, health services, and death row. The court also ordered the parties to notify the court by June 1,

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[4/] The United States did not participate on the merits of the termination motions. We therefore take no position on the merits issues in this appeal.

1999, whether an agreement could be reached on a proposed form of judgment that would remedy the unconstitutional conditions the court found in its primary order and would conform to the requirements of the PLRA.

Defendant state officials filed a notice of appeal on March 4, 1999. Plaintiffs-appellees David R. Ruiz, et al., filed a cross-appeal as to the merits. Plaintiffs-appellees also filed a motion for amended and additional findings and to alter and amend the judgment, pursuant to Fed. R. Civ. P. 52(b) and 59(e).

On July 27, 1999, the district court issued an order denying plaintiffs-appellees' post-trial motions. The court stated that "[w]hile the evidence and analysis presented by the plaintiffs after the conclusion of the fact-finding hearing appears to be both compelling and useful for any determination concerning the constitutionality of conditions in TDCJ, * * * [t]he court will not consider any new evidence, or new formulation of evidence, because that course would flout the order of the Court of Appeals that this court rule on the defendants' motion not later than March 1, 1999."

SUMMARY OF ARGUMENT

The district court's ruling that the termination provisions of the PLRA violate the constitutional doctrine of separation of powers contradicts the conclusions of every court of appeals that has considered the issue. See Berwanger v. Cottey, 178 F.3d 834 (7th Cir. 1999); Nichols v. Hopper, 173 F.3d 820 (11th Cir. 1999); Benjamin v. Jacobson, 172 F.3d 144 (2d Cir. 1999) (en

banc), cert. denied, 120 S. Ct. 72 (1999); Imprisoned Citizens Union v. Ridge, 169 F.3d 178 (3d Cir. 1999); Hadix v. Johnson, 133 F.3d 940 (6th Cir.), cert. denied, 524 U.S. 952 (1998); Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649 (1st Cir. 1997), cert. denied, 524 U.S. 951 (1998); Dougan v. Singletary, 129 F.3d 1424 (11th Cir. 1997), cert. denied, 524 U.S. 956 (1998); Gavin v. Branstad, 122 F.3d 1081 (8th Cir. 1997), cert. denied, 524 U.S. 955 (1998); Plyler v. Moore, 100 F.3d 365 (4th Cir. 1996), cert. denied, 520 U.S. 1277 (1997). Those courts have uniformly concluded that the termination provision falls comfortably within Congress's authority to affect prospective relief through a change in the applicable law.

First, the PLRA's termination provisions do not violate the separation of powers principles articulated in Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995). In Plaut, the Court held that Congress cannot reverse a final judgment in a suit for money damages. In contrast, this case involves application of the PLRA's termination provisions to prospective relief. Unlike a final money judgment, issuance of a "final" prospective order does not represent "the last word of the judicial department with regard to a particular case or controversy." Id. at 227. A district court continues to play an active role in the interpretation, enforcement, supervision, and modification of its prospective orders; a court always possesses the power to revisit continuing prospective orders in light of the evolving factual or

legal landscape and to modify or terminate the relief. Therefore, it does not offend separation of powers principles to require a court deciding today whether to continue, to modify, or to terminate its prospective orders in order to apply the standards set forth under current federal law — the PLRA.

Second, the termination provisions do not violate the principle established in United States v. Klein, 80 U.S. (13 Wall.) 128 (1872). 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 the power to alter the remedial authority of the federal courts to provide that relief in a prison conditions case that will continue in the future is necessary to remedy a federal right, narrowly drawn, and the least intrusive. But the PLRA "provides only the standard to which district courts must adhere, not the result they must reach." Plyler v. Moore, 100 F.3d 365, 372 (4th Cir. 1996), cert. denied, 520 U.S. 1277 (1997).

Nor do the PLRA's immediate termination provisions violate plaintiffs' due process rights. Prospective relief is always subject to possible modification or termination. Accordingly, plaintiffs here had no "vested rights" in the prospective relief afforded under the 1992 judgment. In any event, due process is provided under the PLRA, because plaintiffs can counter defendants' motion to terminate at a hearing, as they did here,

with evidence that the challenged relief remains necessary under current conditions.

STANDARD OF REVIEW

Because this appeal is from a district court decision interpreting a federal statute and involves a pure question of law, this Court's review is de novo. Spacek v. Maritime Ass'n, 134 F.3d 283, 288 (5th Cir. 1998).

