No. 09-____

IN THE 09-553 NOV 2 - 2009

Supreme Court of the United States

CALIFORNIA STATE REPUBLICAN LEGISLATOR INTERVENORS, *et al.*,
Appellants,

v.

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

On Appeal from an Order of the Three-Judge Court in the United States District Courts for the Northern District of California and the Eastern District of California

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the three-judge court properly determined that crowding was the statutory primary cause of continuing violation of prisoners' constitutional rights, and that no remedy existed other than a prisoner release order pursuant to the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626 where the court simply assumed the continuing existence of violations based on determinations made years prior, refused to hear evidence regarding current prison conditions at the time of trial and disregarded evidence that constitutional levels of care could be achieved at the current prison population level.

2. Whether the system-wide prisoner release order ("Prisoner Release Order") issued by the three-judge court "is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right" in compliance with the PLRA, 18 U.S.C. § 3826(a)(1)(A).

3. Whether the three-judge court properly gave "substantial weight to any adverse impact on public safety or the operation of a criminal justice system" in ordering a reduction of approximately 46,000 inmates within two years in light of the existing seventy percent recidivism rate for inmates in California and the lack of any mechanism in the Prisoner Release Order to mitigate the effect of the ordered release.

PARTIES TO THE PROCEEDING

The California State Republican Senator and Assembly Intervenors (collectively the "Legislator Intervenors") appealing the Three-Judge Court's August 4, 2009 Opinion and Order include the following California State Senators: Senators Samuel Aanestad, Roy Ashburn, James F. Battin, Jr., John J. Benoit, Dave Cogdill, Robert Dutton, Dennis Hollingsworth, Bob Huff, Abel Maldonado, George Runner, Tony Strickland, Mimi Walters and Mark Wyland; and the following California Assembly-members: Michael N. Villines, Anthony Adams, Joel Anderson, Tom Berryhill, Sam Blakeslee, Paul Cook, Chuck DeVore, Michael D. Duvall, Bill Emmerson, Jean Fuller, Ted Gaines, Martin Garrick, Shirley Horton, Guy S. Houston, Kevin Jeffries, Rick Keene, Doug La Malfa, Bill Maze, Roger Niello, Sharon Runner, Jim Silva, Cameron Smyth, Todd Spitzer, Audra Strickland, and Van Tran.

The District Attorney intervenors appealing the Three-Judge Court's August 4, 2009 Opinion and Order include the following: Rod Pacheco, District Attorney County of Riverside, Bonnie M. Dumanis, District Attorney County of San Diego, Tony Rackauckas, District Attorney County of Orange, Jan Scully, District Attorney County of Sacramento, Christie Stanley, District Attorney County of Santa Barbara, Michael A. Ramos, District Attorney County of San Bernardino, Robert J. Kochly, District Attorney County of Contra Costa, David W. Paulson, District Attorney County of Solano, Gregg Cohen, District Attorney County of Tehama, Todd Riebe, District Attorney County of Amador, Bradford R. Fenocchio, District Attorney County of Placer, John R. Poyner, District Attorney County of Colusa,

Michael Ramsey, District Attorney County of Butte, Gerald T. Shea, District Attorney County San Luis Obispo, Edward R. Jagels, District Attorney County of Kern, Gregory Totten, District Attorney County of Ventura, Vern Pierson, District Attorney County of El Dorado, Clifford Newell, District Attorney County of Nevada, Ronald L. Calhoun, District Attorney County of Kings, and Donald Segerstrom, District Attorney County of Tuolumne.

The Sheriff, Police Chief, Probation Chief and Corrections Intervenors appealing the Three-Judge Court's August 4, 2009 Opinion and Order include the following: Amador County Sheriff-Coroner Martin Ryan, Butte County Sheriff Perry Reniff, Calaveras County Sheriff Dennis Downum, El Dorado County Sheriff Jeff Neves, Fresno County Sheriff Margaret Mims, Glenn County Sheriff Larry Jones, Inyo County Sheriff William Lutze, Kern County Sheriff Donny Youngblood, Lassen County Sheriff Steve Warren, Los Angeles County Sheriff Lee Baca, Merced County Sheriff Mark Pazin, Mono County Sheriff Rick Scholl, Monterey County Sheriff Mike Kanalakis, Orange County Sheriff-Coroner Sandra Hutchens, Placer County Sheriff Edward Bonner, San Benito County Sheriff-Coroner Curtis Hill, San Diego County Sheriff William Gore, San Joaquin County Sheriff-Coroner Steve Moore, San Luis Obispo County Sheriff Pat Hedges, Santa Barbara County Sheriff Bill Brown, Santa Clara County Sheriff Laurie Smith, Solano County Sheriff-Coroner Gary Stanton, Stanislaus County Sheriff-Coroner Adam Christianson, Sutter County Sheriff-Coroner J. Paul Parker, Tehama County Sheriff Clay Parker, Tuolumne County Sheriff-Coroner James Mele, Ventura County Sheriff Bob Brooks, Yolo County Sheriff Ed Prieto, Yuba County Sheriff Steve

