

Court of Appeals Docket No. 09-17185

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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CARLOS PEREZ, et al.  
*Plaintiffs-Appellees*

v.

MATTHEW CATE, et al.  
*Defendants-Appellants*

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

No. C 05-05241 JSW  
Honorable Jeffrey S. White, Presiding

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**BRIEF OF *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-  
APPELLEES ON BEHALF OF THE FLORIDA JUSTICE  
INSTITUTE, THE LEGAL AID SOCIETY, THE NATIONAL  
POLICE ACCOUNTABILITY PROJECT, MASSACHUSETTS  
CORRECTIONAL LEGAL SERVICES/PRISONERS' LEGAL  
SERVICES, PRISONER LEGAL SERVICES OF NEW YORK, THE  
SOUTHERN POVERTY LAW CENTER, THE UPTOWN PEOPLE'S  
LAW CENTER, THE AMERICAN CIVIL LIBERTIES UNION OF  
NORTHERN CALIFORNIA, COLUMBIA LEGAL SERVICES, AND  
THE CLASS MEMBERS IN *COLEMAN V. SCHWARZENEGGER***

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## INTERESTS OF THE *AMICI CURIAE*

*Amici* are a group of non-profit organizations across the country that regularly represent prisoners, along with a class of prisoners with serious mental illness incarcerated by the California Department of Corrections and Rehabilitation. These organizations and prisoners depend on the work of paralegals in litigation under the Prison Litigation Reform Act (“PLRA”).

In order to employ paralegals to work on behalf of prisoners, *amici* depend on fees obtained under 42 U.S.C. § 1988 and the PLRA for the work of those paralegals. *Amici* non-profit organizations, as well as private law firms, regularly submit fee applications in prison cases to district courts across the county for the work of their attorneys and paralegals. None of these organizations receives funding from the Legal Services Corporation, which bars its recipients from representing federal, state or local prisoners. *See* 45 C.F.R. § 1637.3. If *amici* organizations are not able to recover reasonable rates for the work of their paralegals, many will be unable to afford to hire paralegals, and therefore unable to use paralegals in the representation of prisoners.

*Amici* submit this brief in order to provide the Court with their perspective about the role of paralegals in prison cases. *Amici* also submit this brief to provide *amici*’s perspective on the practical impact of the unprecedented approach to paralegal compensation suggested by the state in this case. *Amici* urge the Court to reject the state’s approach and preserve the ability of prisoners to obtain competent, effective, and efficient counsel, including paralegals and legal assistants.

*Amici* represented in this brief include the following entities:

Florida Justice Institute, Inc. (“FJI”) is a private, not-for-profit public interest law firm founded in 1978 by leaders of the private bar to, in part,

represent institutionalized persons in prisons and jails to improve conditions of confinement. FJI is primarily funded by The Florida Bar Foundation and attorneys' fees recovered in meritorious cases. FJI administers the Volunteer Lawyers' Project for the Southern District of Florida pursuant to an administrative order.

The Legal Aid Society ("Society") is a private, nonprofit organization that has provided free legal assistance to indigent persons in New York City for almost 135 years. Through its Prisoners' Rights Project, the Society seeks to ensure that prisoners' legal rights are protected. The Society advocates on behalf of prisoners in New York state prisons and New York City jails, and where necessary, conducts class action litigation addressing prison conditions and mistreatment and violence against prisoners. It seeks court-awarded attorneys' fees in appropriate cases.

The National Police Accountability Project ("NPAP") was founded in 1999 by members of the National Lawyers Guild to address law enforcement misconduct, and presently has 400 members throughout the country. NPAP provides training and support for attorneys and other legal workers, public education and information on issues relating to police misconduct for the general public, and information and resources for nonprofit organizations and community groups involved with victims of police misconduct. NPAP also supports legislative reform efforts aimed at increasing police accountability, and appears as *amicus curiae* in cases that present issues of particular importance for lawyers who represent plaintiffs in police misconduct actions. This case is of particular interest to NPAP because its members frequently litigate prison and jail cases and rely on attorneys' fee awards.

Massachusetts Correctional Legal Services, Inc. (“MCLS”), also known as Prisoners’ Legal Services, is a private nonprofit organization founded in 1973 to provide civil legal services to Massachusetts prisoners in state and county facilities. It concentrates on conditions of confinement, staff brutality, improving medical and mental health care, and the overuse of segregation. MCLS is funded by a contract with the Massachusetts Supreme Judicial Court, and by grants, private donations, and court-awarded attorneys’ fees.

Prisoners’ Legal Services of New York (“PLS”), a not-for-profit organization providing civil legal services to indigent inmates in New York State prisons, has been providing legal assistance to inmates for thirty-two years. There are approximately 62,000 individuals in New York State prisons, and PLS’s mission is to ensure that those prisoners receive fair, just, lawful, and humane treatment while incarcerated. PLS receives over 14,000 requests for assistance annually and serves as legal counsel to prisoners on a variety of claims in both state and federal courts, including claims of excessive force, deliberate indifference, and violation of due process. PLS seeks attorneys’ fees in appropriate cases, and for over thirty years PLS has used those fees to maintain operations when other funding sources have decreased or remained stagnant.

