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## ARTICLE

# ALLOWING THE COURTS TO STEP IN WHERE NEEDED: APPLYING THE PLRA'S 90-DAY LIMIT ON PRELIMINARY RELIEF

CATHERINE T. STRUVE\*

Your client is incarcerated and in crisis.<sup>1</sup> He has recently attempted suicide several times. Your mental-health expert has evaluated him and has determined that he is at very high risk of suicide unless he is immediately transferred to an inpatient treatment unit. Your expert writes a report detailing the expert's evaluation and diagnosis. You gather from the prison where your client is being held the records documenting his suicide attempts. You obtain a declaration from an experienced prison administrator who opines that your client's current housing situation is dangerous for him. After attempts at persuasion fail, you file a federal-court complaint against the warden and other relevant prison administrators asserting denial of adequate medical care in violation of your client's Eighth Amendment rights.

You move for a preliminary injunction requiring your client's immediate transfer to an inpatient treatment unit, and after an evidentiary hearing, the court grants the preliminary injunction. But the warden says that a federal statute, the Prison Litigation Reform Act ("PLRA"), limits the length of the injunction to 90 days. The warden is planning to transfer your client back to the general population as of Day 91—despite the fact that, in the view of your expert, his condition still urgently requires inpatient medical care. You return to court, arguing that the PLRA may set a 90-day outer limit on the duration of any single preliminary injunction, but that it does not bar the court from entering a new preliminary injunction if the need for

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\* Professor, University of Pennsylvania Carey Law School. I thank Gregory Sisk and the editors of the University of St. Thomas Law Journal for including me in this symposium; John Boston, David Fathi, David Rudovsky, and Dante Trevisani for extremely helpful discussions of the topic; and David Fathi, Seth Kreimer, and David Rudovsky for helping to improve a draft of this paper. Errors, of course, are mine.

1. This hypothetical is very loosely based on *Melendez v. Sec'y, Fla. Dep't of Corr.*, No. 21-13455, 2022 WL 1124753 (11th Cir. Apr. 15, 2022) (unpublished per curiam opinion).

relief continues past 90 days. Your client’s life may depend on the entry of that second preliminary injunction. Does the court have authority to grant it?

Enacted in 1996, the PLRA responded to two major assertions—that people incarcerated in prisons and jails were swamping the courts with frivolous lawsuits and that federal-court injunctions were imposing unwarranted requirements on prison and jail systems.<sup>2</sup> The first of these assertions led to the PLRA provisions restricting incarcerated persons’ lawsuits in various ways. The second assertion gave rise to the PLRA’s limits on injunctions “in any civil action with respect to prison conditions.”<sup>3</sup> These injunctive-relief limits (1) set requirements for the entry of any injunction, (2) provide for the termination of existing permanent injunctions, and (3) constrain the entry of preliminary injunctions.

This essay will focus on the third of these features, but the first two features provide necessary context. The PLRA, in 18 U.S.C. § 3626(a)(1), sets what is often referred to as the “need / narrowness / intrusiveness” limit on “prospective relief”: “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 violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.”<sup>4</sup> In part because injunctions that had already been entered in prior litigation were a particular target of the PLRA’s proponents, 18 U.S.C. § 3626(b)(1) provides for the termination of those preexisting injunctions. It makes permanent injunctions “terminable” upon motion, starting two years after the injunction’s grant and continuing every year thereafter.<sup>5</sup> However, the court can deny the motion to terminate “if the court makes written findings” that there is a “current and ongoing violation of the Federal right” and that the need / narrowness / intrusiveness requirements are met.<sup>6</sup>

18 U.S.C. § 3626(a)(2) addresses preliminary injunctions in particular. It, too, sets a need / narrowness / intrusiveness limit: “Preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm.”<sup>7</sup> Section 3626(a)(2)’s last

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2. See Allison M. Freedman, *Rethinking the PLRA: The Resiliency of Injunctive Practice and Why It’s Not Enough*, 32 STAN. L. & POL’Y REV. 317, 328 (2021) (“Supporters of the Act had two main goals: to reduce what they viewed as a large volume of frivolous prisoner litigation, and to discourage ‘overzealous federal courts’ from micromanaging the nation’s prison system.”).

3. 18 U.S.C. § 3626; see generally Freedman, *supra* note 2, at 319 (“the PLRA aimed to curb courts’ most powerful remedial tool—injunctive relief, typically with ongoing court monitoring to ensure timely compliance”).

4. 18 U.S.C. § 3626(a)(1).

5. *Id.* § 3626(b)(1).

6. *Id.* § 3626(b)(3).

7. *Id.* § 3626(a)(2). Section 3626(a)(2) also requires the court to “give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief and [to] respect the principles of comity set out in paragraph (1)(B) in tailoring

sentence sets the durational limit that is the focus of this essay: “Preliminary injunctive relief shall automatically expire on the date that is 90 days after its entry, unless the court makes the findings required under subsection (a)(1) for the entry of prospective relief and makes the order final before the expiration of the 90-day period.”<sup>8</sup>

Turning back to our hypothetical: Suppose that the court has concluded that the “unless” clause in Section 3626(a)(2)’s last sentence requires entry of a permanent injunction.<sup>9</sup> Though this case is relatively simple by the standards of prison-conditions litigation,<sup>10</sup> you would not be able, within 90 days, to try the case to completion in order to demonstrate your entitlement to the permanent injunction.<sup>11</sup> So the warden appears to be correct that the preliminary injunction you’ve obtained for your client will expire by operation of law on Day 90. What does this mean for your ability to protect your client from Day 91 forward? In its 2021 decision in *Georgia Advocacy Office v. Jackson*, the Eleventh Circuit seemed to suggest that the 90-day limit is insurmountable, and that if a plaintiff needs preliminary relief to last all the way to final judgment, the plaintiff must litigate the case through a trial on the merits and all the way to its conclusion before Day 90.<sup>12</sup> The startling nature of that suggestion inspired this essay.

In Part I, I describe the Eleventh Circuit’s reasoning in *Georgia Advocacy Office v. Jackson*. In the remainder of this essay, I argue that the Eleventh Circuit’s analysis in that case overlooked the possibility that the court can grant *more than one* 90-day preliminary injunction, consistent with the letter and spirit of Section 3626(a)(2). In Part II, I support my argument by reference to the text, structure, and history of Section 3626. In Part III.A, I describe the widespread recognition, among courts applying Section 3626(a)(2), that sequential preliminary injunctions are available where ap-

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any preliminary relief.” (Section 3626(a)(1)(B) provides that “[t]he court shall not order any prospective relief that requires or permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law, unless— (i) Federal law requires such relief to be ordered in violation of State or local law; (ii) the relief is necessary to correct the violation of a Federal right; and (iii) no other relief will correct the violation of the Federal right.” *Id.* § 3626(a)(1)(B).)

8. *Id.* § 3626(a)(2).

9. That conclusion is not ineluctable. For an argument that the “unless” clause requires only that “the district court makes all required findings and issues a complete and final preliminary injunction order,” see *Ga. Advoc. Off. v. Jackson*, 4 F.4th 1200, 1217 (11th Cir. 2021) (Wilson, J., dissenting), *panel opinion vacated as moot*, 33 F.4th 1325 (11th Cir. 2022). To cabin the scope of this symposium essay, I will not attempt to settle the meaning of the “unless” clause here.

10. Simple in the sense that it involves a single plaintiff, a single constitutional violation, and a single basic issue – whether this individual plaintiff is ready to be transferred from inpatient care back to the general population. Many of the cases discussed in this essay are much more complex than that.

11. Indeed, one might expect that a *defendant* presented with the prospect of a trial on the merits within the 90-day period would complain that there had not been a sufficient opportunity for discovery.

12. See *infra* notes 36–40 and accompanying text.

propriate. In Part III.B, I consider the litigation-strategy implications of sequential preliminary injunctions. Part IV briefly concludes.

### I. A LIMITED-DURATION OPINION ON LIMITED-DURATION PRELIMINARY INJUNCTIONS

I first became aware of Section 3626(a)(2)'s 90-day limit when I read the Eleventh Circuit's 2021 opinion in *Georgia Advocacy Office v. Jackson*.<sup>13</sup> Happily for the state of precedent on Section 3626(a)(2), the Eleventh Circuit later vacated that opinion because the case had become moot (through settlement) before the court of appeals' mandate issued.<sup>14</sup> But, in the meantime, that opinion alarmed me sufficiently that it spurred me to research Section 3626(a)(2)'s origins and function. I provide a brief description of the *Jackson* appeal here for two reasons. First, there is the surprising nature of the *Jackson* majority's vision concerning the intended function of Section 3626(a)(2)'s 90-day limit. It is worth asking how a court of appeals could adopt a reading of the statute so at odds with actual litigation practice and so ungrounded in the statute's legislative history.<sup>15</sup> Second, a look at the parties' contending litigation positions illustrates the presence of two distinct sets of issues that are worth disentangling. One of those issues (does Section 3626(a)(2) permit issuance of sequential preliminary injunctions?) is the focus of this essay, while resolution of the other

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13. *Jackson*, 4 F.4th at 1204.

14. *Jackson*, 33 F.4th at 1326 ("Because the parties have settled and mooted this case before our mandate issued, the proper action is to vacate our prior opinion, and dismiss the appeal as moot."). Whether the practice that the Eleventh Circuit followed here is in any tension with U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 29 (1994) ("mootness by reason of settlement does not justify vacatur of a judgment under review"), is beyond the scope of this essay.

Within days of the issuance of the initial opinion, an Eleventh Circuit judge had directed the circuit clerk to withhold issuance of the mandate, see Order dated July 19, 2021, at 2, *Jackson*, 4 F.4th 1200 (No. 19-14227), a development that signaled that that judge may have requested an internal poll on whether to rehear the appeal en banc, see Eleventh Circuit I.O.P. 5 accompanying FED. R. APP. P. 35. Meanwhile, in the district court, the plaintiffs moved for entry of a second preliminary injunction, see Plaintiff's Motion for Issuance of a Second Preliminary Injunction at 1, *Ga. Advoc. Off. v. Labat*, No. 19-01634 (N.D. Ga. July 23, 2021), ECF No. 318, but the district court took that motion under submission and never resolved it. Instead, it granted the plaintiffs summary judgment on claims against a number of defendants, see Order dated Sept. 13, 2021, at 23, *Labat*, No. 19-cv-01634 (N.D. Ga. Sept. 13, 2021), ECF No. 321. Thereafter, the parties jointly moved to send the case to mediation, and it ultimately settled, with the district court certifying a settlement class and approving a class settlement for injunctive relief that set requirements concerning, inter alia, the conditions of confinement for the class members held in the South Fulton Jail. See Final Order Approving Settlement at 3, *Labat*, No. 19-cv-01634 (N.D. Ga. Apr. 4, 2022), ECF No. 343.

