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

CONSOLIDATED OPPOSITION TO APPELLEES' MOTIONS TO DISMISS OR AFFIRM

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The State's Jurisdictional Statement presents substantial questions arising under the Prison Litigation Reform Act ("PLRA"). It asks this Court to decide whether the requirements for convening a three-judge court to consider a "prisoner release order," J.S. 11-18, were satisfied; and, if properly convened, whether the three-judge court misinterpreted and misapplied 18 U.S.C. § 3626(a)(3)(E) in issuing the order under review. J.S. 18-27. In addition, the remedy imposed is independently worthy of plenary review because, *inter alia*, the district court acknowledged that its release order "'extends further than the identified constitutional violations'" to the plaintiff-classes, *id.* at 28, contravening the text of 18 U.S.C. § 3626(a)(1)(A). Moreover, in conflict with this Court's holdings, the court used professional benchmarks, not the minimum standards of the Eighth Amendment, to determine the scope of relief ordered. J.S. 30-34.

If this Court does not grant review, the State must reduce its prison population by at least 38,000-plus inmates. Compare *Plata* Mot. 3-4 n.1, with J.S. 2 n.2. No matter how the State implements the order, it must reduce the prison population by a startling amount. Thus, the substantial legal questions presented by this "prisoner release order" have profound practical consequences and public importance.

In response, appellees assert that a petition for certiorari would not be granted in this matter and therefore that the decision below should be summarily affirmed. *Coleman* Mot. 17-18, 1; *Plata* Mot. 14-15, 21, 36-37. But the considerations anima-

ting this Court's discretionary review play no role here. In important contrast to the denial of a petition for certiorari, this Court's summary affirmances are precedential decisions that bind the lower courts. See Sup. Ct. R. 18.12; *Hicks* v. *Miranda*, 422 U.S. 332, 344-45 (1975); cf. *Plata* Mot. 14. The case for review of this appeal is uniquely powerful because it involves a "prisoner release order" under the PLRA. After significantly narrowing this Court's general appellate jurisdiction in 1988, see Pub. L. No. 100-352, 102 Stat. 662, Congress *expanded* the Court's mandatory jurisdiction to include prisoner release orders when it enacted the PLRA. Congress plainly understood that any "prisoner release order" case would involve a lengthy record of litigation over alleged violations of prisoners' federal rights. Thus, the extensive record that appellees treat as a warrant for summary affirmance instead is a reason that Congress expected this Court to engage in plenary review in precisely this type of case.

In all events, this case is inappropriate for summary affirmance. As shown, it presents significant, unresolved issues of statutory construction. Moreover, what appellees call an "admittedly unusual" order, *Coleman* Mot. 16, 37, mandates a result that Congress would not have imagined when it enacted the PLRA. The court imposed the most drastic relief ever ordered in a prison conditions case despite, *inter alia*, the State's continuing progress in remedying constitutional violations, the concession by appellees' experts that constitutional compliance likely has been achieved at particular facilities, and the State's ongoing development of solutions for overcrowding and improvement of prison conditions generally. This Court should grant plenary review.

I. THE FIRST QUESTION PRESENTED IS PROPERLY BEFORE THE COURT AND IS SUBSTANTIAL.

Appellees claim that the Court cannot consider the first question presented because "[t]he State did not pursue a timely appeal of the single-judge court's order and it should not be allowed to use the PLRA to end-run the ordinary appellate procedures for challenging a district court decision." *Coleman* Mot. 18-19; *Plata* Mot. 16. Appellees are wrong on the law and misrepresent the record.

The State timely appealed the orders convening the three-judge court to the Ninth Circuit. See J.S. 6 n.4. In contradiction of their position now, appellees then argued that those orders were *not* appealable to the Ninth Circuit because they "d[id] not resolve a 'collateral' matter separate from the merits of the action," but instead "[we]re 'directly intertwined' with the ultimate claims in the cases." Mot. Dismiss 14, No. 07-16361 (9th Cir. Aug. 19, 2007). Appellees asserted that "the Orders will be fully reviewable if and when the three-judge court were to *issue relief such as an injunction or a prisoner release order*," *id.* (emphasis added), knowing full well that this Court has exclusive jurisdiction over any such appeal. The court agreed and dismissed the appeal. *Coleman* v. *Schwarzenegger*, No. 07-16361, 2007 WL 2669591 (9th Cir. Sept. 11, 2007) (per curiam).

In these circumstances, this Court should not permit Appellees to disavow their prior contentions. See *New Hampshire* v. *Maine*, 532 U.S. 742, 749-51 (2001) (discussing judicial estoppel).

