Nos. 09-1232 and 09-1233

IN THE

Supreme Court of the United States

GOVERNOR ARNOLD SCHWARZENEGGER, *et. al.*,

Appellants,

and

CALIFORNIA STATE REPUBLICAN LEGISLATOR INTERVENORS, *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

PLATA APPELLEES' MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether the Court's jurisdiction under 28 U.S.C. § 1253, which extends to orders "granting or denying ... an interlocutory or permanent injunction" rendered "by a district court of three judges," authorizes direct review of a single-judge district court's decision to convene a three-judge panel.

2. Whether the three-judge court clearly erred in concluding that the conditions for a prison population cap under 18 U.S.C. § 3626(a)(3)(E) were satisfied based on its fact-intensive determinations (i) that prison overcrowding is the primary cause of California's failure to provide inmates with constitutionally adequate mental and medical healthcare, and (ii) that, in light of numerous unsuccessful previous court orders spanning years of failed remedial efforts, "no other relief" would remedy the ongoing constitutional violations.

3. Whether the three-judge court's order requiring California to bring its prison population to within 137.5% of its prisons' total design capacity, while affording State officials broad discretion to choose which remedial measures will safely and effectively address the prison overcrowding crisis, is narrowly drawn, extends no further than necessary, and is the least intrusive means necessary to correct the ongoing violations of inmates' federal constitutional rights.

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Pursuant to Rule 18.6, the *Plata* appellees move for a partial dismissal of the appeal because this Court lacks appellate jurisdiction over a challenge to a decision by a single-judge district court. Appellees further move to affirm the order below because the questions raised are so insubstantial that no further argument is warranted. For the reasons set forth below and for the additional reasons set forth in the motion to dismiss or affirm filed by the *Coleman* appellees, the Court should summarily affirm the lower court's decision.

INTRODUCTION

This appeal arises from an order requiring the State of California to reduce its prison population because no other remedy will prevent further serious injury and death in California's dangerously overcrowded prisons.

There can be little dispute about the essential facts underlying the three-judge court's decision. After proclaiming a "Prison Overcrowding State of Emergency" four years ago, the defendant Governor recently concluded that California's prison system is now so overcrowded that it is "collapsing under its own weight." His counsel conceded that medical care in the prisons continues to be so inadequate as to violate the Eighth Amendment.

In response to the prison crisis, the Governor has repeatedly urged the state legislature to reduce the prison population, most recently by proposing measures to reduce the population by 37,000 prisoners over two years, and in frustration

expressed a true understanding of why judicial relief is necessary:

> I don't blame the courts for stepping in to try to solve the health care crisis that we have, the overcrowding crisis that we have, because the fact of the matter is, for decades the state of California hasn't really taken it seriously. It hasn't really done something about it.

Ex. P-384, Trial Tr. 650-51.

After concluding a lengthy trial in this case, the three-judge court found that overwhelming evidence establishes that overcrowding is the "primary cause" of the Eighth Amendment violations and that no other remedy could succeed without a reduction in the population.

In its appeal, the State raises the question of whether a federal court can impose a narrowly tailored prison population cap under these circumstances. The answer must be affirmative.

Congress expressly authorized federal courts to remedy unconstitutional prison conditions by imposing a cap on the population of correctional facilities. 18 U.S.C. § 3626(a)(3). As directed by Congress, the three-judge court imposed the population reduction order on California's prisons only as a last resort, after decades of judicial (and political) efforts to remedy the constitutional violations proved unsuccessful, and only after it exhaustively studied the potential impact of its order on public safety and found that the order would not have substantial adverse consequences.

The court's order to reduce the prison population is supported by the former head of California's prison

system and by witnesses who have run or are currently running state prison systems in Texas, Pennsylvania, Washington State and Maine. All of these officials testified for the plaintiffs, some for the first time and two without compensation. All affirmed that overcrowding was the primary barrier to the operation of a minimally adequate health care system in California. Four other correctional health care experts – one testifying for defendants – joined that chorus of opinion.

The State asserts here that the lower court strayed far from its federal role when it imposed a population cap. But the State's portrayal of the lower court's decision is inaccurate; the court's 183-page opinion reveals a remarkably different picture from that depicted in the Jurisdictional Statement. It is a picture of a court that used every other remedy in its power before even considering imposing a population cap; that repeatedly delayed its rulings in the vain hope of voluntary action by the State; that took its responsibilities to protect constitutional rights seriously while protecting the State's political prerogatives; and that fairly surveyed the vast and overwhelming evidence before issuing the order on appeal.

The State claims correctly that the order to reduce the prison population by about 38,000 prisoners over a two year period is significant.[1] But, like much in

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[1] The State exaggerates when it claims that the order requires a reduction of 46,000 prisoners. In its filings in the district court, it cited the figure of 40,000, State-App. 32a, and with the current population level, the correct figure is 38,246. *See*

(continued)

the State's brief, this assertion lacks context. California has one of the largest prison systems in the world, currently housing 165,000 prisoners. Every month it releases on parole more than 10,000 prisoners. And although it may seem counter-intuitive, the evidence overwhelmingly proves that releasing more low-risk prisoners on parole will not increase crime. The length of incarceration is not related to recidivism; thus, literally millions of other prisoners have been released "early" at the same time that the crime rate has been dropping to the lowest level in decades.

The lower court's opinion in this case is not, as the State suggests, policy reform hidden in judicial clothing. It is a straightforward application of the rules set by Congress to a unique set of facts that can bear no other conclusion.

The lower court's detailed opinion makes that clear, but so does the State's brief. Instead of arguing that the factual findings are clearly erroneous, the State picks a few points in its favor while ignoring all of the overwhelming evidence that supports the findings. Instead of remaining true to its definition of a key phrase ("primary cause") in the controlling statute that the lower court adopted verbatim at its request, the State suggests a new one on appeal that is contrary to the statute's plain language. Instead of proposing a viable alternative to population

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http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/WeeklyWed/TPOP1A/TPOP1Ad100421.pdf. The figure would be even smaller if the State builds new prison facilities.

reduction, the State suggests the receivership as a remedy while it simultaneously argues in the Ninth Circuit in this very case that Congress prohibited such a remedy when it enacted the Prison Litigation Reform Act.

The three-judge court did what Congress told it to do in these circumstances. After finding that crowding was the primary cause of the constitutional violations, and that no other relief would provide a remedy, the court granted relief. Its order was consistent with both the governing statute and this Court's opinions requiring that the relief be narrowly tailored and the least intrusive means to remedy the constitutional violations. The court set the population cap under a time frame the State determined it could meet, and it gave the State complete freedom to determine how to comply with that order.