15. In fairness to the panel majority, it must be noted that the PLRA is a difficult statute to interpret. It is to be hoped that courts faced with that task will make use of resources such as John Boston's recently-published and authoritative work, see generally JOHN BOSTON, *THE PLRA HANDBOOK: LAW AND PRACTICE UNDER THE PRISON LITIGATION REFORM ACT 84-86* (Richard Resch ed., 2022), a treatise that includes an insightful discussion of the topic treated in this essay, see *id.* at 84-86.

(can a court remove Section 3626(a)(2)'s 90-day limit by "finalizing" its findings short of entering a permanent injunction?) lies beyond its scope.

In *Jackson*, the individual named plaintiffs sued on behalf of a proposed class of women with psychiatric disabilities confined in the Fulton County Jail system.<sup>16</sup> They asserted claims under the Eighth and Fourteenth Amendments, the Americans with Disabilities Act, and the Rehabilitation Act.<sup>17</sup> One of their core challenges was to the jail system's use of solitary confinement for women with psychiatric disabilities.<sup>18</sup> In July 2019, after a three-day evidentiary hearing, the district court found that the plaintiffs had shown a likelihood of success on the merits of their deliberate-indifference-to-serious-medical-needs claims and their disability-discrimination claims.<sup>19</sup> It entered a preliminary injunction setting minimum out-of-cell-time requirements for women held in specified parts of the jail and requiring development of a plan for the conditions of the women's confinement.<sup>20</sup> It stated that the reasons for its order would "be discussed in greater detail in a forthcoming opinion as required by 18 U.S.C. § 3626(a)(2),"<sup>21</sup> but, in the meantime, it stated that the relief it ordered was "narrowly drawn, extend[ed] no further than necessary to correct the violation of the constitutional right at issue, and [wa]s the least intrusive means necessary to correct the violation of the Federal right" at issue.<sup>22</sup> In September 2019, the district court issued a detailed "Addendum Order" providing "findings of fact, conclusions of law, and a considered determination that the relief ordered by this Court satisfies 18 U.S.C. § 3626(a)(2)."<sup>23</sup> As to both the out-of-cell-time requirement and the conditions-of-confinement requirements, the district court provided a detailed explanation for its holding that the relief met the PLRA's "need-narrowness-intrusiveness" requirements.<sup>24</sup>

The defendants appealed the July and the September preliminary-injunction orders to the Eleventh Circuit.<sup>25</sup> Both on appeal and in the court below, the parties disputed how to apply Section 3626(a)(2) to the district court's July and September orders. In the view of the plaintiffs, the district court's September 2019 order met Section 3626(a)(2)'s requirement of

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16. See Complaint ¶¶ 26–30, *Labat*, No. 19-cv-01634 (N.D. Ga. Apr. 10, 2019), ECF No. 1.

17. *Id.* ¶¶ 165–97.

18. See *id.* ¶¶ 3–10, 89–98, 165–72, & Prayer for Relief. The plaintiffs adopted the definition of solitary confinement as "[i]nvoluntary confinement in a cell for an average of 22 hours or more per day without meaningful human contact." *Id.* ¶ 89.

19. Order dated July 23, 2019, at 1, *Labat*, No. 19-cv-01634, ECF No. 65.

20. See *id.* The then-covered units were three units that undisputedly "housed women with psychiatric disabilities." Order dated Feb. 26, 2020, at 2, *Labat*, No. 19-cv-01634 (N.D. Ga. Feb. 26, 2020), ECF No. 143.

21. Order dated July 23, 2019, *supra* note 19, at 1.

22. Order dated July 23, 2019, *supra* note 19, at 5 n.1.

23. Order dated Sept. 23, 2019, at 1, *Labat*, No. 19-cv-01634 (N.D. Ga. Sept. 23, 2019), ECF No. 94.

24. *Id.* at 41.

25. See Notice of Appeal, *Labat*, No. 19-cv-01634 (N.D. Ga. Oct. 18, 2019), ECF No. 105.

“mak[ing] the findings required under subsection (a)(1) for the entry of prospective relief and mak[ing] the order final before the expiration of the [PLRA’s] 90-day period.”<sup>26</sup> By contrast, the defendants argued that the preliminary injunction had expired in late October 2019, by operation of Section 3626(a)(2)’s 90-day limit.<sup>27</sup> The district court found this “a close question”<sup>28</sup> but ended up agreeing with the plaintiffs that Section 3626(a)(2)’s “makes the order final” means “finalizing the preliminary injunction by including the required findings”; thus, the district court concluded, its “preliminary injunction may be extended beyond the 90-day period during the pendency of the action or until further order of the court.”<sup>29</sup>

The Eleventh Circuit panel split on this issue. The panel majority ruled that the district court’s September order had failed to remove Section 3626(a)(2)’s 90-day limit, because “the entry of a permanent injunction is necessary to prevent a preliminary injunction from expiring by operation of law after 90 days under the PLRA’s ‘unless’ clause.”<sup>30</sup> In this view, the preliminary injunction had expired 90 days after its issuance, by operation of Section 3626(a)(2).<sup>31</sup> This rendered the defendants’ appeal from the preliminary-injunction orders moot, and, because the panel majority found no applicable exception to the mootness doctrine, it dismissed the appeal.<sup>32</sup> The dissent, by contrast, would have held that the preliminary injunction was still in effect because, in its view, “[i]n the context of § 3626(a)(2), a preliminary injunction is finalized, and does not expire, if within 90 days of issuance the district court makes all required findings and issues a complete and final preliminary injunction order.”<sup>33</sup>

It is not my goal, in this essay, to resolve the dispute over whether Section 3626(a)(2)’s “unless” clause requires entry of a permanent injunction in order to lift the 90-day limit. Rather, I will focus on a different issue—namely, the panel majority’s failure to acknowledge the possibility of sequential preliminary injunctions. The defendants, arguing that the original preliminary injunction had expired under Section 3626(a)(2), had main-

26. Reply in Support of Plaintiffs’ Motion to Modify Preliminary Injunction Order at 8, *Labat*, No. 19-cv-01634 (N.D. Ga. Jan. 3, 2020), ECF No. 126 (arguing that “[t]he phrase [“makes the order final”] includes within its meaning orders tailoring preliminary relief to the circumstances of the case through a finalized preliminary injunction order containing the findings and narrowly tailored provisions mandated by § 3626(a)(2)”).

27. Defendants’ Response in Opposition to Plaintiffs’ Motion to Modify Preliminary Injunction Order at 2, *Labat*, No. 19-cv-01634 (N.D. Ga. Dec. 10, 2019), ECF No. 120.

28. Order dated Feb. 26, 2020, at 4, *Labat*, No. 19-01634 (N.D. Ga. Feb. 26, 2020), ECF. No. 143.

29. *Id.* at 5.

30. Ga. Advoc. Off. v. Jackson, 4 F.4th 1200, 1211 (11th Cir. 2021), *vacated as moot*, 33 F.4th 1325 (11th Cir. 2022).

31. *See id.* at 1215.

32. *Id.* at 1216.

33. *Id.* at 1217 (Wilson, J., dissenting).

tained that if the plaintiffs wished for preliminary relief to extend beyond October 2019, they needed to seek a second or successive preliminary injunction every 90 days.<sup>34</sup> The plaintiffs agreed that the statute permitted entry of a second or successive preliminary injunction.<sup>35</sup> But the panel majority's explanation of Section 3626(a)(2)'s 90-day limit creates serious doubt as to whether the panel agreed with this view. At the very least, the panel majority studiously ignored the possibility of successive preliminary injunctions.

In the view of the panel majority, Section 3626(a)(2) created a novel way to vastly compress the litigation of prison-conditions challenges. Noting that the PLRA was designed in part to prevent federal courts from micromanaging prison and jail conditions, the *Jackson* court argued that Section 3626(a)(2) served that goal in part by “chang[ing] the function of preliminary injunctions in prison cases.” As the court recognized, preliminary injunctions ordinarily extend throughout the lawsuit’s pendency in order “to prevent the plaintiff from suffering irreparable injury before the court can reach a final decision on the merits.”<sup>36</sup>

A preliminary injunction under the PLRA, however, . . . will automatically expire 90 days after its entry unless certain conditions are met, one of which . . . is the entry of a permanent injunction after a trial on the merits. § 3626(a)(2) . . . [T]he PLRA’s 90-day cap on preliminary injunctions limits the harmful effects of potentially unjustified or overbroad injunctions and expedites the life-cycle of prison cases. The PLRA thus subordinates the traditional function of preliminary injunctive relief—the prevention of injury pending a trial on the merits—to the PLRA’s overarching goal of reducing judicial involvement in prison management.<sup>37</sup>

With this idea in mind, the panel majority outlined two “possible outcomes after a district court issues a 90-day preliminary injunction”<sup>38</sup>:

One possibility is that the defendant reforms its practices to comply with the terms of the injunction within the 90 days. . . . If the district court is satisfied that the defendant’s reforms are in earnest and sufficiently enduring, it should ordinarily let the preliminary injunction expire on the 90th day and dismiss the case, since a permanent injunction would no longer be “necessary to correct

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34. For example, at the oral argument in the court of appeals, counsel for the defendants argued that the appeal was not moot because (even on the defendants’ theory that the preliminary injunction had expired) Section 3626(a)(2) did not prevent the district court from entering a new preliminary injunction after expiration of the first one. See Oral Argument at 3:30, *Jackson*, 4 F.4th 1200 (No. 19-14227), <https://www.ca11.uscourts.gov/oral-argument-recordings>.

35. For example, at oral argument on appeal, counsel for the appellees stated that “the operative injunction order” was by then the one entered by the district court in February 2020. See *id.* at 15:50.

36. *Jackson*, 4 F.4th at 1209.

37. *Id.* at 1209–10.