ARGUMENT

I

THE TERMINATION PROVISIONS OF THE PLRA DO NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE

A. Requiring Courts To Apply The PLRA Standards To Existing Prospective Decrees And Orders Does Not Violate Separation Of Powers Principles

The district court erred in holding that 18 U.S.C. 3626(b) violates the separation-of-powers principles set forth in Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995). For purposes of separation of powers analysis, there is a crucial distinction between judicial rulings, such as money judgments, which "become[] the last word of the judicial department with regard to a particular case or controversy," id. at 227, and prospective decrees, such as the consent decree at issue here, which never were meant to represent the last word of the court with regard to the case before it.

In Plaut, the Supreme Court overturned an effort by Congress to force courts to apply new law to existing final, monetary judgments. At issue was legislation that allowed plaintiffs in

certain securities fraud suits to revive actions previously dismissed as time barred by 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," 514 U.S. at 230, and thus violated separation of powers principles. In the context of money damages, the Court in Plaut 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." Id. at 227. In contrast, Plaut itself noted that a prospective order issued by a court, whether in the form of a litigated judgment or a consent decree, does not similarly represent "the last word of the judicial department with regard to a particular case or controversy." Ibid. The Court stated 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." Id. at 232 (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, 556-557 (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").

Injunctive orders are "final" for certain purposes, such as appeal rights. See, e.g., Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 378 (1992); United States v. Michigan, 18 F.3d 348, 351 (6th Cir.), cert. denied, 513 U.S. 925 (1994). Unlike with a final money judgment, however, issuance of a "final" prospective order does not end the courts' role. Federal courts continue to play an active role in the interpretation, enforcement, supervision, and modification of their prospective orders. Unlike with a money judgment, a court always possesses the power — indeed the obligation — to revisit continuing prospective orders in light of the evolving factual or legal landscape and to modify or terminate the relief accordingly. See Board of Educ. v. Dowell, 498 U.S. 237, 246-250 (1991) (setting out standard for termination of a school desegregation injunction based on defendants' claim of compliance); Western Union Tel. Co. v. International Bhd. of Elec. Workers, Local Union 134, 133 F.2d 955, 957 (7th Cir. 1943) ("though a decree may be final as it relates to an appeal * * *, yet, where the proceedings are of a continuing nature, it is not final, * * * and the injunction will be vacated * * * where the law has been changed"). Cf. Plaut v. Spendthrift Farm, Inc., 1 F.3d 1487, 1495 (6th Cir. 1993), aff'd, 514 U.S. 211 (1995). Recently, in Agostini v. Felton, 521 U.S. 203, 215 (1997), the Supreme Court reaffirmed that "it is appropriate to grant a Rule 60(b)(5) motion when the party

seeking relief from an injunction or consent decree can show 'a significant change either in factual conditions or in law.' A court may recognize subsequent changes in either statutory or decisional law. * * * A court errs when it refuses to modify an injunction or consent decree in light of such changes." See also id. at 239 (contrasting the relief available from prospective orders under Rule 60(b)(5) to the relief available in nonprospective judgments under Rule 60(b)(6), which is limited to "extraordinary circumstances"). Obviously, then, the relief defendants challenge here is quite different from the final money judgment at issue in Plaut. See Plyler v. Moore, 100 F.3d 365, 371 (4th Cir. 1996) ("the consent decree at issue here was not a final judgment for separation-of-powers purposes"; rather, a "judgment providing for injunctive relief * * * remains subject to subsequent changes in the law"), cert. denied, 520 U.S. 1277 (1997); Gavin v. Branstad, 122 F.3d 1081, 1087 (8th Cir. 1997) ("In a continuing case, a consent decree is not the 'last word' of the courts in the case, even after the decree itself has become final for purposes of appeal. Rather, a consent decree is an executory form of relief that remains subject to later developments"), cert. denied, 524 U.S. 955 (1998); Dougan v. Singletary, 129 F.3d 1424, 1426 (11th Cir. 1997) ("Consent decrees are final judgments, but not the 'last word of the judicial department'"), cert. denied, 524 U.S. 956 (1998); Hadix v. Johnson, 133 F.3d 940, 943 (6th Cir.) ("Although the parties entered into a consent decree containing provisions for

prospective relief, that does not mean they are guaranteed that implementation of the decree will proceed undisturbed by legislative action"), cert. denied, 524 U.S. 952 (1998).