The order below does not present any substantial questions warranting this Court's plenary review, and should be summarily affirmed.

JURISDICTION

This Court has jurisdiction over the State's and Intervenors' appeals from the injunction issued by the three-judge court pursuant to 28 U.S.C. § 1253, but lacks jurisdiction over the State's challenge to the single-judge court decision to convene the three-judge court, State J.S. 11-18.

STATEMENT OF THE CASE

1. This appeal arises out of two separate actions to remedy unconstitutional health care in the prisons, *Plata v. Schwarzenegger*, a case filed on

behalf of prisoners with serious medical needs, and *Coleman v. Schwarzenegger*, a case filed on behalf of prisoners with serious mental disorders.

The *Plata* plaintiffs filed suit in 2001 claiming that the State fails to provide constitutionally adequate medical care. Int. App. 13a. In 2002, the State agreed to a settlement, conceding that the prison conditions are unconstitutional and that judicial oversight is necessary under the PLRA. *Plata* D.E. 68, ¶29.

Following the settlement, the *Plata* court issued other supplemental orders aimed at improving the quality of care and governance of the prison medical system. Int. App. 14a-30a. However, "defendants proved incapable of or unwilling to provide the stipulated relief." Int. App. 14a. "Three years after entering into the consent decree, not a single prison had successfully implemented the remedial procedures, despite the fact that a 'significant number' of inmates had died as a direct result of substandard medical care – a fact the State openly acknowledges." *Plata v. Schwarzenegger*, No. 09-15864, 2010 WL 1729472 at *2 (9th Cir. Apr. 30, 2010).

Ultimately, the court appointed a receiver to oversee prison medical care. Int. App. 29a-30a. Even the Receiver could not remedy the constitutional violations. Int. App. 30a.

The reason constitutional violations have persisted for years despite intensive judicial oversight is straightforward: prison overcrowding. Int. App. 30a, 141a-142a.

The prisons were built to house 80,000 prisoners. Int. App. 57a. They now house double that number.

Int. App. 9a. Some prisons are crowded to 300% of capacity. Int. App. 10a. No other state faces a comparable crisis.

In 2006, Governor Arnold Schwarzenegger declared a "Prison Overcrowding State of Emergency" because, he said, the severe prison crowding "has caused substantial risk to the health and safety of the men and women who work inside these prisons and the inmates housed in them" making prisons places of "extreme peril to the safety of persons." 09-416-Appellees'-App. 2a, 14a.

The Governor further declared that "immediate action is necessary to prevent death and harm caused by California's severe prison overcrowding." Int. App. 61a. The state of emergency is still in effect. Int. App. 62a.

The most visible consequence of crowding is the prisons' overuse of so-called "ugly" beds—more than ten thousand double and triple bunks "crammed into gyms and dayrooms that were never meant to be used for housing." Int. App. 100a (citation omitted); *see also* 09-416-Appellee-App. 19a-23a (photographs of ugly beds). The former head of the Texas prison system testified that "'[i]n more than 35 years of prison work experience, I have never seen anything like it.'" Int. App. 100a.

According to a former high-ranking California prison official: "the risk of catastrophic failure in a system strained from severe overcrowding is a constant threat.... [I]t is my professional opinion this level of overcrowding is unsafe and we are operating on borrowed time." Int. App. 84a-85a.

Nowhere is this risk of catastrophic failure felt more acutely than in the health care system. The

health care infrastructure is simply unable to deal with the vast number of prisoners:

• *Crowding Causes Deadly Delays in Emergency Response.* Because of the extremely overcrowded living conditions, it can be nearly impossible for prison staff to identify or respond adequately to medical emergencies. Int. App. 110a-111a; Trial Tr. 380:1-381:7, 382:14-383:3. A former head of California's prison system described how a prisoner was assaulted in the middle of a crowded gymnasium converted to overflow housing. Because the gym was so crowded, prison staff didn't even know about the injury – much less provide emergency medical aid – until after the victim had already died. Trial Tr. 382:2:-383:3 (Woodford).

• *Lack of Space to Deliver Health Care.* The three-judge court found that "[o]ne of the clearest effects of crowding is that the current prison system lacks the physical space necessary to deliver minimally adequate care to inmates." Int. App. 85a. Indeed, as the Receiver has reported, "'the available clinical space is less than half of what is necessary for daily operations.'" Int-App. 93a (citation omitted). A former Secretary of California prisons testified that "the lack of space is not only a housing issue, but it's impacting other factors, like delivery of healthcare services, the lack of offices, and clinical space." *Plata* D.E. 1992-10 at 5 (Tilton).

• *Increased Lockdowns Due to Crowding Impede Access to Care.* Because the prisons are so overcrowded, inmate control is difficult, and prison administrators rely heavily on lockdowns to exert control. Int. App. 116a-117a. During lockdowns, prisoners are unable to leave their housing units to

go to health clinics; instead, medical staff must go cell-to-cell to see prisoners. Int. App. 117a-118a. This causes serious delays in access to care, and results in inadequate care. Int. App. 116a-188a.

- *Crowding Results in Inadequate Screening of New Prisoners.* Prison reception centers, where prisoners are processed on arrival, are so crowded that they have no place to properly screen new prisoners. As a result, prisoners' "health needs are not identified" and "cannot be treated. In addition, inmates whose needs are not identified may be placed in a setting that will exacerbate existing but unidentified health problems." Int. App. 89a; *id.*, 87a-88a.

- *Spread of Infectious Diseases.* As the Governor proclaimed, overcrowded living conditions cause an "increased, substantial" risk of transmission of infectious diseases. 09-416-Appellees'-App. 2a; Int. App. 101a-102a.

- *Shortages of Health Care Staff.* Because the prisons are overcrowded, there are simply too few health care practitioners to address the basic needs of prisoners. Int. App. 104a-109a. While the prisons have improved their staffing levels from their former rock-bottom levels, the overcrowded prisons continue to provide such dismal working conditions that the prisons remain unable to recruit or retain enough staff. Int. App. 154a. And even if enough staff could be recruited, they would have almost nowhere to work, because of the lack of space in the overcrowded prisons. Int. App. 154a-155a.

- *Overwhelmed Medication Management Systems.* The sheer number of prisoners housed in institutions built for half their number has

overwhelmed the prisons' medication management systems. As a result, the prisons are unable to deliver the right medication to the right prisoner in a timely manner. Int. App. 112a-114a.

