No. 09- 1233

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

JURISDICTIONAL STATEMENT

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April 12, 2010

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QUESTIONS PRESENTED

1. Whether the three-judge district court had jurisdiction to issue a "prisoner release order" pursuant to the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626.

2. Whether the court below properly interpreted and applied Section 3626(a)(3)(E), which requires a three-judge court to find, by clear and convincing evidence, that "crowding is the primary cause of the violation of a Federal right; and ... no other relief will remedy the violation of the Federal right" in order to issue a "prisoner release order."

3. Whether the three-judge court's "prisoner release order," which was entered to address the allegedly unconstitutional delivery of medical and mental health care to two classes of California inmates, but mandates a system-wide population cap within two years that will require a population reduction of approximately 46,000 inmates, satisfies the PLRA's nexus and narrow tailoring requirements while giving sufficient weight to potential adverse effects on public safety and the State's operation of its criminal justice system.

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

Intervenor-plaintiff:

California Correctional Peace Officers' Association,

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
Ana J. Matosantos, Director of the California Department of Finance
Stephen W. Mayberg, Director of the Department of Mental Health

The following 144 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
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
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
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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
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District Attorney Gerald T. Shea
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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
Bill Berryhill, Legislator
Connie Conway, Legislator
Danny Gilmore, Legislator
Curt Hagman, Legislator
Diane Harkey, Legislator
Steven Knight, Legislator
Dan Logue, Legislator
Jeff Miller, Legislator
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Jim Nielsen, Legislator

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OPINIONS BELOW

On January 12, 2010, the three-judge district court (Reinhardt, Henderson, Karlton, J.J.) entered the "Order to Reduce Prison Population" (App. 1a-10a) that is the subject of this appeal. See 2010 WL 99000. On August 4, 2009, the three-judge court made the predicate findings for the order on appeal. See 2009 WL 2430820, reproduced in the Appendix to the Jurisdictional Statement filed in No. 09-416 at 1a-256a.[1] The *Coleman* court's January 4, 2010 order (App. 11a-16a) is available at 2010 WL 55886.

The three-judge court's order denying the State's motion to dismiss or, in the alternative, for summary judgment (09-416-App. 257a-272a) is available at 2008 WL 4813371. The orders granting plaintiffs' motions to convene a three-judge court (09-416-App. 273a-304a) are available at 2007 WL 2122657 and 2007 WL 2122636.

JURISDICTION

On July 23, 2007, over the objections of appellants ("the State"), the District Courts for the Northern and Eastern Districts of California entered orders convening a three-judge district court pursuant to the PLRA, 18 U.S.C. § 3626(a)(3)(B), in accordance with 28 U.S.C. § 2284. 09-416-App. 273a-304a. The State contends that the three-judge court was improperly convened and lacked jurisdiction to issue the order on appeal. *Infra* 11-18.

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[1] The Clerk of Court authorized the parties to cite the appendices filed in Number 09-416 rather than reproducing those materials. Appellants cite that appendix as "09-416-App." and this Jurisdictional Statement's Appendix as "App."

On January 12, 2010, the three-judge court's "Order to Reduce Prison Population" granted injunctive relief under the PLRA. App. 1a-10a. The State noticed its appeal on January 19, 2010. App. 17a-24a. This Court has jurisdiction under 28 U.S.C. § 1253.

STATUTORY PROVISIONS INVOLVED

The PLRA's relevant provisions, 18 U.S.C. § 3626, are reproduced at 71a-73a.

STATEMENT OF THE CASE

Pursuant to the PLRA, the three-judge district court issued an "Order to Reduce Prison Population," *i.e.*, a "prisoner release order." 18 U.S.C. § 3626(a)(3). Although that court *sua sponte* stayed the order pending resolution of this appeal, once it takes effect, the State must cap its aggregate prison population at 137.5% of the institutions' combined design capacity within two years to address allegedly unconstitutional medical and mental health care provided to two plaintiff-classes of California inmates. Ultimately, the court has required the State to reduce the population of its correctional facilities by approximately 46,000 inmates.[2] This is the first PLRA "prisoner release order" imposed over a defendant's objection and the most sweeping intrusion into a state's management of its correctional facilities in history.

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[2] The three-judge court estimated the required prisoner reduction at approximately 46,000 inmates. 09-416-App. 235a. Appellants use that figure for simplicity although the prison population—and thus the necessary reduction—fluctuates over time.

This appeal presents substantial questions concerning the availability and scope of "prisoner release orders" under the PLRA. Before Congress enacted the PLRA, this Court had repeatedly instructed lower courts to exercise extreme caution in using their equitable powers to interfere with the management of prisons, particularly state institute-ions. See, *e.g.*, *Lewis* v. *Casey*, 518 U.S. 343, 362-63 (1996); *Preiser* v. *Rodriguez*, 411 U.S. 475, 491-92 (1973). Lower courts recognized that ordering the political branches to release prisoners or cap their prison populations was the most intrusive form of interference. See, *e.g.*, *Inmates of Occoquan* v. *Barry*, 844 F.2d 828, 843-44 (D.C. Cir. 1988). Congress nevertheless concluded that further constraints on federal courts were necessary and enacted the PLRA.

Among other things, the PLRA permits only three-judge courts to issue "prisoner release orders," and such courts may not be convened until certain jurisdictional prerequisites are satisfied. Addition-ally, three-judge courts shall not order a "prisoner release" unless plaintiffs present "clear and convincing" proof that "crowding" is the "primary cause" of a violation of federal rights and that "no other relief" will remedy the violation. Finally, any "prisoner release order" is circumscribed by strict nexus and narrow tailoring requirements.

This Court's full review of the questions presented here is essential to the orderly development of law under the PLRA. This Court has exclusive jurisdiction over appeals from "prisoner release orders." Thus, any summary affirmance would give the three-judge court's order substantial, unwarrant-ed influence. The decision below conflicts with Congress's design in the PLRA and this Court's

prison-conditions and federalism jurisprudence. Probable jurisdiction should be noted.

A. Statutory Background

The PLRA, Pub. L. No. 104-134, tit. VIII, 110 Stat. 1321, 1321-66 (1996), defines the federal courts' remedial powers over conditions of confinement. 18 U.S.C. § 3626. Prospective relief must be "narrowly drawn, extend[] no further than necessary to correct the violation of the Federal right, and [be] the least intrusive means necessary." *Id.* § 3626(a)(1)(A). In considering whether such relief is appropriate, a court "shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." *Id.*

In addition to these constraints, Congress imposed limits on a federal court's ability to enter a "prisoner release order"—*i.e.*, "any order ... that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or non-admission of prisoners to a prison," *id.* § 3626(g)(4)—as a remedy. *Id.* § 3626(a)(3). Only a three-judge district court may grant prisoner release. *Id.* § 3626(a)(3)(C). A three-judge court cannot be convened to consider prisoner release:

> 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.

