Nos. 19-15224, 19-15359

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TODD ASHKER, et al.,

Plaintiffs-Appellees / Cross-Appellants,

v.

GAVIN S. NEWSOM, et al.,

Defendants-Appellants / Cross-Appellees.

On Appeal from the United States District Court
for the Northern District of California (Eureka)

Case No. 4:09-cv-05796-CW (RMI)
The Honorable Robert M. Illman, Magistrate Judge

PLAINTIFFS-APPELLEES / CROSS-APPELLANTS' REPLY BRIEF

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INTRODUCTION

Plaintiffs submit this Reply Brief in Support of their Cross-Appeal from the Magistrate Judge's determination. As a threshold matter, Plaintiffs draw the Court's attention to a major change in position between Defendants-Appellants' Opening Brief (hereafter "First Br.") and Defendants-Appellants' Third Cross Appeal Brief (hereafter "Third Br."). After exhaustive argument before this Court and the District Court regarding the facts and law relevant to CDCR's misuse of confidential information to return *Ashker* class members to solitary confinement, Defendants now purport to "withdraw their challenge to the district court's merits finding" on that claim *without* conceding that they misused confidential information in violation of due process, or lifting their successful objections—based on the pendency of this appeal—to the creation of a remedy for this systemic constitutional violation. (Third Br. at 36; CD 1174, ER 40-42).[1] As Plaintiffs and Amici (including prominent former prison officials) establish, it is important that Defendants recognize that their practices do indeed violate due process and that they are legally obligated to remedy the problem.

[1] Plaintiffs utilize the following abbreviations: The District Court Docket: "CD"; Defendants-Appellants' Excerpts of Record, submitted with their appeal opening brief: "ER"; Defendants-Appellants' Sealed Excerpts of Record, submitted with their appeal opening brief: "SEALED ER"; Plaintiffs-Appellees' Supplemental Excerpts of Record, submitted with their principle and response brief: "SER"; Plaintiffs-Appellees' Supplemental SEALED Excerpts of Record, submitted with their principle and response brief: "SEALED SER".

Given the effort already extended by the parties, Defendants' refusal to concede error or submit to a remedial process, and the resulting likelihood that this issue will require more litigation in the future, Plaintiffs urge this Court, if it determines there is jurisdiction to hear the appeal (discussed below), to affirm the lower court's finding that Defendants' have violated due process by their systemic fabrication and misuse of confidential information.

On the question of jurisdiction—first raised in Plaintiffs-Appellees / Cross-Appellants' Principal and Response Brief (hereafter "Second Br.")—Defendants do not contest the singular operative fact that controls the disposition of this appeal: Judge Wilken's statement that "[t]he magistrate judge's Extension Order was not issued pursuant to the consent statute," 28 U.S.C. § 636(c). (CD 1198, ER 17). That statement requires the dismissal of this appeal since a magistrate judge lacks jurisdiction to enter a final appealable order when the district court judge assigned to the case has not designated the magistrate judge to do so. Faced with the irrefutable and dispositive fact of Judge Wilken's order, Defendants concoct a novel argument, grounded in a misrepresentation of the operative rule, to strip all authority from individual Article III judges over plenary referrals to magistrate judges. This Court should reject that notion and dismiss this appeal for lack of jurisdiction.

Next, Defendants argue that indefinite and even permanent placement in the Restricted Custody General Population Unit ("RCGP") does not deprive Plaintiffs of due process. This argument ignores both the atypical and significant hardship of placement in the RCGP, and the lack of any meaningful hearing or way out for many prisoners so confined. Defendants point to no evidence to displace the lower court's factual finding that the RCGP's singular nature, remote location, prolonged duration, impact on parole eligibility, and stigma combine to give rise to a liberty interest. Nor do Defendants dispute that they have provided prisoners with notice of how to earn release from the RCGP, yet ignore their own guidance during periodic RCGP reviews, rendering those reviews constitutionally deficient. Defendants rely entirely on RCGP prisoners' histories of safety concerns, arguing that they *cannot* create a safe pathway out of the RCGP, and thus concede that for many prisoners there is no way out. Periodic reviews with a predetermined outcome violate due process.

ADDENDUM

Except for the following, all applicable constitutional provisions, treaties, statutes, ordinances, regulations or rules are contained in the Addenda of the First and Second Cross-Appeal Briefs: Federal Magistrate Act of 1979, Pub. L. No. 96-82, 93 Stat. 643 (1979); Northern District of California Local Rules 72 & 73; Northern District General Order 44.

ARGUMENT

I. THE APPEAL MUST BE DISMISSED FOR LACK OF JURISDICTION

This appeal and cross-appeal arise from a decision by a magistrate judge who was not designated by the District Court to issue a final order. Thus, the appeals must be dismissed for lack of jurisdiction.

A. Magistrate Judges Are Not Universally Designated to Issue Final Rulings

The lynchpin of Defendants' argument is a blatant mischaracterization of Northern District of California Local Rule 72-1 ("LR 72-1"). Defendants selectively quote only the first clause of LR 72-1, which reads in its entirety (the portion omitted by Defendants is italicized):

> Each Magistrate Judge appointed by the Court is authorized to exercise all powers and perform all duties conferred upon Magistrate Judges by 28 U.S.C. § 636, *by the local rules of this Court and by any written order of a District Judge designating a Magistrate Judge to perform specific statutorily authorized duties in a particular action*.

(Third Br. at 11, *quoting in part* LR 72-1) (emphasis added). By presenting this Court with only the first clause as if it were the entire rule, Defendants create the false impression that LR 72-1 confers special designation on *all* magistrate judges for *all* cases at *all* times. (Third Br. at 9). But that is not what the full rule says. The first clause "authorize[s]" all magistrate judges to broadly perform their duties under each type of referral—whether for findings and recommendations pursuant

to section 636(b), or for a final order with consent pursuant to subsection (c)—but "designati[on]" to perform specific duties requires a "written order of a District Judge." Thus, Defendants' contention that "by local rule, every magistrate judge in Northern District of California is 'specially designated'" is both manipulative and wrong. (Third Br. at 9). It is telling that Defendants do not cite a single case to support their theory. (*Id.* at 11). Indeed, LR 72-1, read in its entirety, is consistent with Ninth Circuit precedent that special designation "generally derives from an 'individual district judge.'" *Parsons v. Ryan,* 912 F.3d 486, 496 (9th Cir. 2018), *quoting Columbia Record*, 966 F.2d 515, 516-17 (9th Cir. 1992).[2]

Defendants secondarily cite Local Rule 73-1, but it, too, supports Plaintiffs' position. (Third Br. at 14). For cases initially assigned to a district judge, as here, "the parties may consent at any time to the Court *reassigning* the case to a

[2] Special designation pursuant to section 636(c) by individual district court judges is commonplace. *See, e.g., Parsons*, 912 F.3d at 496 (recognizing that the district judge "entered a written order referring the case to [the magistrate judge]… Thus, [the magistrate judge's] designation was effective"); *In re San Vicente Med. Partners Ltd.*, 865 F.2d 1128, 1129 (9th Cir. 1989) (recognizing the order of referral to a magistrate judge under section 636(c) was made by the individual district judge). Judge Wilken, as well, clearly understood special designation under the consent statute to be in the control of the individual district judge. (CD 1198, ER 17); *see, e.g., Chiaverini, Inc. v. Frenchie's Fine Jewelry, Coins & Stamps, Inc.*, No. 04-CV-74891-DT, 2008 WL 2415340, at *1 (E.D. Mich. June 12, 2008) (where statutory basis of order referring case to magistrate judge is unclear, "[the district judge] is in the best position to determine the intent and effect of his Order of Reference").

magistrate judge for all purposes, including entry of final judgment, pursuant to 28 U.S.C. § 636(c)." LR 73-1(b) (emphasis added). Again, this is consistent with the two-part jurisdictional requirement of special designation (here stated as "reassign[ment] … for all purposes"), followed by full consent. LR 73-1(b); *see also* Northern District General Order 44, *Assignment Plan*, § E.4.