38. *Id.* at 1210.



the violation of the Federal right.” § 3626(a)(1)(A). . . . If, on the other hand, the defendant fails to implement reforms or implements half-baked or impermanent reforms, the district court should proceed to a trial on the merits, determine whether a permanent injunction can be issued consistent with § 3626(a)(1)’s requirements, and if so, make the findings required by that section and enter a permanent injunction as part of a final judgment—or in the words of the PLRA, ‘make[ ] the order final.’ § 3626(a)(2).<sup>39</sup>

In sum, the panel majority stated, § 3626(a)(2) furthers the PLRA’s goals by “expediting prison litigation and ending judicial micromanagement”: “Once a preliminary injunction issues, the plaintiff’s entitlement to a permanent injunction is typically ascertained within 90 days, greatly condensing the litigation lifecycle.”<sup>40</sup>

This is the passage that caught my eye when, in the summer of 2021, I first encountered the *Jackson* opinion. The panel majority cited no support for its assertion that “a plaintiff’s entitlement to a permanent injunction [in a prison-conditions case involving a preliminary injunction] is typically ascertained within 90 days,”<sup>41</sup> and as applied to any but the simplest of prison-conditions cases, the assertion sounded wildly implausible. Could Congress—even the Congress that enacted the PLRA—really have intended to impose such a timetable for prison-conditions suits? And did the courts really apply the statute in this way? As I explain in Part II, there is certainly evidence that Congress intended to constrain the entry of preliminary relief, but not in the way that the *Jackson* majority posited. And as I detail in Part III, courts in many circuits (including the Eleventh) share the view of the *Jackson* parties that Section 3626(a)(2) permits successive preliminary injunctions.

## II. TEXT, STRUCTURE, LEGISLATIVE HISTORY, AND THE 90-DAY LIMIT

The Eleventh Circuit majority in *Jackson* seemed to read Section 3626(a)(2) to set an outer limit of 90 days on the duration of preliminary injunctive relief, regardless of how compelling the continuing need may be thereafter. As the *Jackson* court itself recognized, that is quite a departure from the ordinary function of preliminary relief. And, in a case involving the risk of serious harm and also involving complex facts and law that are not susceptible of definitive proof and analysis within a 90-day timeframe,<sup>42</sup> such a hard 90-day limit could remove all effectual remedy for some constitutional violations.

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39. *Id.*

40. *Id.* at 1211.

41. *Id.*

42. In cases governed by the PLRA, injunctive relief—whether preliminary or permanent—must meet the need / narrowness / intrusiveness test, must take account of public-safety and crimi-

The Supreme Court explained in *Brown v. Plata* that “[c]ourts should presume that Congress was sensitive to the real-world problems faced by those who would remedy constitutional violations in the prisons and that Congress did not leave prisoners without a remedy for violations of their constitutional rights.”<sup>43</sup> And in *Miller v. French* it stated that the courts “should not construe a statute to displace courts’ traditional equitable authority absent the ‘clearest command,’ . . . or an ‘inescapable inference’ to the contrary.”<sup>44</sup> Does such a clear and inescapable command exist in this instance?

In this part, I argue that it does not.<sup>45</sup> As I suggest in Part II.A., while it is possible to read the text of Section 3626(a)(2) as the *Jackson* majority did, it is equally possible to read that text as permitting successive preliminary injunctions—particularly in light of the parallels between such a struc-

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nal-justice consequences, and must honor principles of comity. See 18 U.S.C. § 3626(a)(1) (setting requirements for “prospective relief” generally); *id.* § 3626(a)(2) (setting requirements for preliminary relief). Section 3626(a)(1) requires “find[ings]” concerning need / narrowness / intrusiveness, and Section 3626(a)(2) makes “the findings required under subsection (a)(1)” one of the requisites for lifting the 90-day cap on the length of a preliminary injunction.

Separately from the PLRA, FED. R. CIV. P. 52(a)(2) requires the court to state findings of fact and conclusions of law “[i]n granting or refusing an interlocutory injunction,” though the Civil Rules do not appear to extend that requirement to a temporary restraining order limited to the duration set by FED. R. CIV. P. 65(b)(2). Accordingly, for both permanent injunctive relief and preliminary relief that extends further than the presumptive 28-day outer limit set by FED. R. CIV. P. 65(b)(2), FED. R. CIV. P. 52(a)(2) requires that the district court make findings of fact.

However, the plaintiff’s burden at the preliminary-injunction stage differs from that at the permanent-injunction stage. In order to prove entitlement to a permanent injunction, the plaintiff would have to prove the merits of the claim. On a request for a preliminary injunction, by contrast, the relevant factor in the traditional multi-factor test asks only whether the plaintiff has shown a likelihood of success on the merits. See 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 2948.3 (3d ed. 2013) (“All courts agree that [the] plaintiff [seeking a preliminary injunction] must present a prima facie case but need not show a certainty of winning.”) (footnote omitted).

43. *Brown v. Plata*, 563 U.S. 493, 526 (2011).

44. *Miller v. French*, 530 U.S. 327, 340 (2000). In *Miller*, the Court did find such a command with respect to a different feature in Section 3626—namely, “the PLRA’s ‘automatic stay’ provision, [under which] a motion to terminate prospective relief ‘shall operate as a stay’ of that relief during the period beginning 30 days after the filing of the motion (extendable to up to 90 days for ‘good cause’) and ending when the court rules on the motion. §§ 3626(e)(2), (3).” *Id.* at 331. As the Court explained,

Section 3626(e)(2) states that a motion to terminate prospective relief “shall operate as a stay during” the specified time period from 30 (or 90) days after the filing of the § 3626(b) motion until the court rules on that motion. (Emphasis added.) Thus, not only does the statute employ the mandatory term “shall,” but it also specifies the points at which the operation of the stay is to begin and end. In other words, . . . § 3626(e)(2) unequivocally mandates that the stay “shall operate during” this specific interval. To allow courts to exercise their equitable discretion to prevent the stay from “operating” during this statutorily prescribed period would be to contradict § 3626(e)(2)’s plain terms.

*Id.* at 337–38 (emphases in original).

45. For a somewhat similar argument invoking *Brown v. Plata* and *Miller v. French* in critiquing the *Jackson* court’s interpretation of Section 3626(a)(2)’s “unless” clause, see Petition for Rehearing En Banc or Panel Rehearing at 12–15, *Jackson*, 33 F. 4th 1200 (No. 19-14227).

ture and the framework for periodic reevaluation of permanent injunctions. And, I argue in Part II.B., the latter interpretation is at least as good a fit with the PLRA's legislative history.

### A. *Text and Structure*

Section 3626(a)(2) provides:

Preliminary injunctive relief. – In any civil action with respect to prison conditions, to the extent otherwise authorized by law, the court may enter a temporary restraining order or an order for preliminary injunctive relief. Preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief and shall respect the principles of comity set out in paragraph (1)(B) in tailoring any preliminary relief. Preliminary injunctive relief shall automatically expire on the date that is 90 days after its entry, unless the court makes the findings required under subsection (a)(1) for the entry of prospective relief and makes the order final before the expiration of the 90-day period.<sup>46</sup>

This section first sets a baseline principle: preliminary injunctions must be “otherwise authorized by law.” It next sets substantive limits—namely, the need / narrowness / intrusiveness test and the directives to “respect” comity and give “substantial weight” to public-safety and criminal-justice impacts when tailoring preliminary relief. Finally, it sets the presumptive 90-day limit on the duration of preliminary relief, modified by the “unless” clause that was the focus of the litigation in *Jackson*. Resolving the meaning of the “unless” clause is not necessary in order to consider the question on which I focus here—namely, whether anything in Section 3626(a)(2) limits the court to a single preliminary injunction, or whether a second or successive preliminary injunction is possible after the first one expires at the 90-day mark.<sup>47</sup>

Nothing in the text of the provision explicitly answers this question. It's true that the first sentence refers to “an” order for preliminary injunctive relief, but taking the wording of that sentence as implying a numerical limit

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46. 18 U.S.C. § 3626(a)(2).

47. That is not to say that the two issues bear no relation to one another. If a court were to adopt the view put forward by Judge Wilson in dissent in *Jackson*, for instance—that the “unless” clause requires only that “the district court makes all required findings and issues a complete and final preliminary injunction order,” see *Jackson*, 4 F.4th at 1217 (Wilson, J., dissenting)—then that would decrease the need for sequential preliminary injunctions. But so long as the possibility exists that a court might adopt the view of the *Jackson* panel majority—namely, that the “unless” clause requires entry of a permanent injunction—the need for the possibility of sequential preliminary injunctions is evident.

on the number of preliminary injunctions would prove too much. That first sentence refers to “a temporary restraining order or an order for preliminary relief,” and reading this phrasing as a numerical limitation would suggest that the court was limited to one or the other—that is, that it could not first enter a temporary restraining order (“TRO”) and then later a preliminary injunction. Such a limit would make no sense at all, and thus it is more logical to read the use of “an order” in that sentence as a generic reference to the type of order, not as limiting the total number of such orders to one.

Nor does reading Section 3626(a)(2) to permit successive preliminary injunctions render the 90-day limit surplusage. By setting the 90-day outer limit on the duration of any single preliminary injunction, the provision builds a framework for periodic review of preliminary relief: a court can enter a preliminary injunction, but that preliminary injunction can last at most 90 days, after which preliminary relief cannot continue unless the court reassesses the need for it. This structure is still a departure from the ordinary practices of preliminary relief, but it fits with the equally novel structure that Section 3626 imposes on permanent injunctive relief.<sup>48</sup> As the Ninth Circuit explained in the path-marking case *Mayweathers v. Newland*,

[n]othing in the statute limits the number of times a court may enter preliminary relief. If anything, the provision simply imposes a burden on plaintiffs to continue to prove that preliminary relief is warranted. The imposition of this burden conforms with how the PLRA governs the termination of final prospective relief. See 18 U.S.C. § 3626(b) . . . .<sup>49</sup>

### B. *Legislative History*

The overall story of the PLRA’s adoption has been well documented. As Margo Schlanger has explained,

[t]he PLRA was put on the agenda of the 104th Congress (via the 1994 Republican Contract with America, which included a pledge to enact the Taking Back Our Streets Act, a broad statute that included the earliest version of the PLRA) by the potent alliance of the National Association of Attorneys General (NAAG) and the National District Attorneys Association (NDAA). NAAG, which came to the topic first, led the charge against what it characterized as frivolous inmate cases (these received more of the focus in the House). The NDAA took the lead against population caps in particular and court orders in general (these received more of the focus in the Senate).<sup>50</sup>

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48. See 18 U.S.C. §§ 3626(b)(1), (3).