- *Overwhelmed Medical Records Systems.* Overcrowding has also overwhelmed the prisons' medical records systems, so that the prisons cannot identify what health care services a prisoner may need. Int. App. 118a-121a.

- *Overburdened Specialist Referral Systems.* Overcrowding has also eclipsed the prisons' ability to provide urgent specialty medical care to prisoners who need it. Int. App. 114a-116a.

- *Prisoners Are Dying From Inadequate Care.* As a direct result of all of these problems caused by crowding, there are "unacceptably high numbers of both preventable or possibly preventable deaths, including suicides, and extreme departures from the standard of care." Int. App. 123a.

According to the Receiver, "[i]t will not be possible to raise access to, and quality of, medical care to constitutional levels with overpopulation at its current levels." Ex. P-55 at 1, *Plata* D.E. 1757 at 10. As recently as January 2010, the Receiver reported to the court that the "prisons remain significantly overcrowded, and the lack of adequate facility space and appropriate beds for medical and mental health purposes continues to impede efforts to improve care." *Plata* D.E. 2289-1 at 6.

2. In November 2006, after the Governor issued the "Prison Overcrowding State of Emergency Proclamation," plaintiffs filed a motion to convene a three-judge court to consider population reduction remedies. Int. App. 62a-63a.

The court delayed hearing the motion in order to give the Receiver an opportunity to report about the impact of overcrowding on his remedial efforts, and urged the State to use the delay to remedy the problems on its own. Int. App. 63a.

Ultimately, the Receiver reported that crowding stymies his remedial efforts. Exs. P-26, Int. App. 86a; P-27; D-1292, Int. App. 41a. The State, meanwhile, failed to develop other remedies.

On July 23, 2007, the *Plata* and *Coleman* courts issued separate orders requesting that a three-judge court be convened. Int. App. 65a. The Ninth Circuit Court of Appeals ordered, without objection, that a single three-judge court be convened to consider both cases. Int. App. 69a.

The three-judge court stayed discovery and delayed consideration of this matter for more than seven months, referring the matter to a settlement referee to give the State another opportunity to resolve the crowding problem on its own. Int. App. 69a-70a. The State again failed to do so.

3. Commencing on November 18, 2008, the lower court held fourteen days of trial and two days of closing argument. Int. App. 70a. The court heard testimony from nearly 50 live witnesses and more by written testimony, and admitted hundreds of documents into evidence. *Id.* Testifying in favor of a population reduction order was the former head of the California prison system, and the current and former heads of state prison systems in Texas, Pennsylvania, Washington State, and Maine. Int. App. 81a n.44.

On August 4, 2009, the court issued an opinion and order finding that plaintiffs have demonstrated

all elements required by the PLRA for issuance of a "prisoner release order." Int. App. 253a-254a.

The court found that "clear and convincing evidence establishes that crowding is the primary cause of the unconstitutional denial of medical and mental health care to California's prisoners." Int. App. 82a.

The court also found and concluded that "[r]educing the population in the system to a manageable level is the only way to create an environment in which other reform efforts, including strengthening medical management, hiring additional medical and custody staffing, and improving medical records and tracking systems, can take root in the foreseeable future." Int. App. 168a (citation omitted).

In other words, the court found, "all other potential remedies will be futile in the absence of a prisoner release order." Int. App. 144a-145a.

4. The court then addressed appropriate relief. Relying on testimony from State prison officials, county jail administrators, the former head of the California prison system, and the former heads of the Texas, Pennsylvania, Washington State, and Maine prison systems, the court concluded that "a cap of no higher than 137.5% is necessary." Int. App. 169a, 175a-185a.

The court gave substantial consideration to potential impacts of the reduction in the prison population, and found that the evidence shows that "the state *could* comply with [its] population reduction order without a significant adverse impact upon public safety or the criminal justice system's operation." Int. App. 187a-188a.

In developing a population reduction plan, the State "would not be required to throw open the doors of its prisons, but could instead choose among many different options or combinations of options for reducing the prison population." Int. App. 173a-174a. Such measures have already been proposed by the Governor, and overwhelming testimony affirms that such measures "either have no impact" on the recidivism rate "or reduce the recidivism rate" and therefore "would not adversely affect public safety." Int. App. 249a; *see also* Int. App. 196a-220a.

5. The State has conceded that it is possible to "safely" reduce the prison population. Int. App. 272a. On November 12, 2009 the State submitted a plan to gradually reduce its prison population using the well-accepted, safe methods examined by the three-judge court, among others. State-App. 32a-70a. In its plan, the State set forth six-month population reduction benchmarks that it would meet during the process of achieving the required population reduction within two years. *Id.* 70a.

6. On January 12, 2010, the three-judge court issued a final order requiring the State to reduce its prison population. The court issued the narrowest and least intrusive remedy available to it under the circumstances; it ordered the State only to meet the six-month population benchmarks set forth in the State's plan, but gave the State free reign to choose which population reduction measures to use. State-App. 3a-6a.

THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

The appeals in this unique, fact-bound case do not have any of the indicia traditionally warranting plenary review: there is no circuit split, no important question of law, and no serious dispute about any of the important facts. The State avers that a summary affirmance by this Court will have a profound precedential effect, but the singular circumstances of the prison crowding in California, and the fact-specific nature of the issues raised by the appeals, will greatly reduce any impact of a summary affirmance, which in any event would be afforded "less deference" than other orders of this Court. *Ashland Oil, Inc. v. Caryl*, 497 U.S. 916, 920 n*(1990); *see also Caban v. Mohammed*, 441 U.S. 380, 390 n.9 (1979) (same); *Gonzales v. Automatic Employees Credit Union*, 419 U.S. 90, 95 (1974) ("in the area of statutory three-judge-court law the doctrine of stare decisis has historically been accorded considerably less than its usual weight").

This case is not about whether the State is currently violating the Eighth Amendment rights of appellees. The State has already admitted that there are current constitutional violations and that while it challenges particular remedies, it does not seek to terminate judicial oversight. *Plata v. Schwarzenegger*, No. 09-15864, 2010 WL 1729472 at *8-9 (9th Cir. Apr. 30, 2010); *Plata,* No. 09-15864 (audio recording of oral argument, Sept. 16, 2009, at http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000003923, at minutes 9:53-10:13).

The State also concedes that the inadequacies in the medical care system are caused in part by prison

crowding. Trial Tr. 2953:6-2954:5 (closing argument). It concedes that the State has long proven unable to remedy the problems on its own, and it admits that federal court intervention is reasonable. Ex. P-384.