Founded in 1971, the Southern Poverty Law Center (“Center”) has litigated numerous civil rights cases on behalf of women, people of color, prisoners, and other victims of discrimination. Although the Center’s work is concentrated in the South, its attorneys appear in courts throughout the country to ensure that all people receive equal and just treatment under federal and state law.

Uptown People's Law Center ("UPLC") is a not-for-profit legal service center serving poor and working people in Chicago, Illinois. In addition to its legal work for community residents, UPLC represents prisoners in challenges to prison conditions, the parole system, and a variety of other matters, in both federal and state courts. UPLC receives over 5,000 requests for representation every year, and has one of the largest dockets of prison cases in Illinois. UPLC files cases, provides advice to prisoners litigating their own cases, and provides assistance to attorneys who are handling cases on a pro bono basis. UPLC therefore has a vital interest in ensuring that reasonable attorneys' fees are awarded in meritorious cases.

The American Civil Liberties Union ("ACLU") is a nationwide nonprofit, nonpartisan organization with over 550,000 members, dedicated to the defense and promotion of the guarantees of individual rights and liberties embodied in the state and federal constitutions. The American Civil Liberties Union of Northern California, founded in 1934 and based in San Francisco, is the largest ACLU affiliate. The ACLU has a strong interest in protecting the right and ability of individuals to enforce important constitutional and statutory rights through litigation, an interest served by the full implementation of public-interest fee-shifting statutes. The capacity of the ACLU to represent persons and organizations in civil rights and civil liberties litigation is in part dependent on such statutes, for attorney fee awards comprise a significant source of funds which (along with foundation grants, membership dues, and individual donations) enables the organization to carry out its litigation program. Also, as a result of its close contacts and work with private attorneys who choose to work pro bono on public interest litigation, the ACLU is acutely aware of the critical importance of fee-

shifting statutes in making possible the active participation of the private bar in public interest litigation.

Columbia Legal Services (“CLS”) and its predecessor organization have represented prisoners and other institutionalized individuals for over 30 years through its Institutions Project (“IP”). This work has focused on conditions of CLS’ clients’ confinement, discrimination, sentencing and placement, alternatives to institutionalization, and access to courts, as well as issues related to rehabilitation, re-entry, and reductions in recidivism. The IP represents these clients to gain humane treatment and the protections our Constitution and laws require for them, and to assist them in creating strong, safe communities. Attorneys’ fee awards are an important source of funding for IP work.

The class members in the *Coleman v. Schwarzenegger* case are a group of California state prisoners with serious mental disorders. The lead counsel in the *Coleman* case are Rosen, Bien & Galvan LLP, a private law firm, and the Prison Law Office, the non-profit organization that represents the class in *Perez*. The *Coleman* class is also represented by the Legal Aid Society-Employment Law Center of San Francisco, and Bingham McCutchen LLP. In 1995, the court in *Coleman* found that defendant California prison officials had violated the Eighth Amendment with respect to the provision of constitutionally adequate mental health care. The case has been in the remedial phase for the last fifteen years. In that remedial phase, class members depend on their ability to communicate with paralegals to alert the court to individual instances where adequate mental health treatment is not being provided, and to systemic problems that continue today. Paralegals also provide other invaluable and skilled services, including litigation support and research.

## SUMMARY OF ARGUMENT

This appeal concerns a brazen attempt by California prison officials (hereinafter “the State”) to drastically limit the ability of prisoners to attract and retain counsel. After years of conceding that prisoners who successfully vindicate their rights can recover at reasonable market rates for work done by paralegals, prison officials now attempt to rewrite the PLRA by imposing a new, separate cap for paralegal compensation at only a fraction of market rates.

Paralegals play a vital role in the unique field of prison litigation. If the state’s attempt to rewrite the PLRA were to be adopted by this Court, prisoners like the class in *Coleman v. Schwarzenegger* would find it even more difficult to find counsel, because it would no longer be cost-effective for counsel for prisoners, such as *amici* organizations and other private law firms, to employ paralegals to staff cases brought by prisoners.

The new, separate cap on paralegal rates under the PLRA advocated by the state is also not supported by the statute or case law. The text of the PLRA provides only that prisoners cannot recover attorneys’ fees at hourly rates that exceed 150% of the rate established by the Judicial Conference under the Criminal Justice Act (“CJA”) for court-appointed counsel. If Congress had intended a separate cap for paralegal rates, it would have imposed one explicitly. The State attempts to create a new, separate restriction on paralegal rates based on the CJA guidelines in the Northern District of California, which compensate paralegals only at the “cost” of the paralegal to their employer. No court has adopted this approach. The Supreme Court has consistently rejected cost-based approaches for attorney and paralegal fees in civil rights cases. Furthermore, this Court has previously interpreted this exact provision of the PLRA to hold that the

PLRA rate cap is based only on the CJA rates established by the Judicial Conference, not on practices of local district courts. In short, there is no legal support for the state's attempt to establish a separate cap on paralegal rates.