Durfor, 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 Michael Harden, City of Pasadena Police Chief Bernard Melekian, City of Paso Robles Police Chief Lisa Solomon, City of Roseville Police Chief Michael Blair, Contra Costa County Chief Probation Officer Lionel Chatman, Fresno County Chief Probation Officer Linda Penner, Mariposa County Chief Probation Officer Gail Neal, Sacramento County Chief Probation Officer Don Meyer, San Luis Obispo Chief Probation Officer Jim Salio, Solano County Chief Probation Officer Isabelle Voit, Stanislaus County Chief Probation Officer Jerry Powers, and Ventura County Chief Probation Officer Karen Staples.

Plaintiffs Below:

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

District Court Defendants, and Appellants in Related Proceeding, Case No. 09-A234:

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

Other Intervenor-Defendants Below:

County of San Mateo
County of Santa Barbara
County of Santa Clara
County of Solano
County of Sonoma

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On Appeal from an Order of the Three-Judge Court in the United States District Courts for the Northern District of California and the Eastern District of California

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion from the three-judge court's August 4, 2009 Opinion and Order (Docket No. 2197 in C 01-1351 TEH; Docket No. 3641 in S-90-0520-LKK-JFM P) is not yet reported in an official publication. It may be found at 2009 WL 2430820 (E.D. Cal/N.D. Cal. Aug. 4, 2009). It is reprinted in the Appendix at 1a-256a.[1]

[1] Citations to the "Appendix," or "App." in abbreviated format, refer to citations to the appellants' appendix to their jurisdictional statement filed with this Court on October 5, 2009, in

JURISDICTION

The three-judge court's Order and Opinion was entered on August 4, 2009. App. 1a-256a. It granted injunctive relief pursuant to the Prison Litigation Reform Act, 18 U.S.C. § 3626. The California State Republican Legislator Intervenors, the District Attorney Intervenors, and the Sheriff, Police Chief, Probation Chief, and Corrections Intervenors filed their notices of appeal on September 3, 2009. Int. App. 1a-5a. The jurisdiction of this Court rests on 28 U.S.C. § 1253, providing for a direct appeal from decisions of three-judge courts.

STATUTORY PROVISIONS INVOLVED IN THE CASE

This appeal concerns interpretation and application of the Prison Litigation Reform Act, 18 U.S.C. § 3626. The relevant provisions are reproduced at App. 356a-358a.

STATEMENT OF THE CASE

The plaintiffs in the class action lawsuits *Plata v. Schwarzenegger*, involving claims of constitutionally inadequate provision of medical care in California state prisons, and *Coleman v. Schwarzenegger*, involving claims of constitutionally inadequate provision of mental health care in California state prisons, moved to convene a three-judge court to consider the issuance of a prisoner release order pursuant to the Prison Litigation Reform Act, 18

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the related matter *Governor Arnold Schwarzenegger, et al. v. Marciano Plata and Ralph Coleman, et al.*, Case No. 09-416. Citations to the appendix attached to the present jurisdictional statement will be noted as the "Intervenors' Appendix" or "Int. App." in abbreviated format.

U.S.C. § 3626 ("PLRA"). The courts had previously determined that the then California Department of Corrections and Rehabilitation ("CDCR") did not provide prison inmates with constitutionally adequate medical and mental health care, respectively. To remedy these constitutional violations, the *Coleman* court appointed a special master ("Special Master") to oversee development and implementation of a plan to remedy the unconstitutional provision of mental health care, App. 36a, and in early 2006, the *Plata* court appointed a receiver ("Receiver") to take control of all aspects of the CDCR relating to the provision of medical care and to bring the CDCR into constitutional compliance. App. 29a-30a. District Court Judges Henderson and Karlton granted the respective plaintiffs' motions to convene a three judge court on July 23, 2007. *See* App. 62a-69a, *see also* App. 273a-287a, 288a-304a. Then Chief Judge Mary M. Schroeder of the United States Court of Appeals for the Ninth Circuit appointed Judge Stephen Reinhardt, Judge Karlton, and Judge Henderson to the panel. *See id.*

Shortly after the appointment of the three-judge court, Appellants moved to intervene as of right in the proceedings, which motions the three-judge court granted. *See* App. 69a.

