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IN THE  
**Supreme Court of the United States**

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GOVERNOR ARNOLD SCHWARZENEGGER, *et al.*,

*Appellants,*

v.

MARCIANO PLATA AND RALPH COLEMAN, *et al.*,

*Appellees.*

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**APPELLANTS' APPLICATION FOR A STAY PENDING THIS COURT'S  
FINAL DISPOSITION OF APPEAL PURSUANT TO 28 U.S.C. § 1253**

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**TO THE HONORABLE ANTHONY M. KENNEDY,  
ASSOCIATE JUSTICE OF THE U.S. SUPREME COURT  
AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT**

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## PARTIES TO THE PROCEEDING

Appellees are the following:

Gilbert Aviles	Clifford Myelle
Steven Bautista	Marciano Plata
Ralph Coleman	Leslie Rhoades
Paul Decasas	Otis Shaw
Raymond Johns	Ray Stoderd
Joseph Long	

California Correctional Peace Officers' Association, intervenor-plaintiff

Appellants are the following five defendants:

Governor Arnold Schwarzenegger  
Matthew Cate, Secretary of the California Department of Corrections and  
Rehabilitation  
John Chiang, California State Controller  
Michael Genest, Director of the California Department of Finance  
Stephen W. Mayberg, Director of the Department of Mental Health

The following 146 individuals are intervenor-defendants:

Samuel Aanestad, Legislator	City of Alhambra Police Chief
Anthony Adams, Legislator	Jim Hudson
Amador County Sheriff Martin Ryan	City of Atwater Police Chief
Joel Anderson, Legislator	Richard Hawthorne
Roy Ashburn, Legislator	City of Delano Chief of
Chief Probation Officer Kim Barrett	Corrections George Galaza
James F. Battin, Jr.*, Legislator	City of Delano Police Chief
John Benoit, Legislator	Mark DeRosia
Tom Berryhill, Legislator	City of Fremont Police Chief
Sam Blakeslee, Legislator	Craig Steckler
Police Chief Michael Billdt	City of Fresno Police Chief
Butte County Chief Probation Officer John Wardell	Jerry Dyer
Butte County Sheriff-Coroner	City of Grover Beach Police
Perry L. Reniff	Chief Jim Copsey
Calaveras County Sheriff	City of Modesto Police Chief
Dennis Downum	Roy Wasden
District Attorney Ronald L. Calhoun	City of Pasadena Police Chief
Chief Probation Officer Lionel Chatman	Barney Melekian
	City of Paso Robles Police Chief
	Lisa Solomon
	City of Roseville Police Chief
	Joel Neves

City of San Bernardino Police  
Chief Michael Billdt  
City of Santa Clara Police Chief  
Steve Lodge  
City of Sonora Police Chief  
Mace McIntosh  
City of Vacaville Police Chief  
Rich Word  
City of Whittier Police Chief  
Dave Singer  
City of Woodland Police Chief  
Carey Sullivan  
Dave Cogdill, Legislator  
District Attorney Gregg Cohen  
Contra Costa County Chief  
Probation Officer Lionel  
Chatman  
Contra Costa County Sheriff  
Warren Rupf  
County of San Mateo  
County of Santa Barbara  
County of Santa Clara  
County of Solano  
County of Sonoma  
Paul Cook, Legislator  
Dave Cox, Legislator  
Police Chief Mark DeRosia  
Chuck DeVore, Legislator  
Del Norte County Sheriff Dean  
Wilson  
Sutter County Sheriff Jim  
Denney  
District Attorney Bonnie M.  
Dumanis  
Robert Dutton, Legislator  
Michael D. Duvall, Legislator  
El Dorado County Sheriff Jeff  
Neves  
Bill Emmerson, Legislator  
District Attorney Bradford  
Fenocchio  
Fresno County Chief Probation  
Officer Linda Penner

Fresno County Sheriff Margaret  
Mims  
Jean Fuller, Legislator  
Glenn County Sheriff Larry  
Jones  
National City Police Chief  
Adolfo Gonzales  
Ted Gaines, Legislator  
Martin Garrick, Legislator  
Police Chief Richard Hawthorne  
Sheriff Pat Hedges  
Dennis Hollingsworth,  
Legislator  
Shirley Horton\*, Legislator  
Guy S. Houston\*, Legislator  
Police Chief Jim Hudson  
Bob Huff, Legislator  
Humboldt County Sheriff Gary  
Philip  
Inyo County Chief Probation  
Officer Jim Moffet  
Inyo County Sheriff William  
Lutze  
District Attorney Edward R.  
Jagels  
Kevin Jeffries, Legislator  
Sheriff Larry Jones  
Sheriff Mike Kanalakis  
Rick Keene\*, Legislator  
Kern County Sheriff Donny  
Youngblood  
District Attorney Robert Kochly  
Doug La Malfa\*, Legislator  
Bill Maze\*, Legislator  
Lake County Sheriff Rod  
Mitchell  
Lassen County Sheriff Steve  
Warren  
Los Angeles County Sheriff Lee  
Baca  
Sheriff William Lutz  
Abel Maldonado, Legislator  
Mariposa County Chief  
Probation Officer Gail Neal