*Amici* therefore respectfully request that this Court decline to adopt the state's proposed approach, and to affirm the district court's decision in full.

## ARGUMENT

### **I. PARALEGALS PLAY A CRITICAL ROLE IN THE EFFICIENT AND EFFECTIVE LITIGATION OF CASES BROUGHT BY PRISONERS**

*Amici* in this case include a class of prisoners who are represented by private law firms and public interest organizations, as well as a group of non-profit organizations who represent prisoners in PLRA cases. *Amici* are therefore well aware of the crucial role that paralegals play in prisoner civil rights cases, and of the importance of ensuring that prevailing parties under the PLRA receive adequate compensation for the work of paralegals.

Prisoner litigation in this country is conducted by a variety of different practitioners, from large private law firms, to sole practitioners, to non-profit organizations. For these practitioners, prison litigation is unique because of the significant communication barriers that exist between lawyers and clients. Prisoners cannot travel to meet with their attorneys, have limited access to telephone calls and paper documents, and suffer from mental illnesses at a higher rate than the general population. Because of these factors, communication with prisoners is often more time-consuming and difficult than with clients who are not incarcerated. A relatively simple legal task, such as obtaining a declaration, which can be quickly resolved with a

non-prisoner client, may take multiple phone calls, visits or letters for a client who is incarcerated.

As a result, in cases brought by prisoners, paralegals often perform tasks that attorneys would otherwise be required to perform. *See Missouri v. Jenkins*, 491 U.S. 274, 288 n. 10 (1989) (“It has frequently been recognized in the lower courts that paralegals are capable of carrying out many tasks, under the supervision of an attorney, that might otherwise be performed by a lawyer and billed at a higher rate.”). For example, paralegals often correspond with prisoners by mail, reviewing letters sent from prisoners and drafting responses regarding issues raised by prisoners. Paralegals travel to jails and prisons for interviews with prisoners to gather evidence to bring before the court. Paralegals also often review the medical and custody files of prisoners to gather documentary evidence regarding a prisoner’s allegation that his or her rights have been violated.

In large class action cases involving systemic reform, the need for paralegals is especially significant. In these cases, counsel for prisoners must sift through large numbers of phone calls, letters and other materials documenting violations of the rights of prisoners, requesting legal assistance, and asking for information about the prisoners’ legal rights. Even after a court has ordered relief, counsel must continue to communicate with class members about the scope of relief provided by the court, the remedies being implemented by defendants, and instances in which violations of prisoners’ rights continue to occur. In systemic reform cases, these tasks require hundreds or thousands of hours of time, time which neither private law firms nor non-profit organizations can spare from their limited attorney resources. As described below, however, the State advocates an approach that would

make it logistically and economically infeasible to continue to use paralegals for these tasks.

## **II. AN ARTIFICIAL COST-BASED APPROACH CONTRADICTS ESTABLISHED PRECEDENT AND WOULD DISCOURAGE THE USE OF PARALEGALS**

The State argues that Plaintiffs' paralegal rates should have been calculated based on the cost of the paralegal to the paralegal's employer. This approach is contrary to Supreme Court precedent and would make it difficult for prisoners to attract counsel to bring meritorious cases.

The Supreme Court has rejected the cost-based approach advocated by the state for over 25 years. As early as 1983, the Court affirmed that fee awards under civil rights statutes should be governed by the same principles that govern the practice of law in other legal specialties. In *Hensley v. Eckerhart*, the Supreme Court noted the legislative history of § 1988 provided that “[i]t is intended that the amount of fees awarded [in civil rights cases] ... be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases.” 461 U.S. 424, 430 n.4 (1983) (quoting legislative history of § 1988); *see also id.* at 447 (Brennan, J., concurring in part and dissenting in part) (noting that “market standards should prevail, for that is the best way of ensuring that competent counsel will be available to all persons with bona fide civil rights claims.”)

A year later, in *Blum v. Stenson*, 465 U.S. 886 (1984), the Supreme Court explicitly rejected the argument that recovery under civil rights statutes should be based on attempts to estimate cost, as opposed to market rates. There, the Court rejected defendant's argument that plaintiffs represented by a legal aid organization should only be allowed to recover for the costs, as opposed to the market rates for their services. *Id.* at 892-96. In

so holding, the court noted that the “statute and legislative history establish that ‘reasonable fees’ under § 1988 are to be calculated according to the prevailing market rates in the relevant community.” *Id.* at 895.