49. *Mayweathers v. Newland*, 258 F.3d 930, 936 (9th Cir. 2001).

50. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1566 (2003). For introducing me to almost all of the legislative history cited in this essay, I am indebted to the collection of legislative history that Professor Schlanger has provided here: <https://www.law.umich.edu/facultyhome/margoschlanger/Pages/PrisonLitigationReformActLegislativeHistory.aspx>. As an al-

I will focus here on the story of Section 3626(a)(2), and its 90-day limit in particular. Initial versions of the proposed limits on injunctive relief omitted any specific provision concerning preliminary injunctive relief.<sup>51</sup> Criticisms of one of those early versions included concerns that the legislation would foreclose courts from using preliminary injunctive relief to address hazardous conditions in jails or prisons.<sup>52</sup> After those critiques, a provision that would become Section 3626(a)(2) was included in a new version of the proposed legislation.<sup>53</sup> Discussion of the 90-day feature in the new provision was sparse, but legislators' more general remarks asserted the intent to clamp down on judicial "micromanagement" of jails and prisons while preserving courts' ability to provide relief where it was truly necessary.<sup>54</sup>

Bills introduced in the House and Senate in February 1995 included limits on "prospective relief" but did not specifically address preliminary relief. For example, S. 400—the "Stop Turning Out Prisoners Act"—would have amended Section 3626<sup>55</sup> to include, among other provisions, one limiting "[p]rospective relief in a civil action with respect to prison conditions."<sup>56</sup> This provision, similar (though not identical) to what would ultimately be codified as Section 3626(a)(1), required findings concerning the narrowness and non-intrusiveness of the relief and required the court to weigh the public-safety and criminal-justice impacts of the relief.<sup>57</sup> In the House, an identical provision appeared in H.R. 667 (a bill called the "Violent Criminal Incarceration Act of 1995").<sup>58</sup> These bills also included a pre-

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ternative way of finding relevant legislative history, I also queried the govinfo.gov website using the following search terms: [collection:(CPRT OR CHRNG OR CREC OR CRECB) AND publishdate:range(1995-01-01,1997-01-01) AND content:(“90 days” and injunctive and prison)] and [collection:(CPRT OR CHRNG OR CREC OR CRECB) AND publishdate:range(1995-01-01,1997-01-01) AND content:(“90 days” and injunction and prison)].

51. See *infra* notes 56–60 and accompanying text.

52. See *infra* notes 62–64 and accompanying text.

53. See *infra* note 65 and accompanying text.

54. See *infra* notes 68–70 and accompanying text.

55. At the time, 18 U.S.C. § 3626, as enacted in 1994, was a much-less-detailed provision that set limits on court relief addressing prison overcrowding.

56. Stop Turning Out Prisoners Act, S. 400, 104th Cong. § 2(a) (1995), available at <https://www.congress.gov/104/bills/s400/BILLS-104s400is.pdf>.

57. The provision stated:

(1) LIMITATIONS ON PROSPECTIVE RELIEF.- Prospective relief in a civil action with respect to prison conditions shall extend no further than necessary to remove the conditions that are causing the deprivation of the Federal rights of individual plaintiffs in that civil action. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn and the least intrusive means to remedy the violation of the Federal right. In determining the intrusiveness of the relief, 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.

*Id.*

58. See Violent Criminal Incarceration Act, H.R. 667, 104th Cong. § 301 (1995), reproduced in H.R. REP. NO. 104–21, at 5 (1995), available at <https://www.congress.gov/104/crpt/hrpt21/CRPT-104hrpt21.pdf>. Materially similar provisions also appeared in S. 816, a May 1995 bill that included proposed amendments to 18 U.S.C. § 3626. See Local Law Enforcement Act of 1995, S.

cursor to Section 3626(b)(1)'s permanent-injunction termination framework<sup>59</sup>—but that precursor was much more draconian (compared with what would ultimately be enacted), providing for automatic termination of permanent injunctions after two years (without the ultimately-enacted exception from termination based on a finding of continuing need for the permanent injunction).<sup>60</sup>

At a July 1995 Senate Judiciary Committee hearing on a set of bills that included S. 400,<sup>61</sup> two witnesses focused particular concern on the bill's requirement of findings prior to the grant of injunctive relief—a requirement that, they worried, would foreclose a court from granting preliminary injunctive relief even where necessary to avoid injury or death. Steve J. Martin, a former prison guard and former General Counsel to the Texas Department of Corrections who by the time of the hearing had become a consultant on prison litigation,<sup>62</sup> offered the following warning:

The last provision that I would like to specifically comment on is the prohibition of preliminary or emergency relief absent a finding, which would obviously require a full-blown hearing. I have been in institutions in which conditions were so severe that I believed that death was imminent. In one particular case, I observed a very, very crowded holding cell that I described later in court as a human carpet. A week after I made that observation, 4 inmates died, were taken to the hospital and died from an infectious disease outbreak. This provision, as I understand it, the way it is written, would have made it very, very difficult to have gone in and gotten a TRO or a preliminary injunction to have remedied that condition immediately.<sup>63</sup>

In a prepared statement submitted to the Judiciary Committee, Chase Riveland, Secretary of the Washington State Department of Corrections, similarly cautioned:

I would also like to comment on the impact the bill would have on preliminary relief. The bill would prevent a court from issuing any relief until after it finds a violation of law. This would prevent a court from entering any form of emergency relief, such as a temporary restraining order or a preliminary injunction. I see no

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816, 104th Cong. § 103(a) (1995), available at <https://www.congress.gov/104/bills/s816/BILLS-104s816is.pdf>.

59. See 18 U.S.C. § 3626(b)(1).

60. See S. 400 § 2(a); H.R. 667 § 301.

61. See *Prison Reform: Enhancing the Effectiveness of Incarceration: Hearing on S. 3, S. 38, S. 400, S. 866, S. 930, and H.R. 667 Before the S. Comm. on the Judiciary*, 104th Cong. 104–573 (1995), [https://www.law.umich.edu/facultyhome/margoschlanger/Documents/Resources/Prison\\_Litigation\\_Reform\\_Act\\_Legislative\\_History/20\\_Hearing\\_Before\\_Committee\\_on\\_Judiciary.pdf](https://www.law.umich.edu/facultyhome/margoschlanger/Documents/Resources/Prison_Litigation_Reform_Act_Legislative_History/20_Hearing_Before_Committee_on_Judiciary.pdf).

62. *Id.* at 75–76 (Martin's prepared statement).

63. See *id.* at 75 (transcript of Martin's live testimony); see also *id.* at 78 (written testimony to the same effect).

good reason to prevent a Court from addressing a proven emergency. For example, a trial court judge in Pennsylvania entered a preliminary injunction requiring that the system impose a program of TB testing of all incoming inmates. The court issued this order after finding that the system was on the verge of a TB epidemic caused by the lack of such testing. STOP [i.e., S. 400] would have prevented the Judge from entering this order. After the order was entered, over 400 cases of TB infection were discovered at just one of the fourteen prisons affected by the order.<sup>64</sup>

Some two months later, in September 1995, Senator Spencer Abraham introduced a new bill, S. 1275, which, for the first time, introduced into the provisions on prospective relief a new item dealing specifically with preliminary relief. This proposed Section 3626(a)(2) read:

Preliminary Injunctive Relief. – In any civil action with respect to prison conditions, to the extent otherwise authorized by law, the court may enter a temporary restraining order or an order for preliminary injunctive relief. Preliminary injunctive relief shall automatically expire on the date that is 90 days after its entry, unless the court makes the order final before the expiration of the 90-day period.<sup>65</sup>

The bill also somewhat softened the provisions concerning termination of permanent injunctive relief by including a provision avoiding termination of a permanent injunction if the court renewed its need / narrowness / intrusiveness findings<sup>66</sup> (a provision that, with some changes in language, would ultimately become Section 3626(b)(3)).<sup>67</sup> Introducing S. 1275, Senator Abraham focused on court orders that, he said, unnecessarily raised the cost of prison administration and liberated dangerous inmates.<sup>68</sup> He made no specific mention of preliminary (as distinct from permanent) injunctive relief.<sup>69</sup> He summarized the bill's purpose thus: "[W]e must curtail interference by the Federal courts themselves in the orderly administration of our prisons. This is not to say that we will have no court relief available for prisoner suits, only that we will try to retain it for cases where it is needed while curtailing its destructive use."<sup>70</sup>

Also in September 1995, Senator Dole introduced S. 1279, which in its proposed amendments to Section 3626 included an expanded version of the preliminary-relief provision, proposed Section 3626(a)(2). This version of

64. *See id.* at 217 (prepared statement of Chase Rivland).

65. Prison Conditions Litigation Reform Act, S. 1275, 104th Cong. § 2(a) (1995), <https://www.congress.gov/104/bills/s/1275/BILLS-104s1275is.pdf>.

66. *See id.*

67. *Compare id.*, with 18 U.S.C. § 3626(b)(3).

68. *See* 141 CONG. REC. S14,316 (1995) (remarks of Sen. Abraham), <https://www.congress.gov/104/crec/1995/09/26/CREC-1995-09-26-pt1-PgS14312-3.pdf>.

69. *See id.* at S14,316–17.

70. *Id.* at S14,316.

Section 3626(a)(2) (which included what ultimately would be the first, second, and fourth sentences of Section 3626(a)(2) as later enacted) added a need / narrowness / intrusiveness requirement for preliminary relief:

Preliminary Injunctive Relief. – In any civil action with respect to prison conditions, to the extent otherwise authorized by law, the court may enter a temporary restraining order or an order for preliminary injunctive relief. Preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm. Preliminary injunctive relief shall automatically expire on the date that is 90 days after its entry, unless the court makes the findings required under subsection (a)(1) for the entry of prospective relief and makes the order final before the expiration of the 90-day period.<sup>71</sup>

The summary of S. 1279 that Senator Dole entered into the record contains only one sentence specifically discussing proposed Section 3626(a)(2): “Preliminary injunctive relief would expire after 90 days, unless made final before that date.”<sup>72</sup> Senator Abraham’s remarks on S. 1279 made no specific mention of preliminary relief but discussed the bill’s limits on prospective relief, including the provision for termination of permanent injunctions: “[The bill] provides that any party can seek to have a court decree ended after 2 years, and that the court will order it ended unless there is still a constitutional violation that needs to be corrected.”<sup>73</sup> He concluded: “This is a balanced bill that allows the courts to step in where they are needed, but puts an end to unnecessary judicial intervention and micromanagement.”<sup>74</sup>

S. 1279’s version of proposed Section 3626(a)(2) (quoted above) would later become part of the Prison Litigation Reform Act of 1995 as contained in H.R. 2076, a 75-page bill (largely concerning appropriations) which was passed by both Houses of Congress and sent to the President for

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71. Prison Litigation Reform Act, S. 1279, 104th Cong. § 2(a) (1995), <https://www.congress.gov/104/bills/s/1279/BILLS-104s1279is.pdf>.