Estoppel aside, the merits of a properly convened three-judge court's "prisoner release order" are within this Court's exclusive appellate jurisdiction. Thus,

this Court can reach the underlying question of whether the three-judge court had authority to enter such relief. *Gully* v. *Interstate Natural Gas Co.*, 292 U.S. 16, 18-19 (1934) (per curiam); see generally *Gross* v. *FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2348 n.1 (2009) (discussing anterior questions). In *Gully*, after a three-judge district court was statutorily convened, this Court reversed the entry of injunctive relief without reaching the decree's merits because the three-judge court was improperly convened:

> [T]his Court by virtue of its appellate jurisdiction in cases of decrees purporting to be entered pursuant to [the statute requiring a three-judge district court], *necessarily has jurisdiction* to determine whether the court below has acted within the authority conferred by that section and to make such corrective order as may be appropriate ....

292 U.S. at 18 (emphasis added); *id.* at 19 (remanding to single-judge court for further proceedings); *accord Gonzalez* v. *Automatic Employees Credit Union*, 419 U.S. 90, 95 n.12 (1974).

Finally, the decisions to convene a three-judge court present substantial issues. Both held that a court can rely on an earlier period of regression or frustration with the pace of the statutory remedies to convene a three-judge court even where, as here, the State is currently making progress under less intrusive remedial orders. See J.S. 12-13, 15. This exceedingly broad interpretation of Congress's command that the defendant be afforded "a reasonable amount of time to comply with the previous court orders" is incorrect. 18 U.S.C. § 3627(a)(3)(ii). The district courts instead should have considered, *inter alia*, the impact of the remedies newly imposed by the Receiver in *Plata*, who, like plaintiffs' experts, has

concluded that his plan of action will remedy all the alleged constitutional violations without resort to prisoner release. J.S. 12-14, 21 n.7, 23.

The appellees' mistake lies in their heavy focus on earlier periods in the litigation. See, *e.g.*, *Coleman* Mot. 20 (referencing "more than 20 years" of litigation and "measures employed since 1997"); *Plata* Mot. 17 (discussing 2004 stipulation and Receiver's 2006 appointment). Appellees' attempt to frame this litigation through *Plata* D.E. 371—the findings of fact and conclusions of law underlying the October *2005* appointment of the Receiver—is illustrative. See *Coleman* Mot. 2. That order, like others appellees cite, does not speak to the State's subsequent progress under the Receiver and the Special Master. See, *e.g.*, J.S. 13 (Receiver's praise for accomplishments in 2009 and 2010).

Appellees respond that "the State fails to mention ... that the single-judge court did not *convene* the three-judge court for more than a year after the Receiver was appointed." *Plata* Mot. 17-18. But, as the State pointed out, the Receiver filed his "Plan of Action" just *two months* before the three-judge court was convened. J.S. 12. The progress under that plan has been substantial, and the Receiver and plaintiffs' experts attest that it will remedy the alleged constitutional violations. *Id.* at 12-14, 23; see also *id.* at 16-17 (progress under Special Master).

II. THE REMAINING QUESTIONS PRESENTED INVOLVE SUBSTANTIAL ISSUES.

Appellees recognize that the second and third questions presented are properly before this Court, but argue that this case is too fact-bound for plenary

review. This contention is incorrect for the reasons stated *supra* at 1-2, and those that follow.

1. Although appellees characterize the State's challenge to the court's interpretation of "primary cause" as disagreement with a "*fact-intensive* judgment," *Coleman* Mot. 25, the district court concluded that "'the primary cause issue is ultimately a question of law.'" 09-416-App. 126 n.55. And, appellees implicitly concede that there exists no uniform interpretation of the term "primary cause" and its relationship to proximate causation. Compare *Coleman* Mot. 23-24, with J.S. 19-20.

