No. 09-

IN THE

Supreme Court of the United States

GOVERNOR ARNOLD SCHWARZENEGGER, *et al.*,

Appellants,

v.

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

Appellees.

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

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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September 4, 2009

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PARTIES TO THE PROCEEDING

Appellees are the following:

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

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
Anthony Adams, Legislator
Amador County Sheriff Martin Ryan
Joel Anderson, Legislator
Roy Ashburn, Legislator
Chief Probation Officer Kim Barrett
James F. Battin, Jr.*, Legislator
John Benoit, Legislator
Tom Berryhill, Legislator
Sam Blakeslee, Legislator
Police Chief Michael Billdt
Butte County Chief Probation Officer John Wardell
Butte County Sheriff-Coroner Perry L. Reniff
Calaveras County Sheriff Dennis Downum
District Attorney Ronald L. Calhoun
Chief Probation Officer Lionel Chatman
City of Alhambra Police Chief Jim Hudson
City of Atwater Police Chief Richard Hawthorne
City of Delano Chief of Corrections George Galaza
City of Delano Police Chief Mark DeRosia
City of Fremont Police Chief Craig Steckler
City of Fresno Police Chief Jerry Dyer
City of Grover Beach Police Chief Jim Copsey
City of Modesto Police Chief Roy Wasden
City of Pasadena Police Chief 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
District Attorney Clifford Newell
Roger Niello, Legislator
Orange County Sheriff Coroner Michael S. Carona
District Attorney Rod Pacheco
District Attorney David W. Paulson
District Attorney Vern Pierson
Placer County Sheriff Edward N. Bonner
District Attorney John R. Poyner
District Attorney Tony Rackauckas
District Attorney Michael Ramos
District Attorney Michael Ramsey
Chief Probation Officer Brian Richart
District Attorney Todd Riebe
Riverside County Sheriff Bob G. Doyle
George Runner, Legislator
Sharon Runner*, Legislator
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

* No longer in the Legislature

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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.[1]

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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[1] 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.[2] 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

[2] 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).[3]

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—

[3] 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.

Indeed, the manner in which the court below tailored the relief had little, if any, relationship to the claims of the plaintiff classes, but instead was focused on the prison population as a whole. The population cap imposed amounts to more than a 25% reduction in California's prison population, or "approximately 46,000" inmates, according to the court's estimate. *Id.* at *19, 83, 106. Nowhere did the court link the cap it selected—137.5% of design capacity—to minimally adequate medical and mental health care for members of the *Plata* or *Coleman* classes. To the contrary, the court's findings refute any such connection.

For instance, the court did not select the figure based on any study or other evidence that 137.5% of design capacity was the maximum population at which either minimally adequate medical or mental health care could be provided to the *Plata* and *Coleman* classes. See generally *Rhodes*, 452 U.S. at 347 (requiring care consistent with "the minimal civilized measure of life's necessities"); *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976). Rather, the court did so because, in its words, the figure is "halfway between the cap requested by plaintiffs and the wardens' estimate of the California prison system's maximum operable capacity *absent consideration of the need for medical and mental health care.*" *Coleman/Plata*, *supra*, at *83 (emphasis added); see also *id.* at *22 (noting that the Corrections Independent Review Panel determined in 2004 that the operable capacity of California's prison system was 145% of design capacity—a measure that did not address medical and mental health care). Moreover, the court recognized that "plaintiffs' experts did not calculate the extent to which the operable capacity of

California's prisons exceeds the percentage necessary for the provision of constitutionally adequate medical and mental health care." *Id.* at *82.

Thus, even though no study has ever been conducted to determine the population at which California's prisons can provide constitutionally adequate medical and mental health care, the court below held that the PLRA and the United States Constitution permit a federal court to pick a number out of thin air and order prisoners released on that basis. See, *e.g.*, *id.* at *83 ("California's prisoner population *must* be reduced to some level between 130% and 145% design capacity if the [State's] medical and mental health services are ever to attain constitutional compliance."); *id.* ("[W]e cannot determine from the evidence whether the national standard selected by the Governor's strike team represents a judgment *regarding the mandates of the Constitution or whether it merely reflects a policy that ensures desirable prison conditions.*") (emphasis added). Accordingly, the 137.5% design capacity figure is not linked to provision of the minimally adequate medical or mental health care the Constitution requires. See also *id.* at *23 (recognizing that "the maximum safe and reasonable capacity of the California prison system . . . is 179% design capacity for prisons holding male prisoners"); *id.* at *75 (admitting that a 145% limit might suffice).