To issue a prisoner release order pursuant to the PLRA, a properly convened[2] three-judge court must

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[2] A plaintiff must establish two prerequisites to properly convene a three-judge court pursuant to the PLRA. First, a district court must have entered an order for less intrusive relief, which relief failed to remedy the violation of the federal right sought to be remedied through the prisoner release order. Second, the defendant must have had a reasonable amount of time to comply with previous court orders. 18 U.S.C.

find "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." 18 U.S.C. § 3626(a)(3)(E).

The PLRA further mandates that prospective relief may be afforded only when it is "narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A). In fashioning the relief, the three-judge court must "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system cause by the relief." *Id.* Implicit in the directive that relief be narrowly tailored and weighed against potential adverse effects is the underlying recognition of the existence of present and ongoing constitutional violations, and that relief beyond what is required unnecessarily impacts public safety and the criminal justice system.

Trial commenced on November 18, 2008, with final oral argument concluding on February 3 and 4, 2009. The three-judge court determined, in an opinion and order dated August 4, 2009, that overcrowding was the primary cause of the constitutionally inadequate provision of medical and mental health care and that

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§ 3626(a)(3)(A). Defendants in the three-judge court proceedings challenge the propriety of the three-judge court's jurisdiction on the grounds that plaintiffs did not establish these two essential requirements (*see generally* Jurisdictional Statement, *Governor Arnold Schwarzenegger, et al. v. Marciano Plata and Ralph Coleman, et al.*, Case No. 09-416), and Appellants reserve the right to comment on this challenge should the appellate proceedings be consolidated.

no other relief could remedy the violations. *See* App. 78a-165a. Accordingly, the three-judge court issued the relief requested by the plaintiffs, namely, a prisoner release order (the "Prisoner Release Order").

The Prisoner Release Order issued by the three-judge court requires a population reduction of approximately 46,000 inmates in the California prison system, or a "population cap" of 137.5% of the correctional system's "design capacity," within two years. In doing so, the three-judge court concluded that the order was narrowly drawn, extended no further than necessary, was the least intrusive means to remedy the constitutional violations and that "substantial weight" had been given to any adverse impact on public safety or the operation of California's criminal justice system caused by the relief ordered. *See* App. 185a-255a.

The issuance of such an extreme and unprecedented prisoner release order gravely threatens public safety in California. Worse still, the mass release order may be entirely unnecessary for two independent reasons. First, the three-judge court simply assumed that constitutional violations indentified years prior to issuance of the Prisoner Release Order continued unabated, and refused to permit evidence at trial to the contrary. Second, even if such violations did exist at the time of trial, no release order was necessary in light of the public statements of the court-appointed Receiver and the testimony of plaintiffs' own expert, that constitutional levels of care could be achieved at the current population level. In sum, this Prisoner Release Order is exactly the type of overreaching and overbroad remedy that Congress sought to curtail when it enacted the PLRA.

This Court recognized well in advance of the PLRA that federal courts are ill-equipped to entangle themselves in the operation of state prison systems. Management of state prisons is "peculiarly within the province of the legislative and executive branches of government. . . ." *Procunier v. Martinez*, 416 U.S. 396, 405 (1974), overruled on other grounds by *Thornburgh v. Abbott*, 490 U.S. 401 (1989). "[C]ourts are ill equipped to deal with the increasingly urgent problems of the prison administration and reform." *Id.*; *see also Lewis v. Casey*, 518 U.S. 343, 364 (1996) (Thomas, J., concurring) ("too frequently, federal district courts in the name of the Constitution effect wholesale takeovers of state correctional facilities and run them by judicial decree.").

Congress agreed and enacted the PLRA to further restrain judicial interference with the management of state prisons. "When Congress enacted the PLRA, it sought to oust the federal judiciary from day-to-day prison management." *Taylor v. United States*, 181 F.3d 1017, 1027 (9th Cir. 1999) (*en banc*) (Wardlaw, J., dissenting); *see also Woodford v. Ngo*, 548 U.S. 81, 93 (2006) ("The PLRA attempts to eliminate unwarranted federal-court interference with the administration of prisons. . . ."); *Miller v. French*, 530 U.S. 327, 347 (2000) ("The PLRA has restricted courts' authority to issue and enforce prospective relief concerning prison conditions. . . ."). Congress was particularly skeptical and demanded higher scrutiny of population caps and prisoner release orders such as the one ordered by the three-judge court below. *See Castillo v. Cameron County*, Tex., 238 F.3d 339, 348 (5th Cir. 2001) (noting that the legislative history of the PLRA reveals Congress' apprehension regarding population caps); *Gilmore v. California*, 220 F.3d 987, 998 & n.14 (9th Cir. 2000) (same); 141 Cong.

