No. 09-A234

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2009

ARNOLD SCHWARZENEGGER, et al., *Applicants*

v.

MARCIANO PLATA and RALPH COLEMAN, et al., *Respondents*.

On Application to the Honorable Anthony M. Kennedy,
Associate Justice of the United States Supreme Court
and Circuit Justice for the Ninth Circuit,
for Stay of an Order of the United States District Courts
for the Northern District of California and the Eastern District of California
Pending This Court's Final Disposition of Appeal

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[314643-1]

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TABLE OF CONTENTS

Page

INTRODUCTION 1

STATEMENT 3

LEGAL STANDARD FOR ISSUING STAY 16

ARGUMENT 18

I. THE STATE CANNOT DEMONSTRATE THAT IRREPARABLE INJURY WOULD RESULT FROM DENIAL OF A STAY 18

II. THIS COURT IS UNLIKELY TO NOTE PROBABLE JURISDICTION OR GRANT PLENARY REVIEW 23

III. THE STATE IS NOT LIKELY TO PREVAIL ON THE MERITS 26

A. There is No Dispute about the Definition of Primary Cause, and the Lower Court's Findings of Fact on This Matter are Correct. 27

B. The Population Cap Chosen by the Lower Court is Well-Supported by the Record. 30

C. The State Was Not Precluded From Offering Any Evidence About Current Conditions. 32

D. The Single Judge District Courts Had No Authority to Order Relief Directed at Overcrowding, as the State Suggests They Should Have. 33

E. The *Plata* Court Correctly Found That Less Intrusive Relief Had Failed to Remedy the Constitutional Violations. 34

IV. THE BALANCE OF THE EQUITIES FAVORS DENYING THE STAY. 35

V. THIS CASE DOES NOT PRESENT EXIGENT CIRCUMSTANCES WARRANTING RELIEF UNDER THE ALL WRITS ACT. 38

CONCLUSION 39

TABLE OF AUTHORITIES

Page

Cases

Aberdeen & Rockfish R. Co. v. SCRAP,
409 U.S. 1207 (1972) 17, 36

Bartlett v. Stephenson,
535 U.S. 1301 (2002) 19

Beame v. Friends of the Earth,
434 U.S. 1310 (1977) 22

Block v. North Side Lumber Co.,
473 U.S. 1307 (1985) 37

California Correctional Peace Officers Association v. Schwarzenegger,
77 Cal. Rptr. 3d 844, 163 Cal. App. 4th 802 (2008) 36

Cardinale v. Louisiana,
394 U.S. 437 (1969) 31

Citizens United v. F.E.C.,
128 S. Ct. 1471 (2008),
128 S. Ct. 1732 (2008) 25

Coleman v. Schwarzenegger,
2007 WL 2122636 (E.D. Cal. July 23, 2007) 6

Coleman v. Schwarzenegger,
2009 WL 2430820 (N.D. Cal and E.D. Cal. August 4, 2009) .... passim

Coleman v. Wilson,
912 F. Supp. 1282 (E.D. Cal. 1995) 1

Commissioner v. Duberstein,
363 U.S. 278 (1960) 27

Commonwealth Oil Refining Co. v. Lummus Co.,
82 S. Ct. 348 (1961) 20

Estelle v. Gamble,
429 U.S. 97 (1976) 1

First Options of Chicago, Inc. v. Kaplan,
514 U.S. 938 (1995) 27

Flynt v. Ohio,
451 U.S. 619 (1981).. 25

Goldstein v. Cox,
396 U.S. 471 (1970)... 23, 25

Gonzalez v. Automatic Employees Credit Union,
419 U.S. 90 (1974).. 23

Graddick v. Newman,
453 U.S. 928 (1981).. 18

Graves v. Barnes,
405 U.S. 1201 (1972)... 18, 20, 28

Miller v. Johnson,
515 U.S. 900 (1995).. 28

Mitchell v. Donovan,
398 U.S. 427 (1970).. 24

MTM, Inc. v. Baxley,
420 U.S. 799 (1975).. 23

New York Natural Resources Defense Council, Inc., v. Kleppe,
429 U.S. 1301 (1976).. 36

Nike, Inc. v. Kasky,
539 U.S. 654 (2003).. 25

Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n,
479 U.S. 1312 (1986).. 16, 38

Ortiz v. Hernandez Colon,
511 F.2d 1080 (1st Cir. 1975),
vacated on other grounds sub nom Colon v. Ortiz,
429 U.S. 1031 (1977).. 23, 24

Parker v. Winnipiseogee Lake Cotton & Woolen Co.,
67 U.S. (2 Black) 545 (1862).. 20

Plata v. Schwarzenegger,
2007 WL 2122657 (N.D. Cal. July 23, 2007)... 6

Rosenblatt v. Cyanamid Co.,
86 S. Ct. 1 (1965).. 24

[314643-1]

Rostker v. Goldberg,
448 U.S. 1306 (1980).. 17

Ruckelshaus v. Monsanto Co.,
463 U.S. 1315 (1983)... 17, 18, 22

San Diegans for the Mt. Soledad Nat'l War Memorial v. Paulson,
548 U.S. 1301 (2006).. 17

State of Alabama v. United States,
279 U.S. 229 (1929).. 36

Swift & Co. v. Wickham,
382 U.S. 111 (1965).. 23

Thoms v. Heffernan,
473 F.2d 478 (2d Cir. 1973),
vacated on other grounds,
418 U.S. 908 (1974)... 23, 24

Times-Picayune Publishing Corp. v. Schulingkamp,
419 U.S. 1301 (1974)... 17, 18

Wernick v. Matthews,
524 F.2d 543 (5th Cir. 1975) 23

Whalen v. Roe,
423 U.S. 1313 (1975).. 35

Wilson v. Seiter,
501 U.S. 294 (1991).. 29

Statutes

28 U.S.C. § 1253... 23

All Writs Act, 28 U.S.C. § 1651 .... 3, 16, 38

Prison Litigation Reform Act, 18 U.S.C. § 3626... passim

Rules

Fed. R. Civ. P. 52.. 27

Other Authorities

H.R. Rep. No. 104-21, § 301 (1995)... 30

INTRODUCTION

This appeal arises from a three judge district court proceeding holding that California's prison system is so overcrowded that it cannot provide basic life sustaining services.

The two underlying cases are *Plata v. Schwarzenegger*, in which the State admitted that it was liable under the Eighth Amendment's cruel and unusual punishment clause for deliberate indifference to the serious medical needs of California prisoners, *see Estelle v. Gamble*, 429 U.S. 97 (1976), and *Coleman v. Schwarzenegger*, in which the district court held that the State violated the Eighth Amendment rights of prisoners by denying them minimally adequate mental health care. *See Coleman v. Wilson*, 912 F. Supp. 1282 (E.D. Cal. 1995). The State has never sought to terminate judicial oversight in either case on the ground that health care has improved.

The State has made its application for a stay pending appeal in the midst of proceedings, initiated under the Prison Litigation Reform Act, 18 U.S.C. § 3626, to determine whether the extreme overcrowding in California's prisons is the primary cause of the violations found to exist in *Plata* and *Coleman*, and to what extent, if any, the population of California's prisons should be limited. The three judge district court has held that a reduction of the prison population is necessary and is the least restrictive means to resolve the constitutional deficiencies, but it has not issued an order requiring the State to release prisoners or to limit its prison population.

The State's request for a stay must be denied for five independent reasons.

First, the State's application for a stay of this order is premature. The order below is not, as the State asserts, a "prisoner release order" (Stay App. at 1), but is instead a non-appealable interlocutory order merely requiring the State to develop a plan to reduce

its prison population. The State's plan, once written, will be the subject of further proceedings in the lower court, including consideration of potential objections by plaintiffs and local law enforcement intervenors, and possibly additional hearings, before any "prisoner release order" is issued. In that process—still to come—the parties will develop the record necessary for full review of this matter, including, most importantly, the actual contours of the final order. That order will be appealable.