Appellees' claim (*Coleman* Mot. 24) that there is "no authority ... to suggest that Congress intended" to incorporate a proximate cause requirement into the standard is incorrect. Pre-PLRA, courts required showings that prison overcrowding proximately caused the alleged violations of plaintiffs' federal rights. See, *e.g.*, *Carver* v. *Knox County*, 887 F.2d 1287, 1294 (6th Cir. 1989); *Marsh* v. *Barry*, 824 F.2d 1139, 1143 (D.C. Cir. 1987) (per curiam); *Abrams* v. *Hunter*, 910 F. Supp. 620, 627 (M.D. Fla. 1995), *aff'd*, 100 F.3d 971 (11th Cir. 1996).[1]

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[1] Appellees also assert that the State forfeited its statutory construction, *Coleman* Mot. 23, or is estopped from advancing it, *Plata* Mot. 19. As to forfeiture, it is well-established that "[p]arties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed." *Dewey* v. *Des Moines*, 173 U.S. 193, 198 (1899); *accord Yee* v. *City of Escondido*, 503 U.S. 519, 534-35 (1992). Moreover, the State's interpretation of "primary cause" here is not inconsistent with its arguments below. *Compare Coleman* Mot. 23 (relying on *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) (respondent "waived" its argument that federal maritime law governed by arguing below that state law applied)). Finally, because the State did not prevail below,

Furthermore, appellees' arguments that the record contains "clear and convincing" evidence that overcrowding is the "primary cause" of the alleged constitutional violations are baseless. See *Coleman* Mot. 25-26; *Plata* Mot. 21-23. Appellees claim that numerous experts "testified that crowding is the primary cause." *Coleman* Mot. 25-26. However, they overlook the district court's acknowledgement that the experts' testimony constituted legal conclusions, 09-416-App. 126 n.55, and they fail to refute the State's demonstration that plaintiffs' experts' legal conclusions lacked foundation. See J.S. 30-32 & n.11. As shown, plaintiffs' experts failed either to analyze what level of care was being provided or to tether their opinions about the consequences of overcrowding to the Eighth Amendment's requirements. See *id.*; see also *Coleman* Mot. 26 (discussing "prison deficiencies" rather than "deliberate indifference" resulting in "unnecessary and wanton infliction of pain").[2]

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judicial estoppel is irrelevant. *New Hampshire*, 532 U.S. at 750-51.

[2] Appellees suggest that the testimony of a State expert, Dr. Packer, is conclusive on whether overcrowding constitutes the "primary cause" of alleged constitutional violations. *Coleman* Mot. 10. But, as the district court acknowledged, Dr. Packer "testified that, with one exception, crowding was *not* the primary cause of the constitutional violations." 09-416-App. App. 138a (emphasis added); *see id.* at 166a (other improvements could remedy the problems even if crowding persisted). Additionally, Dr. Packer's testimony that crowding was the primary cause of deficiencies at reception centers does not indicate that crowding is the primary cause of the alleged Eighth Amendment violations unless one wrongly assumes that reception center shortcomings by themselves constitute unconstitutional care.

2. The interpretation and application of § 3626(a)(3)(E)(ii) also presents substantial questions worthy of review. Like the court below, appellees read out of the statute the requirement that the prisoner release order "remedy the violation of the Federal right." 18 U.S.C. § 3626(a)(3)(E)(ii).

Appellees claim that although the prisoner release order is not "in itself *sufficient* to remedy the violation," it purportedly "is *necessary*" to such a remedy. *Plata* Mot. 21. Their premise is wrong. As the State showed, the Receiver concluded that his plan would remedy all alleged constitutional violations without population controls, see J.S. 12-14; and plaintiffs' experts conceded that (i) the Receiver could provide constitutional levels of care at the current population, (ii) constitutional care may already have been achieved at certain facilities notwithstanding crowding, and (iii) the Receiver's plan would "'ensure'" constitutional care. *Id.* at 23. Appellees' experts' claims of necessity are doubly flawed because they are linked to the propriety of the care provided, and not its constitutionality. *Id.* at 30-32.

Appellees again highlight the State's struggles at earlier points in this litigation, but those prior struggles do not alter this analysis. See, *e.g.*, *supra* at 4-5; *Coleman* Mot. 29; *Plata* Mot. 27. For instance, appellees recognize that their experts conceded that they had administered similarly crowded prison systems while delivering constitutionally adequate care, J.S. 21-22 (populations over 200% design capacity), and that the State showed that some of CDCR's most crowded facilities provide the best care, *id.* at 23-24. But, appellees believe that the district court rightly ignored these facts due to the "extraordinary circumstances of this case, where for

more than 15 years under more than 70 orders, California has failed to fix its constitutionally inadequate prison conditions." *Coleman* Mot. 27.[3] Both appellees and the court ignored the State's commitment to improving mental health and medical care under the current administration and its well-documented successes. Doing so was error.