The State nonetheless claims that the lower court erred in its findings of fact, but the matters it raises are not substantial:

While it admits that the *Plata* court had previously issued orders for less intrusive relief over a period of eight years, the State disputes the court's finding that the State had a "reasonable" amount of time to comply with the earlier orders.

While it admits crowding is one cause of the constitutional violations, the State disputes the lower court's finding that crowding is the "biggest" cause.

While it agrees that crowding imperils the health of inmates, it challenges the finding that crowding must be reduced for the State to remedy the constitutional violations.

While it admits that it can safely reduce the population by the amount ordered, the State argues that the lower court's ruling will jeopardize public safety.

On each of these matters, the lower court's determinations must be upheld because there was no clear error. Fed. R. Civ. P. 52(a)(6); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 948 (1995).

I. The Three-Judge Court Was Properly Convened.

A. The Appeal Must Be Dismissed.

This Court must dismiss the part of the State's appeal that argues that the single-judge court erred when it recommended that the three-judge court be convened. This Court lacks jurisdiction over this matter on direct appeal because the decision by the single-judge court is neither "an order granting or denying" an injunction, nor is it one "required by any Act of Congress to be heard and determined by a district court of three judges." 28 U.S.C. § 1253. The *Plata* appellees join in and rely upon the argument set forth in the *Coleman* Plaintiffs' Motion to Dismiss or Affirm, Nos. 09-1232, 09-1233, at 18-19.

B. The State's Claims Are Meritless.

Even if the Court were to reach the substance of the State's claims, those claims do not warrant plenary review. The lower court has "previously entered" multiple orders for "less intrusive" relief, and a "reasonable amount of time" has surely elapsed, as it is undisputed that the passage of eight years has not sufficed to remedy the violations. 18 U.S.C. § 3626(a)(3)(A).

In 2002, by stipulation, the *Plata* court entered an injunction designed to ensure minimally adequate medical care. *Plata* D.E. 68. Since that time, the *Plata* court has undertaken extensive and extraordinary efforts to effectuate a remedy, as described more fully in *Plata,* 2010 WL 1729472. However, "defendants proved incapable of or

unwilling to provide the stipulated relief." Int. App. 14a.

In 2004, "after two years of little progress, the parties entered into a Stipulated Order Regarding the Quality of Patient Care and Staffing . . . which the court promptly approved." *Plata,* 2010 WL 1729472 at *2.

That too proved ineffective. One year after the State entered the quality of care stipulation, and "[t]hree years after entering into the consent decree, not a single prison had successfully implemented the remedial procedures . . ." *Id.* In the face of the unrelentingly dismal level of medical care, which was admittedly killing a "significant number" of prisoners, the *Plata* court conducted proceedings to determine whether to impose a receivership to oversee the remedial effort. *Id.*

At the hearing on that matter, "[n]umerous experts testified as to the 'incompetence and indifference' of prison physicians and medical staff and described an 'abysmal' medical delivery system where 'medical care too often sinks below gross negligence to outright cruelty.'" *Id.* The State was unable to rebut this evidence, "candidly admit[ting]" that "'to date [it had] failed to attain compliance with all aspects of [prior] Court orders.'" *Id.*

Ultimately, the *Plata* court found it necessary to appoint a receiver to oversee prison medical care, which appointment became effective in 2006. *Id.*

It is true, as the State asserts, that plaintiffs *filed* their motion to convene the three-judge court seven months after the Receiver was appointed. What the State fails to mention is that the single-judge court did not *convene* the three-judge court for more than a

year after the Receiver was appointed, and it did so only after the Governor had proclaimed that prison crowding constitutes a state of emergency that imperils prisoners' health, Int. App. 61a, and the Receiver had reported to the court that crowding-related problems "are now assuming a size, scope and frequency that will clearly extend the timeframes and costs of the receivership and may render adequate medical care impossible . . ." Ex. P-27 at 10.

The *Plata* court found that the conditions for convening a three-judge court had been met because "the Receiver will be unable to eliminate the constitutional deficiencies at issue in this case in a reasonable amount of time unless something is done to address the crowded conditions in California prisons," 09-146 State App. 286a, and "'[t]he Court has given defendants every reasonable opportunity to bring its prison medical system up to constitutional standards, and it is beyond reasonable dispute that the State has failed.'" *Id.* 279a (citation omitted); *see also id.* 281a-282a.

The State has made no showing that the *Plata* court's factual findings are clearly erroneous. To the contrary, the passage of time has proven the court right on all counts. It is now fully four years since the Receiver first took office, and the Receiver has still been unable to remedy the conceded constitutional violations because of crowding. *See Plata* D.E. 2289-1 at 6 (Receiver's report).

II. The Three-Judge Court Correctly Found That Crowding Is The Primary Cause Of The Constitutional Violations And That No Other Relief Would Remedy Them.

A. The Definition Of "Primary Cause."

As the State acknowledges, the three-judge court *adopted verbatim* the definition of "primary cause" proposed by the State below: the "cause that is 'first or highest in rank or importance; chief; principal.'" Int. App. 78a-79a; State J.S. 19. The State is thus judicially estopped from challenging this definition here. *See New Hampshire v. Maine*, 532 U.S. 742, 749-750 (2001).

Moreover, the State did not contend below that the definition adopted by the court was error, nor did it ever argue before the three-judge court that "primary cause" means the "but for" or "proximate cause," as it argues here. The State is thus barred from raising these new contentions on appeal. *Taylor v. Freeland & Kronz,* 503 U.S. 638, 646 (1992).

Even if the Court could consider a legal argument that is both contrary to the party's contention below and raised for the first time on appeal, the new standard proposed by the State cannot be reconciled with the plain text of the statute. The statute uses the term "primary cause," not "but for" cause or "proximate cause." The Court must presume that Congress meant what it said, and may not impose a different standard here.

The State also contends that crowding cannot be the primary cause of the violations because other factors contribute to the constitutional violations (and so, according to the State, "curing crowding

would not remedy the alleged violations"). State J.S. 19. But as the three-judge court correctly found, the PLRA's use of the term "primary" to modify "cause" indicates that Congress understood that there can be multiple causes. Int. App. 79a. And indeed, the State acknowledges that to satisfy the statute crowding need not be the "only" cause, it must simply be the "biggest cause." Trial Tr. 2960:12-15 (closing argument). Even the State's proposed definitions of primary cause – "but for" cause and "proximate" cause – presume the possibility of other, lesser causes. Thus, the State's argument that a factor cannot be the "primary" cause if there are other causes fails as a matter of logic.