These circumstances create a "fair prospect" that a majority of this Court will find that the court below erred by ordering an overall prison population cap of 137.5% of design capacity.

C. There Is A "Fair Prospect" That This Court Will Conclude That The Release Order Must Be Reversed Because The State Was Precluded From Offering Evidence Of Current Conditions.

There is a "fair prospect" of reversal because the relief ordered is artificial insofar as it ignored whether the current conditions in California's prisons violate the *Coleman* and *Plata* plaintiffs' federal rights. The Court expressly declined to "evaluate the state's continuing constitutional violations." *Coleman/Plata*, 2009 WL 2430820, at *31. Instead, it purported to consider "whether . . . requiring a reduction in the population of California's prisons was necessary to remedy the previously identified constitutional violations." *Id.* at *30. But it "did not permit" the State to introduce evidence "relevant only to determining whether the constitutional violations found by the *Plata* and *Coleman* courts were 'current and ongoing.'" *Id.* at *31 n.42.

In doing so, the court deprived the State of the opportunity to present a complete defense and failed to ensure that the relief it ordered was necessary and carefully tailored to remedy the current violations of plaintiffs' federal rights. Because the court below simply assumed that the conditions presented at trial were Eighth Amendment violations, but would entertain no argument to the contrary, there is a "fair prospect" for reversal.

D. There Is A "Fair Prospect" For Reversal On A Number Of Procedural Issues.

In addition to the substantive issues discussed above, there is a "fair prospect" that this Court will find that one or more procedural issues precluded, in whole or in part, the three-judge court from issuing the prisoner release order.

1. The Three-Judge Proceeding Should Have Been Dismissed Because Neither District Court Had Ordered Relief Directed At Overcrowding.

As preconditions to a three-judge court's issuance of a prison release order, a court must have "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," 18 U.S.C. § 3626(a)(3)(A)(i), and the three-judge court must "find[] by clear and convincing evidence that . . . no other relief will remedy the violation of the Federal right," *id.* § 3626(a)(3)(E)(ii). Here, however, it is beyond dispute that neither the *Plata* nor the *Coleman* court had issued an order directed at overcrowding before they granted plaintiffs' motions to convene three-judge proceedings. This stands in stark contrast to the situation in *Roberts* v. *County of Mahoning*, 495 F. Supp. 2d 694 (N.D. Ohio 2006), the only other case in which a three-judge court has been convened under the PLRA. There, the individual district judge had described overcrowding as "the central issue" in the case, had entered orders for less intrusive relief directed at overcrowding, and only granted the motion to convene the three-judge court when it became clear that the relief previously ordered would not suffice. *Id.* at 696-98.

2. California Was Not Afforded A Reasonable Amount Of Time To Comply With Previous District Court Orders in *Plata*.

The PLRA requires that a prisoner release order may not issue unless "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) (emphasis added). This standard was not satisfied here.

On February 14, 2006, the *Plata* court appointed the Receiver effective April 17, 2006. *Plata*, No. C01-1351 TEH (N.D. Cal. Feb. 14, 2006) (Order Appointing Receiver) (Docket No. 473). The order contemplated that 180-210 days later, the Receiver would submit a "detailed Plan of Action." *Id.* at 2:20-22, 2:27-3:1. On November 13, 2006, the Receiver moved for an extension of time to May 10, 2007 to file his plan of action, which the *Plata* court granted on December 19, 2006. *Plata*, No. C01-1351 TEH (N.D. Cal. Dec. 19, 2006) (Order Extending Time) (Docket No. 590). The Receiver filed his initial Plan of Action on May 10, 2007. The plan contemplated that there would be more than two years of efforts to remedy the claimed deficiencies in the delivery of medical care.

In the interim, however, on November 13, 2006, plaintiffs filed a motion to convene a three-judge court to obtain a prisoner release order. On July 23, 2007, the *Plata* court granted plaintiffs' motion. The *Plata* court held that it was not required to "see if the Receiver's Plan of Action is able to remedy the constitutional deficiencies in this case." 2007 WL 2122657, at *3. It did so despite acknowledging that the Receiver had advised the court that his "'Plan of Action will work,'" and that "'those . . . who think that population controls will solve California's prison health care problems . . . are simply wrong.'" *Id.* at *4 (omissions in original); see also *id.* at *3 (finding that "the Receiver has made much progress").