The error of Defendants' interpretation of LR 72-1 as a universal special designation is further apparent from its implication: throughout the lifespan of a case, the parties would have complete control to simply remove the assigned Article III judge. This would undermine Article III authority, overburden the magistrate judges, and overwhelm the appellate docket with section 636(c)(3) appeals.

Simply put, the Northern District local rules fulfill the mandate of section 636(c)(1) by establishing two paths for plenary referrals: at the outset of a case, the district court may make an initial assignment to a magistrate judge who, upon full consent, takes case-dispositive control; later in the case, after a district judge has been assigned, the Article III judge may refer the case or an issue to a magistrate judge. In the latter scenario, which is present here, the district judge controls whether the referral is for findings and recommendations or a final appealable order.

B. The Defect in the Referral Is Jurisdictional

Defendants also argue that non-compliance with section 636(c) here is not jurisdictional. (Third Br. at 14). It is true that mere flaws in the form or mechanics of notification and consent under section 636(c)(2) do not necessarily defeat magistrate judge jurisdiction, but only so long as the jurisdictional requirements of special designation and consent have been met under section 636(c)(1). The mechanics of (c)(2) only come into play *after* the prerequisite of a special designation has occurred. 28 U.S.C. § 636(c)(2); *see also Roell v. Withrow*, 538 U.S. 580, 587 (2003); *Wilhelm v. Rotman*, 680 F.3d 1113, 1119 (9th Cir. 2012) (where designation and consent were satisfied, minor deviation from § 636(c)(2), in that consent form was issued by magistrate judge instead of clerk, did not imperil jurisdiction). Defendants seize on this distinction by characterizing the transfer of this particular motion to the magistrate judge as a merely "ministerial task" and categorizing it as a (c)(2) issue. (Third Br. at 13). But this contortion does not work: the question here is whether in *fact* special designation occurred, not how the parties' consent occurred after that fact. When the prerequisite to consent, i.e., special designation, is lacking, there can be no jurisdiction. 28 U.S.C. § 636(c)(1); *Parsons*, 912 F.3d at 495; *see also* Second Br. at 5-6.

Defendants' related effort to create a semantic division between "designation" and "referral" equally fails. (Third Br. at 13). According to

Defendants, once a federal district authorizes magistrate judges to engage in case-dispositive proceedings under section 636(c)(1), "designation" is complete, and all orders from the assigned district judge relating to the magistrate judge's role in a particular case are mere procedural "referrals" under section 636(c)(2) with no jurisdictional consequence. But the only mention of referral in section 636(c)(2) is an instruction to the district courts to enact measures protecting the voluntariness of the parties' consent to magistrate judges under section (c)(1). 28 U.S.C. § 636(c)(2) ("Rules of court for the reference of civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent."). There is no such thing as what Defendants call "a § 636(c)(2) referral." (Third Br. at 13).

The artifice of Defendants' distinction is clarified further by section 636(c)(3), which states that cases "*referred* under paragraph (1)" of section (c) are subject to direct appeal, even though paragraph (1) never uses the term "refer." 28 U.S.C.§ 636(c)(3) (emphasis added). The rules interchange the terms "designation" and "referral." This belies Defendants' purported distinction between jurisdictional "designations" and non-jurisdictional "referrals." Indeed, Judge Wilken specifically cited section 636(c)(3) in recognizing that the referral here under section (c)(1) was not merely procedural but was jurisdictional. (CD 1198, ER 17).

Defendants' position that consent alone controls jurisdiction, regardless of the parameters set by the assigned district judge, runs afoul of this Court's holdings in *Parsons,* 912 F.3d at 496, and *Columbia Record*, 966 F.2d at 516–17. (Third Br. at 14). Defendants argue that "[n]either case analyzed the jurisdiction issue before this Court, where both parties consented, and then learned—after appeal—that there had been no referral." (*Id.*). It is true that neither *Parsons* nor *Columbia Record* addressed an identical factual situation where the lack of special designation was clarified following consent, but this is a distinction without a difference, since the timing does not alter the fundamental point that an appellate court having full knowledge that the district judges' referral was made without special designation lacks jurisdiction. Defendants also make the conclusory argument that "[n]either case considered the meaning of 'specially designated,' or resolved whether referral rules are jurisdictional." (*Id.*). But that assertion is negated by the text of the opinions: "[T]wo requirements must be met before a magistrate judge may properly exercise civil jurisdiction: (1) the parties must consent to the magistrate judge's authority and (2) the district court must 'specially designate[ ]' the magistrate judge to exercise jurisdiction." *Parsons*, 912 F.3d at 495, *quoting Columbia Record*, 966 F.2d at 516. Defendants are unable to escape the binding effect of these holdings: the defect in the referral made by Judge Wilken *is* jurisdictional. *Parsons*, 912 F.3d at 495 ("the proper exercise of

magistrate judge jurisdiction" presents an "issue of subject matter jurisdiction" for the Court of Appeals); *see also Tripati v. Rison*, 847 F.2d 548, 548 (9th Cir. 1988) (where motions "were not referred to the magistrates by any order of a district judge," and consent was not given, magistrate judge's order was not final appealable judgment).

Defendants' effort to use legislative history to bolster their position that section 636(c)(1) is merely "a broad competency requirement" likewise fails to support their misinterpretation of the statute. (Third Br. at 9). The legislature's general concern that magistrate judges have a level of competence sufficient to handle all cases does not mean that Congress intended that magistrate judges should exercise full Article III powers without any direction from, and even against the intent of, the assigned district court judge. *See Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 59 (1982) (Constitution requires that federal judicial power be vested in courts having judges with life tenure and irreducible compensation "to ensure the independence of the Judiciary"); *Fields v. Washington Metro. Area Transit Auth.,* 743 F.2d 890, 894 (D.C. Cir. 1984) (constitutionality of section 636(c)(3) depends on "accountability of magistrates to the Article III judiciary").

C. Defendants' Proposal to Assume Jurisdiction for "Ambiguous Referrals" Must Be Rejected

Defendants further ask this Court to create new law by ruling that section

636(c) can be satisfied by assuming jurisdiction over appeals stemming from "ambiguous referrals." (Third Br. at 11). This argument can be quickly dismissed, since any ambiguity here has long since been erased by Judge Wilken's clarification. (CD 1198, ER 17). Furthermore, Defendants' newly proposed rule of ambiguous assumption is created out of whole cloth and is contrary to precedent *denying* jurisdiction where the statutory source of a referral is unclear. For example, in *Mendes Jr. Intern. Co.,* the district judge made a handwritten notation on the docket sheet that "[t]his case has been transferred to the docket of [the] Magistrate []." *Mendes Jr. Intern. Co. v. M/V Sokai Maru*, 978 F.2d 920 (5th Cir. 1992). The parties did not object and the plaintiff did not challenge the magistrate judge's authority until the appeal. *Id.* at 922. The Court of Appeals determined that "when the magistrate enters judgment pursuant to 28 U.S.C. § 636(c)(1), absence of the appropriate consent and reference (or special designation) order results in a lack of jurisdiction (or at least fundamental error that may be complained of for the first time on appeal)." *Id.* at 924 (citations omitted). *See also Estate of Jones v. City of Martinsburg, W. Virginia*, 655 F. App'x 948, 953 (4th Cir. 2016) (appellate court lacks jurisdiction where it is "unclear from the record" whether referral to magistrate judge "was pursuant to § 636(c) or § 636(b)").