Because a prospective order in a consent decree operates in futuro, and does not represent the last word of the judiciary in the case, "[w]hen the intervening statute authorizes or affects the propriety of prospective relief," a court must apply the newly-enacted law. See Landgraf v. USI Film Prods., 511 U.S. 244, 273-274 (1994). As the Eighth Circuit explained in Gavin, 122 F.3d at 1088, "the nature of the remedy to be applied in the future[] is not established in perpetuity upon the approval of the consent decree, and it is this issue to which Congress has spoken in the PLRA. We cannot conclude that the Constitution forbids Congress to do so."

In Wheeling & Belmont Bridge Co., the case discussed in Plaut in support of the distinction between money damages and injunctive relief, the Supreme Court first declared that a bridge across the Ohio River unlawfully impeded navigation and ordered the bridge raised or removed. Soon after the injunction was issued, an Act of Congress declared the bridge a "lawful structure[]" and authorized the bridge's owners to maintain it at the same height. See 59 U.S. (18 How.) at 429. The Supreme Court upheld the legislation, against a separation of powers challenge, as a lawful exercise of congressional power, and terminated its own earlier prospective order. Id. at 431-432. In so holding, the Supreme Court drew an explicit distinction

between the prospective relief granted and the money awarded in that case. The Court held that although the prospective relief, entered as part of its prior final judgment, must be vacated in light of the new legislation, the subsequent change in the law could not affect the court costs previously awarded to the plaintiff because of the of separation of powers principle. Id. at 435-436.

The rule of Wheeling & Belmont Bridge Co. is that, although a final money judgment is the judicial department's final word and is therefore unaffected by subsequent legislation, 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 556-557. That rule was reaffirmed in Landgraf v. USI Film Products, 511 U.S. at 273, 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; the "application of the new provision [to a prospective order] is not [considered] retroactive."

The rule articulated by the Supreme Court more than 140 years ago in Wheeling & Belmont Bridge Co. is directly applicable here. "A judgment providing for injunctive relief * * * remains subject to subsequent changes in the law." Plyler, 100 F.3d at 371.

The district court concluded that the PLRA is distinguishable from the statute in Wheeling & Belmont Bridge

Co. because, while Congress has the power to alter the standards for determining whether the right of free navigation is violated, it cannot change the underlying substantive law upon which relief in the consent decree was based, i.e., the Eighth Amendment. The Supreme Court's decision in Plaut refutes that argument. The statutory 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. 514 U.S. at 213-215. It did not alter the underlying substantive standards for securities fraud. Yet, the Court held that this was a change in the "substantive legal standards." Id. at 218. Here, while Congress has not amended the underlying substantive rights upon which plaintiffs sought relief in their complaint (and could not do so, since they are constitutional rights), it has changed applicable law that is within its power to change. As Judge Selya explained in Inmates of Suffolk County v. Rouse, "[t]he relevant underlying law in this case is not the Eighth Amendment * * *. Rather, the relevant underlying law relates to the district court's authority to issue and maintain prospective relief absent a violation of a federal right, and the PLRA has truncated that authority." 129 F.3d at 657. If a consent decree fails to meet the PLRA standards, termination of the decree in response to the PLRA, "therefore, merely effectuates Congress's decision to divest district courts of the ability to construct or perpetuate prospective relief when no violation of a federal right exists."

Ibid.[5/] The fact that the statutory change applicable here involves a restriction on the courts' remedial powers rather than on a change in the underlying law that was a predicate for the claim for relief is of no constitutional significance. See Gavin, 122 F.3d at 1087 ("the difference between this case and Wheeling II — that is, the difference between altering the court's remedial powers and altering the substantive law defining the rights of the parties — is [not] of constitutional significance").

The district court also held that Wheeling & Belmont Bridge Co. established a rule that Congress may alter prospective relief only in the "realm of 'public' rights," but not where the relief involves "private" constitutional rights. 37 F. Supp. 2d at 877. This "public" versus "private" rights distinction has been rejected by the other courts of appeals that have considered it in the context of the PLRA. Only the character of the relief — whether the relief is "the last word of the judicial department with regard to a particular case or controversy," Plaut, 514 U.S. at 227, or is injunctive relief with prospective effect that

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[5/]See also 129 F.3d at 658 ("the relevant underlying law for present purposes is not the Eighth Amendment, but the power of federal courts to grant prospective relief absent a violation of a federal right"); Plyler, 100 F.3d at 372 ("The Inmates fail to understand that the applicable law is not the Eighth Amendment, but rather is the authority of the district court to award relief greater than that required by federal law. * * * [I]t is the authority of the district court to approve relief greater than that required by the Eighth Amendment, not the Eighth Amendment itself, that is at stake. In enacting the PLRA, Congress has deprived district courts of this authority, and in so doing has unquestionably amended the law applicable to this case"); Imprisoned Citizens Union, 169 F.3d at 185-186.