The PLRA, enacted in 1996, made one adjustment to this “prevailing market rates” approach for attorneys of prisoners by enacting a maximum cap on the hourly rate of attorneys’ fees that can be awarded. *See* 42 U.S.C. § 1997e(d)(3). This legislation, however, did not replace the market-based approach for attorneys representing prisoners. Rather, attorneys who represent prisoners in PLRA cases continue to receive reasonable market-based hourly rates for their services, up to the amount of the cap.

More recently, in *Richlin Sec. Service Co. v. Chertoff*, 553 U.S. 571, 128 S.Ct. 2007 (2008), the Supreme Court specifically rejected a defendant’s attempt to award paralegal fees on the same cost basis at issue here. In *Richlin*, the Supreme Court unanimously held that paralegal fees under the Equal Access to Justice Act (“EAJA”) should be reimbursed at market rates, not at the cost to the attorney. *Id.* at 2019. In so doing, the Court made clear that the only relevant rate was the rate charged to a client, and that “it would be anomalous to measure cost from the perspective of the attorney rather than the client.” *Id.* at 2013. In so holding, the court explained that “we find it hard to believe that Congress, without even mentioning paralegals, intended to make an exception of them by calculating their cost from the perspective of their employer rather than the litigant.” *Id.*

As with the EAJA, nothing in the PLRA suggests that Congress intended to create a special, cost-based approach only for paralegals. The State, however, attempts to do just that, arguing that the clear language of the PLRA supports its scheme. The State’s approach, which relies on the Northern District of California’s CJA Manual, suggests that paralegal

employee rates should be based on the employee's "salaried hourly rate, plus costs of employer-paid basic benefits." (ER 41).<sup>1</sup>

This approach conflicts with established principles of civil rights law. Fees in this case were awarded under 42 U.S.C. § 1988, the purpose of which is to allow civil rights plaintiffs to recover a reasonable attorney's fee that is "adequate to attract competent counsel." *Blum*, 465 U.S. at 897. The State's proposed interpretation of the PLRA will create a scheme which will seriously impede prisoners' ability to attract competent counsel, because paralegal rates will not be sufficient to reimburse counsel like *amici* for their costs in employing paralegals. Employing a paralegal involves a number of costs beyond the paralegal's hourly rate of pay and "basic" benefits. For instance, an employer must pay for expenses such as office space in which the paralegal can work, payroll taxes on the paralegal's compensation, a computer for the paralegal's use, and other administrative expenses. None of these costs would be covered by an approach that compensates a party only for a paralegal's hourly rate of pay and basic benefits.

Any work done by paralegals on civil rights cases would therefore result in a net loss for attorneys representing prisoners, such as *amici* non-profit organizations and the private law firms representing the *Coleman* class. If the State's interpretation were adopted, it would no longer be economical for many of these organizations to continue to employ paralegals. As a result, counsel representing prisoners will be more likely to use attorneys to do work that had previously been performed by paralegals. The Supreme Court first recognized this problem in *Missouri v. Jenkins*,

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<sup>1</sup> "ER" refers to the Excerpts of Record filed by Defendants-Appellants.

when it noted that “[t]o the extent that fee applicants under § 1988 are not permitted to bill for the work of paralegals at market rates, it would not be surprising to see a greater amount of such work performed by attorneys themselves, thus increasing the overall cost of litigation.” 491 U.S. at 288 n. 10. The Seventh Circuit also echoed this finding in *Cameo Convalescent Center, Inc. v. Senn*, where it concluded that the use of paralegals “encourages cost-effective delivery of legal services and, by reducing the spiraling cost of civil rights litigation, furthers the policies underlying civil rights statutes.” 738 F.2d 836, 846 (7th Cir. 1984).

As described above, paralegals for *amici* currently perform critical tasks that enable counsel to use valuable attorney time for high-level tasks that can only be performed by attorneys. Without the use of such paralegals, these counsel would be unable to represent prisoners or classes of prisoners in a cost-effective manner. Even prisoners with meritorious claims whose constitutional rights were being violated would therefore find it more difficult to retain counsel to vindicate their rights. Had Congress intended such a result, including the dramatic departure from the traditional measure of paralegal rates that the state advocates here, it would have expressly provided for this scheme. Since it did not, the State’s argument is wholly lacking of any legal support.

### **III. AN ARTIFICIAL COST-BASED APPROACH WOULD SPAWN UNWARRANTED AND UNNECESSARY LITIGATION OVER FEES**

The state’s approach would also create difficult and unnecessary accounting problems which would produce excessive litigation about the appropriate rates. The Northern District of California’s CJA Manual, which the state claims should be used to set paralegal rates under the PLRA,

provides that employers can recover a paralegal's hourly salary plus "basic" benefits. (ER 41). It does not, however, define what benefits are "basic," which is certain to create additional disputes about the proper hourly rate. For instance, some employers may provide benefits such as transportation subsidies, contributions towards flexible spending accounts for medical or child care, or contributions towards a retirement plan. There is no way to know whether these would be classified as "basic" benefits that would be factored into the rate calculation. Instead, this would lead to more litigation about what types of benefits are "basic" and therefore compensable, and what benefits are non-compensable.