Id. § 3626(a)(3)(A). Finally, a three-judge court with jurisdiction "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." *Id.* § 3626(a)(3)(E).

B. Factual Background

1. The appeal involves two class actions, *Plata* v. *Schwarzenegger* and *Coleman* v. *Schwarzenegger*, and allegations of unconstitutional prison healthcare conditions. *Plata* concerns whether healthcare provided to adult inmates with "serious medical conditions" violates the Eighth Amendment. *Coleman* involves allegations that the mental health care provided to inmates with serious mental disorders violates the Eighth Amendment.

In *Plata*, following settlement of plaintiffs' claims, Judge Henderson approved a stipulation for injunctive relief. *Plata* v. *Davis*, No. C01-1351-TEH (N.D. Cal. June 13, 2002) (D.E. 68).[3] In October 2005, after years of remedial efforts designed "'to provide only the minimum level of medical care required under the Eighth Amendment,'" 09-416-App. 16a, the court concluded that the prison medical system did not meet constitutional standards, *id.* at 14a. It therefore placed the medical health-care delivery system of the California Department of Corrections and Rehabilitation ("CDCR") into Receivership. *Id.* The court concluded that "'[d]espite the best efforts of [the State],'" *id.* at 22a,

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[3] Hereafter, appellants cite orders and other materials from the district court records in *Plata*, No. C01-1351-TEH (N.D. Cal.), and *Coleman*, No. CIV-S-90-0520-LKK (E.D. Cal.), by docket entry number, *i.e.*, "*Plata* D.E. __" and "*Coleman* D.E. __." Although the three-judge court's records typically appear on both dockets, appellants reference only one docket entry for the three-judge court materials. Trial transcripts are cited as "Tr."

inter alia, inmates lacked access to care and specialty services, and that CDCR had "serious personnel problems," "was incapable of recruiting qualified personnel," "lacked medical leadership" and necessary equipment, had not implemented tracking systems for inmates needing chronic care, and had "'a culture of non-accountability and non-professionalism.'" *Id.* at 27a-28a.

The Receiver's appointment was effective on April 17, 2006. 09-416-App. 29a-30a. Just months later, however, plaintiffs moved to convene a three-judge court to consider a "prisoner release order." *Plata* D.E. 561 (filed Nov. 13, 2006).

In *Coleman*, following a 1994 trial, the district court concluded that the mental health care provided to the class violated the Eighth Amendment. 09-416-App. 31a, 33a-35a. In December 1995, the court appointed a special master to oversee implementation of injunctive relief. *Id.* at 36a. In 1997, the court approved plans developed by the Special Master, and in the following years, "defendants continued to work with the Special Master to implement and revise" those plans. *Id.* at 37a. In March 2006, the court approved revised plans. *Id.* at 37a-38a. Eight months later, the *Coleman* plaintiffs moved to convene a three-judge court. *Id.* at 304a.

2. The single-judge courts granted plaintiffs' motions to convene a three-judge court over the State's objections. See 09-416-App. 273a-304a.[4] Judges Henderson and Karlton recommended that the cases be heard by the same three-judge court. *Id.*

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[4] The Ninth Circuit dismissed appeals from the orders convening the three-judge court for lack of jurisdiction. *Coleman* v. *Schwarzenegger*, No. 07-16361, 2007 WL 2669591, at *1 (9th Cir. Sept. 11, 2007) (per curiam).

at 286a, 304a. Then-Chief Judge Schroeder assented, seating Judge Reinhardt to complete the panel. Slip op. at 1 (July 26, 2007) (*Coleman* D.E. 2328).

The State moved to dismiss the three-judge proceedings for lack of jurisdiction and, in the alternative, for summary judgment. On November 3, 2008, the three-judge court denied the motion. 09-416-App. 272a.

Trial was held between November 2008 and February 2009. During trial, the three-judge court prohibited defendants from introducing evidence "relevant only to determining whether the constitutional violations found by the *Plata* and *Coleman* courts were 'current and ongoing.'" 09-416-App. 78a n.42. Moreover, it prohibited the State from obtaining discovery from the Receiver or the Special Master, or from calling them as witnesses. See Slip op. at 3 (Sept. 5, 2008) (*Plata* D.E. 1450); Slip op. at 1-2 (June 5, 2008) (*Plata* D.E. 1226); Slip op. at 1-4 (Nov. 29, 2007) (*Plata* D.E. 988). Additionally, the State lacked a meaningful opportunity before trial to implement Assembly Bill 900 ("AB 900"), which became law in 2007 and authorizes, *inter alia*, $8 billion for construction of correctional facilities. See 09-416-App. 146a-150a.

After trial, the court concluded that crowding was the "primary cause" of the alleged violations of plaintiffs' rights and that no other relief could remedy the violations. See 09-416-App. 78a-165a; *id.* at 126a n.55. The court imposed a "prisoner release order" mandating that the population of California's prisons be capped at 137.5% of their combined design capacity within two years. *Id.* at 169a.

The court concluded that a "prisoner release order" was appropriate notwithstanding its findings that

other causes for the alleged constitutional violations exist and that the population cap would *not* remedy them. 09-416-App. 134a, 143a. The court found that the cap satisfied the PLRA's narrow tailoring and nexus requirements, and stated that it gave "substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." 18 U.S.C. § 3626(a)(1)(A); see 09-416-App. 185a-255a.

The court reached these conclusions despite its recognition that the relief "extends further than the identified constitutional violations" and "is likely to affect inmates without medical conditions or serious mental illnesses." 09-416-App. 172a. It selected the 137.5% figure solely because it was "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." *Id.* at 184a. Additionally, the court acknowledged evidence that, absent effective rehabilitation programs, a prisoner release of this magnitude is likely to cause a statistically significant increase in crime. *Id.* at 241a-248a.

3. The August 4, 2009 order required the State to submit, by September 18, 2009, a plan for meeting the 137.5% cap within two years. 09-416-App. 255a, 235a. The State timely noticed its appeal of the order, *id.* at 354a-355a, and unsuccessfully sought a stay from this Court. *Schwarzenegger* v. *Coleman*, 130 S. Ct. 46 (2009). Thereafter, without waiving its challenges to the three-judge court's jurisdiction or the order's lawfulness, 09-416-App. 315a, the State timely submitted a plan to the district court. *Id.* at 312a-353a. The State disclosed that even if proposals pending before the legislature were enacted, it could

safely reduce the population to only 151% design capacity within two years. *Id.* at 317a-318a (proposing to meet cap within five years). On October 21, 2009, the court rejected the plan and required the State to submit a plan to timely meet the 137.5% threshold. Slip op. (Oct. 21, 2009) (*Plata* D.E. 2269). Preserving its objections, the State submitted a revised plan. App. 34a (incorporating newly enacted legislation, but stating that the required reduction "can only be accomplished if the State Legislature enacts new laws and/or this Court orders changes to State laws").