Sheriff Jim Mele  
Police Chief Barney Melekian  
Mendocino County Sheriff Tom  
Allman  
Merced County Sheriff Mark  
Pazin  
Chief Probation Officer Don  
Meyer  
Chief Probation Officer Jim  
Moffett  
Mono County Sheriff Richard  
Scholl  
Monterey County Sheriff Mike  
Kanalakis  
San Joaquin County Sheriff  
Steve Moore  
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Newell  
Roger Niello, Legislator  
Orange County Sheriff Coroner  
Michael S. Carona  
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District Attorney David W.  
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District Attorney Vern Pierson  
Placer County Sheriff Edward  
N. Bonner  
District Attorney John R.  
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District Attorney Tony  
Rackauckas  
District Attorney Michael  
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District Attorney Michael  
Ramsey  
Chief Probation Officer Brian  
Richart  
District Attorney Todd Riebe  
Riverside County Sheriff Bob G.  
Doyle  
George Runner, Legislator  
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San Benito County Sheriff  
Curtis Hill  
San Diego County Sheriff  
William B. Kolender

San Mateo County Sheriff Greg  
Munks  
Santa Barbara County Chief  
Probation Officer Patricia  
Stewart  
Santa Barbara County Sheriff  
Bill Brown  
Santa Clara County Sheriff  
Laurie Smith  
District Attorney Jan Scully  
District Attorney Donald  
Segerstrom  
Shasta County Sheriff Tom  
Bosenko  
District Attorney Gerald T.  
Shea  
Solano County Chief Probation  
Officer Isabelle Voit  
Solano County Sheriff Gary R.  
Stanton  
Jim Silva, Legislator  
Cameron Smyth, Legislator  
Police Chief Lisa Solomon  
Sonoma County Chief Probation  
Officer Robert Ochs  
Sonoma County District  
Attorney Stephan  
Passalacqua  
Sonoma County Sheriff/Coroner  
William Cogbill  
Todd Spitzer\*, Legislator  
Stanislaus County Chief  
Probation Officer Jerry  
Powers  
Stanislaus County Sheriff  
Adam Christianson  
Stanislaus County Sheriff's  
Department  
District Attorney Christie  
Stanley  
Chief Probation Officer Karen  
Staples  
Audra Strickland, Legislator  
District Attorney Gregory  
Totten  
Van Tran, Legislator

Tehema County Sheriff Clay  
Parker  
Ventura County Sheriff Bob  
Brooks  
Michael N. Villines, Legislator  
Mimi Walters, Legislator

Police Chief Rich Word  
Mark Wyland, Legislator  
Yolo County Sheriff Ed Prieto  
Yuba County Sheriff Steve  
Durfor

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## APPLICATION FOR A STAY PENDING FINAL DISPOSITION OF APPEAL

Pursuant to Rules 22 and 23 of this Court's Rules, appellants, Governor Arnold Schwarzenegger, John Chiang, Michael C. Genest, Matthew Cate, and Stephen W. Mayberg (collectively, California or the State) respectfully submit this application for a stay of the judgment and injunctive relief ordered below by a three-judge district court sitting in the Eastern District and the Northern District of California pending final disposition of an appeal to this Court under 28 U.S.C. § 1253. The State filed its Notice of Appeal of the order; its motion to stay the order already has been denied by the three-judge court; and the State is prepared to file its Jurisdictional Statement within 30 days or as soon as the Court requires in order to expedite resolution of this case. Every day that the three-judge court's order hangs over California, it places enormous strains on the State's existing resources and creates intolerable anxiety for both officials and residents of the nation's most populous State.

Convened pursuant to the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626(a)(3)(B), the three-judge district court (Reinhardt, Henderson, Karlton, J.J.) ordered injunctive relief against appellants in the form of a "prisoner release order," *id.* § 3626(a)(3), which will require that California reduce its prison population by approximately 46,000 inmates—25 percent of its total prison population—within two years. See *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, *Plata v. Schwarzenegger*, No. C01-1351 TEH, 2009 WL 2430820, at \*116, \*106 (E.D. Cal./N.D. Cal. Aug. 4, 2009) (hereafter "*Coleman/Plata*") (attached as Ex. A, hereto). The single-judge district courts have imposed a series of remedies to address

