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.

On Appeal from an Order of the Three-Judge Court in the United States District Courts for the Northern District of California and the Eastern District of California

INTERVENORS' OPENING BRIEF

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QUESTIONS PRESENTED

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

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

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

PARTIES TO THE PROCEEDING

Intervenors: [1]

The California State Republican Senator and Assembly Intervenors (collectively the "Legislator Intervenors") include the following current or former California State Senators: Senators Samuel Aanestad, Roy Ashburn, James F. Battin, Jr., John J. Benoit, Robert Dutton, Dennis Hollingsworth, Bob Huff, Abel Maldonado, George Runner, Tony Strickland, Mimi Walters and Mark Wyland; and the following current or former California Assemblymembers: Michael N. Villines, Anthony Adams, Joel Anderson, Bill Berryhill, Tom Berryhill, Sam Blakeslee, Connie Conway, Paul Cook, Chuck DeVore, Bill Emmerson, Jean Fuller, Ted Gaines, Martin Garrick, Danny Gilmore, Curt Hagman, Diane Harkey, Shirley Horton, Guy S. Houston, Kevin Jeffries, Rick Keene, Steven Knight, Dan Logue, Doug La Malfa, Bill Maze, Jeff Miller, Brian Nestande, Jim Nielson, Roger Niello, Sharon Runner, Jim Silva, Cameron Smyth, Todd Spitzer, Audra Strickland, and Van Tran.

The District Attorney intervenors include the following: Rod Pacheco, District Attorney County of Riverside, Bonnie M. Dumanis, District Attorney County of San Diego, Tony Rackauckas, District Attorney County of Orange, Jan Scully, District Attorney County of Sacramento, Christie Stanley, District Attorney County of Santa Barbara, Michael A. Ramos, District Attorney

[1] The parties designated under this heading shall be referred to through the remainder of this brief as the "Intervenors."

County of San Bernardino, Robert J. Kochly, District Attorney County of Contra Costa, David W. Paulson, District Attorney County of Solano, Gregg Cohen, District Attorney County of Tehama, Todd Riebe, District Attorney County of Amador, Bradford R. Fenocchio, District Attorney County of Placer, John R. Poyner, District Attorney County of Colusa, Michael Ramsey, District Attorney County of Butte, Gerald T. Shea, District Attorney County San Luis Obispo, Edward R. Jagels, District Attorney County of Kern, Gregory Totten, District Attorney County of Ventura, Vern Pierson, District Attorney County of El Dorado, Clifford Newell, District Attorney County of Nevada, Ronald L. Calhoun, District Attorney County of Kings, and Donald Segerstrom, District Attorney County of Tuolumne.

The Sheriff, Police Chief, Probation Chief and Corrections Intervenors include the following: Amador County Sheriff-Coroner Martin Ryan, Butte County Sheriff Perry Reniff, Calaveras County Sheriff Dennis Downum, El Dorado County Sheriff Jeff Neves, Fresno County Sheriff Margaret Mims, Glenn County Sheriff Larry Jones, Inyo County Sheriff William Lutze, Kern County Sheriff Donny Youngblood, Lassen County Sheriff Steve Warren, Los Angeles County Sheriff Lee Baca, Merced County Sheriff Mark Pazin, Mono County Sheriff Rick Scholl, Monterey County Sheriff Mike Kanalakis, Orange County Sheriff-Coroner Sandra Hutchens, Placer County Sheriff Edward Bonner, San Benito County Sheriff-Coroner Curtis Hill, San Diego County Sheriff William Gore, San Joaquin County Sheriff-Coroner Steve Moore, San Luis

Obispo County Sheriff Pat Hedges, Santa Barbara County Sheriff Bill Brown, Santa Clara County Sheriff Laurie Smith, Solano County Sheriff-Coroner Gary Stanton, Stanislaus County Sheriff-Coroner Adam Christianson, Sutter County Sheriff-Coroner J. Paul Parker, Tehama County Sheriff Clay Parker, Tuolumne County Sheriff-Coroner James Mele, Ventura County Sheriff Bob Brooks, Yolo County Sheriff Ed Prieto, Yuba County Sheriff Steve Durfor, City of Fremont Police Chief Craig Steckler, City of Fresno Police Chief Jerry Dyer, City of Grover Beach Police Chief Jim Copsey, City of Modesto Police Chief Michael Harden, City of Pasadena Police Chief Bernard Melekian, City of Paso Robles Police Chief Lisa Solomon, City of Roseville Police Chief Michael Blair, Contra Costa County Chief Probation Officer Lionel Chatman, Fresno County Chief Probation Officer Linda Penner, Mariposa County Chief Probation Officer Gail Neal, Sacramento County Chief Probation Officer Don Meyer, San Luis Obispo Chief Probation Officer Jim Salio, Solano County Chief Probation Officer Isabelle Voit, Stanislaus County Chief Probation Officer Jerry Powers, and Ventura County Chief Probation Officer Karen Staples.