The Supreme Court has already identified the problems that these types of cost analyses create, and has come down strongly on the side of market rates as the only workable solution for both litigants and the courts. In *Richlin*, the Court concluded that "[i]t strains credulity that Congress would have abandoned this predictable, workable framework [of market rates] for the uncertain and complex accounting requirements that a cost-based rule would inflict on litigants, their attorneys, administrative agencies, and the courts." 128 S.Ct. at 2019. Market rates have long been used by courts in civil rights cases for exactly this reason.

This case is a perfect example of the inefficiency of a cost-based approach. Defendants now appeal a judgment of \$3,353 and ask this Court to remand to the district court "for a determination of each paralegal's actually [sic] salary," (Defendants' Opening Brief at 19) a task which will result in the expenditure of tens of thousands of dollars more in attorneys' fees to determine an appropriate rate based on the details of Plaintiffs' counsel's compensation and benefit structures. Such a system would only increase the costs of future litigation for both litigants and the courts, and

should be rejected. Indeed, the Supreme Court has made clear that fees litigation should not result in a “second” litigation. *See Hensley*, 461 U.S. at 437 (“A request for attorney’s fees should not result in a second major litigation.”). Yet that is exactly the effect that the State’s scheme would have on litigants and the courts.

#### **IV. DEFENDANTS’ INTERPRETATION OF THE PLRA FINDS NO SUPPORT IN THE TEXT OF THE STATUTE AND CONTRADICTS NINTH CIRCUIT PRECEDENT**

In addition to the practical problems identified above with the State’s proposed approach, the State’s legal theory also cannot be squared with the text of the PLRA or established Ninth Circuit law.

##### **A. The Text of the PLRA Refers Only to One Cap, the Cap on “Court-Appointed Counsel”**

The PLRA provides that in actions brought by prisoners, no award of attorney’s fees “shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18 *for payment of court-appointed counsel.*” 42 U.S.C. § 1997e(d)(3) (emphasis added). 18 U.S.C. § 3006A, in turn, sets out the maximum hourly rate for court-appointed counsel under the Criminal Justice Act, and the process by which the Judicial Conference of the United States can raise the rate as appropriate.

The plain language of the statute therefore provides only one cap, the cap for “court-appointed counsel.” For 2008, the maximum rate set by the Judicial Conference for court-appointed counsel under the CJA was \$113 per hour. *See Hadix v. Johnson*, 398 F.3d 863, 865 (6th Cir. 2005). As a result, the 2008 cap on rates under the PLRA was 150% of \$113, or \$169.50 per hour. The district court in this case therefore appropriately limited the

rates for attorneys and paralegals in this case to no more than \$169.50 per hour.

Plaintiffs in this case have conceded that paralegals are covered by this cap for court-appointed counsel, and cannot recover more than the \$169.50 per hour cap on attorneys' fees under the PLRA. (Appellees Brief at 4). The State, however, is attempting to create a second, separate cap for the rates of paralegals without even a shred of evidentiary or statutory support. Before this Court could ever adopt the State's proposed scheme, it would have to effectively re-write the PLRA.

The Supreme Court has explicitly disapproved freehand judicial enhancement of the PLRA based on courts' policy views. *Jones v. Bock*, 549 U.S. 199, 216 (2007) (refusing to impose an additional pleading requirement under the PLRA, noting that “[w]hatever temptations the statesmanship of policy-making might wisely suggest, the judge’s job is to construe the statute-not to make it better.” (citation and internal quotation marks omitted)). The Supreme Court in *Jones* also refused to read into the PLRA a requirement that prisoners name every defendant in an administrative appeal, given Congress’ failure to specify such a requirement. *Id.* at 217 (holding that the requirement “lack[ed] a textual basis in the PLRA.”).

The reasoning of *Jones* is applicable to other sections of the PLRA, including the attorneys’ fees provision. *See, e.g., Miller v. Donald*, 541 F.3d 1091, 1099 (11th Cir. 2008) (applying *Jones*’ prohibition on judicial supplementation of PLRA to the three strikes provision). Indeed, the argument is even stronger for the attorneys’ fees provisions, given the extreme level of detail provided by Congress in Section 1997e(d). *See* 42 U.S.C. § 1997e(d) (imposing significant restrictions on fees, including an

hourly rate cap, a proportionality restriction and a requirement that fees be “directly and reasonably incurred in proving an actual violation...”).