On January 12, 2010, the three-judge court issued the "Order to Reduce Prison Population" approving the revised plan. App. 3a-6a. That Order also reaffirmed the August 4, 2009 order. *Id.* at 2a. The court adhered to its conclusions that "crowding is the primary cause" of the constitutional violations and "no relief other than a 'prisoner release order' ... is capable of remedying these constitutional deficiencies," and that the 137.5% cap was "narrowly drawn, would extend no further than necessary to correct the violation of California inmates' federal constitutional rights, and was the least intrusive means necessary." *Id.* The court acknowledged that it had "not evaluated the public safety aspect of the State's proposed plan," but stated that "the evidence presented at trial demonstrated that means exist to reduce the prison population without a significant adverse impact on public safety or the criminal justice system." *Id.* at 3a-4a.

The order requires that within 24 months from its effective date, the State's systemwide prison population be "no more than 137.5% of design capacity," and that the population be "no more than" 167%, 155%, and 147% of design capacity at prior six-

month intervals. App. 6a. *Sua sponte*, the court stayed the effective date pending this Court's resolution of any appeal. *Id.* at 8a.

On January 15, 2010, this Court dismissed the State's appeal of the August 4, 2009 order for lack of jurisdiction. *Schwarzenegger* v. *Plata*, 130 S. Ct. 1140, 1140 (2010) (noting "that a further order has been entered in this case, but that order is not the subject of this appeal.... [and] that the district court has stayed its further order pending review by this Court.").

On January 19, 2010, the State timely appealed the "Order to Reduce Prison Population." App. 17a-24a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This case presents questions of substantial importance regarding the prerequisites for issuing a "prisoner release order," in a context that has serious consequences for public safety and our federal system. The substantial, important nature of these issues is clear because Congress vested this Court with exclusive jurisdiction to review any "prisoner release order." Unless this Court notes probable jurisdiction, an unprecedented order requiring the State to reduce its prison population by approximately 46,000 inmates will escape review. Moreover, summary affirmance here would give the three-judge court's decisions unique precedential value in the PLRA's infancy. See *Hicks* v. *Miranda*, 422 U.S. 332, 344-45 (1975).

Even before the PLRA was enacted, courts recognized that population caps represent the highest level of federal court interference with state prison management and a challenge for Our Federalism.

See, *e.g.*, *Taylor* v. *Freeman*, 34 F.3d 266, 268-70 (4th Cir. 1994); *Occoquan*, 844 F.2d at 842-43. Congress sought to further restrain federal court interference with prison conditions through the PLRA. See *Woodford* v. *Ngo*, 548 U.S. 81, 93 (2006); *Taylor* v. *United States*, 181 F.3d 1017, 1027 (9th Cir. 1999) (en banc) (Wardlaw, J., dissenting). The Act takes special aim at prisoner release orders and population caps. See *Castillo* v. *Cameron County, Tex.*, 238 F.3d 339, 348 (5th Cir. 2001); 141 Cong. Rec. S14407, S14414 (daily ed. Sept. 27, 1995) (Sen. Dole) ("Perhaps the most pernicious form of judicial micro-management is the so-called prison population cap.").

Under the district court's interpretation and application of the PLRA, however, Congress's intent to make a "prisoner release order" the remedy of "last resort" will be subverted. In addition, the "Order to Reduce Prison Population" will interfere with the State's operation of its criminal justice system and severely constrain California's ability to set and fund political priorities during these difficult economic times. The PLRA was enacted to prevent such damage to federalism principles. Probable jurisdiction should be noted.

I. THE THREE-JUDGE COURT LACKED JURISDICTION TO ENTER THE "PRISONER RELEASE ORDER."

The question whether the three-judge court had jurisdiction to consider a prisoner release order in *Plata* and *Coleman* is substantial and worthy of this Court's review. In both cases, the courts wrongly concluded that the State had been allotted "a reasonable amount of time to comply with the previous court orders" before they convened the three-judge court to consider prisoner release. 18 U.S.C. § 3626(a)(3)(A)(ii). Specifically, they failed

to give the State a reasonable time period to effectuate the Receiver's and Special Master's recent proposals, despite, for instance, the Receiver's conviction that in time his actions would remedy the alleged constitutional violations.

1. In *Plata*, after the Receiver's appointment become effective in April 2006, the State immediately cooperated with him to address plaintiffs' complaints. On July 5, 2006, he stated that his "mission[] to bring the level of medical care ... up to constitutional requirements will be done." Receiver's First Bi-Monthly Report at 33:1-3, http://www.cprinc.org/docs/court/Receiver1stBiMoR070506.pdf; see Second Bi-Monthly Report at 48:25-27 ("numerous" plans to meet his mission), http://www.cprinc.org/docs/court/Receiver/2ndBiMoR091906.pdf. Just eight months after the appointment became effective, and on the same day that the Receiver requested additional time to submit a "final corrective action plan," *Plata* D.E. 559, at 2:2-4 (Nov. 13, 2006) (capitalization omitted), plaintiffs moved to convene the three-judge court.

On December 19, 2006, the court granted the Receiver's extension request. He filed his Plan of Action on May 10, 2007. It contemplated several years of efforts to remedy the claimed violations. The Receiver attested that the "Plan of Action will work" and that it was "simply wrong" to think that "population controls will solve California's prison health care problems." 09-416-App. 282a.

Nonetheless, in July 2007, the court granted plaintiffs' motion to convene a three-judge court to consider release. 09-416-App. 278a-281a. While admitting that the Receiver "has made much progress," *id.* at 279a-280a, the court held that it was not "require[d] ... to wait more time, potentially years, to see whether the Receiver's plans will

succeed or fail," *id.* at 281a (concluding that the Receiver's progress was outweighed by insufficient progress before his appointment).

The court's decision to short-circuit its own remedial process cannot be squared with § 3626(a)(3)(A)(ii), or the PLRA requirement that "prisoner release" be the "'remedy of last resort.'" 09-416-App. 73a. This point is underlined by the record of steady progress in implementing the Receiver's plans *after* the three-judge court was constituted, including the period during and after trial. As the Receiver advised in June 2008, although he and the State were "at the early stages in fully implementing our goals," "[t]here has already been significant progress on some of [his] goals" and "[s]ubstantial work has been completed at several prisons to improve conditions." *Plata* D.E. 1229, at iv. And in January 2010, the Receiver proclaimed "there is much that prison healthcare stakeholders and advocates can showcase as accomplishments." *Plata* D.E. 2289-1, at 5. Indeed, the State has greatly increased funding for and improved access to medical care, dramatically improved staffing, and enhanced its infrastructure and operational capacity. *Id.*

After the Receivership was instituted, the healthcare funding per inmate nearly doubled. *Plata* D.E. 1632 ¶¶ 7-9; Tr. 734:13-736:25. Initiatives to improve access to care at each institution were "ahead of schedule" by September 2008, *Plata* D.E. 1472, at 9, and showed "marked[] improve[ment] throughout 2009, *Plata* D.E. 2289-1, at 5. See *id.* at 9-10 ("[a]ll institutions have reported improvement in patient-inmate access to scheduled healthcare appointments"); *id.* at 15-23 (improvements to medical system).