Defendants rely on a single inapposite case where the referral was made prior to the October 1979 inclusion of subsection (c) into 28 U.S.C.§ 636, but the magistrate judge's substantive order occurred thereafter. (Third Br. at 11, *citing Alaniz v. Cal. Processors, Inc.*, 690 F.2d 717 (9th Cir. 1982), *overruled on other grounds by Roell v. Withrow*, 538 U.S. 580 (2003); The Federal Magistrate Act of 1979, Pub. L. No. 96-82, 93 Stat. 643 (1979)). In *Alaniz*, the Ninth Circuit determined, in *dicta*, that two orders of reference supported the new requirement of special designation. (*Id.*). Defendants describe *Alaniz* as a case where "it was not clear whether the referral was under § 636(c)," but the case is actually about a unique circumstance where the referral was made before section 636(c) existed. (Third Br. at 11). Thus, Defendants' citation to *Alaniz* does not aid their position.

D. Defendants Cannot Create Jurisdiction Where It Is Otherwise Lacking

Defendants argue that this Court should accept jurisdiction to create a disincentive to "gamesmanship," but Defendants fail to show any such occurrence here. (Third Br. at 15). First, the Court need not even reach the facts, since as a legal matter jurisdiction is either proper or not, and Defendants themselves recognize that their argument depends on the success of their position, refuted above, "that the referral requirement is not jurisdictional." (Third Br. at 16). As this Court has held, in the context of a magistrate judge's failure to obtain proper consent jurisdiction: "Absence of a final judgment vitiates our appellate

jurisdiction… [T]here would be some attractiveness to the notion of an estoppel, were that appropriate. But it is not. A party cannot estop itself into jurisdiction where none exists." *Hajek v. Burlington Northern R.R. Co.*, 186 F.3d 1105, 1107-08 (9th Cir. 1999); *see also Mitchell v. Valenzuela*, 791 F.3d 1166, 1169 n.3 (9th Cir. 2015) (party's actions in district court are irrelevant to jurisdictional question of whether magistrate judge engaged in "the appropriate exercise of federal judicial authority" when issuing final order).

Second, the facts of this case show the gamesmanship accusation to be baseless. Defendants appealed the Extension Order without moving *de novo* before the District Judge, or even seeking the District Court's guidance as to the statutory source of the referral. (Second Br. at 6). After Defendants filed the appeal, Plaintiffs inquired as to the basis for jurisdiction, and concluded, mistakenly, that a referral had occurred pursuant to the consent statute. (*Id*.). Judge Wilken subsequently clarified that the District Court's referral was not made pursuant to the consent statute. (CD 1198, ER 17 [June 26, 2019]). Defendants filed their Opening Brief on Appeal (Dkt. No. 24 [July 17, 2019]) and then filed a motion for stay in this Court. (Dkt. No. 27-1 [July 26, 2019]). In the opposition to the stay motion, Plaintiffs presented Judge Wilken's ground for dismissal of the

appeal. (Dkt. No. 28-1 at 14 n. 4 [Aug. 5, 2019]).[3] Plaintiffs then moved to dismiss the appeal for lack of jurisdiction. (Dkt. No. 39-1 [Aug. 16, 2019]). The Court denied the motion without prejudice to renewing the argument in the merits briefing. (Dkt. No. 45). This timeline shows nothing more than that Plaintiffs made an initial assumption about the referral that later proved incorrect, which Plaintiffs then addressed in the appropriate course of the litigation. Plaintiffs presented the jurisdictional defect to this Court for the first time little more than a month after Judge Wilken's ruling, and again in the motion to dismiss twelve days later. Plaintiffs gained no strategic advantage from viewing the Opening Brief, as Defendants insinuate, since Defendants' positions were already well known and are unconvincing. (Dkt. No. 28-1 at 14-19).

Defendants also argue that Judge Wilken and Plaintiffs have acted in a manner consistent with plenary referral. (Third Br. at 7). But Defendants did not seek the District Court's guidance as to the statutory source of the referral, and filed their appeal two days *before* a *de novo* motion would have been due. 28 U.S.C. § 636(b)(1)(C). Thus, by the time Judge Wilken might otherwise have become aware that the referral was being treated as plenary, that determination

[3] Defendants' contention that Judge Wilken "confirmed that the referral defect was inconsequential" (Third Br. at 7) hardly matches the actual language of the order: "The magistrate judge's Extension Order was not issued pursuant to the consent statute; accordingly, Defendants' appeal of the Extension Order may be defective." (CD 1198, ER 17).

already had been placed in the Court of Appeals. It is disingenuous for Defendants now to contend that by "not treat[ing] the Order as a recommendation, or tak[ing] the case back from the magistrate judge under 28 U.S.C. § 636(c)(4)," Judge Wilken signaled a belief that the referral was plenary. (Third Br. at 7).

Plaintiffs certainly have pursued continued monitoring under the extension order in the District Court. Until this Court rules on the appeal, the extension order must be given full force and effect. Plaintiffs would be derelict, no matter how high their level of confidence on this appeal, by simply waiting for an appellate ruling. *See Coleman v. Tollefson*, 575 U.S. 532, 135 S. Ct. 1759, 1764 (2015) ("trial court's judgment . . . normally takes effect despite a pending appeal"). For the same reason, it would have been unreasonable for Plaintiffs to have dismissed the cross-appeal while the main appeal is pending; rather, Plaintiffs have asked this Court to dismiss and remand *both* the appeal and cross-appeal. (Second Br. at 7).

Since special designation under section 636(c) is lacking, as Judge Wilken has clarified, Magistrate Judge Illman was not authorized to exercise consent jurisdiction and this Court has no jurisdiction over this appeal.

II. PLAINTIFFS' CROSS-APPEAL MUST BE GRANTED

Magistrate Judge Illman reviewed Plaintiffs' voluminous evidence and found that the RCGP "limits prisoners' parole eligibility, is singular, remotely located, prolonged and stigmatizing." (CD 1122, ER 67). Based on these factual

findings, the Magistrate Judge determined that prisoners have a liberty interest in avoiding RCGP placement, but found RCGP designation and review procedures adequate. (*Id.*). In their Third Brief, Defendants challenge several of the lower court's factual findings for the first time and advance new and unsupported legal arguments regarding the appropriate scope of the Court's liberty interest review.[4] As RCGP prisoners have a liberty interest in avoiding placement in that restrictive, unique and stigmatizing unit, and CDCR's periodic review of RCGP placement is meaningless—because it does not provide any pathway out of RCGP confinement

[4] Plaintiffs cross-appealed from Magistrate Judge Illman's denial of their due process challenge to RCGP placement and retention, and that claim has two elements: the existence of a liberty interest, and the question of whether the procedures utilized are adequate. *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). As the existence of a liberty interest is a necessary component to this Court's ruling on Plaintiffs' cross-appeal, it may be included in Plaintiffs' cross-appeal reply in the present Fourth Brief. *See* Fed. R. App. P. 28.1(c)(4) (permitting cross-appellant to file a reply "limited to the issues presented by the cross-appeal"); *Owner-Operator Indep. Drivers Ass'n, Inc. v. Landstar Sys., Inc.*, 622 F.3d 1307, 1328 (11th Cir. 2010) (legal issue "related" to issue raised on cross-appeal is appropriate for inclusion in cross-appeal reply brief). Defendants have acted accordingly, relying on *new* arguments in *response* to Plaintiffs' opening brief on the question of a liberty interest, rather than limiting themselves to a *reply* on the issue. Alternatively, if the Court should find briefing on the existence of a liberty interest inappropriate for this reply, Defendants' new arguments, raised for the first time in their third brief, must be disregarded. *United States v. Alcan Elec. & Eng'g, Inc.*, 197 F.3d 1014, 1020 (9th Cir. 1999) (appeal arguments raised for the first time in reply are waived).

and the results are predetermined—Plaintiffs' due process cross-appeal must be granted.