Appellants:

Governor Arnold Schwarzenegger

Matthew Cate, Secretary of the California Department of Corrections and Rehabilitation

John Chiang, California State Controller

Ana J. Matosantos, Director of the California Department of Finance

Stephen W. Mayberg, Director of the Department of Health

Plaintiffs Below:

Gilbert Aviles	Steven Bautista
Ralph Coleman	Ray Stoderd
Paul Decasas	Otis Shaw
Raymond Johns	Leslie Rhoades
Joseph Long	Clifford Myelle
Marciano Plata	

Intervenor-Plaintiff:

California Correctional Peace Officers' Association

Other Intervenor-Defendants Below:

County of San Mateo

County of Santa Barbara

County of Santa Clara

County of Solano

County of Sonoma

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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INTERVENORS' OPENING BRIEF

OPINIONS BELOW

The three-judge court's August 4, 2009 Opinion and Order (*Coleman* D.E. 3641; *Plata* D.E. 2197). *See* JS1-App. 1a-256a;[1] also found at 2009 WL 2430820

[1] Intervenors cite the State's Appendix to the Jurisdictional Statement filed in Supreme Court of the United States Case Number 09-416, as "JS1-App." and the State's Appendix to the Jurisdictional Statement in this case as "JS2-App." The records in *Coleman*, No. CIV-S-90-0520-LKK (E.D. Cal.) and *Plata*, No. C01-1351-TEH (N.D. Cal.) are cited by docket entry number (*i.e., "Coleman* D.E. __", "*Plata* D.E. __") in the Rule 33.2 version of this brief, as well as in the booklet version when the cited materials are not included in the deferred joint appendix. Citations to the Deferred Joint Appendix are listed as "DJA."

(E.D. Cal/N.D. Cal. Aug. 4, 2009). The three-judge court's January 12, 2010 Order to Reduce Prison Population (*Coleman* D.E. 3767; *Plata* D.E. 2287). *See* JS2-App. 1a-10a; *also found at* 2010 WL 99000 (E.D. Cal/N.D. Cal. Jan. 12, 2010).

JURISDICTION

The three-judge court entered its Opinion and Order on August 4, 2009. JS1-App. 1a-256a. That order granted injunctive relief pursuant to the Prison Litigation Reform Act, 18 U.S.C. § 3626. In its August 4, 2009 Opinion and Order, the three-judge court ordered Governor Schwarzenegger and the other defendants (collectively referred to as the "State") to draft a prison population reduction plan. The State submitted a proposed population reduction plan on September 18, 2009, which would have reduced the prison population below 137.5% of design capacity within five years, as opposed to the two-year reduction dictated in the August 4, 2009 order. The three-judge court rejected the plan and the State submitted a revised plan on November 12, 2009. On January 12, 2010, the three-judge court issued an order adopting the revised plan. The State filed its notice of appeal on January 20, 2010. *See* JS2-App. 17a. The jurisdiction of this Court rests on 28 U.S.C. § 1253, providing for a direct appeal from decisions of three-judge courts.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This appeal concerns the interpretation and application of the Prison Litigation Reform Act, 18 U.S.C. § 3626.