Rec. S14408-01, S14414 (daily ed. Sept. 27, 1995) (statement of Sen. Dole) ("Perhaps the most pernicious form of judicial micromanagement is the so-called prison population cap."); 141 Cong. Rec. S2648-02, S2649 (daily ed. Feb. 14, 1995) (statement of Sen. Huchinson) ("This bill will curb the ability of Federal Courts to take over the policy decisions of State prisons. . . .")

This appeal presents substantial questions regarding when a federal court has the authority to issue a prisoner release order and what the proper scope of any such order should be. The Prisoner Release Order issued below is the first such order made over a defendant's objection since enactment of the PLRA. The unprecedented nature and extraordinary scope of the order, as well as the public importance of settling disputes regarding the interpretation and the application of the PLRA, make it particularly appropriate for this Court to note probable jurisdiction.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This appeal will determine whether the California prison population will be reduced by the release or non-incarceration of tens of thousands of duly arrested, convicted and sentenced criminals, and what impact such an order would have on millions of law-abiding California residents. The appellant intervenor-defendants—police chiefs, sheriffs, probation officers, district attorneys and legislators from across California—joined this litigation for the express purpose of opposing such a system-wide "prisoner release order" and protecting public safety.

Together, the Appellants represent millions of California citizens. On behalf of those citizens, and the

millions more Americans who will be placed at risk of unnecessary and overbroad prisoner release orders if the order of the three-judge court below gains precedential value, we urge this Court to note probable jurisdiction for the following reasons:

I. THE PRISONER RELEASE ORDER SHOULD NOT HAVE BEEN ISSUED BECAUSE THERE WAS NO SHOWING THAT PAST VIOLATIONS WERE CURRENT AND ONGOING AND BECAUSE ALTERNATIVE REMEDIES EXISTED.

Under the PLRA, a three-judge court "shall enter a prisoner release order only if the court finds 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." 18 U.S.C. § 3626(a)(3)(E). For the following reasons, the Prisoner Release Order issued below fails to satisfy either requirement.

The PLRA is written in the present tense and permits issuance of prospective prisoner release orders only to correct current and ongoing violations of federal rights, not to provide a remedy to plaintiffs to compensate them for past wrongs. Notwithstanding this fact, the three-judge court precluded the introduction of evidence and argument on the issue of whether past violations were "current and ongoing" at the time of the trial. App. 78a n.42; *see also* App. 77a. Instead of determining whether any current violations existed, the three-judge court's analysis focused only on "whether . . . requiring a reduction in the population of California's prisons was necessary to remedy the previously identified constitutional violations[.]" App. 77a.

As a result, by the time the Prisoner Release Order issued on August 4, 2009, no determination had been made regarding alleged violations since July 2007. App. 77a. Indeed, neither the *Coleman* nor the *Plata* single-judge courts had held evidentiary hearings regarding the state of the prisons and ongoing violations since September 13, 1995 (*Coleman*) and June 9, 2005 (*Plata*). *See* App. 23a, 33a. Had the three-judge court permitted such evidence and argument at trial, the appellant intervenor-defendants, as well as the State defendants, would have provided compelling evidence regarding massive increases in spending and the allocation of resources, resulting in substantial overall improvements in care. *See, e.g.*, Pre-Trial Hr'g Tr. at 28:16-29:2 (E.D. Cal./N.D. Cal. Nov. 10, 2008) (*Coleman* Docket No. 3541.1; *Plata* Docket No. 1786); Trial Tr. at 6:24-7:9, 57:11-58:13 (E.D. Cal./N.D. Cal. Nov. 18, 2008) (*Coleman* Docket No. 3541.2; *Plata* Docket No. 1829). At a minimum, an understanding of the current nature of any constitutional violations should have affected the three-judge court's determination as to the scope of the order and the depth of the intrusion into state affairs the court deemed necessary. Reliance on stale evidence to craft prospective remedial relief as drastic as the Prisoner Release Order here, ignores the intent of the PLRA and, as discussed below, the statutory and common law mandate that the relief afforded only go as far as necessary.