A. Plaintiffs Have a Liberty Interest in Avoiding RCGP Placement

Defendants attack as "unreasonable" the Magistrate Judge's determination that the RCGP limits parole eligibility. (Third Br. at 42). It is not. Plaintiffs provided evidence that every single RCGP prisoner considered for parole was denied,[5] that the Parole Board treats RCGP placement as disqualifying a prisoner from parole, and that the Board does not treat other forms of segregation, like protective custody, in this way. (SEALED ER 1376, ¶5; SEALED SER 1270-72, 1277, 1280). If Defendants had evidence that any RCGP prisoners were granted parole, or that the Parole Board did not treat RCGP placement as disqualifying, they could have provided that evidence to the District Court. Defendants failed to do so, thus there is no basis to set aside the District Court's findings. *See Parsons v. Ryan*, 912 F.3d 486, 495 (9th Cir. 2018) (Court of Appeals must defer to factual findings made by District Court unless they are clearly erroneous). As for Defendants' insistence that it is "improper" to consider impact on parole eligibility

[5] Defendants belatedly insist that this factual point was not established through competent evidence, but Defendants did not challenge the evidence below and the Magistrate Judge found it to be true. (CD 1122, ER 53, 67). By failure to object below, Defendants have waived the argument. *United States v. Reyes-Alvarado,* 963 F.2d 1184, 1187 (9th Cir. 1992).

when determining the existence of a liberty interest, Plaintiffs have already addressed the issue. (Second Br. at 95).

Defendants' new legal arguments are equally flawed. The Supreme Court decision in *Sandin* requires a court to compare challenged conditions with "the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995). In their first brief, Defendants argued that this requires comparison of RCGP conditions to those in CDCR high-security general population units. (First Br. at 58). However, Magistrate Judge Illman found that the RCGP is "sufficiently different" from such units (CD 1122, ER 67), and those factual findings are entitled to deference on appeal. To avoid this problem, Defendants now argue that the Court should compare the conditions found by the Magistrate Judge to those mandated for RCGP prisoners in the Settlement Agreement. (Third Br. at 40-41). Defendants cite no precedent for this novel approach, and none exists. (*Id.*). General population is a proper baseline for comparison under *Sandin*. *See Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996) ("The *Sandin* Court seems to suggest that a major difference between the conditions for the general prison population and the segregated population triggers a right to a hearing."). Comparing a challenged unit to the terms of a private contract, on the other hand, ignores *Sandin's* instruction to compare restrictions to "the ordinary incidents of prison

life." 515 U.S. at 484. Specific conditions set by settlement for a small segment of the prison population cannot alter the meaning of *ordinary prison life*.

A "case by case, fact by fact consideration" is required to determine what "condition or combination of conditions or factors would meet the [*Sandin*] test," (*Keenan*, 83 F.3d at 1089), yet Defendants argue that it was improper for the Magistrate Judge to rely on each of the RCGP's defining features in conducting the liberty interest analysis. First, Defendants confusingly argue that the Magistrate Judge erred in considering the RCGP's singular nature and remote location because Pelican Bay State Prison, where the RCGP is located, is "just as singular and remotely located." (Third Br. at 44). This makes no sense. The Magistrate Judge described the RCGP as "singular," meaning *one of a kind*, and, in so doing, referenced and accepted Plaintiffs' evidence that the RCGP's singularity makes it a highly unusual placement. Because there is only one such unit in all of CDCR, only about 60 people out of a total prisoner population of about 130,000 have been singled out for this "atypical" experience. (First Br. at 6, 11).

Moreover, this same singularity gives significance to the RCGP's remote location and harsh communication restrictions, especially the restrictions borne by more than half the prisoners on the unit, who are on walk-alone status.[6] To be

[6] Defendants' violation of the Settlement Agreement by placing many RCGP prisoners on walk-alone status is separately addressed in the first appeal filed in this case. (Dkt. No. 18-16427).

sure, all units at Pelican Bay State Prison are equally remote, but prisoners in all other units are eligible for a transfer to general population prisons in less remote locations within the State; RCGP prisoners can *only* be confined at Pelican Bay. This reality is especially onerous for RCGP prisoners whose case factors make them eligible for placement at lower security level facilities, but have no choice other than being housed at the most isolated facility in the state. (SEALED SER 1174, 1189, 1201).

Defendants insist that the Magistrate Judge did not weigh RCGP prisoners' insufficient access to programming and recreation, and isolation on walk-alone status, when finding a liberty interest. (Third Br. at 41). That would make no sense, and is not the case. The Magistrate Judge cited to Plaintiffs' evidence on these issues in describing how the RCGP differs from general population (CD 1122, ER 53), and then referred back to those differences when he found a liberty interest. (CD 1122, ER 67).

Next, Defendants state (without citation) that "the duration of an inmate's stay in a highly restrictive environment could implicate a liberty interest if the duration is unjustified," but Plaintiffs' stays were justified, so the RCGP's prolonged nature should not have been considered. (Third Br. at 45). But justification (or lack thereof) is irrelevant to the liberty interest analysis. *Wilkinson*, 545 U.S at 224 (alleged necessity of placement in a supermax prison

does not "diminish" the conclusion that such placement implicates a liberty interest). Rather, the duration of a given restriction impacts its significance, as "[a] filthy, overcrowded cell and a diet of 'grue' might be tolerable for a few days and intolerably cruel for weeks or months." *Keenan*, 83 F.3d at 1089, *quoting Hutto v. Finney*, 437 U.S. 678, 686–87 (1978); *Wilkinson*, 545 U.S. at 224 (relying on duration as a key factor distinguishing *Sandin*); *Harden-Bey v. Rutter*, 524 F.3d 789, 793 (6th Cir. 2008) ("most (if not all) of our sister circuits have considered the nature of the more-restrictive confinement *and* its duration in determining whether it imposes an 'atypical and significant hardship'") (emphasis in original).

Defendants conclude with one more novel argument—that the Court ought not consider the stigmatizing nature of RCGP placement because "free society would, in general" not find violating a gang norm stigmatizing. (Third Br. at 46). This ignores the Magistrate Judge's factual findings and assumes a distinction not supported by precedent. Plaintiffs presented evidence below that RCGP prisoners are presumed to require protective custody, which leads other prisoners (often wrongfully) to conclude that RCGP prisoners have committed a sex offense, assaulted the elderly, or otherwise violated a gang norm. (SEALED ER 1386-87, ¶ 10; SEALED ER 1394, ¶ 21). Defendants did not challenge or refute this evidence below, and the stigma of being identified as a sex offender previously has been

recognized by this Court as contributing to the existence of a liberty interest. *Neal v. Shimoda*, 131 F.3d 818, 830 (9th Cir. 1997).

Moreover, even if Defendants are correct in assuming that *some* of the stigma created by RCGP placement would not translate to free society, Defendants cite no precedent for their insistence that the Court should ignore evidence that placement in the RCGP stigmatizes a prisoner in "relation to the ordinary incidents of prison life"—namely among other prisoners—and should instead ask whether it would be stigmatizing to some hypothetical person in a completely different situation. Regardless of whether classifying someone as an informant against a gang is stigmatizing in "free society," the Supreme Court has recognized that in prison it is so stigmatizing as to constitute a possible death sentence. *Wilkinson*, 545 U.S. at 227.

Contrary to Defendants' new and unsupported arguments, the Magistrate Judge's finding of a liberty interest based on the RCGP's singular nature, remote location, prolonged duration, impact on parole eligibility, and stigma is supported by precedent, and must be affirmed.

B. RCGP Periodic Reviews Violate Due Process

Plaintiffs submitted voluminous evidence below regarding RCGP review practices and procedures, nearly all of which was unrefuted by Defendants. Defendants now claim Plaintiffs "push too far" in the descriptions of Judge

Illman's resulting factual findings, but Defendants fail to identify any specific descriptions for this Court's consideration. (Third Br. at 38-39). Contrary to Defendants' assertions, nowhere do Plaintiffs claim that this Court should defer to *Plaintiffs'* descriptions of the evidence. Magistrate Judge Illman described Plaintiffs' evidence in summary form, and then, in a later section of his decision, adopted Plaintiffs' evidence. (CD 1122, ER 53, 67). Judge Illman's factual findings are based on twelve uncontested prisoner declarations and thousands of pages of documentary evidence submitted, and those findings are subject to clear error review. *United States v. Showalter*, 569 F.3d 1150, 1159 (9th Cir. 2009).