In denying the motion to stay, the lower court correctly stated: "the State will be required to take no action with respect to implementing any components of a population reduction order until all of these proceedings are completed, and then, should it appeal, we will entertain a motion to stay any action until the Supreme Court has reviewed the final court-ordered plan." Order Denying Motion to Stay at 3 (Stay App., Exh. C).

Second, the State has not demonstrated that it will suffer irreparable harm if it must develop a plan to reduce the prison population. As explained below, the State's plan must provide for a reduction in the prison population by 39,000 prisoners over two years. The chief defendant in this action, California Governor Arnold Schwarzenegger, already has a plan to reduce the prison population by 37,000 prisoners over two years by diverting some offenders away from prison and shortening the length of stay in prison for others. The State will not be irreparably harmed if it is required to submit a plan to the three judge district court that addresses the potential reduction by an additional, 2,000 prisoners.

Third, the State cannot demonstrate that this Court is likely to note probable jurisdiction over this appeal since the order to submit a plan is not appealable.

Fourth, even if this Court has jurisdiction, the State has failed to demonstrate a reasonable probability that this Court will reverse the three judge district court's order. Despite the State's attempt to re-cast its arguments as "purely legal," there are no substantive legal disputes in this case. The appeal raises highly factual contentions on matters as to which this Court will defer to the lower court's findings of fact. And the facts of this case, as found by the lower court, are unique and compelling.

Fifth, the equities tip sharply in favor of denying a stay, which would prolong the prison crowding crisis. Three years ago, Governor Schwarzenegger declared a "prison overcrowding state of emergency," which remains in effect today. The fiscal considerations involved in preparing and submitting a plan cannot outweigh the harm any delay would cause to the plaintiff class members who become seriously ill and die as a result of the constitutionally inadequate medical and mental health care in the prisons. Additionally, granting a stay would be contrary to the public interest, as it would delay a remedy for prison crowding that harms local communities and prison staff, in addition to prisoners.

In short, this is not the extraordinary case warranting invocation of the All Writs Act to grant a stay. Instead, it is a premature effort to seek a stay and appeal. No stay is required to preserve this Court's jurisdiction; the State can comply with the order simply by developing a population reduction plan–something that Governor Schwarzenegger has already done, and something that will inure to the benefit of all Californians.

STATEMENT

1. California's prisons were built to house 80,000 prisoners. *Coleman v. Schwarzenegger*, 2009 WL 2430820 (N.D. Cal and E.D. Cal. August 4, 2009) (Stay App., Exh. A, hereinafter *Plata/Coleman*) at *22. They now house nearly double that

number. *Id.* at *1. Some prisons are crowded to 300% of capacity. *Id*. As a result, according to California Governor Arnold Schwarzenegger, the prisons are places "of extreme peril to the safety of persons." Appendix A at 8 ("Proclamation Regarding Prison Overcrowding, State of Emergency," Governor Schwarzenegger, October 4, 2006); *Plata/Coleman* at *1. In 2006, the Governor declared a State of Emergency because 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." *Plata/Coleman* at *2-3. He further declared that "immediate action is necessary to prevent death and harm caused by California's severe prison overcrowding." *Id.* The State of Emergency is still in effect. *Id.* at *24.

One of the most visible consequences of the gap between the size of the prison population and the capacity of the prisons is the thousands of so-called "ugly" beds—thousands of double and triple bunks "crammed into gyms and dayrooms that were never meant to be used for housing." *Id.* at *42 (internal quotation marks omitted); s*ee* Appendix B (photographs). The former head of the Texas Department of Criminal Justice testified that "'[i]n more than 35 years of prison work experience, I have never seen anything like it.'" *Plata/Coleman* at *42.

Overcrowding, including "ugly" beds, is extraordinarily dangerous, according to the Governor's emergency proclamation and as described by a former high-ranking official in the California Department of Corrections and Rehabilitation (CDCR): "'the risk of catastrophic failure in a system strained from severe overcrowding is a constant threat. As the Director of the Division of Adult Institutions …, it is my professional opinion this level of overcrowding is unsafe and we are operating on borrowed time.'"

Id. at *34. Nowhere is this risk of catastrophic failure felt more acutely than in the State's inability to provide basic levels of health care to its prisoners.

2. The case at hand arises out of two separate actions to remedy unconstitutional health care in the prisons, *Plata v. Schwarzenegger* and *Coleman v. Schwarzenegger*. The *Plata* plaintiffs, prisoners with serious medical needs, filed suit in 2001, claiming that the State fails to provide constitutionally adequate medical care. *Id.* at *3. The State settled the matter in 2002 and entered a stipulation for injunctive relief to improve medical care. *Id.* at *4. However, "defendants proved incapable of or unwilling to provide the stipulated relief." *Id.* at *3. Over the intervening years, the district court entered numerous orders to remedy the violations, each one proving ineffective. *Id.* at *5-7. The court finally imposed a receivership on the state medical system. *Id.* at *8-11. This too has proven ineffective in the face of the crowding crisis: according to the Receiver, crowding related problems "'will *clearly* extend the timeframes and costs of the receivership and may *render adequate medical care impossible* ….'" *Id.* at *26 (quoting Receiver report and adding emphases).

The *Coleman* plaintiffs, prisoners with serious mental disorders, filed suit in 1990 alleging constitutionally inadequate mental health care. *Id.* at *12. After trial, the district court found the California prison mental health care system so deficient as to violate the Eighth Amendment. *Id*. The district court subsequently entered more than 70 orders over the course of 14 years in a futile attempt to remedy the violations. *Id*. at *15. As in *Plata*, crowding prevented meaningful reform. *Id.* at *12-19.

The State has never sought to terminate injunctive relief in either *Plata* or *Coleman* on the grounds that it has achieved constitutional compliance. *Id.* at *31.

3. In November 2006, the *Coleman* and *Plata* plaintiffs filed motions to convene a three judge district court to consider population reduction remedies. Only a specially constituted three judge district court may issue an order that has the purpose or effect of reducing the prison population. 18 U.S.C. § 3626(a)(3).

After the motions to convene the three judge district court were fully briefed, the *Plata* court delayed its decision in order "to provide defendants with an opportunity to outline specific measures they were taking or planned to take to alleviate crowding, as well as to allow the *Plata* Receiver to analyze the effects of crowding on his remedial efforts." *Plata/Coleman* at *24. The *Coleman* court similarly continued the matter "for six months to permit defendants to demonstrate sufficient progress in their remedial efforts and in relieving prison overcrowding such that convening a Three-Judge Court would not be necessary." *Id.*

On July 23, 2007, the *Plata* and *Coleman* courts issued orders requesting that a three judge district court be convened. *Id.* at *25. The *Coleman* court reaffirmed the hope that judicial intervention could be avoided, and "urge[d] the State to find its own solution to the crisis." *Coleman v. Schwarzenegger*, 2007 WL 2122636, at *8 (E.D. Cal. July 23, 2007). The *Plata* court found that although the Receiver had made much progress, the existence of the Receivership did not require the Court "to wait more time, potentially years, to see whether the Receiver's plans will succeed or fail." *Plata/Coleman* at *25 (citing *Plata v. Schwarzenegger*, 2007 WL 2122657, at *3 (N.D. Cal. July 23, 2007)). On July 26, 2007, the Chief Judge of the Ninth Circuit Court of Appeals ordered that a single three judge court be convened to consider population

reduction in both cases simultaneously, in the interests of consistency and judicial economy. *Plata/Coleman* at *27.

The three judge district court was convened and granted motions to intervene on behalf of defendants by certain California district attorneys, sheriffs, police chiefs, probation officers, counties, and Republican state legislators. *Id*. The court also granted the motion by the California Correctional Peace Officer's Association, the union representing correctional officers in California prisons, to intervene on behalf of plaintiffs. *Id.*

4. Despite the urgency of the issues presented, and in recognition of the seriousness of its endeavor, the three judge district court delayed consideration of this matter for more than seven months and referred the matter to a settlement referee, in order to give the State the opportunity to resolve the crowding problem on its own. *Id*. The State failed to do so. *Id*.