There is no question that the district court in *Perez* abided by its duty to interpret the PLRA as written and not, as the State urges here, to read into the statute fee provisions that simply do not exist. *See Jones*, 549 U.S. at 216. This is especially true here, where the State’s proposed change would result not in improvement or clarification of the PLRA, but in logistical chaos that would complicate rather than simplify fee litigation. As much as the State urges this result in order to reduce its liability and create additional barriers for prisoners attempting to attract and retain competent counsel, such a result is not supported by the statute.

**B. This Court Has Already Interpreted the Relevant Provision of the PLRA to Hold that the Practices of Individual District Courts are Irrelevant**

The State’s creative interpretation of the PLRA to divine an additional rate cap for paralegals not only lacks support in the text of the statute, but contradicts this Court’s interpretation of *this exact same provision of the PLRA* in a previous case.

The State asks this Court to disregard the cap on attorneys’ fees established by the Judicial Conference and to find an additional limit on paralegal rates based on the practices of local district courts. This Court, however, has already rejected such an argument in interpreting this exact provision of the PLRA. In fact, the State concedes this point. The State admits that under *Webb v. Ada County*, 285 F.3d 829, 838 (9th Cir. 2002), “Ninth Circuit precedent holds that the amount *authorized* by the Judicial Conference controls under the PLRA.” (Defendants’ Opening Brief at 18) (emphasis in original). Despite making this concession, the State asks this

Court to ignore its own precedent in *Webb* by relying not on the rate authorized by the Judicial Conference, but on a separate practice used by the Northern District of California.

In *Webb*, this Court addressed whether the PLRA attorneys' fee cap should be based on the maximum CJA rate established by the Judicial Conference, or on the CJA rates actually used by local judicial districts, which were based on Congressional budget allocations. *Id.* at 838-39. During the relevant period, the maximum CJA rate established and authorized by the Judicial Conference was \$75 an hour. *Id.* at 839. The case had been litigated in the District of Idaho, however, where CJA court-appointed counsel were only paid \$45 to \$65 an hour. *Id.* at 838.

The plaintiff in *Webb* demonstrated that under the PLRA, he was entitled to 150% of the \$75 rate set by the Judicial Conference, or \$112.50 per hour. *Id.* The district court, however, erroneously held that the lower rate actually paid to CJA counsel in Idaho was the appropriate PLRA baseline rate, stating that the PLRA rate cap should be linked to "the amount actually paid to CJA counsel in each district, not to what might be paid in the future." *Id.* at 839. This Court reversed, correctly holding that under § 1997e(d)(3), the amount actually paid out to CJA counsel by the individual district court was irrelevant. *Id.* The Court noted that "[t]he PLRA expressly provides for payment at the rate 'established' under 18 U.S.C. § 3006A" and that the statute does not refer to the "amount actually appropriated by Congress to compensate court-appointed counsel in criminal proceedings." *Id.*

The State's interpretation of the statute here, which requires looking beyond the rate established by the Judicial Conference to CJA amounts actually paid by each district court, has therefore already been rejected by

this Court. Furthermore, the Ninth Circuit is not the only court to have already interpreted the statute in this manner, as the Sixth Circuit reached the same conclusion in *Hadix v. Johnson*, 398 F.3d 863 (6th Cir. 2005). In *Hadix*, the defendant argued that the PLRA rate cap should not be based on 150% of the \$113 an hour rate authorized by the Judicial Conference, but on 150% of the “implemented” rate in the Western District of Michigan of \$75-\$90 per hour. *Id.* at 865. The Sixth Circuit, however, found “no ambiguity” in the statute and held that “attorney fees under the PLRA should be based on the hourly rate for court-appointed counsel that is authorized by the Judicial Conference, rather than on the rate that is actually paid to such counsel.” *Id.* at 867.

The State here advocates for precisely the interpretation of § 1997e(d)(3) that was rejected by this Court in *Webb* and by the Sixth Circuit in *Hadix*. Here, prison officials attempt to link the PLRA rate for paralegals to the practice of individual district courts with regard to CJA paralegal rates. *Webb*, however, teaches that, under the PLRA, the practice of individual district courts is irrelevant. Rather, the only relevant cap under the PLRA is 150% of rate for “court-appointed counsel” established by the Judicial Conference.

*Webb* involved a dispute over rates for attorneys, as opposed to rates for paralegals. However, as the State concedes, “[t]he Supreme Court has long held that attorney’s fees awarded under 42 U.S.C. § 1988 includes separately billed paralegal fees.” (State’s Opening Brief at 12). In *Missouri v. Jenkins*, the Supreme Court took as its “starting point the self-evident proposition that the ‘reasonable attorney’s fee’ provided for [under § 1988] should compensate the work of paralegals, as well as that of attorneys.” 491 U.S. at 285. The Court affirmed that holding more recently in *Richlin*,

where the Court concluded that the EAJA “must be interpreted as using the term ‘attorney ... fees’ to reach fees for paralegal services as well as compensation for the attorney’s personal labor.” 128 S.Ct. at 2014.