Accordingly, there is a fair prospect that this Court will conclude that by granting plaintiffs' motion for referral, the *Plata* court did not provide defendant

with "a reasonable amount of time to comply with the previous court orders." 18 U.S.C. § 3626(a)(3)(A)(ii).

In sum, the holding below poses a number of significant issues that create at least a fair prospect that this Court will reverse or at least vacate the injunctive relief entered by the district court.

III. THERE IS NO QUESTION THAT IRREPARABLE HARM TO THE STATE WILL RESULT IF THE ORDER IS NOT STAYED.

Irreparable harm not only is likely to result from the denial of a stay, see, *e.g.*, *Lucas*, 486 U.S. at 1304, it is virtually certain. In the near term, the three-judge court's order requires that California submit a prison reduction plan by September 18, 2009. *Coleman/Plata*, 2009 WL 2430820, at *116. To do so will be no small feat. A plan to reduce the prison population by 46,000 over a two-year period while aiming to maximize safety to Californians demands extensive coordination between the executive, including the CDCR and other agencies, and the legislature. See *INS* v. *Legalization Assistance Project*, 510 U.S. 1301, 1305-06 (1993) (O'Connor, J., in chambers) (granting stay because order below "would impose a considerable administrative burden on the INS").

In its September 3, 2009 order denying a stay, the court below brushed aside these burdens. See *Coleman* v. *Schwarzenegger*, *Plata* v. *Schwarzenegger*, Nos. CIV S-90-0520 LKK JFM P, C01-1351 TEH, slip op. at 3-4 (E.D. Cal./N.D. Cal. Sept. 3, 2009) (*Plata* Docket No. 2218) (Ex. C, hereto). The court explained that its order "requires simply the development of a plan; it does not require implementation of any population reduction measures." *Id.* at 3. The court added that these

requirements "will not under any circumstances constitute irreparable harm to the [S]tate," reasoning that

> the [S]tate has already completed much of the necessary work to develop a plan that could satisfy much or all of our order, with the Governor's population reduction proposals having been recently considered and adopted (in full by one house and in part by the other) by the California Legislature.

Id. at 4.

The court below vastly underestimated the immediate impact of its order in a number of important respects. For example, the three-judge court has imposed a far-reaching agenda on the State's executive and legislative branches (one, which if the State is correct on the merits of this appeal, it should not have to follow at all). In the usual course, the State legislature and executive certainly might consider initiatives such as reducing sentences for particular crimes or changing the parole system. Indeed, many such proposals have been discussed in various forms and for a variety of reasons (*e.g.*, reducing the budget deficit). Here, however, a three-judge federal court has set the State's agenda by requiring California to focus myopically on particular goals that the three-judge court selected, *i.e.*, reducing the prison population to 137.5% design capacity within two years, with an accompanying series of interim targets. Although the court below refers to the "development of a plan" as if it merely required the drafting of a document, nothing could be further from the truth. The plan required is a comprehensive reform of State prison policies in order to meet terms and goals dictated by the federal court. Even though a groundwork for putting a plan into effect has been laid because of the recent executive and legislative focus on correctional issues, the amount of work that

remains to be done, particularly given the condensed time frame and new requirements the federal court has imposed (see *supra* at 12), is tremendous.

Moreover, this work must be accomplished at a time when the State's resources for performing its essential governmental functions are already scarce. Human resources and dollars are especially strained given the array of problems facing the executive and legislature at this moment in California's history. For instance, the corrections department is facing a $1.2 billion reduction in its budget and must focus its limited resources on safely implementing that budget reduction. Every human and capital expenditure toward meeting the September 18 deadline puts California at greater risk of neglecting other obligations to its citizenry. See *Barnes* v. *E-Sys., Inc. Group Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1304 (1991) (Scalia, J., in chambers) (finding irreparable harm and granting stay where order below would pose "interference with the State's orderly management of its fiscal affairs"); cf. *U.S. Postal Serv.* v. *Nat'l Ass'n of Letter Carriers*, 481 U.S. 1301, 1302-03 (1987) (Rehnquist, C.J., in chambers) (granting stay which continued the status quo and preserved government entity's ability to carry out other statutory obligations).

