No. 09-553

IN THE

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

RESPONSE TO MOTIONS TO DISMISS OR AFFIRM

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INTRODUCTION

This appeal challenges the first prisoner release order made over a defendant's objection since the enactment of the Prison Litigation Reform Act, 18 U.S.C. § 3626 ("PLRA"). The Prisoner Release Order mandates the release or non-incarceration of approximately 46,000 inmates in the California prison system over the next two years. The order is unprecedented in scope and magnitude and gravely threatens public safety in California.

Appellants' (hereinafter "Appellant-Intervenors") Jurisdictional Statement presented substantial questions regarding the basis for the Prisoner Release Order and identified a series of legal errors committed by the three-judge court below. Specifically, the court misapplied the "primary cause" analysis by simply assuming that overcrowding was the primary cause of ongoing constitutional violations while barring evidence and argument to show the absence of such alleged violations. Second, the court found there was no alternative to a prisoner release order notwithstanding compelling evidence to the contrary from its own Receiver and others. Third, the court found the 46,000-inmate Prisoner Release Order to be narrowly-tailored despite the fact that the vast majority of inmates benefitting from such an order would not be class members. Fourth, the court failed to give substantial weight to public safety in issuing the Prisoner Release Order.

In response, Appellees and the Appellee-Intervenor claim the questions presented are not substantial, that the appeal is premature and that

the decision below should be summarily affirmed. They are wrong on all three claims.[1]

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The legal questions presented are substantial because the system-wide Prisoner Release Order remains unnecessary and imposes an unacceptable level of risk to public safety in California. Under the PLRA, federal courts may issue release orders only under the most limited of circumstances. The PLRA serves to protect the ability of states to operate and maintain their own criminal justice systems and preserves traditional notions of federalism as they relate to the protection of public safety.

The Prisoner Release Order issued below specifically raises legal questions relating to (1) interpretation of the PLRA's requirement that overcrowding must be shown to be the "primary cause" of constitutional violations; (2) interpretation of the PLRA's requirement that no alternative to a release order exists and that any such order must be narrowly tailored; and (3) interpretation of the PLRA's requirement that substantial weight must be given to public safety in the consideration of any release order. As set forth in the Jurisdictional Statement, each of these questions alone is sufficiently

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[1] Appellees and the Appellee-Intervenor assert that this appeal is premature because the court's order merely imposes a population cap and that the State develop a population reduction plan. Appellees' Motion at 1, 4; Appellee-Intervenor's Motion at 13. These arguments are disingenuous, and Appellant-Intervenors agree with and incorporate by reference, the State's comments on this topic at section 1 pages 2-4 of its Brief Opposing Joint Motion to Dismiss or Affirm, filed in Case No. 09-416. The appeal is ripe for adjudication by this Court.

substantial to necessitate the notation of probable jurisdiction by the Court and nothing in Appellees' or Appellee-Intervenor's Motions to Dismiss or Affirm changes that fact.[2]

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).

The Prisoner Release Order issued below failed to meet either of these requirements. First, notwithstanding the fact that 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, the three-judge court precluded the introduction of evidence and argument on the issue of whether past violations remained "current and ongoing" at the time of the trial. App. 78a n.42; *see also* App. 77a. Instead, the three-judge court simply assumed the continuation of "the previously identified constitutional violations[.]" App. 77a.[3] This was error, particularly in light of the

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[2] Appellant-Intervenors address the Appellee-Intervenor's Motion only to the extent it directly addresses the substantial issues raised by the Jurisdictional Statement.

[3] Appellees' claim that "[t]he court's determination was firmly grounded in the current conditions," Appellees' Motion at 10, is

fact that the last determination that any violation existed was already over two years old at the time the Prisoner Release Order was issued on August 4, 2009, and the determination was itself based on evidentiary hearings conducted on September 13, 1995 (*Coleman*), and June 9, 2005 (*Plata*). *See* App. 23a, 33a.

In response, Appellees assert that "Intervenors do not take issue with the three-judge court's conclusion that it had no authority to make a determination whether the underlying conditions are constitutional." Appellees' Motion at 7, n. 1. This assertion is simply wrong and unsupported by the record. Indeed, the Appellant-Intervenors maintained throughout the proceeding below that the three-judge court not only had the authority to make such a determination, but indeed that it is a necessary part of the "primary cause" analysis under the PLRA for the three-judge court to determine whether previously-identified constitutional violations remain current and ongoing. Legislator Intervenors' Trial Brief at 8-9 (E.D. Cal./N.D. Cal. Nov. 3, 2008) (*Coleman* Docket No. 3263; *Plata* Docket No. 1760); Trial Tr. at 57:11-17 (E.D. Cal./N.D. Cal. Nov. 18, 2008) (*Coleman* Docket No. 3541.2; *Plata* Docket No. 1829).