After the stay was lifted, the State filed a motion to dismiss and/or for summary judgment, which was denied on November 3, 2008. *Id.*

5. Beginning on November 18, 2008, the three judge district court held 14 days of hearings and two days of oral argument on plaintiffs' motion for a prisoner release order. *Id.* The court heard testimony from nearly 50 live witnesses and more by declaration and deposition. *Id.* Witnesses included the current and two former CDCR heads, top CDCR officials, top aides to the Governor, state legislators, sheriffs, chief probation officers, police chiefs, district attorneys, county managers, and others. *Id.* at *83, 90-100. Among the experts testifying for plaintiffs were current and former heads of five state prison systems, including California's. *Id.* at *33 & n.44, *83.

6. On February 9, 2009, the three judge district court issued a tentative ruling describing the general outlines of the order that it ultimately issued on August 4, 2009. *Id.* at *27. The purpose of the tentative ruling was to "assist the parties in planning their further actions." *Id.* In the tentative ruling, the court "asked whether a court-appointed settlement referee would be of assistance." *Id.* While the plaintiffs and the intervenors were willing to engage in further settlement discussions, the "state defendants responded that they did not believe such efforts would be fruitful." *Id.*

7. On August 4, 2009, the three judge district court issued a lengthy Opinion and Order, concluding after careful review and analysis of the evidence that plaintiffs had demonstrated all elements required by the Prison Litigation Reform Act (PLRA) for issuance of a prisoner release order, and requiring the State to draft a plan to reduce the prison population. *Id.* at *115-116. The order sets forth the following steps, to occur prior to issuance of a prisoner release order: the State is required to consult with other parties before submitting its plan; after the State's plan is submitted, the plaintiffs and intervenors may file any objections; subsequently, the State may file reply papers, and finally, the court may hold further hearings. *Id.* at *116. Only after these proceedings are complete will the lower court issue its final order that will require the State to reduce its prison population. *Id.* At that time, the court made clear, it would consider seriously any motion for a stay pending appeal of the order to reduce the population. *Id.*

8. In reaching its decision in this case, the court first 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." *Id.* at *33.

It is undisputed that crowding affects nearly every aspect of prison operations. *Id.* at *32-33. According to one former director of California's prison system, it is "'virtually impossible for the organization to develop, much less implement, a plan to provide prisoners with adequate care.'" *Id.* at *34.

The court found that the evidence at trial "overwhelmingly establishes not only that crowding adversely affects every aspect of prison administration, forcing a constant state of crisis management, but also that crowding creates numerous barriers to the provision of medical and mental health care that result in the constitutional violations we consider here." *Id.* at *32.

These barriers include lack of physical space: "[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." *Id.* at *35. Some of the most severe crowding problems occur at prison reception centers, where prisoners are processed on arrival: "The consequences of the state's inability to screen inmates properly at the reception centers are obvious: If an inmate's health needs are not identified, they 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." *Id.* at *37.

Moreover, most prisons lack the space to provide treatment to the seriously sick and mentally ill prisoners they have identified. *Id.* at *38-41. There are simply too few medical and mental health beds to house acutely ill prisoners; indeed, according to the *Plata* Receiver, "'available clinical space is less than half of what is necessary for daily operations.'" *Id.* at *38.

Thus the crowded conditions themselves exacerbate prisoners' mental illness: the mental health bed shortages "have created a destructive feedback loop that is now endemic to the CDCR's mental health care delivery system. Inmates denied necessary mental health placements 'are decompensating and are ending up in mental health conditions far more acute than necessary …. creat[ing] a cycle of sicker people being admitted, with greater resources necessary to treat them, which then creates even further backlog in an already overwhelmed system.'" *Id.* at *41.

The overcrowding also has the potential to cause physical illness, by increasing risk of transmission of infectious disease. *Id.* at *42.

Inadequate staffing is another crowding-created barrier to adequate health care. Crowding renders the number of health care staff insufficient to address the basic needs of prisoners, which further delays and denies care. *Id.* at *43-46. Crowding also causes shortages in custodial staff, who are needed to escort prisoners to and from appointments within an institution and, if necessary, to outside specialty care, and "short-staffing can lead to forced overtime and burnout, such that staff make poor decisions, particularly in health care emergencies." *Id.* at *46 (internal quotation marks omitted).

Also as a result of crowding, defendants are unable to deliver the right medication to the right prisoner in a timely manner, simply because the medication management system is overwhelmed by the sheer number of prisoners requiring care. *Id.* at *47-48. This means that "prisoners receive their medications late or not at all, and suffer as a result." *Id.* at *47 (internal quotation marks omitted).

The crowding also makes it impossible for many prisoners who need specialty care, including urgent care, to get it (*id.* at *49), and has overwhelmed the prison medical

and mental health records systems, without which "appropriate health care services cannot be provided." *Id.* at *50-52 (internal quotation marks omitted).

Another result of crowding is that prison administrators rely heavily on lockdowns to exert control over the prisons. *Id.* at *49-50. "There are housing units in the California Department of Corrections that are locked down more often than they are unlocked." *Id.* at *50 (internal quotation marks omitted). During lockdowns, prisoners are unable to leave their housing units to go to clinics; instead, medical staff must go cell-to-cell to see prisoners. *Id.* This results in further delays in access to care, and inadequate care, because the prisons are simply not staffed to handle such procedures. *Id.*

Additionally, during lockdowns—and in crowded prisons generally—mentally ill prisoners are more likely to decompensate or become suicidal, placing further strain on the mental health delivery system. *Id.* at *50, 52-53.

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." *Id.* at *53.

One former head of corrections in California testified that she "'absolutely believe[s]'" the primary cause of the medical deficiencies is overcrowding. *Id.* at *54. The former head of Texas prisons agreed, as did the former head of corrections in Pennsylvania, Washington and Maine and the current head of Pennsylvania's prisons. *Id.* at *54-55.

The three judge district court found that "[a]ll of the steps defendants have taken under the *Plata* court's supervision, as well as the steps taken under the *Coleman* court's supervision, have failed to remedy the constitutional deficiencies." *Id.* at *61. That is

because "[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." *Id.*

The Court found that the "only conclusion that can be drawn from the wealth of clear and convincing evidence before this court 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." *Id.* at *63.

9. The three judge district court also found and concluded 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." *Id.* at *64. In reaching that opinion, the lower court reviewed every alternative proposed by the State, as well as any other options it could conceive, and rejected each one after careful consideration. *Id.* at *64-72.

The State proposed to build prisons to relieve crowding, but the evidence demonstrated that any construction could not be completed for many years, during which time plaintiff class members would continue to suffer and die. *Id.* at *64-68. The State "has not even reached the 'preliminary-plan' stage" for construction under a 2007 prison construction bill. *Id.* at *65. Once funding is secured and plans are developed, construction will still be delayed, according to the state, for "several years." *Id.* at *65. The certainty of years of delay means construction is not a "meaningful remedy for the emergency-like conditions in California's prisons." *Id.* at *66.

The State proposed that the *Plata* Receiver and *Coleman* Special Master could resolve the problems, but the Receiver and Special Master disagreed with that assertion, and the three judge district court 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." *Id.* at *71.

The court considered other options, such as simply hiring more staff, but found that crowding impedes recruitment and retention of health care staff, and, even if more staff were hired, there would be nowhere for them to work. *Id.* at *68.

In conclusion, the court found that "[t]he evidence establishes 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.'" *Id.* at *75.

10. The three judge district court then addressed appropriate relief. Relying on testimony presented by jail administrators and current prison officials, as well as 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." *Id.* at *75, 79-81. The three judge district court found that "[a]lthough there is strong evidence that a prison system operating at even 100% design capacity will have difficulty providing adequate medical and mental health care to its inmates, the evidence before the court establishes that California's

prison 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.… Rather than adopting the 130% limit requested by plaintiffs, we will out of caution require a reduction in the population of California's adult prison institutions to only 137.5% of their combined design capacity." *Id*. at *83.