Moreover, the number of health-care staff increased significantly by the trial date. *Plata* D.E. 1472, at 25 (recruitment efforts "have been very positive" and employment goals had been met at dozens of institutions). When trial began, successful recruiting efforts had brought the State within five and two percent of the Receiver's goals for filling physician and registered nurse positions, respectively. Tr. 445:8-446:14, 447:9-448:5.[5] "Significant gains" continued after trial. *Plata* D.E. 2289-1, at 5, 24-25.

There also have been continuing improvements in operations and infrastructure. For instance, the State has made strides in establishing clinical leadership and management structures. *Id.* at 26; *Plata* D.E. 1472, at 33. It has continued to develop data collection and reporting mechanisms to enhance patient care. *Plata* D.E. 2289-1, at 29. Between the trial and January 2010, the State successfully completed the implementation of peer review programs to ensure better quality of care, and established a medical oversight unit to review potential cases of preventable death and patient harm. *Id.* at 32-35; *Plata* D.E. 1472, at 40, 42-43.

These developments directly improve the healthcare of the *Plata* class. See, *e.g.*, Tr. 445:7-446:14, 447:9-23 (plaintiffs' expert Dr. Shansky testified that increased staffing has improved the quality of care); *id.* at 242:9-243:15, 249:25-250:5 (plaintiffs' expert Dr. Beard acknowledged improve-

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[5] *See* Defs.' Trial Ex. 1235, at 3 (62 full-time physicians hired between November 2007 and August 2008); *id.* at 2 (number of full-time Chief Physicians and Surgeons almost tripled between October 2005 and August 2008); *id.* at 4 (13-fold increase in Physician Assistants over two years); *id.* at 5 (four-fold increase in Nurse Practitioners in less than three years); *id.* at 7 (licensed vocational nurses climbed from *4* to *937* in 15 months).

ments in care). By the trial date, the number of deaths had been trending downward for 10 quarters, *id.* at 454:21-455:12, and the number of alleged preventable deaths fell from 18 in 2006 to 3 in 2007, *id.* at 450:20-451:2, 486:16-487:5; Shansky Dep. at 74:7-16.

2. Similarly, in *Coleman*, plaintiffs moved to convene a three-judge court only eight months after the district court approved new remedial plans. *Coleman* D.E. 1772, 1773 (Mar. 3, 2006). The State was actively implementing those plans at the time. See, *e.g.*, *Coleman* D.E. 1950, 1951, 1990, 2061 (plans re: evaluating psychiatrists, beds, and suicide prevention). In June 2006, the *Coleman* court began ordering the State to coordinate compliance efforts with the newly appointed *Plata* Receiver. *Coleman* D.E. 2063, at 3:10-13.

"In spite of the [State's] commendable progress," 09-416-App. 294a, Judge Karlton convened a three-judge court, *id.* at 295a-296a. Like Judge Henderson, Judge Karlton concluded "[i]t has been almost twelve years since this court found widespread violations of the Eighth Amendment ... [and] Defendants have had more than sufficient time to comply with the mandate required by the court's 1995 order and the numerous orders issued since then." *Id.* at 297a. But like the *Plata* court, the *Coleman* court's focus on previous unsuccessful remedial efforts is inconsistent with § 3626(a)(3)(A)(ii) and with the PLRA requirement that "prisoner release" be the "remedy of last resort." See, *e.g.*, Special Master's May 31, 2007 Response to Request for Information at 6 (*Coleman* D.E. 2253) ("[i]mprovement has occurred over the past dozen years").

For instance, whereas staff vacancies ran high in mid-2007, *id.* at 10-11; Special Master's Nineteenth

Monitoring Report at 114-16 (*Coleman* D.E. 2895) (reporting, *inter alia*, vacancy rates of higher than 40% and functional rates as high as 43% in May 2007), a focused recruiting and hiring program launched in November 2007 led to significant successes in filling positions before and after trial. *Plata* D.E. 1715, ¶¶ 48, 57-60 (discussing, *inter alia*, 18% decrease in vacancy rate for psychologists over a six-month period); Special Master's Twenty-First Monitoring Report at 375 (*Coleman* D.E. 3638) ("As of October 31, 2008, the vacancy rate in mental health staffing at CDCR institutions continued the decline that had been found during the preceding monitoring period.") (footnote omitted); *id.* at 375-78 (noting, *inter alia*, vacancy rates for multiple staff categories had fallen to between 11% and 19%). Indeed, the Special Master recognized that certain facilities were fully staffed. See Tr. 929:2-6, 929:14-22.

Additionally, CDCR hired 600 and 1800 custodial staffers in 2007 and 2008, respectively, and those officers serve in dedicated "access to care" units to escort inmates to medical and mental health appointments. *Id.* at 1894:20-1895:6.[6] The staff recruiting has been so successful that CDCR "literally filled up all of [its] prisons with correctional staffing" and planned to cancel academies for additional staff because "we are actually overfilled." *Id.* at 1895:11-18.

Furthermore, under the Special Master, the State added dedicated mental health beds at various institutions, diminishing mental health bed waiting

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[6] The three-judge court chose not to consider such progress, instead relying on plaintiffs' outdated expert reports to criticize the level of custodial staffing dedicated to provision of medical and mental health care. 09-416-App. 110a.

lists. *Plata* D.E. 1715, ¶ 74; Defs.' Trial Ex. 1186. CDCR institutions implemented functional and effective quality management programs. *Coleman* D.E. 3638, at 379, 381. Numerous institutions satisfied Program Guide requirements for suicide prevention, *id.* at 384; and as in *Plata*, an increased number of institutions improved their provision of medication for class members, see, *e.g.*, *id.* at 390-91 (noting "significant improvement").

3. The district courts' decisions to convene a three-judge court despite progress under the interim orders in *Plata* and *Coleman* cannot be reconciled with even pre-PLRA case law. See *Women Prisoners* v. *Dist. of Columbia*, 93 F.3d 910, 929 (D.C. Cir. 1996) (reversing imposition of a population cap and explaining "[t]he court ... should have determined the constitutional propriety of a population cap *at the margin*—that is to say, *after its instructions concerning health and safety measures had been complied with*") (second emphasis added). If the lower courts' approach prevails, a single-judge court may find that insufficient progress at some earlier time vitiates § 3626(a)(3)(A)(ii)'s "reasonable amount of time to comply" requirement, even if current remedial orders show significant progress. Cf. *Casey*, 518 U.S. at 363 & n.8.