In the context of a prisoner's transfer to a unit imposing an atypical and significant hardship, due process requires that Defendants provide notice of the reason for placement, an opportunity to be heard, and meaningful periodic reviews. *Wilkinson*, 545 U.S. at 226. If one of the three requirements is not met, then the procedures in place are constitutionally deficient. *See generally Brown v. Oregon Dep't of Corr.*, 751 F. 3d 983 (9th Cir. 2014). Defendants acknowledge that due process requires meaningful review, but insist that "CDCR cannot change whether a gang wants to harm an inmate" and "cannot diffuse the threat of a prison gang." (Third Br. at 48, 56). Defendants erroneously suggest that because RCGP prisoners are unable to take actions to gain their release to general population, and Defendants cannot provide prisoners with the steps necessary, review procedures

which fail to provide a pathway out of the RCGP nonetheless pass constitutional muster. This is not the case.

First, Defendants ignore Plaintiffs' evidence that CDCR actively misleads RCGP prisoners regarding the path to release and interferes with their good faith attempts to follow CDCR's guidance. As the Magistrate Judge summarized, Plaintiffs presented "[a] number of prisoners' accounts . . . wherein the prisoners submit that they were told that participation in RCGP programs and remaining incident free for a 6-month period would result in them being returned to general population, but that they were nevertheless retained in RCGP based on the presumption that a safety threat continues." (Second Br. at 98, CD 1122, ER 54). CDCR seeks to avoid this deeply problematic fact, insisting that the Magistrate Judge did not find that CDCR officials actually made such statements. (Third Br. at 47). This is irrelevant—Defendants failed to refute Plaintiffs' evidence of the statements below; thus, the evidence is "essentially admit[ted]." *Bland v. California Dep't of Corr.*, 20 F.3d 1469, 1474 (9th Cir. 1994), *overruled on other grounds by Schell v. Witek*, 218 F.3d 1017 (9th Cir. 2000). Moreover, the Magistrate Judge did credit Plaintiffs' evidence (CD 1122, ER 67); he simply disagreed that it demonstrated a systemic due process violation. This was legal error; due process requires adequate and accurate notice of what a prisoner must do to earn release from an atypical and significant hardship. The evidence

demonstrates that Defendants have a general policy of falsely telling prisoners that good behavior will lead to release, when, for virtually all of them, it will not. Misleading class members into believing they have their "keys to release," when CDCR instead applies an unattainable criterion, deprives class members of any meaningful review. *See Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1, 15 (1979) (prisoners denied parole must be given notice of the reason "as a guide to inmate for his future behavior"); *Toevs v. Reid*, 685 F.3d 903, 914 (10th Cir. 2012), *amended on reh'g by* 685 F.3d (10th Cir. 2012) (review process is deficient if "one supposedly has the keys to one's release, but one has no idea what they are").

Along with misleading individuals in the RCGP about what they must do to earn release, Defendants actively obstruct RCGP prisoners' attempts to dispel any gang threat to their safety. Plaintiffs submitted evidence below that CDCR instructs RCGP prisoners to fix their issues with the gang by communicating with current gang members in good standing, but when RCGP prisoners attempt to do so, Defendants charge them with disciplinary violations. (Second Br. at 100-102). Defendants did not even attempt to refute this point either in the court below or on appeal. (*See generally* Third Br. at 50-56). *Gates v. Deukmejian*, 987 F. 2d 1392, 1397-98 (9th Cir. 1992) (opposing party is obligated to submit "evidence to the

district court challenging… the facts asserted by the prevailing party in its submitted affidavits").

Second, if Defendants are correct that there is nothing that can be done to dispel the threat to an RCGP prisoner's safety if released to general population, then the reviews are nothing more than a rubber stamp, and RCGP placement has become the "pretext for indefinite confinement" prohibited by *Hewitt v. Helms*, 459 U.S. 460, 477 n.9 (1983). Defendants attempt to distinguish Plaintiffs' precedent as involving segregation "for reasons that the inmate could control." (Third Br. at 49). In essence, Defendants argue that because Plaintiffs are in restrictive custody through no fault of their own, they somehow are not entitled to due process. This is clearly incorrect. Defendants have an obligation to ensure some way out of restrictive housing that constitutes an atypical and significant hardship. *See Wilkinson*, 545 U.S. at 226. If good behavior is not enough, and attempts to mend relations with the gang will be punished as misconduct, then it is CDCR's constitutional responsibility to identify a different pathway out of the atypical and significant hardship it has created.

Plaintiffs highlighted four case examples detailing the *pro forma* nature of RCGP reviews. (Second Br. at 100-103). Plaintiffs showed that RCGP prisoners, like Prisoner A, are told to remain incident-free for six months to ensure their release to general population, but when CDCR reviews the prisoners, their

successful programming and behavior have no bearing on their release. (Second Br. at 101, *see also* SEALED SER 1291, 1294, 1297 (noting that DRB regularly informed prisoners that after programming in RCGP for six months, they would be transferred to general population)). At multiple reviews, over periods of years, prisoners A, B, C, and D were retained in the RCGP based on the exact same information that led to their initial RCGP placement, and nothing else. (Second Br. at 100-103). In response, Defendants detail that evidence, but ignore the constitutional problem entirely. Instead of addressing the review boards' continued reliance on the initial information that led to RCGP retention, or the boards' failure to provide any way for RCGP prisoners to be released to general population, Defendants argue that these prisoners do have legitimate safety concerns that led them to be placed in the RCGP. (Third Br. at 53-55). That argument is non-responsive. Indeed, it essentially concedes that these prisoners have no way out, as Defendants admit that "CDCR cannot always provide" the keys to release.

Plaintiffs have not argued that RCGP prisoners have no safety concerns; rather, Plaintiffs' point is that CDCR's failure to create any way for RCGP prisoners to alleviate their safety concerns (while misleading Plaintiffs on this central fact) renders the reviews deficient. Defendants provide no evidence or argument to the contrary. When all that is relevant at every periodic review is the

exact same information that led to RCGP placement in the first place, the reviews are nothing but a pretext for indefinite confinement. *Hewitt*, 459 U.S. at 477 n.9; *Kelly v. Brewer* 525 F.2d 394, 400 (8th Cir. 1975).

It is telling what Defendants choose not to address. The RCGP was designed specifically to be a *transitional* location for those inmates with security concerns. (Second Br. 89, CD 424-2, ER 260-261¶ 28). RCGP prisoners were never meant to remain in this segregation indefinitely, and yet, that is the circumstance Defendants have created.

Defendants seem to imply the threat of one constitutional violation—failure to protect the prisoners from harm in a general population unit—somehow excuses the due process violations at hand. (Third Br. at 48). But this ignores an obvious solution to both problems. If it is true, as Defendants claim, that these prisoners cannot safely be given the keys to their release, then Defendants must change RCGP conditions so that Plaintiffs are not permanently subjected to an atypical and significant hardship. Defendants have options; they need not permanently keep Plaintiffs in a unit situated at the most remote prison in the State, which imposes unique restrictions on family visits, has inadequate opportunities for work and education, and warehouses individuals in "walk-alone" isolation with no real opportunity for parole.

Defendants cannot have it both ways. If the RCGP cannot operate as the transitional unit the parties mutually intended through the settlement, Defendants must change the conditions for these indefinite detainees, and ease the restrictions that give rise to an atypical and significant hardship. This would obviate the prisoners' liberty interest and cure the due process problem. What Defendants cannot do is keep these prisoners permanently in an atypical and significant hardship with no meaningful review hearings and no way out.

Defendants are required to keep prisoners safe, but they also are required to ensure that their processes for segregation are constitutional. CDCR must exercise its discretion in a way that achieves both requirements. As such, this Court should reverse the Magistrate Judge's ruling below and require that CDCR provide a "guide for future behavior" to ensure that RCGP placement is not a pretext for indefinite confinement, or alleviate the conditions in the RCGP to remove the atypical and significant hardship imposed on these prisoners.