72. Section Summary, 141 CONG. REC. S14,417 (1995), <https://www.congress.gov/104/crec/1995/09/27/CREC-1995-09-27-pt1-PgS14408.pdf>.

73. *Id.* at S14,419 (remarks of Sen. Abraham).

74. *Id.* Senator Orrin Hatch expressed a similar idea: “While prison conditions that actually violate the Constitution should not be allowed to persist, I believe that the courts have gone too far in micromanaging our Nation’s prisons.” *Id.* at S14,418 (remarks of Sen. Hatch). It would understate the reaction to the PLRA to say that a number of commentators have disagreed with Senator Abraham’s assessment that it was “a balanced bill.” *See, e.g.,* David C. Fathi, *The Prison Litigation Reform Act: A Threat to Civil Rights*, 24 FED. SENT. R. 260, 260 (2012) (“The purpose and effect of the statute is to make it far more difficult for prisoners . . . to vindicate their rights in federal court, by imposing an impressive array of burdens and obstacles that apply only to lawsuits brought by prisoners.”). But it nonetheless seems appropriate to credit the assurances by the bill’s proponents that the bill would not remove the courts’ ability to provide relief where truly necessary.



signature.<sup>75</sup> The accompanying conference report's discussion of "[p]rison conditions remedies" stated in part:

Section 802 amends 18 U.S.C. 3626 to require that prison condition remedies do not go beyond the measures necessary to remedy federal rights violations and that public safety and criminal justice needs are given appropriate weight in framing such remedies. Specifically, the section places limits on the type of prospective relief available to inmate litigants. The relief is generally limited to the minimum necessary to correct the violation of a federal right. Measures limiting prison population such as prison caps or prison release orders can only be imposed as last resort measures after less drastic remedies had proven ineffective. A prison cap in federal proceedings can be ordered only by a three-judge court. These same limitations on prospective relief are applied to preliminary injunctive relief and such relief would expire after a ninety-day period. Prior consent decrees are made terminable upon the motion of either party, and can be continued only if the court finds that the imposed relief is necessary to correct the violation of the federal right.<sup>76</sup>

The conference report also remarked:

The conferees also understand that approximately eight percent . . . of the 10.1 million admittances to jails annually, suffer from severe mental illness . . . . Most of these individuals have not committed violent or serious felonies but rather misdemeanors, or other nonviolent offenses. The conferees further understand that eight percent . . . of the approximately one million people currently incarcerated in our nations prisons, suffer from severe mental illness. The conferees agree that the care and treatment provided to these individuals is essential to their health and do not intend for any of the provisions in this title to impact adversely on the availability of this care and treatment.<sup>77</sup>

A review of the floor debate on H.R. 2076 reveals only one mention of the bill's provision concerning preliminary relief in prison-conditions cases. Representative Conyers asserted, as one of the reasons why "[t]he prison litigation reform provisions [we]re problematic," that:

[T]he provisions would render emergency relief ineffective. Preliminary injunctions would mandatorily terminate 90 days after entry unless the court made the injunction final within the 90-day period. It is virtually impossible for the parties to complete discovery and for the court to complete a trial and issue a decision within 90 days. Preliminary injunctions are designed to address

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75. See H.R. 2076, 104th Cong. § 801(a) (1995), <https://www.congress.gov/104/bills/hr2076/BILLS-104hr2076enr.pdf>.

76. H.R. REP. NO. 104-378, at 166 (1995), <https://www.congress.gov/104/crpt/hrpt378/CRPT-104hrpt378.pdf>.

77. *Id.* at 167.

emergencies, often involving life and death situations that warrant attention in advance of the time that is required to conduct a full-blown trial. Termination of a preliminary injunction, without attention to whether there is good cause for the injunction to remain in effect, and without allowing adequate time for the parties to conduct discovery and the court to hold a trial would deprive a court of the power to prevent a defendant from returning to life threatening practices.<sup>78</sup>

No one attempted to respond to this point during the floor debate, possibly because other speakers' remarks largely focused on other aspects of the appropriations bill.

President Clinton vetoed H.R. 2076 in December 1995, highlighting reasons for the veto that did not relate to the prison-litigation provisions.<sup>79</sup> But in early March 1996, bills containing what would become the Prison Litigation Reform Act were introduced in both the House and Senate. In each bill, the preliminary-injunction provision contained the text that would ultimately be enacted—that is, the provisions included a new sentence requiring consideration of comity and of public-safety and criminal-justice impacts of the preliminary relief.<sup>80</sup> In late April 1996, Congress enacted the Prison Litigation Reform Act as part of an omnibus appropriations bill, and President Clinton signed it into law.<sup>81</sup>

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78. 141 CONG. REC. H14,106 (1995), <https://www.govinfo.gov/content/pkg/CREC-1995-12-06/html/CREC-1995-12-06-pt1-PgH14078-2.htm>.

79. See 141 CONG. REC. H15,166–67 (1995), <https://www.congress.gov/104/crec/1995/12/19/CREC-1995-12-19-pt2-PgH15166-2.pdf>.

80. See S. 1594, 104th Cong. § 802(a) (1996), <https://www.congress.gov/104/bills/s1594/BILLS-104s1594rs.pdf>; H.R. 3019, 104th Cong. § 802(a), <https://www.congress.gov/104/bills/hr3019/BILLS-104hr3019ih.pdf>. Between the President's veto of H.R. 2076 and the enactment of the PLRA, other bills were introduced that would have implemented some features of the PLRA but that did not contain the ultimately-enacted provision on preliminary injunctive relief.

S. 1495, introduced in the Senate days after the veto, would have incorporated some prison-litigation provisions but would not have amended Section 3626 other than to add a provision concerning special masters. S. 1495, 104th Cong. § 201 (1995), <https://www.congress.gov/104/bills/s1495/BILLS-104s1495is.pdf>. In February 1996, a different bill was introduced in the House, see H.R. 2992, 104th Cong. § 201 (1995), <https://www.congress.gov/104/bills/hr2992/BILLS-104hr2992ih.pdf>, that contained a throwback version which reproduced features of the bill, S. 400, that had been introduced in the Senate roughly a year previously, see *supra* note 56 and accompanying text. H.R. 2992, like S. 400, did not address preliminary injunctive relief.

81. See Act of April 26, 1996, Pub. L. No. 104–134, 110 Stat. 1321, <https://www.congress.gov/104/plaws/publ134/PLAW-104publ134.pdf>. The direct history of the enacted legislation is uninformative on the question of the preliminary-injunction provision. For instance, the Senate floor debate included criticisms of the Prison Litigation Reform Act by two Democratic Senators, but neither Senator mentioned the preliminary-injunction provision (which is unsurprising, given that they were invoking previous testimony from the July 1995 hearing on S. 400, which had not included the preliminary-injunction provision). See 142 CONG. REC. S2296-300 (daily ed. Mar. 19, 1996), <https://www.congress.gov/congressional-record/volume-142/issue-38/senate-section/article/S2285-2> (remarks of Senators Kennedy and Simon and prior hearing testimony of John Schmidt).

Admittedly, the legislative history provides no direct evidence concerning the availability of successive preliminary injunctions under Section 3626(a)(2).<sup>82</sup> But the indirect evidence that can be gleaned from the legislative history weighs at least as heavily in support of such a possibility as against it. The first version of the proposed amendments to Section 3626 set limits on prospective relief generally but made no specific provision concerning preliminary relief. After participants in a hearing expressed concern that the prospective-relief limits' requirement of findings concerning narrowness and intrusiveness would prevent courts from entering preliminary relief to address imminent threats to life or health, the next version of the bills included an early version of what would become Section 3626(a)(2). That version included two sentences—one that affirmed the availability of preliminary relief and another that provided for automatic expiration of “[p]reliminary injunctive relief” after 90 days “unless the court makes the order final.”<sup>83</sup> That version also softened the termination provision for *permanent* injunctions by providing for continuation of such injunctions where the need / narrowness / intrusiveness test was met.

This sequence of events could be read to suggest that the inclusion of Section 3626(a)(2) was actually meant, in part, to affirm the availability of preliminary relief—thereby allaying the expressed concerns of those who feared the legislation would bar such relief. It would be odd if a provision introduced at least partly for that purpose simultaneously rendered such relief useless in cases where the necessity for the relief continued past 90 days, but the litigation could not be concluded within such a severely compressed time period. Indeed, such a reading of Section 3626(a)(2) would run directly counter to Senator Abraham's repeated assurances that the bill would tighten the requirements for federal-court relief but would not foreclose it where truly needed.<sup>84</sup> And, in light of the feature that was simultaneously added to the permanent-injunction-termination provision, no such conclusion is necessary: participants may instead have reasoned that the 90-day limit would function similarly to the permanent-injunction mechanism—that is, requiring periodic review of the appropriateness of the relief in question but permitting relief beyond 90 days so long as the court made a determination that it was still necessary.<sup>85</sup>

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82. One can say with certainty, though, that nowhere in the legislative history does there appear any suggestion that participants in the drafting process believed they were creating a revolutionary innovation that would somehow compress the litigation of prison-conditions claims into a total period of 90 days from start to finish.

83. See *supra* note 65 and accompanying text.

84. See, e.g., *supra* notes 70 and 74 and accompanying text (remarks of Sen. Abraham).

85. As noted above, Representative Conyers (then the ranking member on the House Judiciary Committee) did later express concern that proposed Section 3626(a)(2) would foreclose the availability of needed preliminary relief. See *supra* note 78 and accompanying text. But the legislative history provides no indication that any legislators who voted in favor of the PLRA shared this view. To the contrary, the bill's proponents stressed that the bill would not strip the courts of power to provide truly-needed relief.

Admittedly, the final sentence of Section 3626(a)(2) plainly is meant to make the limits on preliminary relief more rigorous.<sup>86</sup> But even if read to permit sequential preliminary injunctions, it still would set rigorous limits by requiring that the preliminary relief either be made final or be subject to court review at least every 90 days. That is to say, Section 3626(a)(2)'s last sentence has significant bite even when read to permit successive preliminary injunctions.

