No. 09-416

DEC 2 2 2009

IN THE

Supreme Court of the United States

GOVERNOR ARNOLD SCHWARZENEGGER, *et al.*,
Appellants,

v.

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

Appeal from the United States District Courts for the Eastern District of California and the Northern District of California

BRIEF OPPOSING JOINT MOTION TO DISMISS OR AFFIRM

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BRIEF OPPOSING JOINT MOTION TO DISMISS OR AFFIRM

The State's jurisdictional statement showed that probable jurisdiction should be noted because this appeal was properly taken from a three-judge court order granting injunctive relief under the Prison Litigation Reform Act ("PLRA"), and should be heard in full because the first-ever contested "prisoner release order" under the PLRA raises substantial legal issues. That order imposes a hard population cap on California's overall prison population, requiring a reduction by tens of thousands of inmates within two years.

Appellees contend that this Court lacks jurisdiction over this appeal because there is no "prisoner release order." Mot. 8-10. The lower court's own descriptions of its order belie that assertion: "[W]e order defendants to reduce the prisoner population to 137.5% of the adult institutions' total design capacity." J.S. App. 169a; see 18 U.S.C. § 3626(g)(4). Moreover, a "prisoner release order" is not essential to jurisdiction. Rather, this Court has jurisdiction over an appeal from any three-judge court order imposing injunctive relief, which the order below does.

Appellees' alternative request for summary affirmance should be denied. Mot. 10-37. This litigation is of profound importance. See J.S. 11-13, 32-34; Mot. 1, 13, 36. The very fact that the order on appeal will require California to reduce its prison population by nearly one third is reason enough for plenary review. Add to that the damage to core principles of federalism and separation of powers embodied in a federal court order that undermines a state executive branch's ability to operate its correctional facilities and the legislature's authority

to order its budget priorities and the suggestion of summary affirmance is incredible. Notwithstanding appellees' suggestions that this case should be summarily affirmed because it is assertedly fact-bound, it implicates important questions of statutory construction. At the end of the day, Congress placed appellate review directly in this Court for precisely a case like this one. Probable jurisdiction should be noted, and the motion to summarily affirm should be denied.

I. THIS COURT HAS JURISDICTION.

Appellees move to dismiss the appeal as premature. Mot. 8-10, 29-32. It is not. This Court's mandatory appellate jurisdiction has attached, the questions presented are ripe, and appellees' prudential concerns are unavailing.

1. Appellees' principal argument is that the order under review "is not a prisoner release order." *Id.* at 8. That would surprise the court that issued it. The three-judge court's own characterizations make clear that the order falls within the definition of a "prisoner release order." 18 U.S.C. § 3626(g)(4) ("any order ... that has the purpose or the effect of reducing or limiting the prison population"); see J.S. App. 169a ("[W]e order defendants to reduce the prisoner population to 137.5% of the adult institutions' total design capacity."); *id.* at 162a (the "prisoner release order set forth below"); *id.* at 253a ("the population cap we order here"); *id.* at 12a (the "order requir[es] ... a population cap"). None of the further proceedings contemplated by the three-judge court will reconsider the "order ... to reduce the prisoner population." *Id.* at 169a.

Furthermore, even if the order were not a "prisoner release order," appellees concede (Mot. 30) that this

Court has jurisdiction over *any* order "granting ... an interlocutory or permanent injunction in any civil action." 28 U.S.C. § 1253. The order imposed mandatory injunctive relief by "requir[ing] the State to develop [and submit] a plan for reducing the prison population." Mot. 8; see J.S. App. 255a-256a. Because the State was "hardly ... free to decline to prepare [and develop the plan]," the order's "coercive ... effect[s]" bring it within § 1253. *Aberdeen & Rockfish R.R.* v. *S.C.R.A.P.*, 422 U.S. 289, 307-08 (1975); cf. *United States* v. *Alabama*, 828 F.2d 1532, 1536-37 (11th Cir. 1987) (per curiam) (28 U.S.C. § 1291 jurisdiction existed despite lack of final remedial plan, because order under review was "specific[], detail[ed], and comprehensive[]" and resolved the issues on appeal); *Frederick L.* v. *Thomas*, 557 F.2d 373, 380-81 (3d Cir. 1977) (same, because submission of plan would "not clarify the questions on appeal"). Indeed, appellees argued below that the State's alleged violation of the injunctive requirements warranted civil contempt sanctions and *the appointment of a criminal prosecutor*. Pls.' Resp. at 8, 14-15, No. C01-1351-TEH (filed N.D. Cal. Oct. 8, 2009) (Docket No. 2256); see also Mot. 8-9.