STATEMENT OF THE CASE

The plaintiffs in the class action lawsuits *Plata v. Schwarzenegger*, District Court for the Northern District of California, Case No. C 01-1351 TEH, involving claims of constitutionally inadequate provision of medical care in state prisons, and *Coleman v. Schwarzenegger*, District Court for the Eastern District of California, Case No. S-90-0520-LKK-JFM P, involving claims of constitutionally inadequate provision of mental health care in state prisons, moved to convene a three-judge court to consider the issuance of a prisoner release order pursuant to the Prison Litigation Reform Act, 18 U.S.C. § 3626 ("PLRA"). Both courts had previously determined that the California Department of Corrections and Rehabilitation ("CDCR") failed to provide prison inmates with constitutionally adequate medical and mental health care. To remedy these constitutional violations, the *Coleman* court appointed a special master ("Special Master") to oversee development and implementation of a plan to remedy the unconstitutional provision of mental health care, JS1-App. 36a. In early 2006, the *Plata* court appointed a receiver ("Receiver") to take control of all aspects of the CDCR relating to the provision of medical care, and to bring the CDCR into constitutional compliance. JS1-App. 29a-30a. District Court Judges Henderson and Karlton granted the respective plaintiffs' motions to convene a three-judge court on July 23, 2007. *See* JS1-App. 62a-69a. The Chief Judge of the Ninth Circuit Court of Appeals at the time, Mary Schroeder, consolidated the two cases and appointed Judge Henderson, Judge Karlton and Ninth Circuit Court of Appeals Judge Stephen Reinhardt to the three-judge court. Shortly after the establishment of the three-judge court, Appellants were permitted to

intervene as of right in the proceedings. *See* JS1-App. 69a.

To issue a prisoner release order, the PLRA mandates that the three-judge court must find "by clear and convincing evidence that – (i) crowding is the primary cause of the violation of a Federal right; and (ii) no other relief will remedy the violation of the Federal right." 18 U.S.C. § 3626(a)(3)(E).

The PLRA further mandates that prospective relief may be afforded only when it is "narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A). In fashioning the relief, the three-judge court must "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system cause by the relief." *Id*.

Trial commenced on November 18, 2008, with final oral argument concluding on February 3 and 4, 2009. The three-judge court determined, in an opinion and order dated August 4, 2009, that overcrowding was the primary cause of the constitutionally inadequate provision of medical and mental health care and that no other relief could remedy the violations. *See* JS1-App. 78a-168a. In its opinion and order, the three-judge court ordered the State to create and file "a population reduction plan that will in no more than two years reduce the population of the CDCR's adult institutions to 137.5% of their combined design capacity." JS1-App. 255a. On September 18, 2009, the State submitted a population plan that provided for a population reduction below 137.5% in five years, based on the defendants' concerns that "reducing the prison population to 137.5% within a two-year period

cannot be accomplished without unacceptably compromising public safety." JS1-App. 317a & n.1. On October 21, 2009, the three-judge court rejected this population reduction plan and ordered the State to prepare a revised plan which would accomplish the ordered population reduction within two years. DJA Vol. IV 1525-1532. The State submitted a revised plan on November 12, 2009 (JS2-App. 25a-70a), which the three-judge court subsequently adopted in its January 12, 2010 Order to Reduce Prison Population. *See* JS2-App. 1a-10a. Together with its August 4, 2009 order, this January 12, 2010 Order to Reduce Prison Population is a "Prisoner Release Order" under the terms of the PLRA. *See* JS2-App. 1a-10a.

The State appealed the August 4, 2009, and January 12, 2010 orders (collectively the "Prisoner Release Orders") and submitted its Jurisdictional Statement on April 12, 2010. The Intervenors filed a separate appeal and Jurisdictional Statement, docketed as Case Number 09-1232. On June 14, 2010, this Court accepted review of the State's appeal. Intervenors are parties to the judgment below and, accordingly, submit this brief addressing the second and third Questions Presented by the State.

SUMMARY OF ARGUMENT

This appeal challenges the only Prisoner Release Orders ever issued over a defendant's objection since the enactment of the PLRA. The Prisoner Release Orders below mandate that the California prison population be reduced by the release or non-incarceration of tens of thousands of duly arrested convicted and sentenced criminals and pose a grave threat to public safety in California. As discussed in detail in the Brief of Appellants, the three-judge court was improperly convened and, accordingly, lacked