In sum, neither the text nor the legislative history of the PLRA compels the conclusion that Section 3626(a)(2) forecloses effective preliminary relief—as it would do, in some cases, if it actually closed off all possibility of preliminary relief past an initial 90-day limit.<sup>87</sup> It is, accordingly, unsurprising that a widespread practice has developed, among courts applying Section 3626(a)(2), of entering successive preliminary injunctions when warranted by the facts. It is to this caselaw, and strategic considerations relating to it, that I turn in the next section.

### III. CASELAW AND STRATEGY UNDER SECTION 3626(A)(2)

In a number of cases around the country, courts applying Section 3626(a)(2)'s 90-day limit have recognized the availability of sequential preliminary injunctions. That is to say, even where Section 3626(a)(2)'s “unless” clause is not met and the 90-day limit applies, these courts recognize that, at the 90-day mark, the court can enter an order for a new preliminary injunction that (if warranted by the facts) may be identical in terms to the

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When in 2008 a subcommittee of the House Judiciary Committee held a hearing on a bill that would have (among other things) deleted the last sentence of Section 3626(a)(2), a similar contrast surfaced. A witness speaking in support of the bill offered a view similar to Rep. Conyers'; by contrast, one of the witnesses who spoke against the legislation assured the subcommittee members that courts already could and did grant successive preliminary injunctions in appropriate cases. *Compare Prison Abuse Remedies Act of 2007, Hearing on H.R. 4109 Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 110th Cong. 189–90 (2008) (statement of Caroline Fredrickson, Director of the American Civil Liberties Union Washington Legislative Office, and Elizabeth Alexander, Director of the ACLU National Prison Project) (arguing that “even if a court finds that prisoners face an imminent threat of physical harm, its preliminary injunction may expire before the court can hold a full trial” and therefore that “prisoners can be denied the protections all other persons receive under our laws because the courts simply run out of time”), *with id.* at 233 (statement of Sarah V. Hart, Former Director of the National Institute of Justice and Counsel to Philadelphia District Attorney Lynne Abraham) (“Current law permits the 90-day injunction to continue if made final. Additionally, courts will often extend the preliminary injunction if new evidence is available.”). H.R. 4109, 110th Cong. (2007) failed to advance to a vote in the House, see <https://www.congress.gov/bill/110th-congress/house-bill/4109/all-actions>, as did a similar bill, H.R. 4335, 111th Cong., introduced in 2009, see <https://www.congress.gov/bill/111th-congress/house-bill/4335/all-actions>.

86. *Cf. Banks v. Booth*, 3 F.4th 445, 449 (D.C. Cir. 2021) (“In this statute Congress clearly meant for preliminary injunctions in civil actions respecting prison conditions to last no longer than 90 days.”).

87. For discussion of the link between the question of sequential preliminary injunctions and the question of the meaning of Section 3626(a)(2)'s “unless” clause, see *supra* note 47 and accompanying text.

previous one. I briefly review that caselaw in Part III.A below, before surveying in Part III.B some of the questions that this doctrinal feature raises for litigation strategy.

#### A. *Caselaw Relating to Successive Preliminary Injunctions Under Section 3626(a)(2)*

Although outliers can be found,<sup>88</sup> the caselaw that focuses on the question generally supports the view that successive preliminary injunctions are available under Section 3626(a)(2). Three circuits have approved sequential preliminary injunctions under the PLRA—the Ninth Circuit in a precedential decision and the Tenth and Eleventh Circuits in nonprecedential decisions. In *Mayweathers v. Newland*, the Ninth Circuit relied on the parallel to the PLRA’s permanent-injunction-termination provision in determining that Section 3626(a)(2) permits successive preliminary injunctions: “Nothing in the statute limits the number of times a court may enter preliminary relief. If anything, the provision simply imposes a burden on plaintiffs to continue to prove that preliminary relief is warranted. The imposition of this burden conforms with how the PLRA governs the termination of final prospective relief.”<sup>89</sup> Shortly thereafter, the Tenth Circuit followed *Mayweathers* in a nonprecedential opinion.<sup>90</sup> And the Eleventh Circuit, in a recent nonprecedential decision, affirmed an order entering a second preliminary injunction.<sup>91</sup> District courts in the First,<sup>92</sup> Second,<sup>93</sup> Third,<sup>94</sup> Sev-

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88. As discussed in Part I above, the now-defunct Eleventh Circuit opinion in *Jackson* arguably evinces this outlier view.

89. *Mayweathers v. Newland*, 258 F.3d 930, 936 (9th Cir. 2001) (citing 18 U.S.C. § 3626(b)).

90. *See* *Alloway v. Hodge*, 72 F. App’x 812, 817 (10th Cir. 2003) (nonprecedential opinion).

91. *See* *Melendez v. Sec’y, Fla. Dep’t of Corr.*, No. 21-13455, 2022 WL 1124753, at \*21 (11th Cir. Apr. 15, 2022) (unpublished per curiam opinion).

Earlier, the Eleventh Circuit had recognized, in dictum, the possibility of sequential preliminary injunctions—holding that the question of the validity of a now-expired preliminary injunction was capable of repetition (given the potential for entry of a second preliminary injunction in the same case) but would not evade review (because the district court, in entering such a second preliminary injunction, might well make the required findings and finalize its order so as to lift the 90-day limit and permit the preliminary injunction to last long enough for the future appeal to be litigated). *See* *United States v. Sec’y, Fla. Dep’t of Corr.*, 778 F.3d 1223, 1229 (11th Cir. 2015). The Eleventh Circuit in that case addressed for the sake of argument the *Mayweathers* view that sequential preliminary injunctions were possible, but held that this possibility did not save from mootness the defendant’s appeal from a now-expired preliminary injunction because the district court had not in fact renewed the preliminary injunction. *See id.* at 1228 n.9. (“None of the orders to which Florida points renewed the preliminary injunction. They merely clarified the scope of the existing injunction. Clarification is not renewal.”).

92. *See* *Reaves v. Dep’t of Corr.*, 195 F. Supp. 3d 383, 427 (D. Mass. 2016) (“Pursuant to 18 U.S.C. § 3626(a)(2), this order for injunctive relief shall expire in ninety days, unless Reaves shows cause why it should be renewed.”).

93. *See* *Barrett v. Maciol*, No. 20-CV-00537, 2022 WL 130878, at \*9 (N.D.N.Y. Jan. 14, 2022) (providing that preliminary injunction would expire in 90 days after entry and that “prior to the expiration of this preliminary injunction, Plaintiffs may seek to renew the preliminary injunc-

enth,<sup>95</sup> Ninth,<sup>96</sup> Tenth,<sup>97</sup> and Eleventh<sup>98</sup> Circuits have recognized the availability of sequential preliminary injunctions.

Swimming against this tide are a handful of district courts that have seemed to assume that Section 3626(a)(2) sets an insuperable 90-day limit on preliminary relief. One court used that as a reason to deny requested preliminary relief on the ground that it would be ineffectual.<sup>99</sup> Another court has used language, in dictum, that might be taken to suggest an as-

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tion for an additional ninety (90) days, by making a request with the Court, in writing, seeking such an extension”).

94. See *Bowers v. City of Philadelphia*, No. 06-CV-3229, 2007 WL 2972556, at \*2 (E.D. Pa. Oct. 10, 2007) (detailing first and second 90-day extensions of the original 90-day preliminary injunction); *Riley v. Brown*, No. 06-0331, 2006 WL 1722622, at \*1 n.1, \*15 (D.N.J. June 21, 2006) (granting motion for second preliminary injunction).

95. See *Peacher v. Conyers*, No. 20-CV-02997, 2022 WL 499893, at \*3 (S.D. Ind. Feb. 17, 2022) (“The preliminary injunction will automatically expire 90 days after its issuance. . . . Mr. Peacher may request that it be renewed no later than 14 days before the injunction expires.”); *Jackson v. Wexford of Indiana, LLC*, No. 19-CV-03141, 2019 WL 5566442, at \*3 (S.D. Ind. Oct. 29, 2019) (“The preliminary injunction automatically expires ninety days after the issuance of this Order . . . . Mr. Jackson may request that it be renewed by no later than fourteen days before the injunction expires.”); *Farnam v. Walker*, 593 F. Supp. 2d 1000, 1004 (C.D. Ill. 2009) (“[T]he preliminary injunction in this case will expire 90 days after its entry, unless the court enters a final order for prospective relief before then. However, nothing in § 3626 prohibits the entry of successive orders for preliminary injunction if needed.”).

96. Such decisions are unsurprising in light of *Mayweathers*. See, e.g., *McGovern v. Ferriter*, No. CV 12-00101, 2014 WL 1932355, at \*5 (D. Mont. May 14, 2014) (“Pursuant to 18 U.S.C. § 3626(a)(2) this preliminary injunction will automatically expire 90 days after its entry. The Court will consider requests to renew or extend the preliminary injunction should this [ ] matter not be resolved prior to that date.”); *Gammett v. Idaho State Bd. of Corr.*, No. CV05-257, 2007 WL 2684750, at \*4 (D. Idaho Sept. 7, 2007) (“[T]he preliminary injunction is valid for 90 days, at which time the Court can renew the injunction, pending the trial in this action.”); *McGiboney v. Corizon*, No. 18-CV-00529, 2020 WL 1666805, at \*9 (D. Idaho Apr. 3, 2020) (holding that initial preliminary injunction had expired at the 90-day mark and stating that, under *Mayweathers*, the plaintiff “would have to continue to prove that preliminary relief is warranted in order to obtain a second preliminary injunction”).

97. See *Martinez v. Reams*, No. 20-CV-00977, 2020 WL 8474726, at \*1 (D. Colo. Dec. 4, 2020) (following *Alloway v. Hodge*, 72 F. App’x 812 (10th Cir. 2003), and granting parties’ request for fifth extension of preliminary injunction).

98. See *Laube v. Campbell*, 255 F. Supp. 2d 1301, 1304 (M.D. Ala. 2003) (“Based on the fact that more than 90 days have now passed since the court entered the preliminary injunction in this case, the court must conclude, under the terms of 18 U.S.C.A. § 3626(a)(2), that the December 2 preliminary injunction has expired . . . . This is not to say, however, that the plaintiffs may not move for another preliminary injunction if they so desire.”). For an account of what happened thereafter in *Laube*, see Freedman, *supra* note 2, at 353.