A reduction to 137.5% of design capacity amounts to a population reduction of 39,000 prisoners.[1]

11. The three judge district court next considered whether an order to reduce the prison population to 137.5% of design capacity would have an adverse impact on public safety. *See* 18 U.S.C. § 3626(a). The court examined an "impressive collection of evidence before the court includ[ing] testimony from former and current heads of corrections of five states; top academic researchers in the field of incarceration and crime; CDCR officials; and county officials, district attorneys, probation officers, and sheriffs from across California." *Plata/Coleman* at *83.

First, the court found that the crowded conditions in California prisons are *increasing* crime because prisoners leave prison more dangerous than before, having been forced into violent, crowded conditions with higher-level offenders, and having been unable to obtain rehabilitative programming because the physical space used for

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[1] The State claims in its motion that the order requires a reduction of 46,000 prisoners. That figure, cited by the three judge district court, is no longer correct, as the prison population has dropped since the evidence in the case was presented. Currently, the design capacity of the in-state adult institutions at issue in this case (which excludes camps and community correction centers) is approximately 80,000 and the population is just over 149,000. *See* CDCR August 31, 2009 Weekly Population Report, *available at* http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/WeeklyWed/TPOP1A/TPOP1Ad090826.pdf (site last visited September 8, 2009). Accordingly, the State's plan must provide methods to reduce the population of adult institutions to 110,000 prisoners, a reduction of 39,000 prisoners.

programming is now filled with beds. *Id.* at *85-87. The overwhelming evidence from local law enforcement officials was that "the current combination of overcrowding and inadequate rehabilitation or re-entry programming in California's prison system itself has a substantial adverse impact on public safety and operation of the criminal justice system." *Id.* at *85. The State itself concurs. *Id.* at *85-86; Appendix A at 2 (Governor's Proclamation). Reducing crowding will ameliorate these problems, thus improving public safety.

Next, the court noted, the State may accomplish the population reduction using safe methods that the Governor and the State's own experts have themselves proposed over the years. *Id.* at *87. The state, in developing a plan, "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." *Id.* at *78. These options include measures "recommended not only by plaintiffs' experts but also by experts for defendants and defendant-intervenors, the Governor, CDCR officials, and the CDCR Expert Panel." *Id.* at *113. The court analyzed those proposals, and found that the overwhelming testimony from all witnesses supported the conclusion that they "either have no impact on or reduce the recidivism rate" and therefore "would not adversely affect public safety." *Id.*; *see also id.* at *87-*99.

Some law enforcement and other witnesses, wrongly assuming that a "prisoner release order" would "involve such drastic measures as a mass early release and/or a ban on the admission of new offenders to prison," identified public safety concerns. *Id.* at *99. The three judge district court carefully considered those concerns in its opinion (*id.* at *99-106), but found that "the evidence demonstrates that the fears regarding increased

crime, arrests, and jail populations are largely unjustified, and that there are ways to achieve a reduction in California's prison population without unduly burdening the already limited resources of local communities." *Id.* at *99. The court further noted that any reduction in the prison population would result in substantial savings to the State, possibly over one billion dollars, and the State's population reduction plan could require some portion of those funds be directed toward community programs to ameliorate any impact of a prison population reduction. *Id.* at *84, 105, 106.

Because the three judge district court gave the State the opportunity to draft a population reduction plan in the first instance, the court did not determine "with finality" whether such plan would have an adverse impact on public safety. *Id.* at *84. However, it found 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." *Id.*

12. Nearly one month after the court issued its August 4, 2009 order, on September 1, 2009, the State moved for a stay in the three judge district court. That court denied the motion on September 3, 2009. Order Denying Motion to Stay.

LEGAL STANDARD FOR ISSUING STAY

The State's application for a stay of the three judge district court's interlocutory order is governed by the All Writs Act, 28 U.S.C. § 1651(a), which provides this Court authority to issue injunctive relief when "necessary or appropriate in aid of [its jurisdiction] and agreeable to the usages and principles of law." *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312 (1986) (Scalia, J., in chambers). The Circuit Justice's injunctive power under the All Writs Act is to be used "'sparingly and only in the most critical and exigent circumstances,' and only where

the legal rights at issue are 'indisputably clear.' Moreover, the applicant must demonstrate that the injunctive relief is "necessary or appropriate in aid of [the Court's jurisdiction]." *Id.* (citations omitted).

An applicant must satisfy a four-part test in order to obtain a stay. If an applicant fails to satisfy any of these four elements, the application must be denied.

First, an applicant must show that the denial of a stay would likely cause irreparable harm. *Times-Picayune Publishing Corp. v. Schulingkamp,* 419 U.S. 1301, 1305 (1974) (Powell, J., in chambers). In the absence of irreparable injury, there is no need to consider the other factors and the application must be denied on that ground alone. *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317 (1983) (Blackmun, J., in chambers).

Second, even if an applicant demonstrates irreparable harm, this does not obviate the need to balance the equities "to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers); *see also San Diegans for the Mt. Soledad Nat'l War Memorial v. Paulson*, 548 U.S. 1301 (2006) (Kennedy, J., in chambers). In balancing the equities, considerable deference is due to the lower courts' determination of the relative harms. *Aberdeen & Rockfish R. Co. v. SCRAP*, 409 U.S. 1207, 1218 (1972) (Burger, C.J., in chambers) (even where Circuit Justice had "doubts" about lower court's balancing of harms, lower court's decision "will not be disturbed unless plainly the result of an improvident exercise of discretion") (internal citations omitted).

Finally, "there must be a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for … the notation of

probable jurisdiction" and "there must be a significant possibility that a majority of the Court eventually will [disagree with the three judge district court's decision]." *Times-Picayune Publishing Corp.,* 419 U.S. at 1305.

Under this Court's precedent, a Circuit Justice should show great "reluctance, in considering in-chambers stay applications, to substitute [his or her] view for that of other courts that are closer to the relevant factual considerations that so often are critical to the proper resolution of these questions." *Graddick v. Newman*, 453 U.S. 928, 934-35 (1981) (declining to stay lower court order requiring release of prisoners) (internal citation omitted). A stay pending appeal should be granted "only under extraordinary circumstances." *Ruckelshaus,* 463 U.S. at 1316. A "district court's conclusion that a stay is unwarranted is entitled to considerable deference." *Id.* This is particularly true where, as here "[t]he case received careful attention by the three-judge court, the members of which were 'on the scene' and more familiar with the situation than the Justices of this Court; and the opinions attest to a conscientious application of principles enunciated by this Court." *Graves v. Barnes*, 405 U.S. 1201, 1204 (1972) (Powell, J., in chambers).

ARGUMENT

I. THE STATE CANNOT DEMONSTRATE THAT IRREPARABLE INJURY WOULD RESULT FROM DENIAL OF A STAY

The State has failed to demonstrate that it would be irreparably injured if the Court denies its application for a stay.

All that is required by the August 4, 2009, order on appeal is that the State develop a plan to reduce its prison population. *Plata/Coleman* at *116. After the State submits a plan, the plaintiffs and intervenors will have an opportunity to comment on it, and the court may hold further hearings. Only after such proceedings are complete—

proceedings for which there is "no fixed time limit"—will the court require the State to *implement* a population reduction plan. Order Denying Motion to Stay at 3. "The State will be required to take no action with respect to implementing any components of a population reduction order until all these proceedings are completed and then, should it appeal [the lower court] will entertain a motion to stay any action until the Supreme Court has reviewed the final court-ordered plan." *Id.* Under these circumstances, no stay is warranted. *Bartlett v. Stephenson*, 535 U.S. 1301, 1304-05 (2002) (Rehnquist, C.J., in chambers) (denying stay application in part because there was no danger that the challenged redistricting plan would be implemented in imminent election before pre-clearance by United States Department of Justice).