California's alleged failure to provide medical care to inmates with serious medical needs and failure to provide mental health care to inmates with serious mental disorders, respectively. The three-judge court, however, concluded for the first time that general overcrowding in California prisons was the "primary cause" of the underlying Eighth Amendment violations. See, e.g., *id.* at \*61-63; see also *id.* at \*54 n.55 (recognizing that "the primary cause issue is ultimately a question of law for the three-judge court to decide"); see generally 18 U.S.C. § 3626(a)(3)(E)(i) (crowding must be the "primary cause" of the underlying violation of federal rights before prisoner release may be ordered). The court held that no relief short of reducing significantly the entire prison population would suffice. See 18 U.S.C. § 3626(a)(3)(E)(ii). Accordingly, the court's order imposes a population cap of 137.5% of design capacity on California's prisons and requires that the State submit a prison reduction plan to the three-judge district court by September 18, 2009, that outlines how it will meet these requirements and what reductions will be achieved after six, twelve, eighteen, and twenty-four months. *Coleman/Plata, supra*, at \*116.

Under the "well established" principles governing stay applications to a circuit justice, a stay is warranted here. *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers); *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers). To obtain a stay, the applicant must show (1) "a 'reasonable probability' that four Justices will consider the issue sufficiently meritorious to . . . note probable jurisdiction"; (2) "a fair prospect that a majority of the Court will conclude that the decision below was erroneous"; and (3) a likelihood

that “irreparable harm [will] result from the denial of a stay.” *Id.* at 1308; *accord Ind. State Police Pension Trust v. Chrysler LLC*, 129 S. Ct. 2275, 2276 (2009) (per curiam). Additionally, a fourth factor may apply: “in a close case it may be appropriate to ‘balance the equities’—to explore the relative harms to applicant and respondent, as well as the interests of the public at large.” *Rostker*, 448 U.S. at 1308. As detailed below, all four considerations are readily satisfied here. See *infra* at 13-33.<sup>1</sup>

*First*, not only is there is a reasonable probability that at least four Justices will find there is probable jurisdiction, it is highly likely that the Court will do so. This case presents federal questions whose “substantiality . . . cannot be doubted.” *Lucas*, 486 U.S. at 1304. The order of the court below is the first “prisoner release order” entered over a state’s objection since the 1996 enactment of the PLRA. It marks the first time a federal district court has interpreted the PLRA’s “primary cause” requirement; the order’s scope sweepingly exceeds any prisoner release relief in history; and the order will likely place communities across the nation’s largest state in danger if it takes force. The immediate impact of the order is to divert State legislative and executive attention from State-initiated prison reform at a time when it is needed the most.

*Second*, there is a fair prospect that a majority of the Court will conclude that the order imposing a prison population cap and requiring California to reduce its

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<sup>1</sup> Before filing this application, appellants filed a motion for a stay with the three-judge district court on September 1, 2009. See Defs.’ Mot. Stay, *Plata*, No. C01-1351 TEH (N.D. Cal. filed Sept. 1, 2009) (Docket No. 2216). On September 3, 2009, the three-judge court denied the motion for stay. See *Coleman v. Schwarzenegger*, *Plata v. Schwarzenegger*, Nos. CIV S-90-0520 LKK JFM P, C01-1351 THE (E.D. Cal./N.D. Cal. Sept. 3, 2009) (*Plata* Docket No. 2218) (attached as Ex. C, hereto).

prison population by an amount the court below estimated to be approximately 46,000 inmates cannot be sustained.<sup>2</sup> The three-judge district court misconstrued the PLRA's requirement that "crowding is the primary cause of the violation of a Federal right," when—by the district court's own admission—myriad causes are at issue, remedying crowding will not itself remedy the underlying alleged constitutional violations, and the individual district courts had issued a series of extreme remedies aimed at these alleged constitutional violations, but they have not been shown to be inadequate to cure the problems. Indeed, even if crowding had been the "primary cause" of the violations, the general population cap of 137.5% of California's prisons' "design capacity" is erroneous because, by the district court's own findings, no nexus exists between the proposed population reduction and the delivery of constitutionally adequate care to the *Plata* and *Coleman* classes. Additionally, although it acknowledged "that resources at the community level are strained, particularly because of the current fiscal crisis," *Coleman/Plata*, 2009 WL 2430820, at \*99, the court erred by failing sufficiently to account for the dangers to the public and strains on the State's finances and machinery of government that will be created by a reduction of 46,000 over a two-year period.