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belied by the court's stated resolution not to make any independent determination of current unconstitutionality. The court's refusal to do so presents a question of law for this Court. This is particularly troubling given statements by the court's own Receiver specifically indicating he can bring the prison system into constitutional compliance, evidence regarding efforts being made by the Receiver to do so over several years, yet the court refusing to allow discovery on the Receiver. *See infra* at 6-7.

It remains uncontested that the three-judge court plainly refused to make a determination regarding whether any current constitutional violations existed at the time that it issued the Prisoner Release Order. App. 78a n.42; 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 (E.D. Cal./N.D. Cal. Nov. 18, 2008) (*Coleman* Docket No. 3541.2; *Plata* Docket No. 1829). Appellees instead claim that the Appellant-Intervenors fail to identify a single item of evidence that was offered but excluded. Appellees' Motion at 6, 11. Appellees omit that when the Legislator-Intervenor's counsel attempted to raise the issue at trial and describe the evidence that the Appellant-Intervenors would offer, the court forcefully refused to consider such evidence and confirmed its view that the record had been made on the issue. Trial Tr. at 57:11-58:13 (E.D. Cal./N.D. Cal. Nov. 18, 2008) (*Coleman* Docket No. 3541.2; *Plata* Docket No. 1829) ("Twice this court has said we will not receive that evidence [of the absence of current constitutional violations]. You have made as clear a record as you can.") This refusal – whether based on perceived lack of authority or for some other reason – violated the PLRA, which requires a timely determination that overcrowding is the primary cause of current constitutional violations, not a determination that overcrowding may have caused violations some time in the past.

Second, a prisoner release order may issue only if a plaintiff demonstrates – by clear and convincing evidence – that "no other relief will remedy the violation of the Federal right." 18 U.S.C. § 3626(a)(3)(E). At trial, the Appellant-Intervenors introduced evidence of alternatives to a prisoner release order, including the alternative of permitting

the court-appointed Receiver to continue his work in the California prison system. Trial Tr. at 2382:15-2386:7, 2465:11-2466:24 (E.D. Cal./N.D. Cal. Dec. 12, 2008) (*Coleman* Docket No. 3541.12; *Plata* Docket No. 1939). Most importantly, however, they introduced compelling evidence from the court's Receiver that is simply impossible to reconcile with the three-judge court's conclusion that a release order was necessary and that no alternative existed.

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.

Appellees seek to diminish the significance of the Receiver evidence as "out-of-context excerpts from an out-of-court talk given by the Receiver. . . ." Appellees' Motion at 12. As a preliminary matter, the parties were limited to "out-of-court" evidence because the three-judge court refused to permit discovery on the Receiver and refused to have him testify in court. *See* Protective Order re Deposition of Receiver (E.D. Cal./N.D. Cal. Nov. 29, 2007) (*Coleman* Docket No. 2577; *Plata* Docket No. 988). Moreover, the evidence was not taken out of context as the Legislator-Intervenors provided the three-judge court and all parties with the full recording of the Receiver's statements. Trial Declaration of

Assemblymember Todd Spitzer, ¶ 28 and Exhibit D thereto, (E.D. Cal./N.D. Cal. Oct. 30, 2008) (*Coleman* Docket No. 3173; *Plata* Docket No. 1656). Finally, Appellees' citation to additional statements by the Receiver that "because frankly everything in the prisons is made more difficult by overcrowding . . . . I have no doubt that the conditions of overcrowding, by itself, contributes to greater morbidity," (*id.*) does not diminish the viability of continuing the Receiver's work or justify issuance of the Prisoner Release Order. Even if crowded conditions make alternative relief "more difficult," that does not mean that alternatives do not exist. The Receiver's unqualified statement that his office is capable of providing constitutional levels of care "no matter what the population is," (*id.*) underscores this point.

Congress intended a prisoner release order be "the remedy of last resort." H.R.Rep. No. 104-21, at 25 (1995). Here, the Prisoner Release Order was issued notwithstanding compelling evidence from the person in the best position to know – the current Receiver – that constitutional levels of care can be provided without a release order. Accordingly, the Prisoner Release Order fails to comply with the PLRA's requirement that such release orders may be issued only when "no other relief will remedy the violation of the Federal right." 18 U.S.C. § 3626(a)(3)(E).[4]

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[4] In addition to continuing the work of the Receiver and Special Master, defendants and the Appellant-Intervenors offered evidence of other alternative remedies to correct any constitutional violations including, but not limited to increased hiring of medical, mental health and custodial staff, increased construction of facilities and full implementation of AB 900 (bi-partisan legislative authorizing billions of dollars in increased

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.