The State complains that drafting a plan will take too much effort. But the State has already committed the resources necessary toward drafting just such a plan. The State's plan, when submitted, must reduce the prison population by 39,000 prisoners over two years. The chief defendant-appellant, Governor Arnold Schwarzenegger, recently submitted a proposal to the State legislature that would reduce the prison population by 37,000 in two years. Appendix D (publication authored by current CDCR Secretary Matt Cate). This proposal reflected substantial planning and consideration of options by the State. *See, e.g.*, *Plata/Coleman* at *20-21, 83. Thus, the three judge district court found, "the state has already completed much of the necessary work to develop a plan that could satisfy much or all of our order, with the Governor's population reduction proposals having been recently considered and adopted (in full by one house and in part by the other) by the California Legislature." Order Denying Motion to Stay at 4. Under these circumstances, where the work is mostly complete, the district court found that

"developing a plan to resolve the state-acknowledged crisis in the prisons will not under any circumstances constitute irreparable harm to the state." *Id.* This Court "weighs heavily" a lower court's determination that an appellant has failed to demonstrate irreparable harm. *Graves*, 405 U.S. at 1203.

Incredibly, the State claims that drafting a population reduction plan will be too expensive because CDCR is facing a $1.2 billion budget shortfall. Stay App. at 28. In fact, the Governor long ago spent the money to develop a plan and urged State policymakers to follow it precisely because *implementing* such a plan will save the State $1.2 billion per year. Appendix C ("CDCR Prison Population Reduction Package, By the Numbers"). The stay application fails to quantify what additional expense would be required to submit a plan to the court, but it is beyond dispute that any such sum would be dwarfed by the savings that will be realized by a population reduction.

In short, the additional effort required for the State to submit a population reduction plan the court simply does not amount to irreparable harm. *Compare Parker v. Winnipiseogee Lake Cotton & Woolen Co.*, 67 U.S. (2 Black) 545, 551 (1862) (loss of health is irreparable injury) *with Commonwealth Oil Refining Co. v. Lummus Co.*, 82 S. Ct. 348 (1961) (no irreparable injury where order merely required party to prepare for arbitration).

The State also claims it will suffer irreparable harm absent a stay because of the deadline for submission of a plan, complaining that it needs more time to overcome "political hurdles," including obtaining legislative approval. Stay App. at 28-29.[2] The

[2] The State also suggests, absurdly, that it will be irreparably harmed because "plaintiffs moved to compel discovery and additional injunctive relief." Stay App. at 29. In fact, plaintiffs' motion merely seeks to require the State to comply with the order requiring the

State avers that the timing of the lower court's order interferes unduly with the normal legislative process. But the legislative session ends one week before the State's plan must be submitted to the Court. *See* http://www.senate.ca.gov/~newsen/schedules/_CALENDAR/jointCalendar2009.pdf (session ends September 11; plan is due on September 18). Moreover, the legislature has had ample time to act. Three years ago, the Governor proclaimed that prison crowding is an emergency and all but begged the legislature to take action to fix it. Appendix A (Governor's Proclamation). Two years ago, the lower courts granted the State two separate six-month stays of litigation in order to allow the State to come up with a plan to remedy prison crowding. *Plata/Coleman* at *24. Six months ago, the lower court issued a tentative ruling which informed the State of its intended order and urged the State to develop a plan. *Id.* at *27. Nothing about the preliminary step of preparing a plan prevents the legislature from addressing the problem through the normal legislative process during the period of briefing and hearings provided for in the order on appeal. Indeed, the legislature and the Governor have "already completed much of the necessary work." Order Denying Motion to Stay at 4.

The timing of the State's motion also belies its claim that compiling a plan for submission to the court in 45 days will cause it irreparable injury. The order on appeal was issued on August 4, 2009, and required the State to submit its population reduction plan 45 days later, on September 18, 2009. *Plata/Coleman* at *116. If developing the plan truly caused the State irreparable injury, the State would have appealed and filed its

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State to consult with the parties in drafting its population reduction plan. Opinion at 183. The State intended to comply with that requirement by holding a 90-minute meeting with plaintiffs four days before the plan was due. Plaintiffs' motion seeks documents in advance of such meeting so it can meaningfully review the plan and provide insight, comments, and suggestions. It can hardly be said that such consultation would be burdensome; to the contrary, it would ensure timely, informal resolution of disputes.

motion to stay expeditiously. Instead, the State waited nearly a full month before filing its motion to stay and notice of appeal. Under the circumstances, the State can hardly claim urgency. *Ruckelshaus*, 463 U.S. at 1318 ("failure to act with greater dispatch tend[ed] to blunt [a party's] claim of urgency and counsel[ed] against the grant of a stay"); *Beame v. Friends of the Earth*, 434 U.S. 1310, 1313 (1977) (taking undue time to apply for a stay or for certiorari found to "vitiate much of the force of [the applicants'] allegations of irreparable harm").

Finally, the State also argues that irreparable injury will result absent a stay because the population reduction will commence before this Court can rule on the merits, prisoners will be released, and crime will increase. Stay App. at 30-31. This is simply not true. The order from which the State appeals merely requires the State to develop a population reduction *plan*. The population reduction will not commence until the court issues a "prisoner release order."[3] At that point, the State can take an appeal and seek a stay. The three judge district court specifically stated that it "will entertain motions to stay implementation" once a plan is developed. *Plata/Coleman at* *116.

Because the State has failed to demonstrate that irreparable injury would result absent a stay, there is no need for the Court to consider any other stay factors; the application must be denied on that ground alone. *See Ruckelshaus,* 463 U.S. at 1317 (citation omitted). Nonetheless, as discussed below, the other factors also counsel against entering a stay.

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[3] Moreover, the State could develop a population reduction plan using defendant Governor Schwarzenegger's own proposals, all of which the Governor and the Secretary of Corrections concede will be safe and have no adverse impact on public safety. *Plata/Coleman* at *150, 142; Appendix D (Mathew Cate, "Prisons: It's Time to Reform and Reduce the Population"); Appendix E (Governor's August 19, 2009 Remarks). The State cannot now argue to the contrary.

II. THIS COURT IS UNLIKELY TO NOTE PROBABLE JURISDICTION OR GRANT PLENARY REVIEW

28 U.S.C. § 1253 provides this Court with jurisdiction over appeals from certain interlocutory injunctions issued by the three judge district court. However, the order on appeal—an interim order merely requiring the State to draft a plan—is not the type of injunction contemplated by the statute. The State cites no authority for its proposition that this Court has jurisdiction over this type of interim order.

This Court has held repeatedly that Section 1253's jurisdictional grant is to be "narrowly construed" in the interests of judicial economy. *See, e.g.*, *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90, 96-98 & n.16 (1974); *Goldstein v. Cox*, 396 U.S. 471, 478 (1970). The purpose and intent behind Section 1253's jurisdictional grant is to "'accelerat[e] a final determination on the merits.'" *Gonzalez*, 419 U.S. at 96 (quoting *Swift & Co. v. Wickham*, 382 U.S. 111, 119 (1965)). Accordingly, injunctive orders that do not fully resolve the merits of the action do not qualify for direct appeal under Section 1253. In *MTM, Inc. v. Baxley*, 420 U.S. 799 (1975), conscious of the traditional narrow construction detailed in *Gonzalez*, this Court concluded that it has jurisdiction over direct appeals under Section 1253 only where the three judge district court injunction "rests on resolution of the merits" of the claim presented below. *Id.* at 804; *see also Wernick v. Matthews*, 524 F.2d 543, 547 (5th Cir. 1975) (recognizing that "a direct appeal from an order of a three-judge court will lie to the Supreme Court under [Section 1253] where the order rests upon resolution of the merits").[4]

[4] Consistent with *MTM*, two courts of appeals have determined that three-judge court orders that decide a case on the merits but do not actually order the injunctive relief requested are cognizable by the courts of appeals, not the Supreme Court. *See Ortiz v. Hernandez Colon*, 511 F.2d 1080 (1st Cir. 1975), *vacated on other grounds sub nom Colon v. Ortiz*, 429 U.S. 1031 (1977); *Thoms v. Heffernan*, 473 F.2d 478 (2d Cir. 1973),

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In this case, the August 4, 2009 order is not final. In a misuse of terms, the State claims that the August 4, 2009 order is a "prisoner release order." Stay App. at 1. But under the PLRA, a prisoner release order is "any order … that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison." 18 U.S.C. § 3626(g)(4). The August 4, 2009 order merely requires the State to develop a plan to reduce the prison population. The purpose of the August 4, 2009, order is not to release prisoners, but to have the State provide a plan that might be the basis for a subsequent order that will have the purpose and effect of limiting the prison population. That subsequent ruling, once final, will be an injunction ruling on the merits.