*Third*, denial of a stay will result in substantial irreparable harm to the State and its citizens. By September 18, 2009, the State must submit a plan to reduce its prison population by 46,000 inmates over a two-year period. Although the State will endeavor to comply with the district court's deadline in the event that no stay is

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<sup>2</sup> Based on the evidence at the time of trial, the three-judge court estimates the prisoner reduction to be approximately 46,000 inmates. Because the actual prison population fluctuates over time, the estimated reduction does as well, but for simplicity we will use the 46,000 figure.

issued, developing such a plan requires substantial attention from California's executive and its agencies, as well as its legislature, at a time when the State's resources are limited and its personnel already are spread exceedingly thin. California is in the midst of an historic budget crisis, including massive budget cuts, layoffs, and forced furloughs of its employees. This diversion of resources from the numerous other pressing matters facing California will be an irreparable injury to the State and its citizens. Moreover, the relief ultimately required—a prisoner release order of 46,000 inmates—likely will create dangers to communities throughout California at a time when they are most vulnerable and the State is least equipped to provide services for released prisoners that might prevent future criminal activity.

*Fourth*, even if a close case were presented here—and this is no close case—the balance of equities strongly favors California. Absent a stay, the harms to California and the general public will be irreparable and significant. By contrast, the three-judge court repeatedly admitted that even the prisoner release order will not cure the constitutional deprivations about which appellees complain. In any event, the population reductions will be phased-in over two years, thus any delay pending appeal would be relatively insignificant and in the meantime, the single-judge district court proceedings remain pending and relief remains available to remedy alleged constitutional problems on a more individualized basis.

For these reasons and as detailed below, appellants request that the Court grant the application to stay the judgment and injunctive relief ordered below pending final resolution of this appeal.

## STATEMENT

The appeal involves two cases, *Plata* and *Coleman*, which, before being referred to the three-judge court, were in their remedial phases before the Northern and Eastern Districts of California, respectively. The remedial phases followed settlements between the parties in *Plata* and the court's findings in *Coleman* regarding underlying constitutional and federal statutory violations relating to California's provision of medical care and mental health care services in its prisons. The cases then were consolidated before the three-judge court to determine whether a prisoner release order should issue under the PLRA to remedy crowding that plaintiffs newly contended was the "primary cause" of the underlying violations of their federal rights. See 18 U.S.C. § 3626(a)(3).

### A. *Plata*

*Plata*, which was filed in April 2001, is a class action lawsuit concerning the constitutional adequacy under the Eighth Amendment and sufficiency under the Americans with Disabilities Act and the Rehabilitation Act of medical care provided to California's adult inmates with "serious medical conditions." Pls.' Am. Compl., *Plata*, No. C01-1351 TEH, at 52:22-53:4, 55:16-23 (N.D. Cal. filed Aug. 20, 2001) (Docket No. 20); see also *Coleman/Plata*, 2009 WL 2430820, at \*4 (discussing plaintiffs' complaints about, *inter alia*, "inadequate medical screening,"

“interference of custodial staff with the provision of medical care,” “failure to recruit and retain sufficient numbers of competent medical staff”). In *Plata*, the parties negotiated a settlement of all plaintiffs’ claims and entered into a Stipulation and Order for Injunctive Relief that was entered by Judge Henderson on June 13, 2002. See *Plata*, No. C01-1351 TEH (N.D. Cal. June 13, 2002) (Stipulation and Order) (Docket No. 68). Thereafter, the parties commenced remedial proceedings to correct the alleged constitutional and statutory violations. The stipulation “require[d] defendants to provide only the minimum level of medical care required under the Eighth Amendment.” *Coleman/Plata, supra*, at \*4; see *id.* (discussing details of stipulation); *id.* at \*5 (discussing additional stipulation entered in 2004).

In October 2005, Judge Henderson concluded that the prison medical system still did not meet constitutional standards, see *id.* at \*3, and therefore took the extraordinary step of placing the medical healthcare delivery system of the California Department of Corrections and Rehabilitation (“CDCR”) in a receivership, *id.* In doing so, the district court found that insufficient progress had been made in “tackl[ing] the difficult task of addressing the crisis in the delivery of health care in the California Department of Corrections” “despite the best efforts of [appellants].” *Id.* at \*7 (quoting 2005 WL 2932243, at \*1-2 (N.D. Cal. May 10, 2005)). Judge Henderson concluded, *inter alia*, that inmates still lacked access to care and specialty services, and that the CDCR: had “serious personnel problems,” “was incapable of recruiting qualified personnel,” “lacked medical leadership” and necessary medical equipment, had not developed or implemented tracking systems

for inmates with chronic care needs, and suffered from “a culture of non-accountability and non-professionalism.” *Id.* at \*10. The appointment of a receiver became effective on April 17, 2006. *Id.* at \*11. The receiver was authorized to exercise broad authority to “provide leadership and executive management of the California prison medical health care delivery system with the goals of restructuring day-to-day operations and developing, implementing, and validating a new, sustainable system that provides constitutionally adequate medical care to all class members as soon as practicable.” *Id.* Just months after the appointment of the receiver became effective, however, plaintiffs filed a motion to convene the three-judge court. See Pls.’ Mot., *Plata*, No. C01-1351 TEH (N.D. Cal. filed Nov. 13, 2006) (Docket No. 561).