jurisdiction to make the Prisoner Release Orders. Even had the district court been properly convened, the judgment below would be subject to reversal for failure to comply with PLRA. Specifically, the court below found – purportedly by clear and convincing evidence – overcrowding to be the statutory "primary cause" of Eighth Amendment violations relating to medical and mental health care but refused to hear evidence and argument that no such violations were current and ongoing at the time of trial. The three-judge court also held that no alternatives to the Prisoner Release Orders existed notwithstanding evidence from the *Plata* Receiver and Appellees' own expert that alternatives to the Prisoner Release Orders did exist. The Receiver stated, approximately a month before trial began, "I'm just not seeing difficulty in providing medical services no matter what the population is." DJA Vol. IV 1222-1236 (Trial Declaration of Assemblymember Todd Spitzer, ¶ 28 and Exhibit D thereto, at 30:00 minutes). The Prisoner Release Orders issued by the court below further violated the PRLA because they were not narrowly tailored to the medical and mental health care issues in the underlying class actions. Specifically, the district court acknowledged that the Prisoner Release Orders were, "likely to affect inmates without medical conditions or serious mental illness." JS1-App. 172a. That is an understatement. The Prisoner Release Orders will free tens of thousands of criminals and, at the same time, offer no assurance of correcting any continuing Eighth Amendment violations. The district court stated, "We recognize that other factors contribute to California's failure to provide its inmates with constitutionally adequate medical and mental health care, and that reducing crowding in the prisons will not, without more,

completely cure the constitutional violations that the *Plata* and *Coleman* court have sought to remedy." JS1-App. 143a. Finally, the PLRA requires the three-judge court to give "substantial weight" to public safety in determining whether to issue Prisoner Release Orders and how any such Orders are to be implemented. The court below failed to give substantial weight to public safety and, indeed, admitted that it did not even "evaluate[] the public safety impact of each element of the State's proposed plan." JS2-App. 3a. Instead, the court below purported to "trust that the State will comply with its duty to ensure public safety as it implements the constitutionally required reduction." JS2-App. 4a. However, the trust expressed by the district court is misplaced because it rejected a five year population reduction plan proposed by the State and instead ordered the same reduction over a compressed two-year period notwithstanding the express warning of the State that the Prisoner Release Order could not be implemented "without unacceptably compromising public safety." JS1-App. 317a & n.1. This is particularly true because the Prisoner Release Orders fail to ensure funding for and implementation of programs necessary to mitigate the potentially devastating effect on public safety of simply releasing tens of thousands of criminals into California's communities. For all these reasons, the judgment below should be reversed.

ARGUMENT

To protect the ability of States to operate and maintain their own criminal justice systems and to protect public safety, the PLRA permits federal courts to issue prisoner release orders only under limited and extraordinary circumstances. Appellees failed to establish the necessary prerequisites justifying

issuance of a prisoner release order, and the Prisoner Release Orders issued by the court below exceed the scope allowed by the PLRA.[2]

This Court recognized prior to the enactment of the PLRA that federal courts are ill-equipped to entangle themselves in the operation of state prison systems and that management of state prisons is "peculiarly within the province of the legislative and executive branches of government . . . ." *Procunier v. Martinez*, 416 U.S. 396, 405 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989). For this reason, "courts are ill equipped to deal with the increasingly urgent problems of the prison administration and reform." *Id.*; *see also Lewis v. Casey*, 518 U.S. 343, 364 (1996) (Thomas, J., concurring) ("too frequently, federal district courts in the name of the Constitution effect wholesale takeovers of state correctional facilities and run them by judicial decree.").

Congress agreed and enacted the PLRA to further restrain judicial interference with the management of state prisons. "When Congress enacted the PLRA, it sought to oust the federal judiciary from day-to-day prison management." *Taylor v. United States*, 181 F.3d 1017, 1027 (9th Cir. 1999) (*en banc*) (Wardlaw, J., dissenting); *see also Woodford v. Ngo*, 548 U.S. 81, 93 (2006) ("The PLRA attempts to eliminate unwarranted federal-court interference with the administration of prisons. . . ."); *Miller v. French*, 530 U.S. 327, 347 (2000) ("The PLRA has restricted courts'

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[2] Intervenors do not address the first Question Presented: "Whether the three judge district court had jurisdiction to issue a "prisoner release order" pursuant to the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626." Intervenors join in the arguments made by the State with respect to that Question.

authority to issue and enforce prospective relief concerning prison conditions. . . .”). Congress was particularly skeptical and demanded higher scrutiny of population caps and prisoner release orders such as those ordered by the three-judge court below. *See Castillo v. Cameron County, Tex.*, 238 F.3d 339, 348 (5th Cir. 2001) (noting that the legislative history of the PLRA reveals Congress’ apprehension regarding population caps); *Gilmore v. California*, 220 F.3d 987, 998 & n.14 (9th Cir. 2000) (same); 141 Cong. Rec. S14408-01, S14414 (daily ed. Sept. 27, 1995) (statement of Sen. Dole) (“Perhaps the most pernicious form of judicial micromanagement is the so-called prison population cap.”); 141 Cong. Rec. S2648-02, S2649 (daily ed. Feb. 14, 1995) (statement of Sen. Hutchinson) (“This bill will curb the ability of Federal Courts to take over the policy decisions of State prisons. . . .”).