3. The scope of the prisoner release order alone justifies plenary review.

Appellees do not directly respond to the State's demonstration (J.S. 29-33) that they failed to show that either the 130% cap plaintiffs requested or the 137.5% cap imposed constituted the reduction necessary to cure the alleged *Eighth Amendment* violations. Appellees cite evidence that California's prisons were not built to provide medical and mental health care at populations above 100% design capacity, *Coleman* Mot. 33. They fail, however, to

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[3] Appellees' suggestion that the court's findings were based on similar evidence regarding *current conditions* does not withstand examination. *See Plata* Mot. 28-31. They point to four court findings, *see id.* at 30 (citing Int. App. 82a, 150a, 41a, 49a), but those pertain to: the *Coleman* trial held in ***1994***, Int. App. 41a; evidence as of 2006, *id.* at 49a; testimony regarding conditions in 2007 that has no connection to alleged unconstitutional conditions, *id.* at 82a ("crowding 'affects virtually every aspect of a prison's operation'" and prevents "'*thoughtful decision-making and planning*'") (emphasis added); and construction planning that is not relevant to their argument, *id.* at 150a. Appellees' related claim that the State sought to limit evidence of current unconstitutional conditions is misleading. *Coleman* Mot. 30. The State resisted duplicative discovery that would have interfered with trial preparations, *Coleman* D.E. 2814, at 3, and sought to preclude the introduction of evidence of "overcrowding, housing, or other environmental conditions affecting the general population" rather than evidence of health care that violates the Eighth Amendment. *Coleman* D.E. 3101, at 2.

identify evidence showing that at 100% design capacity, the prisons provide care that is only minimally adequate under the Eighth Amendment or that above 100% design capacity, the care violates the Eighth Amendment. Appellees further suggest that the Governor's prison reform study supported a 130% cap, *id.* at 33-34, but again fail to cite any evidence that those recommendations were directed at satisfying constitutional *minima* rather than the more demanding professional standards. See 09-416-App. 183a-184a ("[W]e cannot determine from the evidence whether the national standard selected by the Governor's strike team represents a judgment *regarding the mandates of the Constitution or whether it merely reflects a policy that ensures desirable prison conditions.*") (emphasis added). Plaintiffs have the burden of showing that the injunctive relief requested is tailored to the violations established. These shortcomings are, accordingly, fatal. See J.S. 33-34; *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979) ("scope of injunctive relief is dictated by the extent of the violation established," an issue on which movant carries the burden).

Additionally, the PLRA requires that any prisoner release order extend "*no further* than necessary to correct the violation of the Federal right of a *particular plaintiff* or *plaintiffs*," 18 U.S.C. § 3626(a)(1)(A) (emphases added); and this Court has imposed similar limitations on equity, see J.S. 29. The district court, however, acknowledged that it was granting an order that "*extends further* than the identified constitutional violations" to the plaintiff-classes. 09-416-App. 172a (emphasis added). In light of this admission, the order violates the PLRA.

Appellees, however, argue that the "discretion" that the court gave the State in implementing the prisoner

release order cures any defects in its tailoring. See *Coleman* Mot. 31-32, 34-35; *Plata* Mot. 36. It does not. For instance, appellees' claim already has been belied by an order issued by Judge Karlton of the three-judge court. See App. 13a. Applying the three-judge court's ruling, the *Coleman* court held that it would not approve a housing plan affecting the class-members "as long as [it] calls for a projected population in excess of 137.5% of the facility's design capacity." *Id.* The 137.5% cap thus does not operate systemwide with a two-year phase-in period. Instead, it is an immediate ceiling upon the State's discretion to manage particular correctional facilities.

Finally, there is no merit to appellees' claims that the State invited any erroneously overbroad relief by failing to propose a specific population cap and by suggesting that class-specific relief was inappropriate. *Coleman* Mot. 34. It was plaintiffs' burden, not the State's, to prove that the remedy was adequately tailored. The State's view, like that of the Receiver and some of plaintiffs' experts, is that any constitutional violations that persist can be remedied without a prisoner release order. Second, the State never asserted that "targeted relief" would be inappropriate. *Id.* (citing Int. App. 236a). Indeed, neither appellees nor the order on which they rely identifies any such assertion by the State. Instead, the State argued that release of seriously mentally ill inmates was likely to create special dangers because of their recidivism rates. *Plata* D.E. 2031 ¶¶ 109-111; Tr. 1770, 2517-18. Doing so does not constitute an opposition to all targeted relief. Clearly, such relief would have been less intrusive than the order on appeal.

CONCLUSION

The Court should note probable jurisdiction (or reserve the jurisdictional question), deny the motions to dismiss and for summary affirmance, and hear the case on the merits.

Respectfully submitted,

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