In addition to the resource limitations that constrain the State, the court's order itself has created a series of political hurdles that hinder the swift formulation and enactment of reforms that the order mandates. It is axiomatic that prison reform is a hot-button political issue. Thus, had proposals for reform arisen in the ordinary political course, they would have been contentious. But by dictating not

only reform, but a highly specific result, *viz.*, reduction of the prison population by 46,000, the court has released a bombshell within the government and among the population of the State. The politics of reform have been complicated by judicial intervention and polarized in a manner that has impeded gains that otherwise might have been more easily achievable. As such, the executive, legislature, and the CDCR have had to spend—and will continue to spend—an inordinate amount of time formulating a plan attempting to satisfy the court's mandates, and that can be implemented in practice.[4]

Furthermore, in addition to California's already existing immediate burdens in attempting to implement the unprecedented prisoner release plan, the State has just come under increased strains because, on September 2, 2009, plaintiffs moved to compel discovery and additional injunctive relief regarding the in-progress plan. *See* Pls.' Mot. Miscellaneous Relief, *Plata*, No. C01-1351 TEH (N.D. Cal. filed Sept. 2, 2009) (Docket No. 2217). Indeed, plaintiffs indicated in their motion that they believe that California has far more work to do in implementing the prisoner release order than the three-judge court acknowledged in its September 3, 2009 order denying California's motion for a stay. Critically, they contend that "defendants' obligation to submit a plan is independent of actions that may or may not be taken by the Legislature." *Id.* at 6; see also *id.* ("[A]s of this date, the

[4] The three-judge court also erred by suggesting that the State's harms are minimal or non-existent because it "set no fixed time limit" for finalizing the plan. *See* Order Denying Motion for Stay at 3. Because the court, in essence, has threatened the legislature and the executive with more involvement if the proposals are not satisfactory, the pressures on individual legislators and the executive are enormous. Legislators have little sense of the timing of prison reform or of the extent to which there actions will be deemed irrelevant by judicial fiat. This undermines the State's ability to set its own agenda in matters of corrections and otherwise, and impairs the function of government on the whole.

legislature has not yet enacted the Governor's population reduction proposals."). In contrast to the three-judge court's dismissive treatment of the burdens faced by California, plaintiffs contend that before September 18, 2009, defendants need to, *inter alia*, "immediately provide" documents and data necessary that will permit plaintiffs' to evaluate the proposed plan, *id.* at 6, 4-5; hold substantive consultations with plaintiffs to discuss plaintiffs' potential objections to the proposed plan, *id.* at 3-4; and "immediately provide plaintiffs notice of the specific measures defendants are actively considering," *id.* at 6; *see id.* at 3-4. Due to the interference with State government that the plan already requires in the period leading up to September 18, 2009, and the additional burdens on California that plaintiffs now seek to impose, there is no question that the State would sustain irreparable harm if a stay does not issue immediately.[5]

Finally, the relief ultimately required by the release order constitutes irreparable harm of surpassing magnitude. The court's order envisions prisoner reductions within 6 months, *i.e.*, March 2010—at least several months before this case is likely to be resolved on appeal. See *Coleman/Plata*, *supra*, at *116. In the event that this Court reverses the decision below, absent a stay, California will have no mechanism to return to prison those inmates who otherwise would have been

[5] In its order granting injunctive relief and in that denying the motion for stay, the court suggested that a request for stay pending appeal somehow would be ripe only once a plan had been submitted and approved. *See Coleman/Plata*, 2009 WL 2430820, at *116 (noting possibility of a stay pending appeal once the court issued a final reduction plan); Sept. 3 Stay Order at 3 (Ex. C). That is wrong. The court below already has entered judgment on the issues to be resolved in this appeal. The court's approval of a final plan will not change its construction or application of the PLRA, nor will it alter the requirement that the population be capped at 137.5% of design capacity. Accordingly, the arguments in favor of stay are at least as strong now as they will be later. If anything, the immediate harm to the State in developing a plan based solely on the district court's agenda enhances the need for a stay now.

incarcerated. Cf. *San Diegans for Mt. Soledad Nat'l War Mem'l* v. *Paulson*, 126 S. Ct. 2856, 2857 (2006) (Kennedy, J., in chambers) (holding that "the equities . . . support[ed] preserving the status quo" during an appeal because "[c]ompared to the irreparable harm of altering the memorial and removing the cross, the harm in a brief delay pending the Court of Appeals' expedited consideration of the case seems slight"). Beyond the impossibility of returning to the status quo absent a stay, any release of prisoners poses additional risks of irreparable harm to California's citizenry. See *supra* at 14-15.