The Prison Release Orders in this case typify the federal interference with a State’s ability to manage its prisons that the PLRA sought to eliminate. The Intervenors – police chiefs, sheriffs, probation officers, district attorneys and legislators from across California – joined this litigation for the express purpose of opposing the issuance of a prisoner release order and vindicating the public safety interests of the millions of California citizens placed at risk by such an order. On behalf of those citizens, and the millions more Americans that could be affected by similar orders in the future, the Intervenors respectfully request that this Court reverse the judgment below.

1. THE PRISONER RELEASE ORDERS SHOULD NOT HAVE BEEN ENTERED BECAUSE THERE WAS NO SHOWING THAT PAST EIGHTH AMENDMENT VIOLATIONS WERE CURRENT AND ONGOING AND BECAUSE ALTERNATIVE REMEDIES EXISTED

Under the PLRA, a three-judge court "shall enter a prisoner release order only if the court finds by clear and convincing evidence that – (i) crowding is the primary cause of the violation of a Federal right; and (ii) no other relief will remedy the violation of the Federal right." 18 U.S.C. § 3626(a)(3)(E). The Prisoner Release Orders issued below fail to satisfy either requirement.

Congress drafted the PLRA in the present tense, permitting issuance of prospective prisoner release orders only to correct current and ongoing violations of Federal rights, not to provide a remedy to plaintiffs to compensate them for past wrongs or to address overcrowding in prisons simply to alleviate overcrowding. Notwithstanding this mandate, the three-judge court prohibited the introduction of evidence and argument on the issue of whether past violations were "current and ongoing" at the time of the trial. JS1-App. 78a n.42; *see also* JS1-App. 77a.

The Intervenors specifically requested from the three-judge court a determination of what constitutional violations, if any, remained at the time of trial and offered to present evidence and argument that there were no such ongoing violations. The request and the offer of the Intervenors were refused by the three-judge court. DJA Vol. VI 2081-2087 (Trial Tr. at 57:11-58:13). "Sir, I am the very source of patience. If you believe that, I'll sell you a piece of the Brooklyn

Bridge really cheap. Twice this court has said we will not receive that evidence [of the absence of current constitutional violations]. You have made as clear a record as you can.").

Instead of determining whether any current violations existed, the three-judge court's analysis focused only on "whether . . . requiring a reduction in the population of California's prisons was necessary to remedy the previously identified constitutional violations[.]" JS1-App.77a. As a result, by the time that the three-judge court made its initial August 4, 2009 order, no determination had been made regarding alleged violations since July 2007. *Id*. Indeed, neither the *Coleman* nor the *Plata* single-judge courts had held evidentiary hearings regarding the state of the prisons and ongoing violations since September 13, 1995 (*Coleman*) and June 9, 2005 (*Plata*). *See* JS1-App. 23a, 33a. Had the three-judge court permitted such evidence and argument at trial, the Intervenors, as well as the State, would have provided compelling evidence regarding massive increases in prison spending and the allocation of resources resulting in substantial overall improvements in medical and mental health care. *See, e.g.*, DJA Vol. V 1690-1691 (Pre-Trial Hr'g Tr. at 28:16-29:2 (E.D. Cal./N.D. Cal. Nov. 10, 2008)); DJA Vol. 6 2081-2087 (Trial Tr. at 6:24-7:9, 57:11-58:13 (E.D. Cal./N.D. Cal. Nov. 18, 2008)).