The State can point to no plausible basis in the statute or in this Court’s precedent for why paralegal fees should be treated differently than attorneys’ fees under the PLRA, and therefore subjected to a separate maximum rate. Instead, strangely, the State points to the Judicial Conference’s Guide to Judiciary Policy to support its theory. That document, however, describes *exactly the standard utilized by the district court* in this case. The Guide to Judiciary Policy, Section 320.70.50, states that paralegal rates under the CJA “may not exceed the lesser of the rate paid to counsel under the CJA or the rate typically charged by counsel to a fee-paying client for such services.” (Defendants Opening Brief, Addendum at 7). In other words, the rate for CJA paralegals should be a reasonable market rate that does not exceed the rate for attorneys. The district court here followed exactly this guidance by awarding a rate, \$169.50 per hour, which did not exceed the PLRA rate paid to counsel, also \$169.50, and which the court found was a reasonable market rate in the Northern District of California. (ER 16-17). The paralegal rates requested by the *Perez* plaintiffs and awarded by the district court were entirely consistent with prevailing rates in the relevant market. *See, e.g., Lira v. Cate*, 2010 WL 727979 at \*5 (N.D. Cal. Feb. 26, 2010) (finding that paralegal rate of \$195 per hour was “within the prevailing market rates as substantiated by plaintiff’s declarations”); *Prison Legal News v. Schwarzenegger*, 561 F.Supp.2d 1095, 1105-06 (N.D. Cal. 2008) (awarding rates of \$160-\$170 per hour for paralegals and law student interns); *Fitzgerald v. City of Los Angeles*, 2009 WL 960825 at \*11 (C.D. Cal., April 7, 2009) (finding that

requested paralegal rate of \$175 per hour was reasonable). Notably, the State never contested the *Perez* plaintiffs' evidence of market paralegal rates and never introduced its own evidence contradicting those rates.

Having found no basis for a reduced rate in the text of the PLRA, in this Court's or Supreme Court precedent, or in Judicial Conference policies, the State attempts to find a separate cap for paralegal rates in the CJA Manual published by the Northern District of California. The State's reliance on this manual is unavailing. As noted above, under *Webb*, the practices of local district courts in awarding CJA compensation are irrelevant under the PLRA. 285 F.3d at 839.

Furthermore, the State's reliance on local district court policies is impracticable. The State asks this court to adopt a rule that PLRA hourly rates for paralegals be based on the maximum CJA rates set by individual district courts. Some district courts, however, do not even set such a maximum CJA paralegal rate. Even the CJA Manual for the Northern District of California, which the State cites, sets only a "guideline" rate, depending on skills and experience, and sets the "appropriate" rate for paralegals who are employees at their salaried hourly rate plus benefits. There is nothing in the CJA manual that removes a District Court's discretion to award more than the "guideline" rate, however, or even to award more than the salary/benefit rate. The Northern District's manual, therefore, does not provide a clear hourly rate as the State contends—it provides only a loose guide.

The policies and practices of other district courts illustrate even bigger problems with the State's proposed approach. The Southern District of California, for example, sets paralegal CJA rates on a case-by-case basis, suggesting a typical range and then requiring attorneys to check with the

judge before assigning a paralegal to their case in order “to determine the compensation rate.” *See* CJA Panel Billing Information, United States District Court, Southern District of California, p. 5, available at [http://www.casd.uscourts.gov/uploads/Attorney%20Assistance/Criminal%20Justice%20Act/CJA\\_Panel\\_Packet.pdf](http://www.casd.uscourts.gov/uploads/Attorney%20Assistance/Criminal%20Justice%20Act/CJA_Panel_Packet.pdf). Similarly, the policies of the District of Hawaii apparently provide no cap on paralegal compensation at all, other than to note that prior authorization should be secured if the total amount of paralegal fees requested will exceed a certain level. *See* Notice to CJA Panel Attorneys Regarding Availability of Investigative, Expert, and Other Services, available at [http://www.hid.uscourts.gov/forms/CJA25\\_0905.pdf](http://www.hid.uscourts.gov/forms/CJA25_0905.pdf). Considering these varying local policies and practices, it is clear why Congress benchmarked the PLRA rate cap to the rate established by the Judicial Conference, and not to the policies of individual district courts. These local policies make clear that it is not practicable for this Court to hold that paralegal rates under the PLRA are capped at 150% of the maximum paralegal rate under the CJA in each district, because such a maximum rate in each district does not exist. Such a holding would only create additional confusion among litigants and additional, unnecessary fee litigation in the district courts.

**V. THE STATE’S PROPOSED NEW CAP ON PARALEGAL RATES WOULD UNFAIRLY DISADVANTAGE PRISONERS IN LITIGATION AGAINST GOVERNMENT DEFENDANTS**

In addition to the legal and practical problems previously identified, the State’s interpretation of the PLRA to set a new, separate cap on paralegal rates would also further exacerbate the inequities that already exist in prison litigation.