CONCLUSION

For the reasons set forth above, this Court should dismiss the Appeal and Cross-Appeal for lack of jurisdiction. In the alternative, if the Court determines that it has jurisdiction, the Court should affirm the finding of a liberty interest and reverse the Magistrate Judge's finding regarding the adequacy of current CDCR procedures with respect to the RCGP. As addressed in the Second Brief, the Court

must also affirm the Magistrate Judge's finding of systemic due process violations with respect to CDCR's misuse of confidential information and unqualified transmittal of gang validation to the Board of Parole Hearings, and the extension of the Settlement Agreement for an additional 12-month term.

Dated: April 29, 2020

Respectfully submitted,

s/Rachel Meeropol

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 19-15224, 19-15359

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Case Nos. 19-15224, 19-15359

PLAINTIFFS-APPELLEES / CROSS-APPELLANTS' ADDENDUM

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Public Law 96-82
96th Congress

An Act

To improve access to the Federal courts by enlarging the civil and criminal jurisdiction of United States magistrates, and for other purposes.

Oct. 10, 1979
[S. 237]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Magistrate Act of 1979".

Federal Magistrate Act of 1979.
28 USC 631 note.

SEC. 2. Section 636 of title 28, United States Code, is amended—

(1) by redesignating subsections (c) through (f) thereof as subsections (d) through (g), respectively; and

(2) by inserting immediately after subsection (b) thereof the following new subsection:

"(c) Notwithstanding any provision of law to the contrary—

"(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate may exercise such jurisdiction, if such magistrate meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

28 USC 631.

"(2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.

"(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court. In this circumstance, the consent of the parties allows a magistrate designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

Appeal.

Appeal.

"(4) Notwithstanding the provisions of paragraph (3) of this subsection, at the time of reference to a magistrate, the parties may further consent to appeal on the record to a judge of the district court in the same manner as on an appeal from a judgment of the district court to a court of appeals. Wherever possible the local rules of the district court and the rules promulgated by the conference shall endeavor to make such appeal expeditious and inexpensive. The district court may affirm, reverse, modify, or remand the magistrate's judgment.

"(5) Cases in the district courts under paragraph (4) of this subsection may be reviewed by the appropriate United States court of appeals upon petition for leave to appeal by a party stating specific objections to the judgment. Nothing in this paragraph shall be construed to be a limitation on any party's right to seek review by the Supreme Court of the United States.

"(6) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate under this subsection.

Record of proceedings.

28 USC 753.

"(7) The magistrate shall determine, taking into account the complexity of the particular matter referred to the magistrate, whether the record in the proceeding shall be taken, pursuant to section 753 of this title, by electronic sound recording means, by a court reporter appointed or employed by the court to take a verbatim record by shorthand or by mechanical means, or by an employee of the court designated by the court to take such a verbatim record. Notwithstanding the magistrate's determination, (A) the proceeding shall be taken down by a court reporter if any party so requests, (B) the proceeding shall be recorded by a means other than a court reporter if all parties so agree, and (C) no record of the proceeding shall be made if all parties so agree. Reporters referred to in this paragraph may be transferred for temporary service in any district court of the judicial circuit for reporting proceedings under this subsection, or for other reporting duties in such court.".

SEC. 3. (a) Section 631(a) of title 28, United States Code, is amended by striking out the last sentence and inserting in lieu thereof the following: "Where the conference deems it desirable, a magistrate may be designated to serve in one or more districts adjoining the district for which he is appointed. Such a designation shall be made by the concurrence of a majority of the judges of each of the district courts involved and shall specify the duties to be performed by the magistrate in the adjoining district or districts.".

(b) Section 631(b) of title 28, United States Code, is amended—

(1) by inserting "reappointed to" immediately after "appointed or";

(2) in paragraph (1), by inserting ", and has been for at least 5 years," immediately after "He is"; and

(3) in paragraph (1), by inserting "or" at the end of subparagraph (A), by striking out "or" at the end of subparagraph (B), and by striking out subparagraph (C).

(c) Section 631(b) of title 28, United States Code, is amended—

(1) by striking out the period at the end of paragraph (4) and inserting in lieu thereof "; and"; and

(2) by adding at the end thereof the following new paragraph:

Selection standards.

"(5) He is selected pursuant to standards and procedures promulgated by the Judicial Conference of the United States. Such standards and procedures shall contain provision for public notice of all vacancies in magistrate positions and for the establishment by the district courts of merit selection panels,

composed of residents of the individual judicial districts, to assist the courts in identifying and recommending persons who are best qualified to fill such positions.".

(d) Section 631 of title 28, United States Code, is amended—

(1) by redesignating subsections (f) through (j) thereof as subsections (g) through (k), respectively; and

(2) by inserting immediately after subsection (e) thereof the following new subsection:

"(f) Upon the expiration of his term, a magistrate may, by a majority vote of the judges of the appointing district court or courts and with the approval of the judicial council of the circuit, continue to perform the duties of his office until his successor is appointed, or for 60 days after the date of the expiration of the magistrate's term, whichever is earlier.".

(e) The merit selection panels established under section 631(b)(5) of title 28, United States Code, in recommending persons to the district court, shall give due consideration to all qualified individuals, especially such groups as women, blacks, Hispanics, and other minorities. Selection recommendations. 28 USC 631 note.

(f) Magistrates serving prior to the promulgation of magistrate selection standards and procedures by the Judicial Conference of the United States may only exercise the jurisdiction conferred under the amendment made by section 2 of this Act after having been reappointed under such standards and procedures or after having been certified as qualified to exercise such jurisdiction by the judicial council of the circuit in which the magistrate serves. 28 USC 631 note.

(g) The amendment made by subsection (c) of this section shall not take effect until 30 days after the meeting of the Judicial Conference of the United States next following the effective date of this Act. Effective date. 28 USC 631 note.

SEC. 4. Section 633(c) of title 28, United States Code, is amended by striking out the final sentence.

SEC. 5. Section 604(d)(3) of title 28, United States Code, is amended by inserting immediately before the semicolon the following: ", including (A) the number of matters in which the parties consented to the exercise of jurisdiction by a magistrate, (B) the number of appeals taken pursuant to the decisions of magistrates and the disposition of such appeals, and (C) the professional background and qualifications of individuals appointed under section 631 of this title to serve as magistrate". 28 USC 631.

SEC. 6. Section 1915(b) of title 28, United States Code, is amended to read as follows:

"(b) Upon the filing of an affidavit in accordance with subsection (a) of this section, the court may direct payment by the United States of the expenses of (1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate in any civil or criminal case, if such transcript is required by the district court, in the case of proceedings conducted under section 636(b) of this title or under section 3401(b) of title 18, United States Code; and (3) printing the record on appeal if such printing is required by the appellate court, in the case of proceedings conducted pursuant to section 636(c) of this title. Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts.". Court expenses. 28 USC 636. *Ante*, p. 643.

SEC. 7. (a) Section 3401 of title 18, United States Code, is amended—

(1) by amending subsection (a) to read as follows:

"(a) When specially designated to exercise such jurisdiction by the district court or courts he serves, any United States magistrate shall have jurisdiction to try persons accused of, and sentence persons convicted of, misdemeanors committed within that judicial district."; Misdemeanors, jurisdiction.

(2) by amending subsection (b) to read as follows:

Defendant's rights.

"(b) Any person charged with a misdemeanor may elect, however, to be tried before a judge of the district court for the district in which the offense was committed. The magistrate shall carefully explain to the defendant that he has a right to trial, judgment, and sentencing by a judge of the district court and that he may have a right to trial by jury before a district judge or magistrate. The magistrate shall not proceed to try the case unless the defendant, after such explanation, files a written consent to be tried before the magistrate that specifically waives trial, judgment, and sentencing by a judge of the district court.";

(3) by amending subsection (f) to read as follows:

Misdemeanor proceedings.