Finally, although appellees raise the specter of "piece-meal appellate review" and "splinter[ed] appellate proceedings," Mot. 9, they cannot identify a single issue pending before the three-judge court that might hinder meaningful review of the questions presented here or lead to reexamination of the population cap below. There are none. No further proceedings will be had on whether: (1) the three-judge court was properly convened, (2) "'crowding'" was the "'primary cause of the violation of a Federal right,'" or (3) the 137.5% cap satisfied the PLRA's

nexus and narrow tailoring requirements. J.S. i. Although appellees vaguely suggest that the three-judge court's consideration of their comments on the State's population reduction plan might be relevant to this appeal, they fail to mention that they asserted below that the State's court-ordered proposal satisfied the requirements of the court's order. Pls.' Resp. Population Reduction Plan at 1, No. C01-1351-TEH (filed N.D. Cal. Dec. 7, 2008) (Docket No. 2280). There is simply nothing more that must be done to prepare this case for this Court's review.

Therefore, consistent with the purposes of 28 U.S.C. § 1253, the present posture of the case ensures that review of the questions presented will: be meaningful; "accelerat[e] a final determination on the merits"; and minimize the potential for "disruption of state ... regulatory programs caused by the outstanding injunction." *Swift & Co.* v. *Wickham*, 382 U.S. 111, 119-20 (1965).

2. Additionally, appellees assert that this Court lacks jurisdiction to consider whether the three-judge court was properly convened and thus had jurisdiction to issue the prisoner release order, and that the State instead can raise this issue only by appeal to the Ninth Circuit and then *certiorari*. Mot. 29-32. This argument is meritless. Whether the single-judge courts erred in holding that a three-judge court could be convened not only is intertwined with whether the three-judge court could grant a prisoner release order, it is logically anterior and thus properly presented. *Gross* v. *FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2348 n.1 (2009); see *Missouri* v. *Jenkins*, 515 U.S. 70, 84 (1995) ("permissible scope of the District Court's remedial authority" was anterior). One of the PLRA's purposes is to ensure that no prisoner release order will issue unless the

requirements for convening a three-judge court are met, and it would defeat that purpose if this Court's review of such an order could not even examine whether those statutory prerequisites are satisfied.[1] Indeed, appellees' interpretation encourages precisely the "piece-meal" review about which they otherwise claim concern.

Moreover, appellees' argument directly conflicts with the position that they took before the Ninth Circuit when the State, in fact, immediately appealed the single-judge courts' orders empanelling the three-judge court. See J.S. 7 n.2 (noting dismissal of appeals). Appellees argued that the orders were not appealable because they "d[id] not resolve a 'collateral' matter separate from the merits of the action," but instead "[we]re *'directly intertwined' with the ultimate claims* in the cases." Mot. Dismiss at 14, No. 07-16361 (filed 9th Cir. Aug. 19, 2007) (emphasis added). Appellees also asked the Ninth Circuit to dismiss the appeals because "the Orders will be fully reviewable if and when the three-judge court were to *issue relief such as an injunction or a prisoner release order*." *Id.* (emphasis added). Appellees should not

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[1] This holds regardless of whether the PLRA's requirements for convening a three-judge district court are "procedural" or "jurisdictional." Mot. 29-30; *cf.* Vickie C. Jackson, *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy*, 86 Geo. L. J. 2445, 2445 & n.1, 2447 & n.11, 2450 n.26 (1998) (suggesting that prerequisites to convening three-judge court are jurisdictional); 18 U.S.C. § 3626(a)(3)(C)-(D) (provisions governing convening three-judge courts incorporate subparagraph (A), which is directed at courts); *Lindh* v. *Murphy*, 521 U.S. 320, 344 (1997) (Rehnquist, C.J., dissenting) ("[T]he most salient characteristic of jurisdictional statutes [is that their] commands are addressed to courts rather than to individuals.").

be permitted to disavow these positions now. See *Coleman* v. *Schwarzenegger*, No. 07-16361, 2007 WL 2669591 (9th Cir. Sept. 11, 2007) (per curiam) (adopting appellees' position); *New Hampshire* v. *Maine*, 532 U.S. 742, 749-51 (2001) (discussing judicial estoppel).

Appellees' motion to dismiss should be denied.

II. THE MOTION FOR SUMMARY AFFIRMANCE SHOULD BE DENIED.

1. In arguing against full review, appellees suggest that summary affirmance would have "no significant impact" on PLRA litigation because this Court "'gives less deference to [its] summary dispositions.'" Mot. 36. But this misses the point.