Less intrusive measures to address constitutional violations often take substantial time. By enacting the PLRA, Congress made plain its intent that such measures be given a full opportunity to succeed before a three-judge court is convened to consider prisoner release. The improvements detailed above individually and cumulatively demonstrate that the single-judge courts prematurely convened the three-judge court. Accordingly, that court lacked

jurisdiction to issue the "Order to Reduce Prison Population."

II. THE COURT'S INTERPRETATION OF § 3626(a)(3)(E) IS CONTRARY TO THE PLRA AND WOULD GREATLY EXPAND THE AVAILABILITY OF "PRISONER RELEASE ORDERS."

Section 3626(a)(3)(E) requires a three-judge court to find, by clear and convincing evidence, that "crowding is the primary cause of the violation of a Federal right; and ... no other relief will remedy the violation" before issuing a "prisoner release order." The court's interpretation of § 3626(a)(3)(E) presents substantial questions for review.

In finding that overcrowding is the primary cause of constitutional violations, the court did not give the word "primary" its natural meaning. It found overcrowding a primary cause of the medical and mental healthcare inadequacies simply because crowding contributed to those problems and impeded their solution. That interpretation contravenes the statute's plain meaning and Congress's purposes. See 09-416-App. 126a n.55 (the primary cause determination is "'a question of law'"). It allowed the court to order prisoner release despite its simultaneous finding that the 137.5% cap would not remedy the alleged Eighth Amendment violations. At a minimum, the elimination of the "primary cause" of a constitutional violation should "remedy the violation of the Federal right."

Moreover, the court's finding that plaintiffs presented "clear and convincing" evidence that less intrusive measures could not remedy the alleged constitutional violations is unsustainable. All of the court's findings with respect to § 3626(a)(3)(E) were

artificial because it did not analyze—and appellants were prohibited from taking discovery from the Receiver or the Special Master, and introducing evidence about—the "current and ongoing" nature of alleged federal violations.

1. Congress did not define the statutory phrase "primary cause," nor does the legislative history address it. See 09-416-App. 79a & n.43. Although the three-judge court purported to accept the State's interpretation of the requirement, *id.* 78a ("the cause that is 'first or highest in rank or importance; chief; principal'"), it did not apply that interpretation. Instead, in finding that overcrowding was the "primary cause" of the alleged constitutional violations, the court used a standard that made crowding a *contributing cause* of the violations. See *Black's Law Dictionary* 250 (9th ed. 2009) ("contributing cause" is "[a] factor that—though not the primary cause—plays a part in producing a result").

The court recognized that myriad causes for the alleged violations exist, many of which pre-date the crowding at issue. See 09-416-App. 16a-17a, 31a-52a, 104a-126a. And, the court acknowledged that curing the crowding would not remedy the alleged violations because independent (primary) causes would continue to produce constitutional injury. *Id.* at 134a, 143a.

In these circumstances, crowding cannot be the primary cause of the alleged constitutional violations because it is not their proximate and "but for" cause. See *Rocco* v. *Lehigh Valley R.R.*, 288 U.S. 275, 278-80 (1933) (discussing "primary" and "proximate" causation under the Federal Employers' Liability Act); *The G.R. Booth*, 171 U.S. 450, 460-61 (1898) (discussing "proximate" and "primary causation"); *Metro. Pittsburgh Crusade for Voters* v. *City of*

Pittsburgh, 964 F.2d 244, 251 (3d Cir. 1992) (a "primary cause" encompasses "but for" and "proximate" causation; such standards are "significantly more stringent than [a] 'material contributing factor' test") (citations omitted). In other contexts, courts recognize that it is much easier for a litigant to satisfy a "contributing factor" test than to demonstrate that a particular circumstance is the "primary cause" of a statutory violation. *Hawkins* v. *Dir., Office of Workers Compensation Programs*, 907 F.2d 697, 705 n.12 (7th Cir. 1990) (Black Lung Benefits Act); *Borras* v. *Sea-Land Serv., Inc.*, 586 F.2d 881, 885-86 (1st Cir. 1978) (Jones Act).

By finding that crowding is the primary cause here, the district court effectively nullified § 3626(a)(3)(E)(ii). That provision assumes that by addressing "crowding," the prisoner release order will do what lesser relief could not: "remedy the violation of the Federal right." If overcrowding is the primary cause of any violation, then eliminating overcrowding should undo all or virtually all constitutional harm. The record makes clear that this would not be true here.

Before the three-judge court was convened, *Coleman* and *Plata* were not litigated as cases about crowding. The underlying alleged violations involved the delivery of medical and mental health care. Accordingly, the thrust of orders entered by the single-judge courts was directed, not at crowding, but at problems such as recruitment and retention of qualified personnel, medical leadership, medical equipment, screening systems, systems to track patients with needs, record keeping, and institutional culture. See 09-416-App. 16a-17a, 22a-23a, 33a-36a. The *Coleman* Special Master, the *Plata* Receiver, and plaintiffs' expert agreed that even if the crowding is

remedied, these pre-existing problems will continue to cause the alleged constitutional violations.[7]

The lower court's interpretation of § 3626(a)(3)(E) therefore allows a three-judge court to order prisoner release whenever it is frustrated with the speed or ability of less intrusive relief to remedy the violations of federal rights—even though the federal violations will continue after the release occurs. See 09-416-App. at 134a, 143a. This fails to give meaning to Congress's intent to make prisoner release the PLRA's "'the remedy of last resort.'" *Id.* at 73a.

2. The three-judge court concluded that overcrowding was the primary cause of the constitutional violations because it believed that "all other potential remedies will be futile in the absence of a prisoner release order." 09-416-App. 144a-145a. The court's view is not supported by the record, let alone clear and convincing evidence.

Initially, the three-judge court's analysis is inconsistent with the testimony of plaintiffs' experts. They repeatedly opined that constitutionally adequate medical and mental health care can be provided in severely overcrowded prisons, claiming that they had done so in the state prison systems they administer-

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[7] *See, e.g.*, Deposition of Dr. Shansky at 61:14-24 (Dec. 10, 2007) (*Plata* D.E. 1481, Ex. A) (testifying the CDCR will not have constitutionally adequate medical care delivery "[i]f the only improvement that was made in the next two years is ... there are 40,000 less inmates"); *Plata* D.E. 673, at 42:24-43:1 (Receiver: it is "simply wrong" to believe "that population controls will solve California's prison health care problems"); Receiver's Turnaround Plan of Action at ii-iv, 1-20 (*Plata* D.E. 1229); 09-416-App. 157a-158a (Special Master: "'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'") (alteration omitted).

ed. See Tr. 241:2-6, 252:7-253:25 (Dr. Beard); *id.* at 212:5-214:10 (testifying that although it "is impossible to really do a good job" when prison population is at 150-60% of design capacity, he ran a prison at over 200% design capacity); *id.* at 285:21-286:14 (Dr. Lehman); *id.* at 457:1-13, 478:7-479:16 (Dr. Shansky).