### **B. *Coleman***

*Coleman*, which was originally filed in April 1990, is a class action lawsuit involving allegations that the mental health care services provided to California’s inmates with serious mental disorders are constitutionally inadequate and violate the Rehabilitation Act. See Pls.’ Am. Compl., *Coleman*, No. CIV S-90-0520 LKK JFM, ¶¶ 30-31 (E.D. Cal. filed Jul. 25, 1991) (Docket No. 61); see also *Coleman/Plata*, 2009 WL 2430820, at \*12-15. Following a 1994 trial, the district court held that the mental health care provided to the class members violated the Eighth Amendment. *Coleman/Plata*, *supra*, at \*12. The court found that the mental health care delivery system was inadequate with respect to its screening mechanisms, access to appropriate care, medical record system, administration of psychotropic drugs, staff competence, and suicide prevention. *Id.* at \*13. In

December 1995, the court appointed a special master to oversee implementation of injunctive relief. See *id.* at \*14. In 1997, the court approved plans (hereafter “Program Guides”) developed by the special master. *Id.* Thereafter, “defendants continued to work with the Special Master to implement and revise the [Program Guides],” and, in March 2006, the *Coleman* court approved a revised Program Guide and ordered immediate implementation of those provisions. *Id.*; see also *id.* at \*18-19 (discussing special master’s monitoring reports throughout 2006). Just eight months later, on November 13, 2006, the *Coleman* plaintiffs moved to convene a three-judge panel to limit the prison population. See Pls.’ Mot., *Coleman*, No. CIV S-90-0520 LKK-JFM (E.D. Cal. filed Nov. 13, 2006) (Docket No. 2036).

### **C. Proceedings Before The Three-Judge Court**

On November 13, 2006, plaintiffs in *Plata* and *Coleman* simultaneously filed separate motions to convene a three-judge court in an effort to obtain “prisoner release order[s]” pursuant to 18 U.S.C. § 3626(a)(3). A “prisoner release order” under the PLRA includes “any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison.” *Id.* § 3626(g)(4). Such orders may be granted only by a three-judge court, and only upon plaintiffs’ showing, “by clear and convincing evidence that—(i) crowding is the primary cause of the violation of a Federal right; and (ii) no other relief will remedy the violation of the Federal right.” *Id.* § 3626(a)(3)(E); see also *id.* § 3626(a)(3)(A) (“no court shall enter a prisoner release order unless—(i) a court has previously entered an order for less intrusive relief that has failed to remedy

the deprivation of the Federal right sought to be remedied through the prisoner release order; and (ii) the defendant has had a reasonable amount of time to comply with the previous court orders”).

Over the State’s objections, the *Plata* and *Coleman* courts held a joint hearing on June 27, 2007, to determine whether to refer each case to a three-judge court. On July 23, 2007, both courts granted plaintiffs’ motions to convene a three-judge court. See *Plata v. Schwarzenegger*, No. C01-1351 TEH, 2007 WL 2122657 (N.D. Cal. July 23, 2007); *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM, 2007 WL 2122636 (E.D. Cal. July 23, 2007).<sup>3</sup>

On November 3, 2008, the three-judge court denied the State’s motion for dismissal or, alternatively, summary judgment. See *Coleman v. Schwarzenegger*, *Plata v. Schwarzenegger*, Nos. CIV S-90-0520 LKK JFM P, C01-1351 TEH, 2008 WL 4813371 (E.D. Cal./N.D. Cal. Nov. 3, 2008) (attached as Ex. B, hereto). Defendants argued that plaintiffs’ crowding claims had not been exhausted during administrative proceedings and therefore were subject to dismissal under the PLRA. See *id.* at \*1-4. The State submitted that the three-judge proceedings should be dismissed for lack of jurisdiction because neither individual district court had ordered less intrusive relief directed at crowding—as opposed to the underlying deficiencies in providing medical and mental health care to the class members—

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<sup>3</sup> Immediately following the courts’ orders convening the three-judge court, California filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit. See Notice of Appeal, *Plata*, No. C01-1351 TEH (N.D. Cal. July 27, 2007) (Docket No. 799). The Ninth Circuit dismissed the appeal for lack of jurisdiction. *Coleman v. Schwarzenegger*, No. 07-16361, 2007 WL 2669591, at \*1 (9th Cir. Sept. 11, 2007) (per curiam) (“The district court orders from which appellants seek to appeal can be effectively reviewed following the entry of a final order by the three-judge district court.”).

before the three-judge court was convened. See *id.* at \*4; see generally 18 U.S.C. § 3626(a)(3)(A)(i), (E)(i)-(ii). Finally, California contended that it was entitled to summary judgment because there was no question that crowding was not the “primary cause” of, nor would it remedy, any existing Eighth Amendment violations. See *Coleman*, 2008 WL 4813371, at \*5-7.