For example, while a stated basis for the underlying Prisoner Release Orders was the rate of inmate mortality in California prisons, federal studies demonstrate that state prison inmates enjoy a lower mortality rate than the comparable age cohort of the

public at large[3] and that California inmates have consistently had lower mortality rates than inmates in almost all other state prison systems.[4] Ironically, the Pennsylvania state prison system, which produced two of the expert witnesses upon whom the three-judge court relied, possessed the third highest inmate mortality rate among all 50 States during the same time.[5] In sum, the plain language of the PLRA – written as it is in the present tense – requires Appellees to demonstrate that overcrowding "is" the primary cause of current and ongoing constitutional violations. The three-judge court not only refused to require Appellees to do so, it impermissibly precluded Intervenors from offering evidence and argument to demonstrate the complete lack or, at most, limited nature of any such violations.

A prisoner release order may issue only if a plaintiff demonstrates – by clear and convincing evidence –

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[3] United States Department of Justice, Bureau of Justice Statistics, Christopher J. Mumola, *Brief: Medical Causes of Death in State Prisons 2001-2004*, (January 2007) ("*Medical Causes of Death in State Prisons 2001-2004*"), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/mcdsp04.pdf. This report reflects an average citizen mortality rate of 308 per 100,000 and an inmate mortality rate of 250 per 100,000 per year. This phenomenon is summarized in a U.S. Department of Justice press release entitled "Death Rates Lower in State Prisons Than in the General Population," United States Department of Justice, Office of Justice Programs, January 21, 2007, *available at*: http://www.ojp.usdoj.gov/newsroom/pressreleases/2007/BJS07010.htm.

[4] U.S. Department of Justice, Bureau of Justice Statistics, *State Prison Deaths 2001-2006*, (Table 8) (2008) [finding that the composite mortality rate for California prison inmates was lower than inmate mortality in 37 other states], *available at* http://bjs.ojp.usdoj.gov/content/dcrp/prisonindex.cfm.

[5] *Id*.

that "no other relief will remedy the violation of the Federal right." 18 U.S.C. § 3626(a)(3)(E). Appellees failed to meet this burden and the evidence before the threejudge court actually established that a prisoner release order was not necessary to address any constitutional violations that might have existed at the time of trial. Most significantly, the Receiver and Appellees' expert, both provided evidence demonstrating that a prisoner release order was not necessary to achieve and maintain constitutional levels of care. The *Plata* Receiver stated that, under his control, the California prison systems would not have any "difficulty in providing medical services [to the entire prison population] no matter what the population is." DJA Vol. IV 1222-1236 (Trial Declaration of Assemblymember Todd Spitzer, ¶ 28 and Exhibit D thereto, at 30:00 minutes and 31:20 minutes (E.D. Cal./N.D. Cal. Oct. 30, 2008)).[6] Similarly, Appellees' expert, Dr. Ronald Shansky, testified that California could provide constitutionally adequate care for more than 172,000 inmates if other reforms were implemented. Shansky Dep. at 144:3-14 (Dec. 10, 2007); *see also* DJA Vol. VI 2280-2281 (Trial Tr. at 491:19-492:08 (E.D. Cal./N.D. Cal. Nov. 21, 2008) (Dr. Shansky admits that additional changes beyond those set forth in the Receiver's "Turnaround Plan" (*Plata* D.E. 1229) were not needed to bring the CDCR's provision of medical care into compliance, and that the "Turnaround Plan" did not envision a population reduction)). Nothing in the three-judge court's

[6] The parties were limited to such "out-of-court" evidence from the Receiver because the three-judge court refused to permit discovery on the Receiver and refused to have him testify in court. *See* Protective Order re Deposition of Receiver (E.D. Cal./N.D. Cal. Nov. 29, 2007) (*Coleman* D.E. 2577; *Plata* D.E. 988).

Prisoner Release Orders reconciles the uncontroverted evidence adduced from the Receiver and Appellees' expert above that a release order was not necessary and that other alternatives to a prisoner release order existed.[7] The Prisoner Release Orders issued here were clearly not "the remedy of last resort" as envisioned by Congress. H.R.Rep. No. 104-21, at 25 (1995).