The court's conclusion is further undermined by its failure to consider the ongoing improvements in *Plata* and *Coleman* described *supra* § I (failure to consider progress infects analysis of jurisdiction to convene a three-judge court). This evidence was plainly relevant to a determination whether plaintiffs had established, by clear and convincing evidence, that a prisoner release order was required because "no other relief" would suffice. See 09-416-App. 145a-162a (discussing purported inadequacy of less intrusive remedies). The three-judge court erred by considering each of the potential remedial measures in isolation rather than examining their cumulative effect, by unreasonably dismissing the individual effectiveness of those potential remedies, and by failing to consider the most current evidence of progress.

Additional Hiring. The court rejected additional hiring as a less intrusive form of relief. See 09-416-App. 154a-155a. As shown *supra* § I, the hiring trends affecting the *Plata* and *Coleman* class members were extremely positive between 2007 and 2008. The court declined to recognize these improvements although the State introduced evidence of such progress at trial. See, *e.g.*, *supra* 14-15 & n.5. Instead, the three-judge court relied on the state of staffing in 2007 and before, to dismiss additional hiring as a potential remedy. 09-416-App. 154a; see *id.* 47a-48a & nn.31-34 (staffing between

1998 and 2007); *id.* at 28a (staffing in 2005). But, had the court considered the actual state of hiring, it would have concluded that plaintiffs failed to establish, by clear and convincing evidence, that continued staffing increases—whether alone or in concert with other measures—would not have remedied the alleged violations of the class members' rights.

The Receiver and the Special Master's Ability to Remedy Alleged Violations Absent Release. The court's claim that the tools available to the *Plata* Receiver and the *Coleman* Special Master were insufficient to remedy the alleged violations of plaintiffs' rights absent a prisoner release order is not supported by clear and convincing evidence. See 09-416-App. 155a-159a. For instance, as plaintiffs' expert testified: "'[Q.] Is it your opinion that no matter what resources he has or what actions he takes, the Receiver cannot provide for constitutional levels of medical care at current population levels? [A.] No.'" Tr. 1430:2-6.

Most notably, the court apparently declined to credit Dr. Shansky, *plaintiffs' expert*, when he testified that that some prisons already may be providing constitutional levels of care, notwithstanding their overcrowding. Tr. 456:11-15. He also testified that if the Receiver's Turnaround Plan were fully implemented, it would "ensure a constitutional level of healthcare and mental healthcare" even without prisoner release. *Id.* at 491:1-492:8.

By plaintiffs' counsel's estimation, certain facilities that previously had provided constitutionally inadequate care showed marked improvements despite very large populations. For instance, plaintiffs' report following their February 2007 visit to the Central California Women's Facility, whose

population was 195.2% of design capacity, stated that "[b]ecause of the overall progress implementing the *Plata* policies and procedures," in-person monitoring visits to the facility would no longer be necessary. Defs.' Trial Ex. 1074, at 1. They noted that the facility was "fully staffed" and the prison had "eliminated" a previous backlog. *Id.* at 4-10; see also Office of the Inspector Gen., *Central California Women's Facility: Medical Inspection* Results 1-2, 7-28 (2009), *at* http://www.cprinc.org/docs/resources/OIG_CCWF_MedInspectionResults_200904.pdf (reporting multiple 100% scores for compliance with Receiver's policies and procedures as well as many other scores above 80% compliance). Similarly, plaintiffs' report of their March 2008 visit to Mule Creek State Prison, whose population exceeded 215% of design capacity, stated that its "'compliance with key access to care time frame requirements ... is generally very good at present time.'" Tr. 441:18-442:12; *id.* at 440:24-25. And, following a July 2007 visit to CSP-Solano, whose population was 230.8% of design capacity, plaintiffs reported that they found just "a few areas" in which the facility was "out of compliance with the *Plata* Policies and Procedures." Letter from Zoe Schonfeld, Prison Law Office 2 (July 10, 2007).

In all events, any conclusion that the Receivership and Special Mastership would have been unable to remedy the alleged violations of the *Plata* and/or *Coleman* class members' constitutional rights must be rejected because of the evidentiary limitations imposed before and during trial. The State was unable to gather and introduce the most relevant evidence on this point, namely the Receiver's and the Special Master's views on whether a prisoner release order was necessary. *Supra* 7.

Moreover, the three-judge court gave no weight to the positive developments under the Receivership and Special Mastership that occurred between the August 30, 2008 close of evidence and the close of trial. See *supra* § I (discussing progress after that date).[8] The court precluded the State from "introduc[ing] ... evidence relevant only to determining whether the constitutional violations found by the *Plata* and *Coleman* courts were 'current and ongoing.'" 09-416-App. 78a n.42.[9] The court stated that it had no need to consider these issues because the single-judge district courts had "both found, without objection from defendants, that constitutional violations were ongoing" in July 2007, and "defendants ha[d] never filed a motion to terminate under § 3626(b), the proper means for any challenge to the existence of 'current and ongoing' constitutional violations." *Id.* at 77a.

The three-judge court's reasoning is unsound. Particularly in light of the successes discussed above, *supra* § I, the State's failure to dispute whether violations were ongoing *16 months before trial* says little about the status of the alleged constitutional violations during trial—let alone on August 4, 2009 or at issuance of the "Order to Reduce Prison Population" now on appeal. The State's decision not to move to terminate proceedings (requiring a showing that *all* constitutional violations had been remedied) does not indicate either which violations

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[8] Furthermore, the court did not consider evidence of the improvements between the trial and its January 12, 2010 order. *Compare supra* § I.

[9] The court repeatedly ruled that evidence would not be allowed to prove current constitutional conditions. *See, e.g.*, *Plata* D.E. 1786, at 28:16-29:2; Tr. at 6:24-7:9.

had been cured or what measures are necessary to address remaining violations, if any.

The record lacks the "clear and convincing" evidence required to support prisoner release.

Out-of-State Transfers. The three-judge court reasoned that the number of transfers to date and proposed in the future were "too small to significantly affect the provision of medical and mental health care to California's inmates." 09-416-App. 160a. The court erred in rejecting the possibility of transferring California inmates to out-of-state facilities as a less intrusive remedy. *Id.* at 159a-162a.