Accordingly, this Court is unlikely to note probable jurisdiction over an appeal from the August 4, 2009, order, and "no stay should be granted pending an appeal which would not lie." *Rosenblatt v. Cyanamid Co.*, 86 S. Ct. 1, 3 (1965) (Goldberg, J., in chambers).

Even if the August 4, 2009 order were appealable, however, prudential concerns counsel against noting probable jurisdiction or granting plenary review. The order is

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vacated on other grounds, 418 U.S. 908 (1974). Both courts reasoned that such orders are tantamount to declaratory judgments, which are not cognizable by the Supreme Court under Section 1253. *See Mitchell v. Donovan*, 398 U.S. 427, 430 (1970).

Ortiz is of particular note, because the three-judge court in that case "expressly retained jurisdiction and the right to issue an injunction later if the legislature did not" act to cure the unconstitutional statute. *Ortiz*, 511 F.2d at 1081. The legislature did not act, and the defendants appealed. Based in part on the fact that the three-judge court was "plain in reserving consideration of a possible injunction," the First Circuit first held that it, not the Supreme Court, was the proper reviewing court. It then declined jurisdiction over the case and remanded to the district court "to take such action as it sees fit on the injunction." *Id.* at 1083. Because the three judge district court has made it clear that it plans to issue an injunction on the merits only after consideration of the State's plan, this Court is unlikely to conclude that it has probable jurisdiction over the August 4, 2009 order.

preliminary in nature, and contemplates that the three judge district court will hold subsequent proceedings, and will then issue a final order requiring the State to implement a population reduction plan. That order may then be appealed to this Court. This Court has declared repeatedly that "piece-meal appellate review is not favored." *Goldstein,* 396 U.S. at 478. Thus, in *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (*per curiam*), the Court dismissed as improvidently granted a writ of certiorari from a non-final order. With a non-final order, reaching the merits of appellants' claims does not "serve the goal of judicial efficiency. For, even if we were to decide the … issues presented to us today, more … issues might well remain in this case, making piecemeal review of the Federal … issues likely." *Id.* at 660 (Stevens, J., concurring) (citing *Flynt v. Ohio*, 451 U.S. 619, 621 (1981) (*per curiam*)). The same is true in the case at hand. If the Court were to take jurisdiction over the appeal and affirm, it is likely that one of the more than 140 defendants and intervenors will take another appeal to the Court from a final order. A more efficient means for resolving the case would be to await a final order, and to resolve all of the issues at once.

Other factors weigh against plenary review as well. First, the State's appeal raises no substantive legal questions. Although the State attempts to cast its contentions as "pure legal" ones, the State, the plaintiffs and the Court agree on substantially all the standards and law governing this action, as discussed below. Even where a case presents substantial constitutional questions, this Court has been careful to avoid premature appeals. *See Citizens United v. F.E.C.*, 128 S. Ct. 1471 (2008) (directing briefing on jurisdiction under 28 U.S.C. § 1253), 128 S. Ct. 1732 (2008) (dismissing appeal for want of jurisdiction).

Moreover, the factual contentions that the State raises are unlikely to succeed on appeal. This Court defers heavily to lower court findings of fact, and in this instance the lower court's findings were unanimous, well documented, and thorough.

The State further contends that the August 4, 2009 order is appropriate for plenary review because of the "order's potential harm to community safety." Stay App. at 14. But that points to precisely the issue why the case is *not* appropriate for plenary review: it is beyond cavil that the August 4 order—requiring the state to develop a plan—will have no impact on crime or communities. Furthermore, as explained above, the State is constrained to suggest that a reduction in the prison population will increase crime. The Governor himself—a defendant in this action—denies that proposition. *Plata/Coleman* at 140, 132; Appendix E (Governor's August 19, 2009 Remarks) (outlining his plan to "cut costs and relieve overcrowding but without sacrificing pubic safety.").

III. THE STATE IS NOT LIKELY TO PREVAIL ON THE MERITS

The State attempts to cast its arguments as "purely legal" ones, but the State has raised highly fact-intensive questions of a rather simple nature: crowding is one cause of the unconstitutional conditions, but is it the primary cause? What is the appropriate population level for the California prison system? The legal claims the State raises are incidental to these factual arguments, and are tenuous at best.

After carefully considering all of the evidence presented in this case, the three judge district court issued a detailed 184-page Opinion and Order describing the lay and expert witness testimony, assessing the credibility of witnesses, examining all of the evidence received, and drawing logical and necessary findings of fact and legal conclusions. The opinion was unanimous, and the court did not find the questions to be close. *See, e.g., Plata/Coleman* at *62 (evidence regarding primary cause was

"overwhelming and overwhelmingly persuasive"); *Id.* at *72 ("[t]he testimony we received from the experts overwhelmingly rejected the claim that alternatives such as construction of prisons or other facilities or the transfer of small numbers of prisoners could render a prisoner release order unnecessary"); *Id.* at *87 ("There was overwhelming agreement among experts for plaintiffs, defendants, and defendant-intervenors that it is 'absolutely' possible to reduce the prison population in California safely and effectively"); and *Id.* at *113 ("The evidence and testimony from plaintiffs, defendants, and defendant-intervenors overwhelmingly showed that there are ways for California to reduce its prison population without such an adverse impact, and that a less crowded prison system would in fact benefit public safety and the proper operation of the criminal justice system").

This Court's review of the lower court's findings will be highly deferential. "Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Fed. R. Civ. P. 52(a)(6); *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 948 (1995). The lack of complicated, disputed legal standards counsels even further deference. *Commissioner v. Duberstein*, 363 U.S. 278, 289 (1960).

A. There is No Dispute about the Definition of Primary Cause, and the Lower Court's Findings of Fact on This Matter are Correct.

The State is unlikely to prevail on a claim that the lower court erred in its interpretation of the term "primary cause." At trial, the State argued that the court should use the dictionary definition of "primary cause": the cause that is "first or highest in rank

or importance; chief; principal." *Plata/Coleman* at *31. The lower court accepted the State's definition. *Id.* This legal issue is not disputed.

The State's real argument is that other problems in addition to crowding have caused the constitutional violations at issue in this case, and "it is by no means clear that [crowding] is the 'primary cause.'" Stay App. at 18-19.

Even if ultimate questions of causation are legal, the predicate findings of fact underlying the conclusion that crowding is the most important cause is a pure question of fact, reviewed for clear error. *Miller v. Johnson*, 515 U.S. 900, 917 (1995); *Graves,* 405 U.S. 1201, 1203-1204. The court below did not err.

The State next argues that crowding can only be the primary cause "if a population reduction is the only effective remedy for the claimed violation." Stay App. at 19. That contention is contrary to the plain language of the statute.

The PLRA requires that two findings be made before a three judge district court can issue a prisoner release order, that "(i) crowding is the primary cause of the violation of a Federal right; and (ii) no other relief will remedy the violation of the Federal right." 18 U.S.C. § 3626(a)(3)(E). Nothing in the statute says that a prisoner release order must be the "only remedy" for the violation, nor does the State cite any other authority for that proposition. Indeed, as the lower court noted, the statutory use of the term "primary" itself implies that there will be other, albeit less important, causes. *Plata/Coleman* at *31.