Nor is there any requirement, as the State suggests, that curing crowding must by itself remedy all the violations. Any such rule would raise serious questions about the statute's constitutionality, because it would prohibit courts from remedying the main cause of a constitutional violation unless the relief would simultaneously resolve all deficiencies. Congress did not prohibit courts from granting relief from overcrowding unless that remedy alone would cure all constitutional deficiencies, and its use of the term "primary cause" recognizes the possibility of multiple contributing causes, and, accordingly, multiple types of relief.

The three-judge court put it succinctly: "The PLRA does not require that a prisoner release order, on its own, will necessarily resolve the constitutional deficiencies. . . . All that the PLRA requires is that a prisoner release order be a necessary part of any successful remedy. If all other potential remedies will be futile in the absence of a prisoner release

order, 'no other relief will remedy the violation.'" Int. App. 144a (quoting 18 U.S.C. § 3626(a)(3)(E)(ii)). The statute is satisfied when a prisoner release order is *necessary* regardless of whether it is in itself *sufficient* to remedy the violation. Int. App. 134a.

Nonetheless, as a practical matter, eliminating crowding will satisfy the State's proposed standard that the remedy must "undo all or virtually all" of the constitutional violations. State J.S. 20. The *Plata* court has already appointed a receiver and issued numerous orders aimed at improving medical care, through, e.g., "recruitment and retention of qualified personnel, medical leadership, medical equipment, screening systems, systems to track patients with needs, record keeping, and institutional culture." State J.S. 20-21. As the evidence bore out, once the crowding is reduced the Receiver and the State will be able to implement the court orders already in effect, and to correct the ongoing constitutional violations. *See* Int. App. 158a-159a.

B. The "Primary Cause" Findings.

In the proceedings below, the State conceded that the inadequacies in the medical care system are caused in part by prison crowding. Trial Tr. 2953:6-2954:5 (closing argument). The only question, then, is the degree to which crowding – as opposed to other factors – is causing the violations.

That is a question that the trial court is uniquely positioned to answer, and which the lower court resolved based on the voluminous record, and overwhelming testimony below.

One former head of California's prison system testified that she "absolutely believe[s]" the primary

cause of the medical deficiencies is overcrowding. Int. App. 126a. The former head of Texas prisons agreed, as did the top corrections officials from Pennsylvania, Washington and Maine. Int. App. 126a-128a.

The current and two past directors of California's prison system all concede that crowding adversely affects nearly every aspect of prison operations, including the provision of health care. Int. App. 82a-84a; Trial Tr. 1683:11-20, 1684:5-16; *Plata* D.E. 1714-14, ¶ 3.

That consensus reflects the reality that the unprecedented level of overcrowding in California prisons is an insuperable obstacle to solving the problems of constitutionally deficient mental and physical health care.

As the court found, and the State does not contest:

- Crowding causes potentially deadly delays in emergency response. Int. App.110a-111a.
- Crowding increases the transmission of infectious diseases. Int. App. 101a-102a.
- Having too many prisoners for the prison infrastructure has crippled the prisons' ability to provide the right medication to the right prisoner. Int. App. 112a-114a.
- The sheer number of prisoners has overwhelmed the prisons' medical records system. Int. App. 118a-121a.
- There are not enough medical facilities to provide medical care to the vast number of prisoners who need it. Int. App. 85a-95a.

- There is no place to properly screen the tens of thousands of new prisoners to see if they have serious medical conditions. Int. App. 87a-89a.
- There are not enough beds to house medically-needy prisoners in appropriate settings. Int. App. 95a-97a.
- There are not enough medical staff to treat the vast number of prisoners, the overcrowded unsanitary conditions make it impossible to recruit enough new staff, and even if new staff were hired there would be no space for them in the prisons. Int. App. 154a-155a.
- There are not enough medical specialists to treat the large number of prisoners who urgently need specialty care. Int. App. 114a-116a.
- Crowding-caused lockdowns lead to serious delays in providing medical care. Int. App. 116a-118a.
- Crowding contributes to an unacceptably high number of prisoner deaths. Int. App. 142a.

The lower court summed up the evidence this way: "[t]he crushing inmate population has strained already severely limited space resources to the breaking point, and crowding is causing an increasing demand for medical and mental health care services, a demand with which defendants are simply unable to keep pace." Int. App. 140a.

As the court found, the "only conclusion that can be drawn from the wealth of clear and convincing

evidence . . . is that the unconstitutional denial of adequate medical and mental health care to California's inmates is caused, first and foremost, by the unprecedented crowding in California's prisons." Int. App. 143a. Neither appellant claims that these findings are clearly erroneous.

C. The "No Other Relief" Findings.

Closely related to the finding that crowding is the "primary cause" of the constitutional violations is the three-judge court's conclusion that "no other relief" will remedy the violations. Int. App. 144a-145a.

The court canvassed the various proposals for "other relief" that were presented by the State and Intervenors, as well as all other evidence on the subject, and concluded that "clear and convincing evidence" establishes that "the constitutional deficiencies in the California prison system's medical and mental health system cannot be resolved in the absence of a prisoner release order." Int. App. 145a.

The State points to various other "remedies" that it suggests could have improved medical care even without a reduction in the prison population, but never claims that the three-judge court's detailed factual findings on each subject were clear error. None of its claims raise a substantial question warranting plenary review.

1. Receiver. The State's claim that the Receiver is "other relief" that could remedy the violations lacks merit.[2]

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[2] It is also ironic. Just after the trial below was concluded, the State sought to terminate the Receivership (and the (continued)

The three-judge court canvassed the Receiver's efforts, and lauded the work he has done to improve the medical system. *See, e.g.*, Int. App. 30a, 155a-156a, 158a. But despite four years of the Receiver's best efforts, and despite the State's insinuation to the contrary in its brief, the State has conceded that constitutional violations remain. *Plata,* 2010 WL 1729472 at *8-9; *Plata,* No. 09-15864 (audio recording of oral argument). And the three-judge court correctly found that "a reduction in the present crowding of the California prisons is necessary if the efforts of the *Plata* Receiver and the *Coleman* Special Master to bring the medical and mental health care in California's prisons into constitutional compliance are ever to succeed. In the absence of a prisoner release order, all other remedial efforts will inevitably fail." Int. App. 158a-159a.

The State's position is that this Court should ignore all the evidence supporting the trial court's findings, and rely instead on cherry-picked testimony taken out-of-context from plaintiffs' experts that the State claims undermines plaintiffs' case. Not only is that an improper approach to adjudicating this fact-bound question, but the State is wrong on the facts.