Any prisoner release order issued pursuant to the PLRA 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 to meet this requirement in four separate respects.

First, the three-judge court refused to consider whether previously-identified constitutional violations

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resources for the California prison system). Trial Tr. at 1678:10-1680:17 (E.D. Cal./N.D. Cal. Dec. 10, 2008) (*Coleman* Docket No. 3541.9; *Plata* Docket No. 1920); Trial Tr. at 1892: 14- 1911:1 (E.D. Cal./N.D. Cal. Dec. 11, 2008) (*Coleman* Docket No. 3541.10; *Plata* Docket No. 1929); Trial Tr. at 2726:13-2735:8 (E.D. Cal./N.D. Cal. Dec. 22, 2008) (*Coleman* Docket No. 3541.14; *Plata* Docket No. 1972). With respect to the prison transfers to out-of-state or federal custody, Appellees claim that these alternatives constitute prisoner release orders because they would direct the release of inmates from *a* prison. Appellees' Motion at 17. This argument ignores the fact that any such transferred inmates would remain in custody. Finally, Appellees assert incorrectly that the Appellant-Intervenors "do not contest *any* of the three-judge court's findings rejecting the alternatives to a prisoner release order that were proposed by the State." Appellees' Motion at 18 (emphasis in original). On the contrary, the Appellant-Intervenors believe that the three-judge court improperly rejected a number of viable alternatives including increased hiring, increased construction of facilities and continuance of the work of the Receiver and Special Master among other alternatives.

existed at the time of trial and the scope of such violations, if any. Nor did the three-judge court endeavor to determine which, if any, of the 33 facilities within the California prison system currently fail to provide constitutional levels of care. The result is an overbroad and overreaching release order that fails to adequately address current conditions.

Second, under 18 U.S.C. § 3826(a)(1)(A) any relief must "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."). Appellees fail to cite or distinguish *Hines* asserting instead that the Appellant-Intervenors do not contest the three-judge court's finding that a "systemwide remedy is appropriate." Appellees' Motion at 20. This is not so. The PLRA requires that any relief be targeted on current violations of the constitutional rights of "a particular plaintiff or plaintiffs." 18 U.S.C. § 3826(a)(1)(A). Accordingly, no basis exists for a systemwide release order that goes far beyond what is necessary to address current violations of the rights of specific class members, if any.

Third, 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. Appellees respond by asserting incorrectly that the Appellant-Intervenors do not contest a conclusion of the three-judge court that "[o]ther forms of relief

[other than reducing the prison population] are either unrealistic or depend upon a reduction in prison overcrowding for their success." Appellees' Motion at 22. Not only do the Appellant-Intervenors contest the conclusion that a release order is necessary to provide constitutional levels of care, that view is supported by the court's own Receiver who stated plainly his ability to provide constitutional care "no matter what the population is." Spitzer Trial Decl., *supra*, ¶ 28 and Exhibit D, at 30:00 minutes (E.D. Cal./N.D. Cal. Oct. 30, 2008) (*Coleman* Docket No. 3173; *Plata* Docket No. 1656); *see also id.* at 31:20 minutes ("We believe we can provide constitutional levels of care no matter what the population is.")

Fourth, the Prisoner Release Order sets a mandatory population cap of 137.5% of the correctional system's "design capacity" over two years regardless of whether any alleged constitutional violations are abated. Appellees offer assurances that this overbreadth presents no issue because the three-judge court retained jurisdiction "to consider any modifications [to the population reduction plan] made necessary by changed circumstances." Appellees' Motion at 23. This assurance clashes directly with the three-judge court's determination that it lacked authority to determine whether any constitutional violations continued at the time of trial and Appellees' assertion that issues including "whether prospective relief should be maintained or terminated, are questions reserved to the single judge district courts." Appellees' Motion at 7. For this reason as well, it is crucial that the overbreadth of the release order be addressed at this time.

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.

Appellees acknowledge, as they must, that Congress intended release orders as "the remedy of last resort." However, they fail to grasp the impact that the release of 46,000 prisoners would have on public safety in California. Instead, they assert that it is hypothetically possible to reduce prison population without adversely impacting public safety. Appellees' Motion at 24.

However, the issue is not whether it is metaphysically possible to reduce prison population in some minimal amount and maintain safety, the question is whether substantial weight has been given to the adverse impact on public safety that will result from the release of 46,000 inmates. No release order of this magnitude has previously been ordered, much less implemented safely. Tellingly, neither the three-judge court nor the Appellees address these realities in defending the largest Prisoner Release Order in this country's history.

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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