The court has authority to issue a prisoner release order if such order is *necessary* to remedy the constitutional violations, even if that order is not *sufficient* to completely eradicate the violations.

The three judge district court correctly found that crowding relief is a necessary precondition to remedy violations in *Coleman* and *Plata.* The court examined the other available remedies in detail (*id.* at *63-75) and determined that reducing the prison population is a "prerequisite to providing constitutionally adequate medical and mental health care to California prisoners." *Id.* at *64. The State does not argue otherwise.

The three judge district court correctly found that "[t]he PLRA does not require that a prisoner release order, on its own, will necessarily resolve the constitutional deficiencies found to exist in *Plata* and *Coleman*." *Id.* at *63. Where as here, reducing crowding is a prerequisite without which the other forms of relief will not remedy the federal violation, then the "no other relief" prong is met. *Id.* at *63-64.

If the State's contrary reading of the PLRA were correct, the only circumstance under which a three judge district court could enter a prisoner release order would be where the reduction in the prison population would automatically resolve the constitutional violation. In cases like this one, however, where crowding relief is *necessary* but not *sufficient* to remedy the violation, a three judge district court would have to deny relief and allow the violations to continue. In practice, such a bar on crowding relief where other factors were present would be insurmountable. As the State acknowledges, (Stay App. at 20), overcrowding itself does not constitute an Eighth Amendment violation, but rather acts in combination with other factors that result in deprivation of a basic human need, such as medical or mental health care. *Wilson v. Seiter*, 501 U.S. 294, 304 (1991). Nothing in the plain language of the statute supports the conclusion that Congress commanded the federal courts to ignore these practical

realities and allow proven violations to continue. As Congress recognized when it passed the PLRA,

> While prison caps must be the remedy of last resort, a court still retains the power to order this remedy despite its intrusive nature and harmful consequences to the public if, but only if, it is truly necessary to prevent an actual violation of a prisoner's federal rights.

H.R. Rep. No. 104-21, § 301, at 25 (1995).

In the case at hand, reducing crowding is "truly necessary to prevent an actual violation of a prisoner's federal rights." *Id.* The three judge district court's order was correct.

B. The Population Cap Chosen by the Lower Court is Well-Supported by the Record.

The State claims that the three judge district court erred in ordering the State to develop a plan to reduce the prison population to 137.5% of design capacity because (a) the reduction will "likely" affect prisoners without medical conditions or serious mental illness, and (b) the State contends the court did not have enough support for the 137.5% figure. These arguments are unlikely to prevail on appeal.

The State's claim that the prisoner release order will benefit non class members is not ripe. It is the State's responsibility in the first instance to determine the method by which the population will be reduced, and hence which prisoners will be affected, and to provide that information to the lower court as part of its plan. After the State submits its plan, and the parties have an opportunity to object, the court will determine the appropriate contours of the prisoner release order. At that point there will be a record about the characteristics of the population that will be affected under the State's

recommendation, and the court's rulings on that recommendation. At this preliminary stage, however, no such record exists.

The State's next contention, that the three judge district court erred in setting the prison population cap at 137.5% of design capacity, is similarly unavailing. The three judge district court exercised its authority under the PLRA to determine an appropriate population level, fully cognizant of the limits Congress imposed on that discretion. *Plata/Coleman* at *76-77 (cap must extend no further than necessary).

The State did not contend below that it could provide constitutionally adequate health care at a specific population level and it did not present any evidence "suggesting that the population of California's prisons should be reduced to some level above 130%." *Id.* at *79, 82.

Here the State does not argue that 137.5% is the *wrong* number, but rather that the three judge district court should have had more information (in the form of a study that the State failed to provide) to determine the *right* number. The State waived the argument that a study was required by failing to raise that argument below. *Cardinale v. Louisiana*, 394 U.S. 437 (1969) (dismissing writ of certiorari where petitioner raised an argument not raised in lower court).

Moreover, it is not likely that this Court would find that the three judge district court's findings were clearly erroneous, because the 137.5% cap is firmly grounded in evidence from the State's own reports and deliberations regarding the maximum tolerable crowding levels. *Plata/Coleman* at *75-83. The three judge district court concluded that "[a]lthough there is strong evidence that a prison system operating at even 100% design capacity will have difficulty providing adequate medical and mental health care to its

inmates, the evidence before the court establishes that California's prison 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.… Rather than adopting the 130% limit requested by plaintiffs, we will *out of caution* require a reduction in the population of California's adult prison institutions to only 137.5% of their combined design capacity." *Id.* at *83 (emphasis added). The Court found, based on the evidence before it, that it is "convinced that a cap of no higher than 137.5% is necessary …." *Id.* at *75.

C. The State Was Not Precluded From Offering Any Evidence About Current Conditions.

The State's assertion that it was "precluded from offering evidence of current conditions" in the prisons is simply false. Stay App. at 23. To the contrary, the State introduced and the court accepted extensive evidence from defendants about current conditions of mental health and medical care within California prisons.

The State's medical and mental health experts toured the prisons and introduced reports describing the conditions they found. *Plata/Coleman* at *33, 34, 37, 41, 47, 51-52, 58-61, 74-75. The State introduced testimony from its expert on health care statistics and also introduced summaries of data regarding current medical and mental health care staffing and institutional populations. *Id.* at *54, 23, 44-45. The State introduced into evidence the reports of the *Coleman* Special Master and the *Plata* Receiver about current conditions. *Id.* at *15, 18-19, 22, 25, 35, 38-39, 41, 43-44, 47, 50, 54, 62, 66, 67, 69-70, 71, 79. The State presented the testimony of the chief State officials in charge of the prisons, as well as the State officials in charge of medical and mental health care delivery

and financing, regarding current conditions. *Id.* at *2, 34, 66, 15-16, 22, 34, 50, 79. The State does not identify a single piece of evidence that was offered but not admitted.

Under the PLRA, the proceedings in the three judge district court were solely about whether to enter a prisoner release order to remedy the constitutional violations that the single judge courts had found to exist. 18 U.S.C. § 3626(a)(3)(E). That is not to say that the State was precluded from proving that it had eliminated the constitutional violations. In convening the three judge district court, "the *Plata* and *Coleman* courts both found, without objection from defendants, that the constitutional violations were ongoing." *Plata/Coleman* at *31 (citations omitted). The State did not contest those findings. Nonetheless, the three judge district 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 appropriate proceeding. Transcript of Pretrial Conference, November 10, 2008, at 28-29; *see* 18 U.S.C. § 3626(b) (procedures for termination motions). The State did not do so.

Having failed to raise the issue in the appropriate forum, having failed to identify a single piece of evidence on this point that was not admitted, and having never made an offer of proof as to any such evidence, the State cannot prove any prejudice from the three judge district court's evidentiary rulings.

D. The Single Judge District Courts Had No Authority to Order Relief Directed at Overcrowding, as the State Suggests They Should Have.

The State argues that the three judge district court was not properly convened because neither the *Plata* court nor the *Coleman* court had previously issued orders "directed at overcrowding." Stay App. at 24. As a preliminary matter, the question

whether the court was properly convened in the first instance is not properly before the Court on this appeal from an interlocutory order.

Moreover, it is not altogether clear what the State means by an order "directed at overcrowding." In passing the PLRA, Congress prohibited single judge district courts from issuing orders to reduce the prison population. Only a three judge district court may issue an order "that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison." 18 U.S.C. § 3626(g)(4); 18 U.S.C. § 3626(a)(3)(B). The single judge courts in *Plata* and *Coleman*, though faced with chronic and fatal deficiencies in the health care system, had no authority to order the state to fix the prison crowding problem.