99. The court first enumerated other reasons that preliminary relief was unwarranted, and then concluded: “Finally, as a practical matter, the Prison Litigation Reform Act significantly limits the preliminary injunctive relief available to a plaintiff who challenges conditions of confinement. Even if an injunction issued, its effect would expire after 90 days. 18 U.S.C. § 3626(a)(2).” *Incumaa v. Stirling*, No. 17-CV-1608, 2021 WL 2291787, at \*3 (D.S.C. June 4, 2021). The court appeared to be implying that preliminary relief ordering the facility to accommodate plaintiff’s religious observance would not be worthwhile because such relief could last, at most, 90 days – a rationale that appears to overlook the possibility of sequential preliminary injunctions.

sumption that complying with Section 3626(a)(2)'s "unless" clause provides the only avenue for extending preliminary relief past 90 days.<sup>100</sup>

### B. Strategic Considerations

As noted in the preceding section, successive preliminary injunctions are an established feature of the landscape of preliminary relief under the PLRA. They provide a needed safety valve in situations where the risk of harm to the plaintiff requires that preliminary relief continue past the initial 90-day period set by Section 3626(a)(2).<sup>101</sup> This feature is apparently unique to the context of prison-conditions litigation. It is, thus, worthwhile to ask briefly what questions of litigation strategy might arise in connection with this feature. Its very uniqueness suggests one issue: where the court and the other parties might be unaware of the 90-day limit, how should the plaintiff think about raising the topic proactively? Once the 90-day limit is under discussion in the case, if the plaintiff seeks a second or successive preliminary injunction, what must the plaintiff do in order to obtain that successive order? If the court grants more than one sequential preliminary-injunction order, how does the 90-day limit on each order's duration affect the availability of and process for appellate review? I briefly touch upon these questions below.

If the district judge is not already aware of Section 3626(a)(2)'s 90-day limit, a plaintiff might wonder whether they should proactively raise the topic with the judge. Doing so seems the better course of action for several reasons. As a practical matter, the court may learn of the 90-day limit on its own.<sup>102</sup> Even if it does not, the defendant is likely to alert the court to the 90-day limit whenever the defendant decides that such a course of action

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100. In *Dodge v. County of Orange*, the court scolded the parties for their prior failure to mention Section 3626(a)(2)'s 90-day limit, and stated:

preliminary injunctive relief expires unless the court makes the order final, consistent with § 3626(a)(1) (which requires a court to make findings as to whether prospective 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), within ninety days after the entry of the preliminary injunction. Plaintiffs made no effort to have this Court timely make the findings necessary to permit continuance of the injunction.

*Dodge v. Cnty. of Orange*, 282 F. Supp. 2d 41, 58 (S.D.N.Y. 2003).

101. An alternative safety valve could be provided by interpreting Section 3626(a)(2)'s "unless" clause as Judge Wilson did in dissent in *Jackson*. *Ga. Advoc. Off. v. Jackson*, 4 F.4th 1200, 1217 (11th Cir. 2021) (Wilson, J., dissenting), *panel opinion vacated as moot*, 33 F.4th 1325 (11th Cir. 2022).

102. "Because more than 90 days had passed since the court had issued the preliminary injunction, the court sua sponte raised the issue of its expiration under § 3626(a)(2), and held a conference call with all parties on March 10." *Laube*, 255 F. Supp. 2d at 1303. For a case in which apparently the 90-day limit was not identified as an issue until it was spotted by the court of appeals on the defendant's interlocutory appeal, see *United States v. Sec'y, Fla. Dep't of Corr.*, 778 F.3d 1223, 1225 (11th Cir. 2015) ("Attorneys and judges sometimes overlook a statutory provision, a regulation, or a decision that directly controls a case. We have all done it occasionally. It happened in this case.").

serves its interests,<sup>103</sup> so failing to deal with the issue up front leaves the potential for future trouble. Relatedly, if the judge learns of the limit only later, the judge may be annoyed by the parties' failure to alert the court sooner.<sup>104</sup>

In cases where there will be an ongoing need for preliminary relief, there are costs associated with the need to obtain successive preliminary injunctions. Where the facts are unchanged, the request for the next preliminary injunction presumably could be supported by reference to the original record.<sup>105</sup> But in dynamic and changing situations (think, for instance, of the changing state of public health knowledge in the early days of the COVID-19 pandemic), the mere passage of time might alter the facts on the ground. In other instances, a strategic defendant might do just enough in the way of compliance with the original preliminary injunction to support an assertion that the facts have changed, and thus to ground an argument that the plaintiff must go to the effort and expense of submitting a new round of evidence in support of the request for the next preliminary injunction. On the other hand, where the likelihood of ongoing need is clear, the court might encourage the parties to stipulate to the entry of the successive preliminary injunction.<sup>106</sup> And the entry of a first preliminary injunction can, and ought to, increase a defendant's motivation to think seriously about

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103. In *McGiboney v. Corizon*, the defendant raised the 90-day limit in a motion for reconsideration, and the court retroactively held that the nominally-non-time-limited preliminary injunction had expired at the 90-day mark. See *McGiboney v. Corizon*, No. 18-CV-00529, 2020 WL 1666805, at \*8 (D. Idaho Apr. 3, 2020).

104. In one case, the court described an "incomprehensible development"—namely, "that neither side . . . so much as mentioned the PLRA until after the preliminary injunction expired. Apparently, neither plaintiffs' counsel nor the County's attorney was aware that, pursuant to the PLRA, preliminary injunctive relief expires unless the court makes the order final . . . within ninety days after the entry of the preliminary injunction. Plaintiffs made no effort to have this Court timely make the findings necessary to permit continuance of the injunction." *Dodge*, 282 F. Supp. 2d at 58 n.23. The court observed that, subsequently, the defendant had hired a law firm with PLRA experience, and that since then, "the PLRA and its requirements have been the focus of substantial litigation, and this trial was conducted with those requirements very much in mind." *Id.*

This is not to say that a failure to proactively raise the 90-day issue when requesting a preliminary injunction necessarily violates the lawyer's duty of candor toward the tribunal, see, e.g., MODEL RULES OF PRO. CONDUCT r. 3.3(a)(2) (AM. BAR ASS'N 2021) ("A lawyer shall not knowingly: . . . (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel . . ."). After all, absent satisfaction of Section 3626(a)(2)'s "unless" clause, the statute itself apparently accomplishes the "automatic [ ] expir[ation]" of the preliminary injunction at the 90-day mark, and this is true whether or not the preliminary-injunction order so states. In any event, the considerations stated in the text already provide ample reason to raise the issue.

105. See BOSTON, PLRA HANDBOOK, *supra* note 15, at 86 ("If nothing has changed since the first injunction, that fact may be sufficient to justify entry of a new injunction or renewal of an existing one.").

106. *Cf.* *Barrett v. Maciol*, No. 20-CV-00537, 2022 WL 130878, at \*9 (N.D.N.Y. Jan. 14, 2022) (stating that the plaintiffs could seek renewal of the preliminary injunction at the close of the initial 90 days and noting that "to avoid the necessity of Plaintiffs having to continually seek to renew the preliminary injunction pending resolution of this case on the merits, the parties may file



settlement: the grant of preliminary relief can send a strong signal concerning the court's view of the potential merit of the claims.

In cases where, instead, the defendant contests the entry of the preliminary relief, the 90-day limit poses interesting challenges to the availability of appellate review. It is unlikely that an appeal from a preliminary injunction will be litigated to conclusion in 90 days or less.<sup>107</sup> Thus, unless the defendant obtains a stay of the preliminary injunction and the stay operates to toll the 90-day period—a concept that no court has yet adopted as law—it seems likely that any appeal will confront the question of mootness.<sup>108</sup> Unsurprisingly, a number of the appellate cases that discuss Section 3626(a)(2)'s 90-day limit concern this question of mootness on appeal.

Where the appeal involves only a challenge to a now-expired preliminary injunction, the courts of appeals have tended to dismiss the appeal on mootness grounds.<sup>109</sup> Though defendants may contend that their appeals

with the Court a stipulation agreeing to keep the preliminary injunction in place pending final resolution of this case”).

107. Unlikely, but definitely not impossible. For an example of a case where the court of appeals expedited its decision and took roughly 45 days to decide an appeal from a preliminary injunction, see *Swain v. Junior*, 961 F.3d 1276, 1280 n.1 (11th Cir. 2020).

108. In *Ahlman v. Barnes*, the Ninth Circuit rejected the idea that the Supreme Court's previous stay of the district court's preliminary injunction tolled the running of Section 3626(a)(2)'s 90-day period, see *Ahlman v. Barnes*, 20 F.4th 489, 493–94 (9th Cir. 2021), and although the defendant then sought Supreme Court review based on its argument to the contrary, see Petition for Writ of Certiorari, *Ahlman*, 20 F.4th 489 (No. 22-1351), 2022 WL 1126611, the Supreme Court denied certiorari, see 142 S. Ct. 2755 (2022). In one recent case, the Eleventh Circuit avoided an analogous question by deciding an appeal from a preliminary injunction before the date when the (stay)ed preliminary injunction was (by its own terms) originally set to expire. See *Swain*, 961 F.3d at 1280 n.1. (The issue is analogous but not identical because the 45-day limit at issue in *Swain* was set by the district court, not by Section 3626(a)(2)).

109. See BOSTON, PLRA HANDBOOK, *supra* note 15, at 86 (“Most courts to date have held that an appeal from the grant of a preliminary injunction will be mooted when the order expires . . .”).

This was the outcome adopted in the Eleventh Circuit's now-vacated ruling in *Jackson*. See *Ga. Advoc. Off. v. Jackson*, 4 F.4th 1200, 1216 (11th Cir. 2021), *vacated as moot*, 33 F.4th 1325 (11th Cir. 2022). See also, e.g., *Banks v. Booth*, 3 F.4th 445, 449 (D.C. Cir. 2021).

There is an asymmetry here, because if the plaintiff cross-appeals from the district court's preliminary-injunction order to challenge the district court's refusal to grant broader preliminary relief, the expiration of the preliminary injunction will likely moot the defendant's appeal from the actual preliminary injunction but not the plaintiff's cross-appeal from the denial of additional preliminary relief. See *Norbert v. City & Cnty. of San Francisco*, 10 F.4th 918, 927 (9th Cir. 2021) (“The PLRA does not prevent plaintiffs from appealing the district court's order insofar as it denied plaintiffs relief because what expired after 90 days was only the preliminary injunctive relief that was entered.”).