Having denied defendants’ motion, trial before the three-judge court commenced on November 18, 2008. Trial continued intermittently throughout December 2008 and February 2009. At trial, despite the statutory requirement that the three-judge court ensure that “the defendant has had a reasonable amount of time to comply with the previous court orders,” 18 U.S.C. § 3626(a)(3)(A)(ii), the three-judge court refused to permit defendants to introduce evidence “relevant only to determining whether the constitutional violations found by the *Plata* and *Coleman* courts were ‘current and ongoing.’” *Coleman/Plata*, 2009 WL 2430820, at \*31 n.42. Similarly, the three-judge court gave short shrift to the potential impact of Assembly Bill 900, which the Governor signed into law in 2007 and authorizes, *inter alia*, eight billion dollars for the construction of additional correctional facilities. See *id.* at \*64-67. Thus, the State was prevented from showing what advances had been made under the receivership that had been in effect for less than a year in *Plata* and could not prove how they were implementing the *Coleman* special master’s latest recommendations. Nor did the State have a sufficient opportunity to execute the newly enacted legislation prior to the three-judge court’s ruling.

Following trial, on August 4, 2009, the court answered the fundamental “question of law” whether crowding was the “primary cause” of the underlying violations of plaintiffs’ federal rights, *id.* at \*54 n.55 (internal quotation marks omitted), by holding that crowding is the primary cause and that no other relief can remedy the violations, see *id.* at \*31-75. The court therefore granted plaintiffs’ request for a prisoner release order, imposing a population cap on California’s prisons of 137.5% of the design capacity, and requiring the State to provide the court, by September 18, 2009, with a plan to reduce its prison population to that level (equal to a release of up to 46,000 inmates or over 25% of the prison population) within two years. *Id.* at \*116, \*106. The order also stated: “The court will not grant any stay of the proceedings prior to the issuance of the final population reduction plan, but will entertain motions to stay implementation of that plan pending the resolution of any appeal to the Supreme Court.” *Id.* at \*116.

Nonetheless, on September 1, 2009, the State filed with the three-judge court a motion for a stay pending disposition of its appeal to this Court pursuant to 28 U.S.C. § 1253. See *supra* n.1. On September 3, 2009, the State timely filed notices of appeal from the three-judge court’s order entering injunctive relief. The three-judge court denied California’s motion for a stay on September 3, 2009, see *supra* n.1, thus the State seeks a stay from this Court pending its disposition of the appeal.

## ARGUMENT

A stay should issue here because: (1) there is more than a “reasonable probability” that this Court will note probable jurisdiction; (2) a “fair prospect” exists that this Court will conclude that the decision below was erroneous, in full or in part; (3) California will suffer irreparable harm without a stay and (4) in the event that this Court considers this a “close case,” the relative harm to California and the safety interests of the public at large outweigh any minimal harm that a delay might cause plaintiffs-appellees. See, *e.g.*, *Lucas*, 486 U.S. at 1304; *Rostker*, 448 U.S. at 1308.

### I. **THERE IS A “REASONABLE PROBABILITY” THAT THIS COURT WILL NOTE PROBABLE JURISDICTION.**

There is more than a “reasonable probability” that this Court will note probable jurisdiction of the State’s’ appeal pursuant to 28 U.S.C. § 1253. See *Lucas*, 486 U.S. at 1305. As a preliminary matter, the likelihood that this Court will note jurisdiction is unusually strong because any summary affirmance of the decision of the three-judge district court would carry precedential weight. See *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam); *Tulley v. Griffin, Inc.*, 429 U.S. 68, 74-75 (1976); see also *Hohn v. United States*, 524 U.S. 236, 259-60 (1998) (Scalia, J., dissenting). Moreover, the injunctive relief ordered is unparalleled in scope and presents a level of federal court interference with state control of prisons that is nothing but stunning and wholly unprecedented. Additionally, the appeal will present pure legal questions of national importance involving the PLRA.

First, the character of the relief alone makes review extremely likely. By the three-judge court's own description, "[u]nder the order establishing a population cap, the size of the prison population will be reduced by approximately 46,000." *Coleman/Plata*, 2009 WL 2430820, at \*106. Such a wide-ranging prisoner relief order is unprecedented in this nation's history, and is more startling insofar as *no* three-judge court has issued a prison release order over a state's objection in the 13 years since the passage of the PLRA.