Receiver's remedial plans) on the grounds that both are forms of relief prohibited by the PLRA. *Plata,* 2010 WL 1729472. Either the Receiver fits within the definition of "relief" that a court may order under the PLRA (18 U.S.C. § 3626(g)(9)) and that a three-judge court must consider as an alternative a prisoner release order, or it is not "relief" that a court may enter under the PLRA, and must be terminated. The State cannot have it both ways.

Contrary to the State's assertion, plaintiffs' experts do not undermine the "no other relief" finding.

Plaintiffs' medical expert, a former consultant to California and a federal court receiver for the District of Columbia Jails' health care system, testified that the Receiver "will be unable to address and resolve the critical medical care deficiencies until the need for services within the system is significantly reduced." *Plata* D.E. 1714-13 at ¶¶3, 136.

The current Secretary of Corrections in Pennsylvania, who was chosen by the State of California to sit on its own expert panel, testified that reducing the population is "the only way" to fix the inadequacies. Trial Tr. 1583:15-22; Ex. P-2 at ii.

The former Secretary of Corrections in Pennsylvania, Washington and Maine, who is also a member of the State of California's expert panel, testified that as a result of the "overwhelming" crowding, the Receiver will be unable to remedy the violations. Trial Tr. 270:25-272:13.

Other correctional experts, including the former director of the Texas prison system, and Intervenors' independent expert, agreed. Trial tr. 153:7-11, 180:3-11 (Scott); *see also* Trial Tr. 2190:16-2191:2, 2201:24-2202:6 (Defendant-Intervenor expert).

Even a former *Plata* defendant who was acting Secretary of California's prison system testified that unless the State reduced overcrowding, it would "never" be able to provide or sustain constitutionally adequate medical or mental health care. Trial Tr. 385:3-10.

That some of the experts agreed that it *may* hypothetically be possible to provide health care in

crowded prisons does not undermine their ultimate conclusions, based on the concrete facts on the ground in California, that California's unprecedented level of overcrowding makes adequate care impossible. Trial Tr. 286:9-287:1; Trial Tr. 270:25-272:13; Trial Tr. 492:21-25.

2. Hiring. The three-judge court correctly found as a matter of fact that additional hiring, without reducing crowding, would be ineffective. Int. App.154a-155a. The court extensively canvassed all the hiring evidence produced by the parties, Int. App. 105a-112a, and found that it is unlikely the State will be able to hire enough medical and custodial staff under current conditions: despite extensive efforts, there has been a "serious and ongoing difficulty in filling vacant positions," Int. App. 154a, which is due in part to the fact that "working conditions for such personnel in California's overcrowded prisons are uninviting, and many potential staff members are unwilling to work under them." *Id.*

Furthermore, the court found that "[e]ven if staff could be hired, they would have almost nowhere to work because CDCR's facilities lack the physical space required to provide medical and mental health care." Int. App. 154a-155a. No party claims that these factual findings are erroneous.

3. Out-of-State Transfers

The State wrongly contends that the three-judge court erred in "rejecting the possibility" of expanding the number of out-of-state transfers. State J.S. 26. As the three-judge court found, ordering the State to transfer more prisoners out-of-state is not an *alternative* to a prisoner release order, it is an order that would *constitute* a prisoner release order. Int.

App. 159a n.58 (18 U.S.C. § 3626(g)(4) defines "prisoner release order" as one that "directs the release from . . . *a* prison"). Indeed, the State's population reduction plan incorporates precisely this measure. State-App. 60a-61a.

4. Construction

The State claims that it might be able to alleviate prison crowding through construction. The court's order takes this into account; the State can achieve the necessary reduction in crowding through construction, population reduction, or some combination of the two. Int. App. 262a.

Nonetheless, as the court found, the State has proven utterly unable to accomplish its prison construction goals. Int. App. 149a-154a. The construction plan on which the State hangs its argument – AB 900 – was part of a measure approved in 2007, and yet not a single prison bed has been built now, fully three years later. Int. App. 150a. And the State itself sought to terminate and delay the Receiver's plan to construct medical facilities. *Plata*, 2010 WL 1729472 at *10. The court correctly found, based on this track record, that construction is not a viable alternative to a court order because of the delays associated with prison construction. Int. App. 145a-154a. The State does not claim that the court's conclusions regarding delay were error.

D. The Findings Are Based On Current Evidence

1. There are current, ongoing violations of the plaintiffs' constitutional rights. The State has admitted this fact, and concedes the necessity of

judicial oversight. *Plata,* 2010 WL 1729472 at *8-9. Yet the State nonetheless peppers its brief with insinuations, explicit and implicit, that it has fixed the problems, and the court's involvement in prison medical care is an unwarranted intrusion into state affairs. The problem is that such contentions lack any *factual* support.

Thus, for example, the State complains that it was prohibited from gathering and introducing evidence relevant to whether the constitutional violations are "'current and ongoing.'" State J.S. 19; *see also* Int. J.S. 6. Such argument is simply inconsistent with the State's concession that there are current and ongoing violations. In any event, neither the State nor Intervenors identify a single item of evidence that was excluded. That is because all that the three-judge court limited was the legal questions it would answer, which are prescribed by statute.

Under the PLRA, the proceedings in the three-judge court were solely about whether to order the State to reduce prison overcrowding; the questions whether there is a constitutional violation in the first place, and whether prospective relief should be maintained or terminated, are questions reserved to the single judge district courts. 18 U.S.C. §§ 3626(a), (b), (e). Accordingly, the three-judge court correctly held that it did not have authority to re-determine the underlying liability question. State App. 77a-78a.[3] No party contests this legal conclusion.

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[3] The three-judge court invited the State, if it contended that the constitutional violations had been remedied, to bring that matter before the single judge district courts in an (continued)

That does not mean, however, that evidence about current conditions was excluded. The State introduced voluminous documentary evidence – as well as percipient and expert testimony – about current conditions within the prisons in connection with its contentions that crowding is not the primary cause of the violations and that other relief will remedy the violations.