"(f) The district court may order that proceedings in any misdemeanor case be conducted before a district judge rather than a United States magistrate upon the court's own motion or, for good cause shown, upon petition by the attorney for the Government. Such petition should note the novelty, importance, or complexity of the case, or other pertinent factors, and be filed in accordance with regulations promulgated by the Attorney General."; and

(4) by adding at the end thereof the following new subsections:

Youth offenders.

"(g) The magistrate may, in a case involving a youth offender in which consent to trial before a magistrate has been filed under subsection (b) of this section, impose sentence and exercise the other powers granted to the district court under chapter 402 and section 4216 of this title, except that—

18 USC 5005 *et seq.*, 4216.

"(1) the magistrate may not sentence the youth offender to the custody of the Attorney General pursuant to such chapter for a period in excess of 1 year for conviction of a misdemeanor or 6 months for conviction of a petty offense;

"(2) such youth offender shall be released conditionally under supervision no later than 3 months before the expiration of the term imposed by the magistrate, and shall be discharged unconditionally on or before the expiration of the maximum sentence imposed; and

"(3) the magistrate may not suspend the imposition of sentence and place the youth offender on probation for a period in excess of 1 year for conviction of a misdemeanor or 6 months for conviction of a petty offense.

"(h) The magistrate may, in a petty offense case involving a juvenile in which consent to trial before a magistrate has been filed under subsection (b) of this section, exercise all powers granted to the district court under chapter 403 of this title. For purposes of this subsection, proceedings under chapter 403 of this title may be instituted against a juvenile by a violation notice or complaint, except that no such case may proceed unless the certification referred to in section 5032 of this title has been filed in open court at the arraignment. No term of imprisonment shall be imposed by the magistrate in any such case.".

18 USC 5031 *et seq.*

18 USC 5032.

(b) The heading for section 3401 of title 18, United States Code, is amended by striking out "Minor offenses" and inserting in lieu thereof "Misdemeanors".

(c) The item relating to section 3401 in the table of sections of chapter 219 of title 18, United States Code, is amended by striking out "Minor offenses" and inserting in lieu thereof "Misdemeanors".

SEC. 8. (a) The first sentence of section 635(a) of title 28, United States Code, is amended by inserting after "including" the following: "the compensation of such legal assistants as the Judicial Conference, on the basis of the recommendations of the judicial councils of the circuits, considers necessary, and".

(b) The first sentence of section 634(c) of title 28, United States Code, is amended by striking out "clerical" and inserting in lieu thereof "legal, clerical,".

SEC. 9. The Judicial Conference of the United States shall undertake a study, to begin within 90 days after the effective date of this Act and to be completed and made available to Congress within 24 months thereafter, concerning the future of the magistrate system, the precise scope of such study to be recommended by the Chairmen of the Judiciary Committees of each House of Congress.

Study, availability to Congress. 28 USC 631 note.

SEC. 10. Such sums as may be necessary to carry out the purposes of this Act are hereby authorized to be appropriated for expenditure on or after October 1, 1979.

Appropriations authorization. 28 USC 631 note.

Approved October 10, 1979.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 96-287 accompanying H.R. 1046 (Comm. on the Judiciary) and No. 96-444 (Comm. of Conference).
SENATE REPORTS: No. 96-74 (Comm. on the Judiciary) and No. 96-322 (Comm. of Conference).
CONGRESSIONAL RECORD, Vol. 125 (1979):
May 2, considered and passed Senate.
June 25, 26, H.R. 1046 considered and passed House; passage vacated and S. 237, amended, passed in lieu.
Sept. 20, Senate agreed to conference report.
Sept. 28, House agreed to conference report.
WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 15, No. 41:
Oct. 10, Presidential statement.

GENERAL ORDER NO. 44
ASSIGNMENT PLAN

A. PURPOSE

This plan is adopted pursuant to 28 U.S.C. § 137 and Civil Local Rule 3-3(a). The purpose of the plan is to:

1. Provide an equitable system for a proportionate division of the caseload among the district and magistrate judges of the court;
2. Ensure that cases are randomly and blindly assigned, except as otherwise provided herein to promote efficient case management;
3. Provide for necessary adjustments to caseload assignments; and
4. Provide a basis for monitoring the operation of the case assignment system.

B. ADMINISTRATION

The Executive Committee shall have the power to make and review all orders of assignment and reassignment consistent with this plan. As provided in Civil L.R. 77-2(e), the Clerk, when directed by the committee or as specifically provided for in this plan, may sign orders on behalf of the Executive Committee.

C. CASE NUMBERS

Each case commenced in or transferred to the court pursuant to Civil L.R. 3-2 shall be assigned a case number by the Clerk upon filing. A separate sequence of case numbers shall be maintained for criminal and civil cases. Case numbers shall conform to the format approved by the Administrative Office of the United States Courts.

D. ASSIGNMENT OF CASES

1. Unless otherwise required by the Executive Committee, cases shall be assigned by the Clerk to the judges holding chambers in the courthouse or courthouses serving the county in which the action arises.
2. Cases shall be assigned blindly and at random by the Clerk by means of an automated system approved by the judges of the court. Such system will be designed to accomplish the following:
    a. Proportionate, random and blind assignment of cases;
    b. Except as set forth in paragraphs (D)(4) through (D)(7), an approximately equal distribution among the active judges of the court of newly filed civil and criminal cases within each of the case categories established by the court
    c. A high level of security so as to reasonably avoid prediction of the results of any case assignment;
    d. A system of credits and debits to adjust for reassignments of cases among and between judges;
    e. A record of all assignments and reassignments made.
3. Notwithstanding any other provision of the Assignment Plan, the Clerk shall maintain a district-wide system of assignment for prisoner petitions (including death penalty

habeas corpus), bankruptcy, intellectual property rights, Social Security, federal tax suits, antitrust and securities class actions. Venue for cases in these categories shall be proper in any courthouse in this District. These cases shall not be reassigned on the basis of intra-district venue.

4. Notwithstanding any other provision of the Assignment Plan, the Clerk shall assign cases transferred to this District pursuant to Federal Rule of Criminal Procedure 20 in the following manner. Assignment of Rule 20 cases shall be made prior to execution of a consent to transfer in the manner set forth in Criminal L.R. 20-1. Any subsequent Rule 20 proceeding involving the same defendant and arising out of the same or superseding charges shall be deemed to be a related case and shall be assigned to the originally assigned judge.

5. Notwithstanding any other provision of the Assignment Plan, the Clerk shall assign any non-capital habeas petition filed by a prisoner to the same judge who was assigned any previous petitions filed by or on behalf of that prisoner.

6. Notwithstanding any other provision of the Assignment Plan, the Clerk shall assign any non-habeas civil complaint filed by a prisoner within five (5) years after the filing of the first civil complaint by that party to the same judge to whom the first such complaint was assigned. After five (5) years, the next new civil complaint filed by that prisoner shall be assigned to a different judge, in accordance with paragraph (D)(2) above, who shall then be assigned that prisoner's civil filings for the next five (5) years. Thereafter, a different judge shall be assigned for each subsequent five-year period.

7. Notwithstanding any other provision of the assignment plan, the Clerk shall assign a bankruptcy matter to the same judge who was assigned any previously filed bankruptcy matter arising from the same case in the United States Bankruptcy Court.