The court acknowledged that "there is likely some correlation between incarceration rates and crime rates," and credited plaintiffs' experts who relied on studies showing "that every ten percent increase in the incarceration rate results in a two to four percent decrease in the crime rate . . . and that massive incarceration rates have contributed to a 25% reduction in violent crime across the United States." *Coleman/Plata*, *supra*, at *110. Moreover, the court noted that a recent study, upon which plaintiffs' experts relied, concluded that a 10 percent decrease in the incarceration rate leads to a statistically significant 3.3 percent increase in crime rates, unless evidence-based programming is expanded. See *id.*; Trial Tr. at 2029:15-2032:19 (E.D. Cal./N.D. Cal. Dec. 10, 2008); Defs.' Trial Ex. 1331, at 10, 15; see also *supra* at 15. California citizens who fall victim to any such crimes embody the starkest example of irreparable harm. See *Town of Castle Rock, Colo.* v.

Gonzales, 545 U.S. 748, 787 (2005) (Stevens, J., dissenting) (acknowledging that physical harms may constitute irreparable injuries).[6]

All of these harms are likely, if not certain, and compel a stay here.

IV. EVEN IF THIS WERE A CLOSE CASE, AND IT IS NOT, THE EQUITIES FAVOR A STAY.

The factors relevant to a stay all clearly favor granting such relief. Nonetheless, even if this were a "close case"—which it is not—the equities also heavily weigh in California's favor. See *Rostker*, 448 U.S. at 1308 (in such cases the Court is to consider the "relative harms" and the "interests of the public at large"). Here, as shown above, the existence of irreparable harm to California is irrefutable, and the nature of those harms is significant. Similarly, the interests of the public at large greatly favor a stay. As discussed, the public is likely to be placed at risk of increased crime if the release order takes effect, and other scarce resources will be diverted from the public as a whole and toward the CDCR if the order remains unstayed.

In contrast, the harm plaintiffs-appellees would sustain from a stay is minimal, or non-existent. As the three-judge court acknowledged, even if the prison release order were fully executed two years from now, it would be unlikely to remedy the constitutional deprivations about which plaintiffs complain. See *Coleman/Plata*, *supra*, at *70, 58. The immediate benefit of the order to the plaintiff classes is therefore even more tenuous; the real beneficiaries will be

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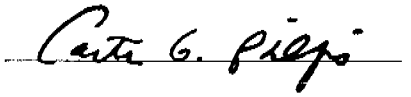
[6] Additionally, because state resources will need to be diverted to provide social services to the newly released prisoners, it is likely that essential services to other California citizens will be reduced. In the event of reversal, there will be no way to remedy those harms that occur in the interim.

inmates—including those not in the *Coleman* or *Plata* classes—who are or should be lawfully imprisoned but who will not be incarcerated. Furthermore, the State is committed to having the merits determined as soon as the Court's calendar will permit and intends to file its Jurisdictional Statement no later than 30 days from this Court's order or sooner if the Court prefers. The State anticipates that, at the very latest, this appeal would be resolved by the end of the October 2009 Term and is willing to comply with any briefing and argument schedule the Court adopts to accomplish a speedy resolution of this extraordinarily important appeal. Thus, delaying implementation of the prison release order by, at most, nine months would be a minor harm, particularly given the pending single-judge district court proceedings that are continuing to provide remedies to the actual members of the plaintiff classes in *Coleman* and *Plata*. Accordingly, the equities strongly favors staying the three-judge court's order. See *San Diegans for Mt. Soledad Nat'l War Mem'l*, 126 S. Ct. at 2857 (stay entered where delay pending appeal would impose only "slight" harm); *Legalization Assistance Project*, 510 U.S. at 1305-06.

CONCLUSION

For the foregoing reasons, the three-judge court's injunctive order should be stayed pending final disposition of this appeal.

Respectfully submitted,



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September 4, 2009

CERTIFICATE OF SERVICE

No. 09-

Governor Arnold Schwarzenegger, et al.,

Appellants,

v.

Marciano Plata and Ralph Coleman, et al.,

Appellees.

I, Carter G. Phillips, do hereby certify that, on this fourth day of September, 2009, I caused two copies of the Appellants' Application For A Stay Pending This Court's Final Disposition Of Appeal Pursuant To 28 U.S.C. § 1253 in the foregoing case to be served by first class mail, postage prepaid, on the following parties:

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