The three-judge court erred by issuing the Prisoner Release Orders notwithstanding viable alternatives currently underway, including the continued work of the court-appointed Receiver and Special Master. Moreover, the three-judge court improperly rejected a number of viable alternatives to a prisoner release order on the belief that such alternatives were too speculative or would take too long to implement. JS1-App. 145a-162a. One such alternative was the possibility of transferring California inmates to out-of-state facilities. JS1-App. 159a-161a. The three-judge court rejected the alternative because "we conclude that the transfer of inmates to out-of-state facilities would not on its own begin to provide an adequate remedy for the constitutional deficiencies in

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[7] Indeed, on May 17, 2010, the Receiver sent correspondence to Intervenor Assembly Member Martin Garrick urging support, not for a prisoner release order, but for passage of the final legislation necessary for construction of additional facilities targeted directly at further improving medical and mental health care in the California prisons. He stated, "[a]pproval of AB 552 in order to fund our negotiated construction plan will represent a significant step towards conclusion of the Federal Receivership." Letter from the Hon. J. Clark Kelso to the Hon. Martin Garrick, dated May 17, 2010. Assembly Bill 552 was approved by the California State Senate in a bi-partisan 30-0 vote, including each of the Intervenors that cast a vote. AB 552 was enacted on June 3, 2010.

the medical and mental health care provided to California inmates." JS1-App. 161a. This criticism, however, applies with equal force to the Prison Release Orders. JS1-App. 134a ("We find that reducing crowding is a necessary but not sufficient condition for eliminating the constitutional deficiencies in the provision of medical care to California's inmate population."), 143a ("We recognize that other factors contribute to California's failure to provide its inmates with constitutionally adequate medical and mental health care, and that reducing crowding in the prisons will not, without more, completely cure the Constitutional violations the *Plata* and *Coleman* courts have sought to remedy."). Finally, even if it had been shown that none of the alternatives to a prisoner release order discussed at trial – such as out-of-state transfers, remand to federal custody of undocumented prisoners, additional construction of facilities, additional hiring and continuance of the work of the Receiver and Special Master – alone could remedy any current constitutional violations, the three-judge court erred by not determining that a combination of the alternatives set forth above could be used together as an alternative to the Prisoner Release Orders.

2. THE PRISONER RELEASE ORDERS ARE NOT NARROWLY DRAWN, ARE NOT THE LEAST INTRUSIVE MEANS TO REMEDY ANY REMAINING VIOLATIONS AND FAIL TO GIVE SUBSTANTIAL WEIGHT TO PUBLIC SAFETY

a. The Prisoner Release Orders Fail To Satisfy The PLRA's Requirement That Any Such Relief Be Both Narrowly Drawn And The Least Intrusive Means To Remedy Violation Of The Federal Right.

The PLRA provides that a prisoner release order is valid only if the order "is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A). The Prisoner Release Orders here fail in at least four respects.

The three-judge court refused to consider whether previously identified constitutional violations existed at the time of trial and, if so, the scope of any such continuing violations. DJA Vol. VI 2081-2087 (Trial Tr. at 57:11-58:13 (E.D. Cal./N.D. Cal. Nov. 18, 2008)). Nor did the three-judge court endeavor to determine which, if any, of the thirty-three facilities within the California prison system failed to provide constitutional levels of care at the time of trial. *Id*. The result is an overbroad and overreaching system-wide release order that fails to identify adequately or correct any present violation of the Federal rights of a particular plaintiff or plaintiffs. *See Hines v. Anderson*, 547 F.3d 915, 922 (8th Cir. 2008) (affirming dismissal of an order under the PLRA that was not tailored to the specific violation at issue because

it addressed medical conditions generally rather than "a particular medical issue that existed at the time.").

Though it had been several years since any determination that conditions in the California prison system violated any Federal right and many years since any evidentiary hearing on the existence of constitutional violations, the trial court refused to hear evidence or argument at trial that no Eighth Amendment violations were ongoing. As a result, the current record is devoid of any finding by the trial court regarding the scope or existence of an ongoing constitutional violation. In the absence of these findings, the Prisoner Release Orders cannot and do not comport with the PLRA's narrow tailoring requirement.

In any event, the Prisoner Release Orders are overbroad because they require a systemwide reduction in California's inmate population and are not targeted at correcting the alleged violations of the federal rights of members of the *Coleman* and *Plata* plaintiff classes. The wholesale reduction of the overall prison population ordered in this case provides no guarantee of remedying, in whole or part, the medical and mental health treatment issues – staffing ratios, equipment and facilities, and record-keeping – alleged by the plaintiff classes. *See* DJA Vol. IV 1222-1236 (Spitzer Trial Decl., ¶ 28 and Ex. D, at 30:00 minutes (E.D. Cal./N.D. Cal. Oct. 30, 2008) (constitutionally compliant care can be provided "no matter what the population is"); *see also id*. at 31:20 minutes ("We believe we can provide constitutional levels of care no matter what the population is.")). The PLRA, as well as respect for the federalism concerns implicated by this case, demands a more focused remedy.