E. The *Plata* Court Correctly Found That Less Intrusive Relief Had Failed to Remedy the Constitutional Violations.

The State argues that the single judge *Plata* court should have given the Receiver more time to fix the constitutional violations before asking that the three judge district court be convened to consider a prisoner release order. Stay App. at 24-26. The State does not make a similar argument in *Coleman*.

As previously noted, the question whether the lower court was properly convened in the first instance is not properly before this Court, as this is an appeal from an interlocutory order. In any event, the contention is meritless.

What the State's application omits is that the *Plata* court issued two prior orders in addition to appointing a receiver for the medical care system before convening the three judge panel. After three and five years respectively, neither of the prior orders nor the Receiver cured the constitutional violations, and there was not, and is not now, a reasonable prospect for compliance in the foreseeable future. *Plata/Coleman* at *5-6, 25.

Before convening a three judge district court the *Plata* court asked the Receiver whether his mission could be accomplished without a reduction in overcrowding. He answered as follows:

> Every element of the [Receiver's] Plan of Action faces crowding related obstacles. Furthermore, overcrowding does not only adversely impact the Receiver's substantive plans, it also adversely impacts on the very process of implementing remedies because overcrowding, and the resulting day to day operational chaos of the CDCR, creates regular "crisis" situations which call for action on the part of the Receivership and take time, energy, and person power away from important remedial programs.

Id. at *25-26 (quoting Receiver's Report Re: Overcrowding).

The *Plata* court's decision proved correct. It is now three years since the Receiver was appointed, and still the Receiver has failed to remedy the constitutional violations. *Plata/Coleman* at *11. That is because of crowding. As the three judge district court found, crowding is the primary cause of the constitutional violations, and the constitutional violations cannot be remedied in a timely manner without addressing crowding. *Id.* at *63-64.

For these reasons, the State is unlikely to prevail on a claim that the *Plata* court clearly erred when it convened the three judge district court without first giving the Receiver more time to remedy the problems. Indeed, even if the *Plata* court had prematurely assumed that the Receivership would fail to remedy the violations absent a prisoner release order, such error was harmless in light of the subsequent events in the case, which have proven the *Plata* court's original finding to be correct. *Id.*

IV. THE BALANCE OF THE EQUITIES FAVORS DENYING THE STAY.

A lower court's determination regarding the equities of a stay is "presumptively correct" (*Whalen v. Roe*, 423 U.S. 1313, 1316 (1975)) and should only be disturbed if the

court abused its discretion. *Aberdeen & Rockfish R. Co.*, 409 U.S. at 1218; *New York Natural Resources Defense Council, Inc., v. Kleppe*, 429 U.S. 1301, 1311 (1976); *State of Alabama v. United States*, 279 U.S. 229, 231 (1929).

The three judge district court carefully considered the balance of the hardships and issued a well-reasoned and unanimous decision concluding that "the balance of the equities is in favor of development of a plan rather than in delaying such development for another year or more." Order Denying Motion to Stay at 4.

On the State's side, the only hardship from following the lower court's interim order is the marginal additional work required to turn the Governor's population reduction plan into a plan appropriate for submission to the court. On the plaintiffs' side, a stay will further delay a remedy for constitutional violations that are endangering the lives and health of thousands of class members.

The lower court had already correctly found that the State will be unable to provide adequate health care to plaintiffs unless and until the State reduces its prison population. *Plata/Coleman* at *75. The Governor said as much in his State of Emergency proclamation, in which he admitted that prison crowding is so severe it endangers the health and safety of prisoners, staff, and the public. Appendix A (Governor's Proclamation); *see also California Correctional Peace Officers Association v. Schwarzenegger*, 77 Cal. Rptr. 3d 844, 855-856, 163 Cal. App. 4th 802, 819-820 (2008) (upholding Emergency Proclamation based on Governor's judicial admissions of dangers to prisoners, staff and the public); *Plata/Coleman* at *24.

Accordingly, in denying the motion to stay, the lower court found that "Constitutional deprivations are now occurring and are adversely affecting the health and

mental health of many thousands of prisoners in the California prison system. Plaintiffs have been seeking relief from these deprivations for almost two decades, and, under the terms of our August 4, 2009 order, the state will have two more years to resolve crowded prison conditions once a final plan is ordered by this court, even aside from any delay resulting from a stay issued pending appeal on the merits and the final resolution of the matter by the Supreme Court." Order Denying Motion to Stay at 4. The court concluded that "[n]o equitable purpose whatsoever could be served by further delays in formulating a plan." *Id.*

Furthermore, the court found that "the public interest lies in the state's making progress towards resolving its prison crisis, which includes the undisputed crowding that led the Governor to declare a state of emergency in 2006 that remains in effect to date. Development of a population reduction plan can only further this process and, thus, the public interest." *Id.* The lower court's decision on these highly factual issues should not be disturbed. *Block v. North Side Lumber Co.*, 473 U.S. 1307 (1985) (Rehnquist, J., in chambers) (where lower court held that equity favored respondents, "no basis for disturbing [this] conclusion in this highly factual issue").

Governor Schwarzenegger referred to California's prisons as "a powder keg" in his State of the State address in January 2007. Plf's Exh. P-3 at 49. Another top CDCR official declared that "the risk of catastrophic failure in a system strained from severe overcrowding is a constant threat. As the Director of the Division of Adult Institutions [for the CDCR], it is my professional opinion this level of overcrowding is unsafe and we are operating on borrowed time." *Plata/Coleman* at *34.

These dire warnings were recently borne out when a riot erupted in an overcrowded prison just two weeks ago. After the riot was quelled, the Governor toured the facilities, and attributed the riot to overcrowding. He noted that the riot "is a terrible symptom of a much larger problem, a much larger illness. The reality is that California's entire prison system is in a state of crisis. It is collapsing under its own weight." Appendix E at 1-2 (Governor's August 19, 2009 Remarks). Further delay is not in the public interest.

V. THIS CASE DOES NOT PRESENT EXIGENT CIRCUMSTANCES WARRANTING RELIEF UNDER THE ALL WRITS ACT.

The State's stay motion arises in the context of a direct appeal, rather than a certiorari petition. Thus, the Court should issue a stay only when "necessary or appropriate in aid of [its jurisdiction] and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The motion should be denied because no stay is necessary to preserve the Court's jurisdiction over this matter. *See Ohio Citizens for Responsible Energy, Inc,* 479 U.S. at 1312. Full implementation of the August 4, 2009 order would not deprive this Court of jurisdiction over an appeal, because all that the three judge district court did was to order the State to devise a population reduction plan.

The case will not become moot or unreviewable if the State develops a plan. To the contrary, once the State develops a population reduction plan, and the three judge district court enters an order to reduce the prison population, the entire matter—including the order to reduce the prison population—may be ripe for review in this Court.

Because the State has failed to meet its burden for issuance of an injunction under the All Writs Act, the application should be denied.

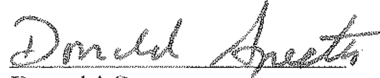
///

CONCLUSION

The application for a stay should be denied.

September 9, 2009

Respectfully submitted,



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CERTIFICATE OF SERVICE

No. 09-A234

ARNOLD SCHWARZENEGGER, et al.,

Applicants,

v.

MARCIANO PLATA and RALPH COLEMAN, et al.,

Respondents.

I, Donald Specter, do hereby certify that, on this ninth day of September, 2009, I caused a copy of the Joint Opposition to Application For Stay in the foregoing case to be served by first class mail, postage prepaid, on the following parties:

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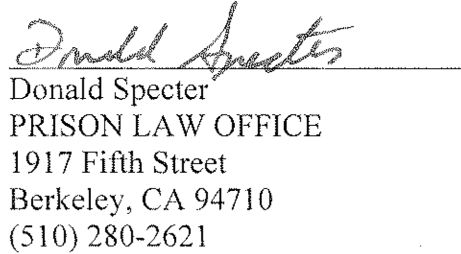
I further certify that all parties required to be served have been served.

September 9, 2009



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