Relevant here is the sway that affirmance of this unprecedented release order would have over the *lower courts*. J.S. 11-12, 34 (discussing, *inter alia*, *Hicks* v. *Miranda*, 422 U.S. 332, 344-45 (1975)). On that point, appellees offer no response. A summary affirmance would give the three-judge district court's decision enormous influence. See *Hicks*, *supra*; *United States* v. *Blaine County, Mont.*, 363 F.3d 897, 904 (9th Cir. 2004) (rejecting argument that this Court's summary affirmance of three-judge district court did not bind the Ninth Circuit). For the first time, a court ordered prisoner release over an objection under the PLRA, and that extraordinary order will impact tens of thousands of prisoners. Summary affirmance here would be relied upon as authority for courts presiding over PLRA cases to short-circuit a defendant's ongoing efforts to implement the plans of a special master or receiver and to adopt the misguided approach the court below employed in capping the State's prison population at 137.5% of design capacity.

2. Appellants also urge summary affirmance on each individual question presented, contending that the answers to each question are too fact-bound to warrant this Court's attention. That is wrong. The trial record's length does not diminish the substantiality of the legal questions presented. But even if the issues were inherently limited in their impact to the parties here, that would be no reason for the Court to abdicate its duty to perform its exclusive appellate function that Congress has assigned to it.

a. The first question presented turns on the appropriate interpretation of § 3626(a)(3)(A)'s requirement that a defendant have "had a reasonable amount of time to comply with the previous court orders." The court below was the first to apply the requirement and to find a three-judge court properly convened over a party's objection. Appellees make much of the many remedial orders issued by the single-judge courts throughout the litigation. Mot. 32-35. Yet, they effectively ignore the legal issues presented regarding the contours of the "reasonable amount of time requirement." See J.S. 14-18. Important questions surround whether a three-judge court is properly convened under the PLRA *whenever* a single-judge district court can point to some past period during which the defendant did not comply with court orders. The issue is particularly acute in this case where, as one district court itself acknowledged, "'commendable'" progress subsequently has been made (even though the underlying violations of federal law have not been completely remedied). J.S. App. 294a, *quoted in* J.S. 17.[2] These

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[2] The State's positions here and in the Ninth Circuit are consistent. *Contra* Mot. 35-36. In the Ninth Circuit, the State has preserved claims that the PLRA does not authorize

are substantial questions that are fundamental to Congress's intent to ensure that prisoner release orders are remedies of "last resort."

b. The jurisdictional statement showed that the second question is substantial because no other court has ever interpreted the PLRA's "primary cause" requirement, and Congress offered little guidance. J.S. 18-19; see generally *Walling* v. *A.H. Belo Corp.*, 316 U.S. 624, 631 (1942) (interpretation of statutory term is a "question of law"). Appellees' argument that summary affirmance would be appropriate because the court below adopted and correctly applied the State's definition is misleading, compare Mot. 18, with J.S. App. 268a ("[a]ccepting, *arguendo*, Defendants' definition of 'primary'"), and wrong. The State always has contended that "primary cause" cannot be divorced from the command that "prisoner release" must "*remedy* the violation of the Federal right." 18 U.S.C. § 3626(a)(3)(E)(ii) (emphasis added); see J.S. 21-23; Defs.' Mem. Supp. Mot. Dismiss at 17-18, No. C01-1351-TEH (filed N.D. Cal. Sept. 15, 2008) (Docket No. 1479).[3] But the court below conceded that relief directed at crowding would

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receiverships. *See id.* at 35. No matter how that issue is resolved, the State's position is that *any* remedial measures (whether imposed by a single-judge court acting alone, or in concert with a special master or receiver) must satisfy § 3626(a)(3)(A)(ii)'s "reasonable amount of time" requirement.

[3] Appellees' suggestion (Mot. 18) that the State forfeited this statutory construction issue is baseless. *See Harris Trust & Sav. Bank* v. *Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 n.2 (2000) ("'a party can make any argument in support of [a federal] claim; parties are not limited to the precise arguments they made below'"); *U.S. Nat'l Bank* v. *Indep. Ins. Agents*, 508 U.S. 439, 446 (1993) ("'[T]he court ... retains the independent power to identify and apply the proper construction of governing law[.]'").

not remedy the violation, J.S. App. 134a, 143a, and appellees still offer no response on this point.