For a case in which the court of appeals affirmed a preliminary injunction after what appears to have been its termination date, see *Porretti v. Dzurenda*, 11 F.4th 1037, 1045, 1052 (9th Cir. 2021). The district court entered a preliminary injunction on May 31, 2020. See *Porretti v. Dzurenda*, No. 17-cv-01745, 2020 WL 2857498, at \*7 (D. Nev. May 31, 2020). Defendants timely filed a notice of appeal from that order. See Notice of Appeal, *Porretti*, No. 17-cv-01745, ECF No. 258. Thereafter, the district court entered an order on August 31, 2020 “reissu[ing] the injunctive relief ordered in its May 31, 2020 order.” *Porretti*, No. 17-cv-01745, 2020 WL 6834234, at \*2 (D. Nev. Aug. 31, 2020). The defendants did not file a notice of appeal from the August order. See Docket, *Porretti*, No. 17-cv-01745, 2020 WL 2857498. On December 1, 2020, the district court “so ordered” a stipulation extending the preliminary injunction “until February 26, 2021.”

fall within the mootness exception for matters capable of repetition yet evading review, courts of appeals have rejected such contentions either by taking the view that the issue is not capable of repetition<sup>110</sup> or by reasoning that, when repeated, the issue will not evade review via a future appeal. Courts of appeals ruling that the issue will not evade review have relied on the availability of an appeal either from a future preliminary injunction that is (through compliance with Section 3626(a)(2)'s "unless" clause) not durationally limited<sup>111</sup> or from a future permanent injunction.<sup>112</sup>

Another possibility is that appellate review could take place by means of consolidated appeals from successive preliminary injunctions entered in compliance with Section 3626(a)(2)'s 90-day limit. In this model, the defendant could appeal each successive preliminary injunction once it is entered. Even if one or more of the preliminary injunctions expired during the pendency of the appeal, there would always be one such preliminary injunction in current effect, and thus the court of appeals—even if it dismissed as moot the appeal from now-expired versions of the preliminary injunction—could decide the appeal from the preliminary injunction that was still in effect.<sup>113</sup>

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Expedited Stipulation and Order to Extend Preliminary Injunctive Relief Pursuant to 18 U.S.C. § 3626, *Porretti*, No. 17-cv-01745 (D. Nev. Dec. 1, 2020), ECF No. 325. Prior to the Ninth Circuit's determination of the appeal on August 30, 2021, the district-court docket reflects no further extensions of the preliminary injunction. Given that the court of appeals briefing was completed in early January 2021, see Docket, *Porretti*, No. 20-16111, it seems likely that no one raised a question of mootness in connection with the appeal. Cf. *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 98 (1993) ("[W]hile the initial burden of establishing the trial court's jurisdiction rests on the party invoking that jurisdiction, once that burden has been met courts are entitled to presume, absent further information, that jurisdiction continues. If a party to an appeal suggests that the controversy has, since the rendering of judgment below, become moot, that party bears the burden of coming forward with the subsequent events that have produced that alleged result.").

110. See *Ahlman*, 20 F.4th at 495 ("[T]he chance that Plaintiffs successfully acquire another preliminary injunction, at least without significantly worse conditions than previously existed, is remote. Certainly, any subsequent injunction would be based on an entirely new set of factual circumstances."), *cert. denied*, 142 S. Ct. 2755 (2022).

111. See *United States v. Sec'y, Fla. Dep't of Corr.*, 778 F.3d 1223, 1229 (11th Cir. 2015) ("There is no basis for us to predict that if the United States seeks a new preliminary injunction, the district court (assuming it grants the motion) will decline to make the required need-narrowness-intrusiveness findings or will refrain from finalizing its order. See 18 U.S.C. § 3626(a)(2). Or to put it in terms of the mootness exception, there is no 'reasonable expectation' that any new preliminary injunction would expire before it reached this Court on appeal."); see also *Victory v. Berks Cnty.*, 789 F. App'x 328, 333 n.5 (3d Cir. 2019) (unpublished opinion) (citing Secretary, Florida Department of Corrections as support for the court's conclusion that issues concerning two expired preliminary injunctions would not evade review "because the District Court can prevent future injunctions from expiring under the PLRA").

112. See, e.g., *Jackson*, 4 F.4th at 1216 ("Defendants can obtain review when the District Court enters a permanent injunction after a trial on the merits, assuming Plaintiffs succeed.").

113. This is what happened in the Eleventh Circuit's *Melendez* decision: the court of appeals dismissed as moot the defendant's appeal from the first preliminary injunction, and reviewed on the merits the district court's grant of the second preliminary injunction. See *Melendez v. Sec'y*,

The district court would have jurisdiction to enter the successive orders despite the pendency of an appeal from an earlier version of the order. Typically, an appeal transfers jurisdiction from the district court to the court of appeals with respect to matters encompassed within the appeal.<sup>114</sup> However, the district court retains jurisdiction with respect to matters outside the scope of the appeal; and even as to matters within the appeal's scope, the district court can take actions in aid of the court of appeals' jurisdiction. A new district-court order that puts in place preliminary relief that is materially similar to that in the order being appealed might be seen as being in aid of the appellate court's jurisdiction, because—for the reasons noted here—the entry of the new preliminary injunction might permit the court of appeals to surmount a mootness barrier to reviewing the issues on appeal.<sup>115</sup> Alternatively, one might view the scope of the first appeal as limited to the issue of the grant of injunctive relief for the initial 90-day period, in which event the grant of a new preliminary injunction for a subsequent period might be seen as outside the scope of the initial appeal.

When the district court enters a new preliminary injunction after the defendant has already appealed a prior preliminary injunction in the same case, the defendant—if it wishes to appeal the new preliminary injunction—must file a new or amended notice of appeal. The difference between filing a new notice of appeal and filing an amended notice is subtle and not entirely clear.<sup>116</sup> The advantage of filing an amended notice of appeal is that this may relieve the appellant of the need to pay an additional filing fee.<sup>117</sup> An amended, rather than new, notice of appeal would presumably mean that the court of appeals would treat the matter as a single appeal encompassing both of the orders designated in the amended notice—the original preliminary injunction order and the new one. If, instead, the defendant filed a new notice of appeal, then the court of appeals would likely consolidate the two appeals to be heard in tandem.<sup>118</sup>

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Fla. Dep't of Corr., No. 21-13455, 2022 WL 1124753, at \*9 (11th Cir. Apr. 15, 2022) (unpublished opinion).

114. See 16A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & CATHERINE T. STRUVE, FEDERAL PRACTICE AND PROCEDURE § 3949.1 (5th ed. 2019).

115. Cf. FED. R. CIV. P. 62(d) (“While an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party’s rights.”).

116. See WRIGHT ET AL., *supra* note 114, § 3949.3.

117. See *Owen v. Harris Cnty.*, 617 F.3d 361, 363 (5th Cir. 2010) (“We conclude, therefore, that no fee can be required for any amended notice of appeal, irrespective of whether it pertains to a post-judgment motion.”). Since one of the required fees is \$ 500, see Judicial Conference Schedule of Fees, Court of Appeals Miscellaneous Fee Schedule, note to 28 U.S.C. § 1913, the savings from filing an amended notice of appeal might add up, especially if the case turns out to involve multiple sequential preliminary injunctions.

118. See FED. R. APP. P. 3(b)(2) (“When the parties have filed separate timely notices of appeal, the appeals may be joined or consolidated by the court of appeals.”). It is not entirely clear whether Rule 3(b) was drafted with the situation discussed in the text in mind. Appellate Rule

These considerations illustrate that the reading of Section 3626(a)(2) advocated in this essay—permitting the entry of successive preliminary injunctions—actually holds the promise of protecting the defendant’s opportunity for appellate review of preliminary-injunction orders in prison-conditions litigation. A contrary reading of Section 3626(a)(2) would make such appellate review harder to obtain, because the defendant would need to persuade the court of appeals either to expedite the appeal so briskly that the decision would occur in 90 days or less, or to apply an exception to the mootness doctrine and decide the appeal after the preliminary injunction expired by operation of law. As shown by the cases discussed above, application of the “capable of repetition, yet evading review” exception to mootness is not guaranteed in this context.<sup>119</sup>

### CONCLUSION

By enacting the PLRA, Congress sought to tighten markedly the requirements for granting prospective relief in prison-conditions litigation. Section 3626(a)(2) implements this goal with respect to preliminary relief. By requiring that a plaintiff either meet the “unless” clause in Section 3626(a)(2)’s final sentence or seek a new preliminary injunction at least every 90 days, Section 3626(a)(2) makes it less likely that preliminary relief will persist, unexamined, for extended periods in long-running prison litigation. This feature is among those that Senator Abraham may have referred to when he stated that the PLRA would “put[ ] an end to unnecessary judicial intervention and micromanagement.”<sup>120</sup>

However, preliminary relief may need to last longer than 90 days in cases where the plaintiff would otherwise be at risk of harm during the remainder of the litigation. Senator Abraham assured his colleagues that the PLRA’s strictures would still “allow[ ] the courts to step in where they are needed”<sup>121</sup>—and nothing in the statute’s text, structure, or history requires the conclusion that such need must be disregarded after 90 days have elapsed since the entry of preliminary relief. Nor is it realistic to think that the parties or the court have the resources to drop all other matters and litigate such a lawsuit through to conclusion in 90 days. It is thus both unsurprising and appropriate that, rightly presuming “that Congress was sensitive to the real-world problems faced by those who would remedy con-

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3(b)(1) is written in terms that focus on situations where “two or more parties are entitled to appeal from a district-court judgment or order,” so perhaps it could be argued that the use of “the parties” in Rule 3(b)(2) likewise points to situations in which the multiple appeals are taken by different parties—rather than by a single party from multiple orders. However, consolidating multiple appeals in the situation described in the text would be sensible and entirely consistent with the spirit of Appellate Rule 3(b).

119. See *supra* notes 110–112 and accompanying text.

120. See *supra* note 74 and accompanying text.

121. See *supra* note 74 and accompanying text.

stitutional violations in the prisons,”<sup>122</sup> courts have recognized the availability of sequential preliminary injunctions under Section 3626(a)(2).

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122. *Brown v. Plata*, 563 U.S. 493, 526 (2011).