Second, and equally important, the three-judge court ignored evidence from its own court-appointed Receiver and Special Master, as well as plaintiffs' expert that a prisoner release order was not necessary to achieve and maintain constitutional levels of care. Specifically, the *Plata* Receiver stated that under his control, the California prison systems could

provide constitutional levels of care regardless of population. He stated in a public address that "I'm just not seeing difficulty in providing medical services no matter what the population is." Trial Declaration of Assemblymember Todd Spitzer, ¶ 28 and Exhibit D thereto, at 30:00 minutes (E.D. Cal./N.D. Cal. Oct. 30, 2008) (*Coleman* Docket No. 3173; Plata Docket No. 1656). The Receiver continued, stating "we believe we can provide constitutional levels of care no matter what the population is." *Id.* at 31:20 minutes. Similarly, the *Coleman* Special Master acknowledged that "even the release of 100,000 inmates would likely leave the defendants with a largely unmitigated need to provide intensive mental health services to program populations that would remain undiminished" and releasing even 50,000 inmates would not bring the staffing resources into compliance. App. 157a-158a. Finally, plaintiffs' expert, Dr. Shansky, testified that California could provide constitutionally adequate care for more than 172,000 inmates if other reforms were implemented. Shansky Dep. at 144:3-14 (Dec. 10, 2007); *see also* Trial Tr. at 491:19-492:08 (E.D. Cal./N.D. Cal. Nov. 21, 2008) (*Coleman* Docket No. 3541.5; *Plata* Docket No. 1840) (Dr. Shansky admits that additional changes beyond those set forth in the Receiver's "Turnaround Plan" (*Plata*, No. C01-1351-TEH (N.D.Cal. June 6, 2008) (Docket No. 1229)) were not needed to bring the CDCR's provision of medical care into compliance, and that the "Turnaround Plan" did not envision a population reduction).

With the passage of the PLRA, Congress intended a prisoner release order be "the remedy of last resort." H.R.Rep. No. 104-21, at 25 (1995). Based on the evidence above, there can be little doubt that the Prisoner Release Order was not the remedy of last resort, and that the three-judge court erred when it

held that no alternative to a prisoner release order existed.[3]

II. THE PRISONER RELEASE ORDER FAILS TO SATISFY THE PLRA'S REQUIREMENT THAT ANY SUCH RELIEF BE BOTH NARROWLY DRAWN AND THE LEAST INTRUSIVE MEANS TO REMEDY VIOLATION OF THE FEDERAL RIGHT.

Under the PLRA, any prisoner release order issued by a three-judge court is valid only if the order "is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3826(a)(1)(A). The Prisoner Release Order here fails in at least four respects.

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[3] Moreover, the three-judge court improperly rejected a number of viable alternatives to a prisoner release order on the grounds that such alternatives were too speculative or would take too long to implement. App. 145a-162a. One such alternative was the possibility of transferring California inmates to out-of-state facilities. App. 159a-161a. The three-judge court rejected the alternative because "we conclude that the transfer of inmates to out-of-state facilities would not on its own begin to provide an adequate remedy for the constitutional deficiencies in the medical and mental health care provided to California inmates." App. 161a. Ironically, the three-judge court then issued the Prisoner Release Order while acknowledging that such an order would not necessarily correct current Constitutional violations, if any. App. 134a, 143a. Although it appears the three-judge court has determined a prison population reduction alone will not remedy any asserted constitutional violation, at minimum, additional out-of-state transfers and transfers to federal custody should have been ordered prior to issuance of a system-wide prisoner release order in order to protect public safety in California.

First, because the three-judge court refused to hear evidence or argument regarding whether constitutional violations continued at the time of trial, the resulting Prisoner Release Order was not narrowly tailored to the correction of then-current violations, if any. This is particularly true because the Prisoner Release Order was issued another six months after trial, more than two years since there had been any determination that conditions in the California prison system violated any Federal right, and many years since the last evidentiary hearings on the existence of constitutional violations. Accordingly, the remedy ordered goes far beyond anything necessary or reasonable in light of the conditions as they currently exist.

Second, the Prisoner Release Order is overbroad because it requires a system-wide reduction in California's inmate population and is not targeted at correcting possible violations of the federal rights of members of the *Coleman* and *Plata* plaintiff classes. Indeed, the three-judge court acknowledges that the Prisoner Release Order, if implemented, "is likely to affect inmates without medical conditions or serious mental illness." App. 172a. Citing with approval plaintiffs' expert Dr. Pablo Stewart, the three-judge court acknowledged that a reduction of the prison population by 50,000 inmates would only affect 10,000 *Coleman* class members. App. 238a-239a. 40,000 inmates, or eighty percent of those to be released, would not have suffered a constitutional violation. "[F]ederal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation." *Missouri v. Jenkins*, 515 U.S. 70, 98 (1995) (citation omitted). The overwhelming majority of those benefitting from the Prisoner

Release Order are not affected by the purported constitutional violations. For these reasons, the Prisoner Release Order violates the requirement of 18 U.S.C. § 3826(a)(1)(A) that any such relief "extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." *See Hines v. Anderson*, 547 F.3d 915, 922 (8th Cir. 2008) (affirming dismissal of an order under the PLRA that was not tailored to the specific violation at issue because it addressed medical conditions generally rather than "a particular medical issue that existed at the time.").