The State sought to transfer greater numbers of prisoners housed in CDCR institutions to out-of-state facilities, but Judge Karlton prohibited it from doing so. See slip op. at 2 (Nov. 6, 2006) (*Coleman* D.E. 2025) (allowing 80 inmates' transfer, but ordering that "[n]o other CDCR inmates are to be transferred"); cf. Cal. Code Regs. tit. 15, § 3379(a)(9)(F)(2), (G)(1)-(2) (regulations promulgated as a result of Judge Karlton's order, prohibiting transfer of class members absent a court order). Thus, despite the findings that CDCR facilities were providing unconstitutional care, Judge Karlton refused to transfer inmates to facilities outside California—where they would have received care that satisfied the Eighth Amendment.[10] In these circumstances, the three-judge court should have refused to order prisoner release unless the district courts allowed the

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[10] Ironically—given the State's alleged "deplorable" care, 09-416-App. 20a, 280a—the court prohibited additional transfers because of the Special Master's concern, *Coleman* D.E. 2025, at 2 ¶ 3, that "the actual state of mental health services" at the *out-of-state transferee institutions* would not provide sufficiently high quality care. *See id.*, Ex. 1, at 3.

State to exhaust its avenues for prisoner transfer. Absent such an effort, plaintiffs could not have proven by clear and convincing evidence that transfers of CDCR inmates would not remedy any constitutional violations.

Construction. The court also rejected the State's argument that its desire to implement AB 900 and its willingness to construct facilities would constitute less intrusive remedies than prisoner release. See 09-416-App. 145a-154a. The court declined to credit plaintiffs' experts' testimony that prison construction helped remedy federal law violations in systems they administered, Tr. 287:10-20, 289:18-20, and that the construction of additional treatment facilities in California could remedy the alleged violations, *id.* at 254:25-256:8, 457:1-458:6.

The court dismissed the State's construction proposals as infeasible because "it will be years before any re-entry facility construction ... will be completed." 09-416-App. 147a-148a; *id.* at 149-150a. The court's reasoning is internally inconsistent. The court *sua sponte* stayed its prisoner release order pending appeal; once effective, that order will take *two years* to implement. In this time, construction that could be a partial remedy will occur. The prisoner release order was not the "'the remedy of last resort.'" *Id.* at 144a.

The court failed properly to account for these intrusive measures individually and cumulatively, which could remedy the alleged constitutional violations. The decision below thus presents substantial questions warranting plenary review.

III. THE COURT'S INTERPRETATION OF THE PLRA'S NEXUS AND NARROW TAILORING REQUIREMENTS IS DEEPLY FLAWED.

Even if § 3626(a)(3)(E) were satisfied, the scope of the prisoner release order raises substantial questions worthy of review.

The district court has imposed an inflexible population cap, 137.5% of the prisons' combined design capacity, that must be met within two years. App. 5a-6a; see *id.* at 13a (*Coleman* order incorrectly requiring that a particular institution's population immediately satisfy the 137.5% cap). The "Order to Reduce Prison Population" is not "narrowly drawn," it extends "further than necessary to correct the [alleged] violation" of the *class members*' rights, and does not give sufficient weight to adverse impacts on public safety and the operation of the State's criminal justice system. 18 U.S.C. § 3626(a)(1)(A).

1. The three-judge court expressly stated that "the relief sought by plaintiffs extends further than the identified constitutional violations" insofar as it "is likely to affect inmates without medical conditions or serious mental illnesses." 09-416-App. 172a. The population cap addresses the prison population as a whole, not only members of the plaintiff-classes. On its face, the relief violates the PLRA because it is not "narrowly drawn" and is broader than necessary to "correct the violation of the Federal right of ... particular ... plaintiffs," *i.e.*, the class members. 18 U.S.C. § 3626(a)(1)(A); see H.R. Rep. No. 104-21, at 24 n.2 (1995) ("[T]he provision stops judges from imposing remedies intended to ... provide an overall improvement in prison conditions.").

The court's holding also conflicts with the Eighth Circuit's interpretation of the statute's narrow-

tailoring requirement. See *Hines* v. *Anderson*, 547 F.3d 915, 922 (8th Cir. 2008) (decree is "not narrowly drawn" because it addressed medical care generally, not "a particular medical problem that existed at the time"). Moreover, it violates this Court's holdings that "'federal-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) ("*Jenkins II*"); *id.* at 90-92.

Additionally, by directing the prisoner release order at *all* California prisoners, the relief intrudes on the State's management of its criminal justice system. This contravenes § 3626(a)(1)(A)'s requirement that the court "give substantial weight to any adverse impact on ... the operation of the criminal justice system." See also 141 Cong. Rec. S2647, S2649 (daily ed. Feb. 14, 1995) (Sen. Hutchison). And this significant invasion of the State's managerial prerogatives vis-à-vis the general prison population violates this Court's limits on the scope of equitable relief generally and in prison-conditions litigation specifically. See, *e.g.*, *Turner* v. *Safley*, 482 U.S. 78, 84 (1987); *Bell* v. *Wolfish*, 441 U.S. 520, 548 (1979).

This Court should review this case to ensure that the PLRA's requirements are given the meaning Congress intended and that courts do not impose prison population caps other than as a last resort.

2. Additionally, plaintiffs failed to establish that the 137.5% of design capacity cap is "narrowly drawn, extends no further than necessary ... , and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A). The court treated design capacity as a synonym for the appropriate prison population and overcrowding as a constitutional violation; it erred in both respects.

To understand plaintiffs' failings, it is critical to understand what "design capacity" means in California's prisons. It refers to the number of inmates a prison may house based on one inmate per cell, single bunks in dormitories, and no beds in space not designed for housing. 09-416-App. 57a. California, however, "has never limited its prison population to 100% design capacity," because, *inter alia*, its prisons frequently were planned and built to double-cell inmates. *Id.* A facility intended to house two inmates per cell that houses two inmates in each cell (and thus is not overcrowded) is nonetheless at 200% of "design capacity."

Equally important, housing two inmates in a cell designed for one does not violate the Eighth Amendment. *Rhodes v. Chapman*, 452 U.S. 337, 348 (1981). Overcrowding alone does not violate the Eighth Amendment. See *Hoptowit* v. *Ray*, 682 F.2d 1237, 1249 (9th Cir. 1982). Instead, plaintiffs must show that the State is failing to provide medical and mental health care consistent with "the minimal civilized measure of life's necessities," *Rhodes*, 452 U.S. at 347, and is acting with "deliberate indifference to serious medical needs of prisoners" resulting in "'unnecessary and wanton infliction of pain.'" *Estelle* v. *Gamble*, 429 U.S. 97, 104-05 (1976); see *Wilson* v. *Seiter*, 501 U.S. 294, 298-302 (1991).

Plaintiffs' experts repeatedly recognized that constitutionally adequate medical and mental health care can be provided in prisons where the population far exceeds design capacity. *Supra* 21-22. Plaintiffs nonetheless sought a cap at 130% of design capacity—"the federal standard for prison overcrowding," 09-416-App. 180a—without linking that population level to the State's ability to satisfy its constitutional obligations. *Id.* at 183a. Put different-

ly, they failed to show that California's prisons must meet the federal standard for prison overcrowding to provide constitutionally adequate medical and mental health care.