Prisoners are already significantly limited in their ability to retain counsel to vindicate their constitutional and statutory rights. Prisoners, of course, can very rarely afford to hire lawyers with their own funds. A prisoner's only option may be to hire counsel who is willing to take the case based on the possibility of recovering attorney's fees if he or she is successful in litigating the case. The PLRA, however, creates additional barriers for prisoners not faced by other civil rights litigants, including an administrative exhaustion requirement and a requirement of physical injury. 42 U.S.C. § 1997e(a), (e). The PLRA also includes a set of restrictions on attorneys' fees, including capping the hourly rate at which plaintiffs can recover and capping the amount of attorneys' fees as a percentage of the prisoner's recovery. 42 U.S.C. § 1997e(d)(2)-(3). These PLRA restrictions already significantly disadvantage prisoners by prohibiting prisoners from obtaining attorneys compensated at market rates. As a result, prisoners already must convince attorneys to work against long odds at a fraction of their market rates. The State now attempts to make the task of retaining a lawyer even more difficult by limiting the rates lawyers can recover for paralegals who assist them.

This attempt to limit the ability of prisoners to hire attorneys who can compensate their staff at market rates is especially troublesome to *amici* based on their knowledge of the practices of state and governmental entities themselves. Many of the *amici* regularly encounter government entities who hire private law firms with paralegals compensated at market rates. For example, the California prison officials who are defendants in this very action have done this regularly. *See, e.g., Coleman v. Schwarzenegger*, 2009 WL 2851846 (E.D. Cal. Sept. 3, 2009) (California state prison officials represented by private law firm of Hanson Bridgett, LLP); *Schwarzenegger*

*v. Plata*, 130 S.Ct. 1140 (Jan. 19, 2010) (California state prison officials represented by private law firm of Sidley Austin LLP). These government entities thus can and do choose to pay hundreds of dollars an hour for paralegals to work on their behalf, but now attempt to limit prisoners' recovery to a fraction of those rates. The State wishes to retain the option to pay market rates for their own paralegal work, but to prevent prisoners from retaining law firms and paralegals who would be compensated at the same rates. Such an approach should not be adopted absent explicit Congressional intent. *See Missouri v. Jenkins*, 491 U.S. at 287 (noting "that it would hardly accord with Congress' intent to provide a 'fully compensatory fee' if the prevailing plaintiff's attorney in a civil rights lawsuit were not permitted to bill separately for paralegals, while the defense attorney in the same litigation was able to take advantage of the prevailing practice and obtain market rates for such work.") While Congress, in enacting the restrictive fee provisions described above, clearly intended to create some hurdles for prisoners in need of counsel, it did not intend to impose this additional cap. If Congress had intended to do so, it could have expressly referenced local CJA manuals or carved out different rates for paralegal services.

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## CONCLUSION

The State's novel interpretation of the PLRA to create a new, separate cap on paralegal rates would devastate the ability of organizations like those listed on this brief to represent prisoners on a cost-effective basis. Such an interpretation has no support in the statute or this Court's precedent, and would create an unwieldy and complicated system for determining the appropriate rates of recovery for work done by paralegals. *Amici* respectfully request that this Court affirm the district court in full.

Dated: April 28, 2010

Respectfully submitted,

ROSEN, BIEN & GALVAN, LLP

By: /s/ Ernest Galvan

Ernest Galvan

*Attorneys for Amici Curiae*

**CERTIFICATE OF COMPLIANCE TO  
FED. R. APP. P. 32(a)(7)(C) AND  
CIRCUIT RULE 32-1 FOR CASE NUMBER 09-17185**

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this brief is proportionately spaced, has a typeface of 14 points or more and contains 6,660 words as counted by the Microsoft Word 2003 word processing program used to generate the brief.

Dated: April 28, 2010

*/s/ Ernest Galvan* \_\_\_\_\_

Ernest Galvan

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1(a) and 29(c), *amici curiae* make the following corporate disclosure statement.

Each of Florida Justice Institute, Inc.; Legal Aid Society; Massachusetts Correctional Legal Services, Inc.; National Police Accountability Project; Prisoners' Legal Services of New York; Southern Poverty Law Center; Uptown People's Law Center; Columbia Legal Services; and the American Civil Liberties Union of Northern California certifies that it is a nonprofit corporation, that it has no parent corporation, and that no publicly held corporation owns 10% or more of its stock.

Dated:

/s/ Ernest Galvan

Ernest Galvan

**CERTIFICATE OF SERVICE**

I hereby certify that on April 28, 2010, I electronically filed the foregoing

**MOTION TO FILE BRIEF OF AMICI CURIAE**

**BRIEF OF AMICI CURIAE**

with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: April 28, 2010

/s/ Ernest Galvan

Ernest Galvan