Third, just as the Prisoner Release Order extends to individuals far beyond the plaintiff classes, it also reaches far beyond the medical and mental health issues that were the basis of the underlying action. Under the PLRA, a narrowly-tailored order would focus directly and exclusively on medical and mental health issues such as staffing ratios, equipment and facilities, and record-keeping. Indeed, the decision of the three-judge court to issue a broad prisoner release order, rather than a more targeted order focused directly and exclusively on medical and mental health care, raises the very real possibility that the Prisoner Release Order will not correct the prior violations. *See* App. 143a ("We recognize that other factors contribute to California's failure to provide its inmates with constitutionally adequate medical and mental health care, and that reducing crowding in the prisons will not, without more, completely cure the constitutional violations the *Plata* and *Coleman* courts have sought to remedy."); App. 157a-158a (noting the Special Master's finding that "even the release of 100,000 inmates would likely leave the defendants with a largely unmitigated need to provide intensive mental health services to program

populations that would remain undiminished"); Receiver's Report re: Overcrowding at 42:24-43:1, *Plata*, No. C01-1351-TEH (N.D. Cal. filed May 15, 2007, Docket No. 673), *available at* http:///www.cprinc.org/docs/court/ReceiverReportReOvercrowding451507.pdf ("those who believe that the challenges faced by the Plan of Action are uncomplicated and who think that population controls will solve California's prison health care problems, are simply wrong.").

Finally, the Prisoner Release Order issued by the three-judge court sets a population cap of 137.5% of the correctional system's "design capacity" to be achieved within two years, without providing a justifiable basis for the percentage chosen, improperly using the archaic and misleading measure of "design capacity" rather than "operational capacity," over an arbitrary time frame, and without any provision for limiting continued population reduction in the event constitutional violations have been resolved at a higher population level. For these reasons, the Court should note probable jurisdiction.

III. THE PRISONER RELEASE ORDER VIOLATES THE PLRA BECAUSE IT NOT ONLY FAILS TO GIVE SUBSTANTIAL WEIGHT TO ANY ADVERSE IMPACT ON PUBLIC SAFETY, IT AFFIRMATIVELY THREATENS PUBLIC SAFETY.

Just as the three-judge court failed to narrowly tailor the Prisoner Release Order to reduce prison population, it also failed meaningfully to consider the adverse impacts on public safety that the order would necessarily cause. 18 U.S.C. § 3626(a)(1)(A); App. 53a, 185a. No prisoner release order should ever issue without appropriate protection of the public. *See* 18 U.S.C. § 3626(a)(1)(A); *see also* H.R. Rep. No. 104-21,

at 9 (1995); 141 Cong. Rec. at S14418 (statement of Sen. Hatch). The three-judge court's order does violence to this important protection contained in the PLRA.

The three-judge court first asserts that a reduction of approximately 46,000 prisoners "could" be accomplished "without a significant adverse impact upon the public safety or the criminal justice system's operation." App. 187a; *see also* App. 201a. At the same time, the order also acknowledges that limiting such negative impacts depends on appropriate programs being "properly implemented." App. 195a, *see also* App. 211a, 215a-216a. Inexplicably, however, the three-judge court fails to order any of the protections that it identifies as necessary to protect public safety. *See* App. 210a ("the CDCR could use risk assessment. . . ."; "The state might also consider implementing. . . ."), 224a ("if a risk assessment instrument were used. . . ."), 233a (leaving it to the state to decide whether to divert resources to fund community rehabilitative programs), 235a (same), 253a ("a failure by the state to comply with the experts' recommendations to take these steps would . . . be contrary to the interests of public safety"). In the end, the three-judge court admits, as it must, that its order cannot be implemented without compromising public safety because "[s]uccessful implementation of such programming will, of course, require space that is currently not available in California's prisons." App. 215a n.80. Moreover, the three-judge court never meaningfully addresses the issue of funding for the programs that it believes are necessary to mitigate the risk of the massive prisoner release.