Furthermore, appellees fail to meet even the proposed legal standard for which they advocate. See Mot. 19-20. Appellees' argument that the "primary cause" requirement was satisfied because the order was "*necessary* but not *sufficient* to remedy the violation," *id.* at 20, cannot be reconciled with their expert's concession that the alleged violations could be remedied *without addressing overcrowding*. J.S. 23. In short, the population cap is neither necessary *nor* sufficient.

Additionally, the State's showings on this point were significantly hindered by its inability to collect and introduce evidence regarding changed circumstances. *Contra* Mot. 20-23. For instance, although the Receiver and the Special Master had suggested that other reforms were more important to remedying the alleged violations and progress was being made along those lines, see, *e.g.*, J.S. 16-17, 22 & n.6; Intervenors' J.S. 9-10, the court prohibited the State from obtaining discovery from them or calling them to testify at trial. Having deprived the State of important evidence from the Receiver and the Special Master about the ongoing reforms and the current state of the alleged violations, any findings regarding "primary cause" and nexus (see *infra*) are suspect. See generally *Coleman/Plata*, No. C01-1351-TEH, slip op. at 21:22-25 (N.D. Cal. Aug. 4, 2009) (Docket No. 2197) (recognizing the Receiver's progress); Special Master Report at 6-7, 355-56, No. CIV-S-90-0520 (E.D. Cal. filed Sept. 12, 2008) (Docket No. 3029) (discussing improvements).

c. The third question falls within the heart of this Court's jurisprudence on prison conditions, see, *e.g.*, *Lewis* v. *Casey*, 518 U.S. 343, 357-63 (1996); *id.* at

385-92 (Thomas, J., concurring), and the limitations on equitable remedies for unconstitutional conditions, see *id.* at 359-63; *Jenkins,* 515 U.S. at 98. The court below admitted that it was using a systemwide remedy to address alleged violations affecting only a subset of the prison population. J.S. App. 172a; *contra Jenkins, supra*; *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 420 (1977) ("[O]nly if there has been a systemwide impact may there be a systemwide remedy."). And it imposed a hard population cap based on an interest in improving the prisons' efficiency and functionality, not the underlying alleged constitutional violations. See J.S. 29-30. Nonetheless, appellees suggest that summary affirmance would be appropriate because the State has "flexibility" in implementing systemwide relief. Mot. 24.

This is no answer. The order is not "flexible." It imposes a hard cap of 137.5% of design capacity on the State's entire prison population under a time frame the State does not control. The State's ability to tinker at the margins with how the cap will be imposed does not make the order comparable to those in the cases relied upon by appellees. Compare *Bounds* v. *Smith*, 430 U.S. 817, 818-19, 821-22 (1977) (injunction merely required state to "'devis[e] a Constitutionally sound program' to assure inmates access to the courts," a constitutional right enjoyed by *all* prisoners).

Appellees also argue that the systemwide 137.5% cap can be summarily affirmed because the State failed to show what alternative cap should apply. Mot. 25-26. They cite no authority, however, for the novel proposition that the non-movant must demonstrate how narrow any injunctive relief must be. To the contrary, because "the scope of injunctive

relief is dictated by the extent of the violation established," the burden falls upon the movant. *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979); see *Milliken* v. *Bradley*, 418 U.S. 717, 744-45 (1974) (reversing interdistrict injunction because plaintiffs made a deficient record on scope).

Moreover, the State *does* contend that either the 137.5% or 130% figures would provide the "*wrong* cap." *Contra* Mot. 25. *Neither* number was sufficiently tied to the complained-of *constitutional violations* rather than a nebulous desire that the prisons "'function properly.'" See J.S. 29-31; see also J.S. App. 179a-181a (discussing 130% cap as the "federal standard[] for prison overcrowding"). And the court's misinterpretation of § 3626(a)(3)(E)(ii)'s "primary cause" and "remedy" requirements illustrates why either number would be "wrong." *Supra* at 8-9. Any analysis of whether the relief ordered satisfies the nexus and narrow tailoring requirements is misguided if that relief will not remedy the underlying alleged violation.

Finally, the limitations on the State's ability to gather and present evidence on changed conditions undermines the nexus holding. Contrary to appellees' suggestion that current conditions are irrelevant because the State has not moved to terminate proceedings, Mot. 20, any improvement in conditions would necessarily alter the nexus analysis. Assuming *arguendo* that overcrowding is the primary cause of the remaining violations and that *some* population cap is required to remedy them, the cap's size must be tied to the outstanding violations. At a minimum, the issue deserves plenary consideration.

CONCLUSION

The Court should note probable jurisdiction and deny appellees' motion for summary affirmance.

Respectfully submitted,

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