"remains subject to subsequent changes in the law," Plyler, 100 F.3d at 371 — is important in the context of separation of powers, and not the source of the underlying right. See Gavin, 122 F.3d at 1088 (citing Plaut, 514 U.S. at 230) ("The issue here is not the validity or even the source of the legal rule that produced the Article III judgments, but rather the immunity from legislative abrogation of those judgments themselves"); Imprisoned Citizens Union, 169 F.3d at 186 (Supreme Court's "holding in Wheeling Bridge did not hinge on the distinction between public and private rights"). See also Benjamin v. Jacobson, 935 F. Supp. 332, 347-349 (S.D.N.Y. 1996), aff'd in part, rev'd in part, and remanded, 172 F.3d 144 (2d Cir. 1999) (en banc), cert. denied, 120 S. Ct. 72 (1999).

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

Contrary to the district court's conclusion (37 F. Supp. 2d at 878-879), the termination provisions of the PLRA do not impermissibly "prescribe rules of decision to the Judicial Department * * * in cases pending before it," in violation of United States v. Klein, 80 U.S. (13 Wall.) 128, 146 (1872). As the First, Third, Fourth, Sixth, and Eighth Circuits have held, the termination provisions of the PLRA do not violate the separation of powers principle set forth in Klein. See Inmates of Suffolk County Jail, 129 F.3d at 657-658; Imprisoned Citizens Union v. Ridge, 169 F.3d 178, 187-188 (3d Cir. 1999); Plyler, 100 F.3d at 372; Hadix, 133 F.3d at 943; Gavin, 122 F.3d at 1089.

The Supreme Court's decision in United States v. Klein is plainly distinguishable.

In Klein, the Supreme Court struck down a statute that mandated that presidential pardons of persons who had given aid and comfort to confederate officers during the Civil War be considered by courts not as evidence of loyalty, but as conclusive evidence of disloyalty. 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. 80 U.S. (13 Wall.) at 146-148. Thus, Congress may not usurp the judicial function and dictate the outcome of a specific case or cases. Congress may, however, always amend the applicable law and require the courts to apply the amended law to a case before it. See Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 441 (1992). As the Supreme Court explained 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.'" 514 U.S. at 218 (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. But Congress has left to the courts the judicial function of determining "what the law is," Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803), 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. As the Fourth Circuit held in Plyler:

> In short, [the PLRA termination provisions provide] only the standard to which district courts 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."

The district court's assertion (37 F. Supp. 2d at 879) that the PLRA violates the principles of Klein because it requires termination of relief in the absence of the findings specified in 18 U.S.C. 3626(b) is incorrect. It is true that defendants could file a motion for "immediate termination" of a pre-PLRA judgment that was not supported by findings 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," 18 U.S.C. 3626(b)(2).[6/] Such a motion, however, was always subject to the limitation in 18 U.S.C. 3626(b)(3). Under Section 3626(b)(3), a court ruling on the motion for termination "shall not" terminate prospective relief if it makes "written findings based on the

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[6/] The "immediate termination" provision, 18 U.S.C. 3626(b)(2), is of less significance since April 1998, when all pre-PLRA decrees, regardless whether they are supported by the findings specified in Section 3626(b)(2), became subject to periodic review pursuant to 18 U.S.C. 3626(b)(1)(A)(iii) (two years after the date of enactment of the PLRA).

record that prospective relief remains necessary to correct a current and 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." [7/] Congress has not predetermined the content of those findings; it has simply required that they be made for any prospective relief that plaintiffs seek to continue in futuro. See Plyler, 100 F.3d at 372 (PLRA "does not purport to state how much relief is more than necessary * * * [and] provides only the standard to which district courts must adhere, not the result they must reach"). Congress has the power to alter the remedial authority of the federal courts in a prison conditions case alleging violations of constitutional rights by limiting the authority to award relief to that which is necessary to remedy a violation of federal law. See Yakus v. United States, 321 U.S. 414, 439-440 & n.8 (1944) (upholding Congress's authority to restrict the courts' remedial authority and noting numerous instances in which Congress has