The three-judge court attempts to downplay the breathtaking risk to the public of its Prisoner Release Order by criticizing the present California prison system as being "criminogenic," asserting that the system itself causes an adverse impact on public safety. *See* App. 188a, 191a-192a. The court cites to expert witness testimony for the notion that "high risk inmates do not rehabilitate and low-risk inmates learn new criminal behavior." App. 190a; *see also* App. 212a ("'with high risk individuals, they don't naturally get better. They gravitate up. So when they come out, they are worse off'"). According to the Prisoner Release Order, each year 123,000 or 134,000 offenders are returning to their communities "often more dangerous than when they left," App. 191a (citation omitted), and at least 50 percent of which are released "without the benefit of any rehabilitation programming." App. 199a. Even if the three-judge court's assessment is accurate and incarceration has had a negative effect on many prisoners, it still does not follow that public safety will remain uncompromised by the release of 46,000 "criminogenic" inmates in a two year period. This is particularly true because, as set forth above, the Prisoner Release Order contains no provision to ensure violent and dangerous inmates are not released, to promote rehabilitation and a decrease recidivism, or to protect public safety in any way.

Similarly, the three-judge court also disregarded the opinions of all experts who concluded public safety would be adversely affected by a prisoner release order. *See* App. 193a-194a, 201a, 220a-222a, 233a-234a, 246a-248a. The court's stated reason for doing so was that such opinions were not credible because they did not take into account potential mitigating factors and assumed that prisoners would be

indiscriminately released into the general population. *Id.* But the Prisoner Release Order does not contain any potential protections for the public such as mandatory use of risk assessment tools or creation of local rehabilitative programs. This oversight, together with the refusal of the three-judge court meaningfully to acknowledge the temporal and fiscal realities currently faced by the State of California, virtually assures that the disregarded expert testimony will be proven right and crime will spike in California as a result of the Prisoner Release Order.

More troubling still are the conclusions of the three-judge court that early release of the above-discussed "criminogenic" prisoners will likely reduce recidivism, and that its Prisoner Release Order will not increase the number of crimes committed by those released. *See* App. 201a, 203a. The most the three-judge court will acknowledge is that early release of inmates will permit those released to commit the same crimes at an earlier date. *See* App. 201a. The court's reasoning fails to take into account that inmates released early will have more time in the community to commit additional crimes and also fails to recognize the basic fact that crimes that would not have occurred because of the continued incapacitation of prisoners during their incarceration, will occur if this Prisoner Release Order is implemented and inmates gain early release.

As set forth above, this appeal raises a number of substantial questions worthy of review by this Court. The Prisoner Release Order issued below is unprecedented in size and scope, contrary to the plain language of the PLRA and will unduly endanger California families.

CONCLUSION

The Court should note probable jurisdiction, reverse the determination of the three-judge court, and remand for further proceedings in accordance with guidance from this Court.

Respectfully submitted,

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November 2, 2009

APPENDIX

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
AND THE NORTHERN DISTRICT OF CALIFORNIA
UNITED STATES DISTRICT COURT COMPOSED
OF THREE JUDGES PURSUANT TO
SECTION 2284, TITLE 28 UNITED STATES CODE

[Filed 09/03/2009]

Case No. S-90-0520-LKK-JFM P
THREE-JUDGE COURT

RALPH COLEMAN, *et al.*,
Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, *et al.*,
Defendants.

Case No. C 01-1351 TEH
THREE-JUDGE COURT

MARCIANO PLATA, *et al.*,
Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, *el al.*,
Defendants.

DEFENDANT INTERVENORS'
NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Defendant Legislator Intervenors,[1] District Attorney Intervenors[2] and Sheriff, Police Chief, Probation Chief, and Corrections

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[1] The California Senator and Assembly Intervenors (collectively the "Legislator Intervenors") appealing the Three-Judge Court's August 4, 2009 Opinion and Order include the following: California State Senators: Senators Samuel Aanestad, Roy Ashburn, James F. Battin, Jr., John J. Benoit, Dave Cogdill, Robert Dutton, Dennis Hollingsworth. Bob Huff, Abel Maldonado, George Runner, Tony Strickland, Mimi Walters and Mark Wyland; and the following California Assemblymembers: Michael N. Villines, Anthony Adams, Joel Anderson, Tom Berryhill, Sam Blakeslee, Paul Cook, Chuck DeVore, Michael D. Duvall, Bill Emmerson, Jean Fuller, Ted Gaines, Martin Garrick, Shirley Horton, Guy S. Houston, Kevin Jeffries, Rick Keene, Doug La Matra. Bill Maze, Roger Niello, Sharon Runner, Jim Silva, Cameron Smyth, Todd Spitzer, Audra Strickland, and Van Tran.