E. ASSIGNMENT OF CASES TO MAGISTRATE JUDGES

1. The full-time magistrate judges of this District shall be included in the civil case assignment system in the same manner as active district judges, except for capital habeas corpus petitions, securities class actions, and bankruptcy appeals or bankruptcy withdrawal of reference cases. With respect to such assignments, the following shall apply:

   a. In cases assigned at filing to a magistrate judge, the magistrate judge shall conduct all proceedings including a jury or bench trial and shall order the entry of a final judgment upon the written consent of all parties in the case in accordance with 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73.

   b. In all cases assigned at filing to a magistrate judge the Clerk shall provide all parties with a copy of the forms adopted by the court for "Notice of Assignment of Case To A United States Magistrate Judge for Trial." The form shall indicate that upon written consent of the parties the magistrate judges of this District have been designated to conduct any and all proceedings in a civil case, including a jury or nonjury trial and order the entry of a final judgment. Prior to the magistrate judge taking any dispositive action in the case, the Clerk shall obtain from the parties written consent to the jurisdiction of the magistrate judge in accordance with 28 U.S.C. §636(c) and Fed. R. Civ. P. 73.

c. If a party declines to consent to a United States magistrate judge, the Clerk shall reassign the case to a district judge on a random basis or in accordance with paragraphs (D)(5) and (D)(6), if applicable.

2. Upon filing, the following will be assigned to a magistrate judge for all pretrial proceedings. When the case is ready for trial, upon consent of the parties, it will be retained by the magistrate judge for trial. If all parties do not so consent, the Clerk will randomly assign the case to a district judge in the division where the case is pending.

   a. All actions filed by the United States to recover on a claim for a debt;

   b. Pre-judgment or post-judgment applications by the United States under the Federal Debt Collection Procedures Act.

3. Upon filing, unless exempted by Local Rule, order of a judge of this court, or other provision of this general order, all civil miscellaneous matters will be randomly assigned in the first instance to a magistrate judge who will either resolve the matter or, if necessary, prepare a report and recommendation and request assignment of the matter to the district judge who was the general duty judge on the date the miscellaneous matter was filed. Any objections to the magistrate judge's order or report and recommendation will be resolved by that district judge. See Fed. R. Civ. P. 72. Matters from the Eureka division shall be reassigned, as necessary, to the general duty judge.

4. For cases reassigned to a magistrate judge subsequent to initial case assignment (e.g. at a case management conference), the parties may consent to the assignment of a magistrate judge sitting in any division.

ADOPTED: JULY 22, 1997
AMENDED: JULY 18, 2000
AMENDED: MARCH 1, 2002
AMENDED: JANUARY 30, 2003
AMENDED: AUGUST 26, 2003
AMENDED: APRIL 28, 2008
AMENDED: JANUARY 4, 2010
AMENDED: MAY 29, 2012
AMENDED: MARCH 19, 2013
AMENDED: DECEMBER 17, 2013
AMENDED: JUNE 24, 2015
AMENDED: APRIL 19, 2016
AMENDED: JUNE 20, 2017
AMENDED: JANUARY 1, 2018

FOR THE COURT:

PHYLLIS J. HAMILTON
CHIEF JUDGE

UNITED STATES DISTRICT COURT

Northern District of California

CIVIL LOCAL RULES

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72. MAGISTRATE JUDGES; PRETRIAL ORDERS

72-1. Powers of Magistrate Judge

Each Magistrate Judge appointed by the Court is authorized to exercise all powers and perform all duties conferred upon Magistrate Judges by 28 U.S.C. § 636, by the local rules of this Court and by any written order of a District Judge designating a Magistrate Judge to perform specific statutorily authorized duties in a particular action.

72-2. Motion for Relief from Nondispositive Pretrial Order of Magistrate Judge

Any objection filed pursuant to Fed. R. Civ. P. 72(a) and 28 U.S.C. § 636(b)(1)(A) must be made as a "Motion for Relief from Nondispositive Pretrial Order of Magistrate Judge." The motion must specifically identify the portion of the Magistrate Judge's order to which objection is made and the reasons and authority therefor. The motion may not exceed 5 pages (not counting declarations and exhibits), and must set forth specifically the portions of the Magistrate Judge's findings, recommendation or report to which an objection is made, the action requested and the reasons supporting the motion and must be accompanied by a proposed order. The moving party must deliver any manually filed motion and all attachments to all other parties on the same day that the motion is filed. Unless otherwise ordered by the assigned District Judge, no response need be filed and no hearing will be held concerning the motion. The District Judge may deny the motion by written order at any time, but may not grant it without first giving the opposing party an opportunity to respond. If no order denying the motion or setting a briefing schedule is made within 14 days of filing the motion, the motion shall be deemed denied. The Clerk shall notify parties when a motion has been deemed denied.

72-3. Motion for De Novo Determination of Dispositive Matter Referred to Magistrate Judge

(a) **Form of Motion and Response**. Any objection filed pursuant to Fed. R. Civ. P. 72(b) and 28 U.S.C. § 636(b)(1)(B) must be made as a "Motion for De Novo Determination of Dispositive Matter Referred to Magistrate Judge." The motion must be made pursuant to Civil L.R. 7-2 and must specifically identify the portions of the Magistrate Judge's findings, recommendation or report to which objection is made and the reasons and authority therefor.

(b) **Associated Administrative Motions**. At the time a party files a motion under Civil L. R. 72-3(a) or a response, the party may accompany it with a separately filed motion for "Administrative Motion to Augment the Record" or an "Administrative Motion for an Evidentiary Hearing." Any associated administrative motion must be made in accordance with Civil L.R. 7-11.

(c) **Ruling on Motion Limited to Record before Magistrate Judge**. Except when the Court grants a motion under Civil L.R. 72-3(b), the Court's review and determination of a motion filed pursuant to Civil L.R. 72-3(a) shall be upon the record of the proceedings before the Magistrate Judge.

Commentary

Procedures governing review of a pretrial order by a Magistrate Judge on matters not dispositive of a claim or defense are governed by Fed. R. Civ. P. 72(a) and 28 U.S.C. § 636(b)(1)(A). Procedures governing consideration of a Magistrate Judge's findings, report and recommendations on pretrial matters dispositive of a claim or defense are governed by Fed. R. Civ. P. 72(b) and 28 U.S.C. § 636(b)(1)(B) & (C).

73. MAGISTRATE JUDGES; TRIAL BY CONSENT

73-1. Time for Consent to Magistrate Judge

(a) Cases Initially Assigned to a Magistrate Judge. In cases that are initially assigned to a magistrate judge, unless the Clerk or the magistrate judge has set a different deadline in an individual case:

(1) Parties must either file written consent to the jurisdiction of the magistrate judge, or request reassignment to a district judge, by the deadline for filing the initial case management conference statement.

(2) If a motion that cannot be heard by the magistrate judge without the consent of the parties, pursuant to 28 U.S.C. § 636(c), is filed prior to the initial case management conference, the parties must either file written consent to the jurisdiction of the magistrate judge, or request reassignment to a district judge, no later than 7 days after the motion is filed.

(b) Cases Initially Assigned to a District Judge. In cases that are assigned to a district judge, the parties may consent at any time to the Court reassigning the case to a magistrate judge for all purposes, including entry of final judgment, pursuant to 28 U.S.C. § 636(c).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 15. Certificate of Service for Electronic Filing

Instructions for this form: http://www.ca9.uscourts.gov/forms/form15instructions.pdf

9th Cir. Case Number(s) 19-15224, 19-15359

I hereby certify that I electronically filed the foregoing/attached document(s) on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

Service on Case Participants Who Are Registered for Electronic Filing:

☐ I certify that I served the foregoing/attached document(s) via email to all registered case participants on this date because it is a sealed filing or is submitted as an original petition or other original proceeding and therefore cannot be served via the Appellate Electronic Filing system.

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☒ I certify that I served the foregoing/attached document(s) on this date by hand delivery, mail, third party commercial carrier for delivery within 3 calendar days, or, having obtained prior consent, by email to the following unregistered case participants *(list each name and mailing/email address)*:

Xavier Becerra, Monica Anderson, Neah Huynh
OFFICE OF THE ATTORNEY GENERAL
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004

Description of Document(s) *(required for all documents)*:

PLAINTIFFS-APPELLEES / CROSS-APPELLANTS' REPLY BRIEF and ADDENDUM

Signature s/Linda Nakanishi **Date** Apr 29, 2020

(use "s/[typed name]" to sign electronically-filed documents)

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