Even prior to enactment of the PLRA, it was well-established that principles of federalism, comity, and separation of powers greatly restrained federal judicial intrusion into a state's right to administer its own prison system. See, e.g., *Turner v. Safley*, 482 U.S. 78, 84-85 (1987). Moreover, the PLRA specifically imposes more stringent limits on federal courts' involvement with conditions of incarceration. See, e.g., *Woodford v. Ngo*, 548 U.S. 81, 93 (2006); *Miller v. French*, 530 U.S. 327, 347 (2000). Pertinent here, "[s]ponsors of the PLRA were especially concerned with courts setting 'population caps' and ordering the release of inmates as a sanction for prison administrators' failure to comply with the terms of consent decrees designed to eliminate overcrowding." *Gilmore v. California*, 220 F.3d 987, 998 n.14 (9th Cir. 2000). Because there is undeniable tension between the actions of the three-judge court in imposing the largest ever prisoner release order and Congress's enactment of the PLRA, review is at least probable.

Further enhancing the likelihood of review is the order's potential harm to community safety. The court below imposed unprecedented injunctive relief,

notwithstanding plaintiffs' own evidence that showed a 10 percent decrease in the incarceration rate leads to a statistically significant 3.3 percent increase in crime rates, unless evidence-based programming for released inmates is expanded. See *Coleman/Plata*, 2009 WL 2430820, at \*110-112. Here, however, no evidence was presented that such programming could be expanded or about how much an expansion would cost. The potential harm to the public increases the urgency of review and the likelihood that this Court will note jurisdiction, which greatly strengthens the case for a stay. Cf. *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1307-08 (1976) (Rehnquist, J., in chambers) (granting application to vacate stay entered by court of appeals that threatened to reduce public safety).

Second, the three-judge court's radical approach to a number of federal legal questions of national importance makes review likely. For instance, the core substantive issue likely to be presented on appeal is whether crowding was the "primary cause" of the underlying violations of the prisoners' federal rights. Although no three-judge court has ever entered a "prisoner release order" post-PLRA, let alone applied the "primary cause" standard, the court below interpreted the standard in the broadest way possible to order the most expansive prison release in history. The court below paid no more than lip service to the notion that such an order is the "remedy of last resort" for unconstitutional prison conditions. *Coleman/Plata, supra*, at \*63 (quoting H.R. Rep. No. 104-21, at 25 (1995)).

For example, no previous order of either the *Plata* or *Coleman* district courts was specifically directed at overcrowding. See also *infra* at 24. On the contrary, the

courts' previous orders sought to improve the delivery of medical care to inmates with serious medical needs (*Plata*) and mental health care to inmates with serious mental disorders (*Coleman*). Indeed, the notion that crowding was the "primary cause" of the unconstitutional delivery of medical and mental health care is not only counterintuitive in light of the orders of the individual district judges, but also because the three-judge court and plaintiffs' experts repeatedly acknowledged that the unconstitutional conditions had multiple causes and that even population reductions beyond those ordered by the three-judge court would not necessarily cure the constitutional violations. See *infra* at 18-22. Furthermore, the notion that "less intrusive relief" could not have been granted to remedy even a perceived problem with crowding is belied by the fact that the three-judge court's order is directed at California's overall prison population, not the *Plata* and *Coleman* classes.

Additionally, the three-judge court's application of the PLRA's requirement that a defendant must be accorded a reasonable time to implement previous district court orders before ordering prisoner releases makes plenary consideration by this Court extremely likely. Here, the individual district courts had imposed new obligations on the State as late as April 2006, yet the three-judge court was convened in November 2006. Moreover, although it had been recognized that defendants were undertaking their "best efforts" to remedy the constitutional violations and California had recently passed legislation to improve prison conditions, defendants were precluded at trial from presenting any evidence of "current and ongoing" conditions. Because such an inquiry was pre-destined to find

defendants had not made progress under the earlier, less restrictive orders and does not give any meaning to the statutory requirement that a “reasonable time” be allotted, this Court’s review is reasonably likely.

For the foregoing reasons, there is a reasonable probability that this Court will note probable jurisdiction. Indeed, the “probability” that this Court will note probable jurisdiction is at least as great, if not far greater, than it was when Justice Harlan entered a stay from a district court order in another case raising important issues of first impression. See *Int’l Boxing Club v. United States*, 78 S. Ct. 4 (1957) (Harlan, J., in chambers). There, Justice Harlan stayed relief pending appeal in the “the first government antitrust case involving professional sports to be reviewed by this Court after trial on the merits,” in which there was a “‘drastic’ character to some aspects of the relief granted by the District Court.” *Id.* The PLRA issues raised here are of greater national significance, and this prison release order is the most drastic in history. The Court should follow Justice Harlan’s lead here, staying the injunction pending this Court’s review.