State experts toured the prisons weeks before trial, examined prison medical facilities, interviewed medical personnel, prison staff and prisoners, and testified about the conditions they found. *See, e.g.*, Exs. D-1016, D-1017, D-1019, Int. App. 82a, D-1020; Trial Tr. 1071-1143, 1191-1253. The State introduced exhibits with current health care statistics, medical and mental health care staffing levels, and institutional populations. *See, e.g.*, Exs. D-1233; D-1149, D-1259-1, D-1235-2; Trial Tr. 1272:12-21. The State also introduced the reports of the *Coleman* Special Master and the *Plata* Receiver, which include extensive discussion of current conditions. *See, e.g.*, Exs. D-1087-D-1100, Int. App. 150a, D-1106, D-1224-1231, D-1110-1112, D-1292, Int. App. 41a, D-1293, D-1294, D-1108, Int. App. 49a. State witnesses presented exhaustive testimony about current conditions, including the extent of overcrowding, staffing levels, the use of ugly beds, medication management problems, health care expenditures, and prisoner deaths. *See, e.g.*, Exs. D-1000-1002, D-1004-1008, Trial Tr. 836-944, 1891-

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appropriate proceeding. Pretrial Conf. Tr. 28-29 (Nov. 10, 2008); *see also* 18 U.S.C. § 3626(b). The State has not done so.

1940, 1668-1709, 1734-1772, 755-823, 724-754; *Plata* D.E. 1990-4 at 4-7.

Nor was the State precluded from gathering evidence about current conditions in the prisons. State officials control the prisons and its documents and information; the State's experts had full access to tour the prisons, to talk to prison medical staff, and to review all relevant data and information in the possession of the prison medical staff and Receiver. *See, e.g., Plata* D.E. 1453 at ¶¶ 2-5 & Ex. A; *Plata* D.E. 1453 1624-12 at 1; *Plata* D.E. 1453 1624-8 at 1-2.[4]

2. The State also complains that it was unable to take a deposition of the Receiver to ascertain his "views on whether a prisoner release order was necessary." State J.S. 24. But that is a legal conclusion, well beyond the scope of discovery of a lay witness. And to put it mildly, this kind of a discovery dispute hardly raises a "substantial question" for this Court to review. *See, e.g., Wayte v. U.S.*, 470 U.S. 598, 624-625 (1985) (Marshall, J., dissenting) (abuse of discretion standard applies to discovery disputes, which "acknowledges that appellate courts in general, and this Court in particular, should not expend their limited resources making

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[4] The State makes the absurd contention – never raised below – that the evidence is not "current" because the court set a date for a discovery cutoff, and did not consider post-trial evidence. State J.S. 25. In every case, trial courts must limit discovery and limit the record to evidence properly presented at trial. The State makes no showing that the limits imposed below were erroneous.

determinations that can profitably be made only at the trial level.")

In any event, pursuant to court order, the Receiver reported to the court his views about the impact of crowding on the delivery of medical care. Exs. D-1092-1095. The State cites no authority for the contention that it was entitled to discovery against a judicial officer concerning matters put in those court-ordered reports.

Furthermore, the State suffered no prejudice. The State has not disputed a single fact in any of the voluminous reports the Receiver has issued– many of which the State itself introduced into evidence. *See, e.g.*, Exs. D-1087-D-1100, D-1106, D-1108, D-1110-1112, D-1224-1231. Indeed, the State does not point to one fact that it could have gained from a deposition that would have changed the result in this case; it did not make an offer of proof on any point; and it did not even seek to have the Receiver testify as a trial witness. *See, e.g., Plata* D.E. 1724 (Pretrial Conf. Sta.).

What is more, the State was able to obtain the fifteen specific items of data from the Receiver that it proclaimed were the "best evidence" of the current "status of the delivery of medical care and the Receiver's plans for implementing improvements in medical care." *Plata* D.E. 1436. The Receiver issued a public report that provided each item of data requested by the State, and the court held that such report would be admissible at trial. *Plata* D.E. 1450.

III. The Order Below Provides The Least Intrusive Means To Remedy The Constitutional Violations, And Is Narrowly Tailored.

The State's contentions about the remedy fail because the three-judge court's order is the least intrusive means to remedy the ongoing constitutional violations and is narrowly tailored precisely to maximize the State's remedial discretion. The *Plata* plaintiffs join in the *Coleman* plaintiffs' motion to dismiss or affirm as to these matters. *Coleman* Plaintiffs' Motion to Dismiss or Affirm, Nos. 09-1232, 09-1233 at 31-37.

IV. The Three-Judge Court Gave Substantial Weight To Public Safety Considerations.

The contentions that the lower court erred by failing to give "substantial weight" to public safety concerns fail to raise a substantial question for this Court to review. Only by a false reading of the statute and the opinion below can the State argue that the lower court erred.

1. The State argues that the lower court's order failed to meet a test that is not found in the statute. JS at 33. It states that the court's order must provide "substantial protection to the public." *Id.* (citing legislative history). The statute, however, is more nuanced; for any relief that courts may issue in prison conditions cases, the court must "give 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).

The State implies that the lower court was blind to public safety by issuing an order that would

increase crime absent a substantial investment in "'evidence-based rehabilitative programming.'" State J.S. 33. That is not true. After spending dozens of pages discussing the "Potential Population Reduction Measures and Their Impact on Public Safety and the Operation of the Criminal Justice System," the three-judge court reiterated how seriously it took this review and concluded as follows: "[W]e are confident that a prison population reduction to 137.5% design capacity can be achieved in California without a *substantial meaningful adverse impact on public safety or the operation of the criminal justice system.*" Int. App. 248a (emphasis added).

To support this conclusion the court relied on the report by the State's selected panel of experts,[5] the conclusion of a corrections panel chaired by former Governor Deukmejian, testimony by Intervenor law enforcement witnesses and the experience of other jurisdictions across the country. Int. App. 248a-255a.

The court did not find, as the State suggests, that reducing the population without expanding

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[5] The State, directly contradicting its own federalism theme, makes the remarkable claim that it is "unreasonable" to rely upon the recommendations made by its own experts because the State now faces a new "financial condition." State J.S. 34. But, as the court correctly found, "[a]lthough California's prison population could be reduced without adopting or strengthening such local programs, the benefit to the State of investing in them would be considerable. Whether or not to make such an investment, however, is . . . *a matter for state officials, not the court, to decide.*" Int. App. 235a (emphasis added); *see also* Int. App. 252a-253a (same).

rehabilitation would harm public safety. On the contrary, it found that the lack of programming is the status quo (the State currently releases more than 10,000 prisoners every month without providing meaningful rehabilitation. Int. App. 128a-129a), and increasing rehabilitative programs would "increase public safety above its current level, including after issuance of [the] population reduction order." Int. App. 253a.

The State admits that it can "safely reach a population of 137.5%" of design capacity. Int. App. 272a; 09-416 State J.S. 11. The Governor declared that such a reduction could be accomplished safely in two years. *Plata* D.E. 2258 at 5-7 (current head of California prisons explains Governor's plan to reduce prison population by 37,000 over two years); Trial Tr. 2984:7-2985:15.