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[7/] In reviewing the PLRA's legislative history, the district court concluded (37 F. Supp. 2d at 881) that "Congress not only knew of the constitutional problems with the statute, but passed the statute with the purpose of reopening and deciding judicially developed final judgments." The court referred to the testimony of Associate Attorney General John Schmidt's testimony concerning an earlier version of the PLRA, known as STOP. Id. at 880. The Associate Attorney General's concerns about the constitutionality of the proposed statute were voiced before Congress amended the bill to add the provision that now appears as 18 U.S.C. 3626(b)(3). The addition of Section 3626(b)(3), providing a mechanism for the court to retain prospective relief that satisfied the PLRA's new standards, eliminated the separation of powers problem that the Associate Attorney General identified with Section 3626(b).

exercised such authority). Having made that change in remedial law, Congress also had the authority under Plaut and Wheeling & Belmont Bridge Co. to provide that previously-issued injunctions may only remain in effect if they comply with that new remedial standard. As the Eighth Circuit recognized in Gavin, 122 F.3d at 1088, a "court's opinion on the appropriateness of the remedy is a temporal one," in that it is the judgment of the court at the time a consent decree is entered that the relief in the decree is "an appropriate remedy for the then-existing situation." The PLRA's termination provisions are simply designed to provide a mechanism for determining whether such relief remains appropriate under the new remedial standards established in Section 3626(a).

II

THE TERMINATION PROVISIONS OF THE PLRA DO NOT VIOLATE PLAINTIFFS' DUE PROCESS RIGHTS

Section 3626(b) of the PLRA plainly does not violate plaintiffs' due process rights under the Fifth Amendment. 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, 123-124 (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 or protected property interest. See Landgraf v. USI Film Prods., 511 U.S. 244, 273-274 (1994) (plaintiffs do not have a vested right in an injunctive decree); Board of Regents v. Roth, 408 U.S. 564, 576-578 (1972); United States v. Locke, 471

U.S. 84, 104 (1985). See also Fleming v. Rhodes, 331 U.S. 100, 107 (1947). Thus, plaintiffs do not have any vested rights in the prospective relief afforded under the order the defendants seek to terminate. The courts of appeals that have considered this issue have uniformly rejected a due process challenge to the PLRA termination provisions. See Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649, 658 (1st Cir. 1997), cert. denied, 524 U.S. 951 (1998); Dougan v. Singletary, 129 F.3d 1424, 1426-1427 (11th Cir. 1997), cert. denied, 524 U.S. 956 (1998); Gavin v. Branstad, 122 F.3d 1081, 1090-1091 (8th Cir. 1997), cert. denied, 524 U.S. 955 (1998); Plyler v. Moore, 100 F.3d 365, 374-375 (4th Cir. 1996), cert. denied, 520 U.S. 1277 (1997). As the Eighth Circuit explained, "the vested rights doctrine is really only the due process analogue of the separation-of-powers doctrine that prevents Congress from reopening final judgments of Article III courts." Gavin, 122 F.3d at 1091. Because a prospective order is not immune from subsequent legislation under the Separation of Powers doctrine, it similarly is not insulated from the effects of new legislation under the Due Process Clause.

In any event, plaintiffs are afforded due process under the PLRA. The PLRA's termination provisions, Sections 3626(b)(2) and 3626(b)(3), are not self-enforcing. They require a motion, with proper notice to plaintiffs.[8/] See 18 U.S.C. 3626(b) and (e)(1).

[8/] The district court asserted (37 F. Supp. 2d at 876), that the PLRA, unlike Rule 60(b), "represents an unconstitutional intrusion on the role of Article III courts," because a "'reopening' in the interest of equity may be effected only by a court, not by Congress." The PLRA termination provision is no

(continued...)

As they did in this case, plaintiffs have an opportunity to contest whether the prospective relief is subject to termination under the standards of Section 3626(b)(2) and 3626(b)(3). Even where the prior order has not previously been supported by the findings required for non-eligibility for termination under Section 3626(b)(2), existing relief is preserved where a court finds on the record that the relief currently meets applicable remedial standards. See 18 U.S.C. 3626(b)(3). No greater process is due in this context.

CONCLUSION

For the foregoing reasons, 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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[8/](...continued)
different in this respect than Rule 60(b). Both come into play upon motion of a party, and under each, the court makes the ultimate determination whether to modify or terminate previously-granted relief. See 18 U.S.C. 3626(b)(3).

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 the exempted portions in 5th Cir. R. 32.2.7(b)(3), the brief contains 6139 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 Brief for the United States as Intervenor-Plaintiff-Appellee-Cross-Appellant on the parties to this case by mailing two printed copies and one computer-readable disk copy to counsel of record, first-class, postage prepaid, at the following addresses:

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