## **II. THERE IS A “FAIR PROSPECT” THAT THE STATE WILL PREVAIL.**

This case involves a litany of legal questions that the three-judge court was the first to interpret, and the court below consistently did so in a manner that allowed the most aggressive federal court intrusion into a state’s management of its prisons ever, doing serious violence to Congress’s intent in enacting the PLRA. Therefore, there is plainly a “fair prospect” that California will prevail on appeal. This application focuses on just some of the most significant issues that give rise to a “fair prospect” for reversing or vacating the judgment.

**A. There Is A “Fair Prospect” That California’s Interpretation Of The “Primary Cause” Standard Is Correct.**

To obtain a prisoner release order, plaintiffs had the burden to prove by clear and convincing evidence that “crowding is the primary cause of the violation of a Federal right.” 18 U.S.C. § 3626(a)(3)(E)(i). The court below acknowledged that “the primary cause issue is ultimately a question of law for the three-judge court to decide,” *Coleman/Plata*, 2009 WL 2430820, at \*54 n.55 (internal quotation marks omitted), thus this Court will review that issue *de novo*. See, e.g., *Elder v. Holloway*, 510 U.S. 510, 516 (1994). There is a “fair prospect” that a majority of this Court will disagree with the three-judge court’s construction and application of that standard.

Significantly, the court below acknowledged that the federal violations about which plaintiffs complained were indisputably the result of multiple factors. See, e.g., *Coleman/Plata*, *supra*, at \*58, \*31-32. Indeed, the crux of both classes’ claims as they had been litigated in the district courts for years was not that crowding in the prisons generally caused a deprivation of federal rights, but that a variety of problems in the California prisons combined to create constitutional violations unique to the defined classes. The *Plata* plaintiffs, who have “serious medical needs,” and the *Coleman* plaintiffs, who have serious mental health disorders, asserted that they were denied constitutionally adequate medical care and mental health services, respectively, because of a host of alleged shortcomings in prison management and planning, the skills of prison personnel, and prison equipment and facilities. See *supra* at 7-9. Although it may be the case that the increase in

prison population contributed to some of the shortcomings, it is by no means clear that it is the “primary cause” of the alleged federal violations.

The prospect that a majority of this Court will set aside the district court’s holding is increased by the three-judge court’s failure to read the term “the primary cause” in conjunction with the second, related requirement that “no other relief will remedy the violation of the Federal right.” 18 U.S.C. § 3626(a)(3)(E)(ii). In other words, crowding must be so central to the condition complained of that a population reduction is the only effective remedy for the claimed violation. This reading of “the primary cause” is consistent with the PLRA’s legislative intent to impose a strict causal standard between crowding and the claimed violation before a prisoner release order could issue. See, *e.g.*, 141 Cong. Rec. S14408, S14413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole).

The three-judge court purported to accept the State’s definition of “the primary cause” as “the cause that is ‘first or highest in rank or importance; chief; principal.’” *Coleman/Plata*, 2009 WL 2430820, at \*31. But it disregarded the requirement that crowding must be so central to the condition complained of that a population reduction is the only remedy for the problem. Indeed, the court acknowledged that an overall population reduction of up to 46,000 would not solve the claimed Eighth Amendment violations in the delivery of medical care to the *Plata* class and mental health care to the *Coleman* class.

**B. There Is A “Fair Prospect” That This Court Will Conclude That The Release Order Was Not Narrowly Tailored.**

Even if this Court were to agree with the three-judge court’s interpretation of the “primary cause” standard and to find that less restrictive relief was unavailable, there is a “fair prospect” that the release order will be reversed because it is not narrowly tailored. The court below correctly recognized that the PLRA requires all prospective relief, including a prisoner release order, to “[be] narrowly drawn, extend[] no further than necessary to correct the violation of the Federal right, and [be] the least intrusive means necessary to correct the violation of the Federal right.” *Coleman/Plata*, 2009 WL 2430820, at \*30 (alterations in original) (citing 18 U.S.C. § 3626(a)(1)(A)). Similarly, the court acknowledged that the PLRA mandates that any “remedy be tailored to the actual injuries suffered by class members.” *Id.* The order fails to satisfy these standards.

As an initial matter, overcrowding itself is not a violation of the Eighth Amendment. See *Rhodes v. Chapman*, 452 U.S. 337, 345-50 (1981). As noted, the claimed injuries here are the asserted deprivation of minimally adequate medical and mental health care to the *Plata* and *Coleman* classes, respectively. However, the prisoner release order is not even primarily directed at these injuries or the class members. As the court below admitted: “To be certain, the relief sought by plaintiffs extends further than the identified constitutional violations in one regard: Any population reduction plan developed by the state is likely to affect inmates without medical conditions or serious mental illness.” *Coleman/Plata*, *supra*, at \*77.