The State's expert, as well as the Intervenors, conceded that there are methods for the State to reduce the prison population without adversely impacting public safety. *See, e.g.*, Trial Tr. 1995:8-20 (State's public safety expert); Trial Tr. 3044:7-9, 3045:5-12 (Law Enforcement Intervenors' closing argument); Trial Tr. 3022:24-3023:11 (District Attorney Intervenors' closing argument); Trial Tr. 3063:10-24 (San Mateo County Intervenors' closing argument); Trial Tr. 1007:21-1008:4 (Intervenor San Diego County Deputy District Attorney); Trial Tr. 1052:4-1053:9 (Intervenor Stanislaus County Chief Probation Officer); Powers Report § III (same); Trial Tr. 2770:23-2771:10 (Intervenor Yolo County Chief Probation Officer); *Plata* D.E. 1664 ¶¶ 56-79 (Intervenor Sonoma County corrections expert); *Plata* D.E. 1667 at 5-6 (same); *Plata* D.E. 1711 ¶¶16-20

(Intervenor San Diego District Attorney); *Plata* D.E. 1745, ¶¶17-27 (Intervenor Los Angeles County Sheriffs' Department, Director of Bureau of Operations for Bureau of Offender Programs and Services); *Plata* D.E. 1698, ¶ 3 (Intervenor San Mateo County Chief Probation Officer).

The well-accepted population reduction methods cited by the court include providing additional "good time" credits to prisoners for good conduct and for participation in work or education programs, Int. App. 196a-204a, diverting low-risk technical parole violators and low-level, low-risk offenders away from prison, Int. App. 209a, 204a-208a, 210a-214a, and expanding rehabilitative programs. Int. App. 214a-216a.

Having made these well-supported findings, the three-judge court deferred to the State to design the precise contours of its population reduction program.

2. Intervenors contend that the court "does violence" to the PLRA by delegating to the State the responsibility to develop a remedial plan. Int. J.S. 16. Yet Intervenors do not address – much less contest – the three-judge court's conclusion that it must defer to the State's proposed population reduction measures, consistent with this Court's decisions in *Bounds v. Smith*, 430 U.S. 817, 832-833 (1977) and *Lewis v. Casey*, 518 U.S. 343, 361-363 (1996). Int. App. 172a-173a.

Intervenors also complain that the court erred when it "disregarded" opinions of certain Intervenor witnesses that the court found to be not credible. Int. J.S. 18. The trial court, however, is uniquely situated to make such determinations, and its findings "based on determinations regarding the credibility of

witnesses" demand great deference and "can virtually never be clear error." *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985). Intervenors offer no argument to justify disturbing this rule of deference.[6]

Intervenors hyperbolically claim that by failing to heed their warnings the three-judge court has "virtually assure[d] that . . . crime will spike in California as a result of the Prisoner Release Order." Int. J.S. 18-19. There is no support in the record for such a claim. There is, however, ample support in the record for the opposite conclusion. Dozens of jurisdictions throughout California and the nation have implemented prison population reductions; none have experienced an increase in recidivism or crime. Trial Tr. 2103:20-2105:5-21; 2107:15-2108:17;

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[6] Intervenors' contention is further undermined by the gross distortions in their own witnesses' testimony. For example, one Intervenor declared that a prison population reduction would make his crowded jail overflow, costing the county millions of dollars to transfer jail inmates to other counties; he was forced to admit, however, that his methodology was flawed (Trial Tr. 1794:19-22), his jail is not in fact overcrowded (Trial Tr. 1791:6-12), and no inmates would need to be sent out of county. Numerous other Intervenor witnesses made similar exaggerations. *See, e.g., Plata* D.E. 1922 ¶¶ 6-8 (admitting that estimate of cost to county was wildly overblown, in one instance by a factor of more than twenty); Trial Tr. 2272:1-2273:6, 2276:5-18, Ex. P-841 (exaggerating impact on jails); Trial Tr. 2677:7-2680:7, *Plata* D.E. 1727 ¶¶ 23, 26 (witness had no idea how he came up with exaggerated figures showing impact on jails); *Plata* D.E. 1728 ¶ 33 (similar exaggeration); Trial Tr. 1819:9-1830:3, 1830:21-1831:23 (exaggerating the impact on LA county jails); *Plata* D.E. 1726 ¶¶ 26-27, Trial Tr. 2706:21-2707:5 (exaggerating the impact of a population reduction on prosecutors' ability to try cases).

2108:19-2109:1, 2110:6-2111:8, 2111:10-21, 2112:17-20 (Dr. Krisberg).

Similarly, historical data shows that the crime rate does not increase when the incarceration rate drops. *Plata* D.E. 1714-3 at ¶¶ 19-26; Trial Tr. 2160:20-2162:7 (Dr. Krisberg); *see also* Ex. P-842, Trial Tr. 2815, 2842.

Pursuant to the PLRA's requirement, the three-judge court gave "substantial weight" to potential impacts on public safety, and devoted more than fifty pages of its opinion to that question. Int. App. 185a-256a. The court carefully reviewed the testimony and evidence presented by Intervenors, State defendants, and plaintiffs, and correctly concluded that the evidence "overwhelmingly showed that there are ways for California to reduce its prison population without . . . an adverse impact [on public safety], and that a less crowded prison system would in fact benefit public safety and the proper operation of the criminal justice system." Int. App. 248a-249a. Neither the State nor Intervenors demonstrate that this was clear error.

* * *

The State casts its appeal in the broadest terms possible, invoking grand principles of federalism and judicial activism. The issues actually raised in its Jurisdictional Statement, however, belie these grandiose claims. There are, in fact, no substantial legal disputes. Essentially, the State disputes some of the trial court's findings of fact. And even there, the State's contentions merely peck around the edges of the three-judge court's well-reasoned 183-page

opinion that is based on the overwhelming, largely uncontested evidence in the voluminous record below.

The three-judge court issued the order on appeal cautiously, after all other efforts employed by the lower courts to remedy the constitutional deficiencies had been failing for years, and after the Governor, the head of California's prison system, and the court-appointed Receiver all agreed that the prison crowding crisis in California poses a serious and immediate threat to prisoners' lives.

Appellants' appeals fail to present substantial questions warranting plenary review, and this Court should summarily affirm the decision below.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the *Coleman* Appellees' Motion to Dismiss or Affirm in Nos. 09-1232 and 09-1233, the appeals should be dismissed or the order below should be affirmed.

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