[2] The District Attorney intervenors appealing the Three-Judge Court's August 4, 2009 Opinion and Order include the following: Rod Pacheco, District Attorney County of Riverside, Bonnie M. Dumanis District Attorney County of San Diego, Tony Rackauckas, District Attorney County of Orange, Jan Scully, District Attorney County of Sacramento, Christie Stanley, District Attorney County of Santa Barbara, Michael A. Ramos, District Attorney County of San Bernardino, Robert J. Kochly, District Attorney County of Contra Costa, David W. Paulson, District Attorney County of Solano, Gregg Cohen, District Attorney County of Tehama, Todd Riebe, District Attorney County of Amador, Bradford R. Fenocchio, District Attorney County of Placer, John R. Poyner, District Attorney County of Colusa, Michael Ramsey, District Attorney County of Butte, Gerald T. Shea, District Attorney County San Luis Obispo, Edward R. Jagels, District Attorney County of Kern, Gregory Totten, District Attorney County of Ventura, Vern Pierson, District Attorney County of El Dorado, Clifford Newell, District Attorney County of Nevada, Ronald L. Calhoun, District Attorney County of Kings, and Donald Segerstrom, District Attorney County of Tuolumne.

Intervenors[3] (collectively, the "Statutory Intervenors"), appeal to the Supreme Court of the United States from the Three-Judge Court's August 4, 2009 Opinion and Order (Docket No. 2197 in C 01-1351 TEH

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[3] The Sheriff, Police Chief, Probation Chief and Corrections Intervenors appealing the Three-Judge Court's August 4, 2009 Opinion and Order include the following: Amador County Sheriff-Coroner Martin Ryan, Butte County Sheriff Perry Rein ff, Calaveras County Sheriff Dennis Downum, El Dorado County Sheriff-Jeff Neves. Fresno County Sheriff Margaret Mims, Glenn County Sheriff Larry Jones, Inyo County Sheriff William Lutze, Kern County Sheriff Donny Youngblood, Lassen County Sheriff Steve Warren, Los Angeles County Sheriff Lee Baca, Merced County Sheriff Mark Pazin, Mono County Sheriff Rick Scholl, Monterey County Sheriff Mike Kanalakis, Orange County Sheriff-Coroner Sandra Hutchens, Placer County Sheriff Edward Bonner, San Benito County Sheriff-Coroner Curtis Hill, San Diego County Sheriff William Gore, San Joaquin County Sheriff-Coroner Steve Moore, San Luis Obispo County Sheriff Pat Hedges, Santa Barbara County Sheriff Bill Brown, Santa Clara County Sheriff Laurie Smith, Solano County Sheriff-Coroner Gary Stanton, Stanislaus County Sheriff-Coroner Adam Christianson, Sutter County Sheriff-Coroner J. Paul Parker. Tehama County Sheriff Clay Parker, Tuolumne County Sheriff-Coroner James Mete, Ventura County Sheriff Bob Brooks, Yolo County Sheriff Ed Prieto, Yuba County Sheriff Steve Durfor, City of Fremont Police Chief Craig Steckler, City of Fresno Police Chief Jerry Dyer, City of Grover Beach Police Chief .lim Copsey, City of Modesto Police Chief Michael Harden, City of Pasadena Police Chief Bernard Melekian, City of Paso Robles Police Chief Lisa Solomon, City of Roseville Police Chief Michael Blair, Contra Costa County Chief Probation Officer Lionel Chatman, Fresno County Chief Probation Officer Linda Penner, Mariposa County Chief Probation Officer Gail Neal, Sacramento County Chief Probation Officer Don Meyer, San Luis Obispo Chief Probation Officer Jim Sabo, Solano County Chief Probation Officer Isabelle Voit, Stanislaus County Chief Probation Officer Jerry Powers, and Ventura County Chief Probation Officer Karen Staples.

Docket No. 3641 in S-90-0520-LKK-JFM P) finding that a prisoner release order should issue.

Appellants take this appeal pursuant to 28 U.S.C. § 1253, providing for a direct appeal from decisions of three-judge courts.

Dated: September 3, 2009

By /s/ Chad A. Stegeman
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Attorneys for the Republican Assembly and Senate Intervenors

Dated: September 3, 2009

By /s/ Martin J. Mayer (as authorized on 9/3/09)
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Dated: September 3, 2009

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Alan Tate
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Attorneys for the District Attorney Intervenors

I Chad A. Stegeman, am the ECF user whose ID and password arc being used to file this Notice of Appeal to the Supreme Court of the United States. In compliance with the Northern District of California General Order 45, X.B., I hereby attest that Martin J. Mayer and William E. Mitchell have concurred in this filing.

DATED: September 3, 2009

By /s/ Chad A. Stegeman
Chad A. Stegeman
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Attorneys for the Republican
Assembly and Senate Intervenors

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