Plaintiffs sought a population cap based on expert opinions concerning the level required for a "prison system ... to function *properly*" or "'*appropriately*.'" 09-416-App. 177a-178a (emphases added). Plaintiffs' experts denied that they could assess the population reduction required to provide inmates with care that satisfied the Eighth Amendment:

> [Q.] Isn't it true ... that you hesitate today to come up with a figure to which the prison population needs to be reduced to achieve constitutional levels of care, because ... that would require doing a study that requires data from the Plata Receiver?
>
> A. Yes, that's correct.

Tr. 483:7-12 (Dr. Shansky); *id.* at 490:4-14 (he had "'no clue'" what the number would be); *id.* at 342:15-23 (Dr. Haney: "[Q.] 'Are you aware of what objective standard must be met by [CDCR] in order to show compliance with the elements of providing sufficient mental health beds for the mental healthcare population to show a constitutional compliance? ... [A.] No, ... I don't know how to calculate that.'").

Instead of linking a particular population level to the abridgement of Eighth Amendment rights, Dr. Beard, like many of plaintiffs' experts, testified about the difficulties that crowding creates for a warden. See Tr. 205:12-14 ("any time that you're running over capacity ... you have more possibilities of having problems"). Critically, he also testified that he had operated prisons whose populations were 150-160% and over 200% of design capacity, opining that

doing so was "difficult"—not that the care provided was in violation of the Eighth Amendment—and that "it is impossible to really do a *good job* with prisons that large." *Id.* at 213:1-214:10 (emphasis added).[11]

On this record, the three-judge court lacked a sufficient basis to conclude that "California's prisoner population *must* be reduced to some level between 130% and 145% design capacity if the CDCR's medical and mental health services are ever to attain constitutional compliance." 09-416-App. 143a (emphasis in original). It selected a system-wide cap of 137.5% design capacity solely because it was "halfway between the cap requested by plaintiffs [*i.e.*, the federal standard for overcrowding] and the wardens' estimate of the California prison system's maximum operable capacity absent consideration of the need for medical and mental health care." *Id.* at 184a. This is the antithesis of narrow tailoring.

Without evidence of the population level at which the State could not provide "the minimal civilized measure of life's necessities," *Rhodes*, 452 U.S. at 347, the court substituted professional standards and desirable benchmarks for constitutional requirements. This conflicts with well-established requirements for assessing and remedying alleged constitutional violations. As recognized in *Rhodes*, a lower court "err[s] in assuming that opinions of experts as to desirable prison conditions suffice to establish

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[11] Plaintiffs' experts were unaware of the level of care provided to the class members and had not evaluated CDCR's delivery of care. *See, e.g.*, Tr. 278:4-7 (Lehman: "Q. In preparing your report, you did not know what the space needs were for medical or mental healthcare in California's prisons, did you? A. Specifically, no."); *id.* at 279:4-6 ("Q. ... You did not have knowledge of the status of medical health care delivery in California's prisons as of August 2008, did you? A. No ....").

contemporary standards of decency.... '[T]hey simply do not establish the constitutional minima; rather, they establish goals recommended by the organization in question.'" *Id.* at 348 n.14 (quoting *Wolfish*, 441 U.S. at 544 n.27); *accord Occoquan*, 844 F.2d at 837; *Hoptowit*, 682 F.2d at 1249.

3. As shown *supra* § II, the order does not satisfy the PLRA's nexus and narrow tailoring requirements because it lacks any connection to the Eighth Amendment violations alleged to persist at the trial. See *Jenkins II*, 515 U.S. at 88. The mandatory starting point for analyzing the nexus between the alleged violations and their remedy was an inquiry into the nature of the current federal violations. The court failed to conduct that inquiry. As a result, the court's conclusions about the required scope of the remedy lacked sufficient basis in the record and cannot stand. See *id.* ("'federal-court decrees must directly address and relate to the constitutional violation itself'").

4. Finally, the court failed to meaningfully account for the order's adverse impacts on public safety. 18 U.S.C. § 3626(a)(1)(A). The PLRA's core purpose was to ensure that any prisoner release order provided substantial protection to the public. See *id.*; see also H.R. Rep. No. 104-21, at 9 (1995); 141 Cong. Rec. at S14418 (Sen. Hatch). The court's order fails this test.

The three-judge court candidly acknowledged that the order was likely to increase crime without substantial investment in "evidence-based rehabilitation programming," 09-416-App. 241a-248a—"*i.e.*, programs that research has proven to be effective in reducing recidivism," *id.* at 214a; see *id.* at 200a. However, the court neither found that such programming could be expanded nor calculated the costs of an expansion. Plaintiffs failed to introduce evidence on

these points, and did not carry their burden. See *Mazurek* v. *Armstrong,* 520 U.S. 968, 972 (1997) (per curiam) (to obtain injunctive relief, the movant, "'by a clear showing, carries the burden of persuasion'") (emphasis omitted); *Gomez* v. *Vernon*, 255 F.3d 1118, 1129 (9th Cir. 2001) (discussing the "public safety" consideration codified in the PLRA, and explaining that plaintiffs still bear the burden of showing an entitlement to relief) (alteration omitted). Further, in light of the State's financial condition, it is more unlikely that such programming could be made available. See 09-416-App. 11a n.4, 187a.

Moreover, in the "Order to Reduce Prison Population," the court acknowledged that it "ha[d] not evaluated the public safety aspect of the State's proposed plan," but assumed that public safety could be assured because the State's experts had previously recommended measures for safely reducing the population. App. 3a-4a. Given the State's financial condition, reliance on such previous recommenddations—which presumed cooperation of the legislature and an ability to organize its budgetary priorities without federal court assistance—is unreasonable. The court's order raises substantial questions whether § 3626(a)(1)(A) has been satisfied.

* * *

The court below entered an unprecedented order that intrudes on the State's authority over its prison system and constrains the State's ability to respond to problems within its prison system and more broadly throughout California. The three-judge court has dictated to the State the single method it must use (prisoner release) to address alleged constitutional violations involving healthcare without fulfilling the PLRA's requirements–a statute Congress enacted to protect the State's prerogatives with

respect to prisoner release so that the State can protect its citizens.

Because Congress recognized the federalism concerns inherent in such an order, it mandated appellate review by this Court. Every issue decided by the court below is one of first impression. This alone provides a sufficient basis for this Court to note probable jurisdiction. But what makes the need for review particularly acute is that the court below has provided any court frustrated by the pace of judicial remedies in prison litigation with a roadmap to use to order prisoner release, instead of remedies trained on the constitutional violation at issue. This Court's plenary review is necessary to forestall that result.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

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