Indeed, the three-judge court acknowledged that the Prisoner Release Orders are "likely to affect inmates without medical conditions or serious mental illness." JS1-App. 172a. Citing with approval Appellees' expert Dr. Pablo Stewart, the three-judge court acknowledged that a reduction of the prison population by 50,000 inmates would only affect 10,000 *Coleman* class members. JS1-App. 238a-239a. Thus, forty thousand inmates, or eighty-percent of those to be released, would not have even alleged a constitutional violation. "'[F]ederal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation.'" *Missouri v. Jenkins*, 515 U.S. 70, 98 (1995) (citation omitted). The overwhelming majority of those benefitting from the Prisoner Release Orders are not affected by the purported constitutional violations, and issuing a prisoner release order simply to alleviate prison overcrowding is impermissible under the PLRA. For these reasons, the Prisoner Release Orders violate the requirement of 18 U.S.C. § 3626(a)(1)(A) that any such relief "extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." *See Hines v. Anderson*, 547 F.3d 915, 922 (8th Cir. 2008) (affirming dismissal of an order under the PLRA that was not tailored to the specific violation at 15 issue because it addressed medical conditions generally rather than "a particular medical issue that existed at the time.").

In addition to being overbroad in terms of the individuals affected, the Prisoner Release Orders are similarly overbroad in relation to the issues addressed. Under the PLRA and in the circumstances of this case, the remedy must be narrowly-tailored to redress medical and mental health issues.

A wholesale reduction of the prison population is not such a remedy. Indeed, the three-judge court acknowledged this shortcoming of its ruling. *See* JS1-App. 143a ("We recognize that other factors contribute to California's failure to provide its inmates with constitutionally adequate medical and mental health care, and that reducing crowding in the prisons will not, without more, completely cure the constitutional violations the *Plata* and *Coleman* courts have sought to remedy."); JS1-App. 157a-158a (noting the Special Master's finding that "even the release of 100,000 inmates would likely leave the defendants with a largely unmitigated need to provide intensive mental health services to program populations that would remain undiminished"); Receiver's Report re: Overcrowding at 42:24-43:1, *Plata* D.E. 673), *available at* http:///www.cprinc.org/docs/court/ReceiverReportReOvercrowding451507.pdf ("those who believe that the challenges faced by the Plan of Action are uncomplicated and who think that population controls will solve California's prison health care problems, are simply wrong."). Ironically, the Prisoner Release Orders will also likely compromise the health and increase the mortality rate of the released inmates themselves as federal studies demonstrate that state prison inmates enjoy a lower mortality rate than the comparable age cohort of the public at large.[8]

The Prisoner Release Orders issued by the three-judge court set a population cap of 137.5% of the correctional system's "design capacity" to be achieved within two years, without providing a justifiable basis for the percentage chosen. The three-judge

[8] *See supra* footnote 3.

court implied in its Prisoner Release Orders that constitutional violations had occurred because California prisons had operated for a time at levels up to 190% of design capacity (an average of nearly two inmates per cell). *See* JS1-App. 78a. However, not only is the double-celling of prisoners constitutionally permissible, California actually operates its prisons at a lower percentage of its highest-rated capacity than many other states. *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981) (Holding double-celling of inmates not violative of the Eighth Amendment and noting that "restrictive and even harsh" conditions are simply "part of the penalty criminal offenders pay for their offenses against society."). Specifically, the U.S. Department of Justice reported that, in 2008, California's prison system was operating at 106% of its highest rated capacity – substantially lower than the rate for the highest state, Massachusetts, which was operating at 140% of its highest rated capacity.[9] The federal report "Prisoners in 2008" also reported that 13 states were operating at more than 107% of its highest rated capacity and that the federal prison system was at 135% of highest rated capacity.[10] The 106% of highest rated capacity assessment is consistent with the California Department of Corrections and Rehabilitation's own evaluation that they have approximately 8,000 undesirable beds in converted gymnasiums and other less than optimal locations.[11]

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[9] Ranked by the Congressional Quarterly, CRIME STATE RANKINGS 2010, CONGRESSIONAL QUARTERLY (2010). Their source data is U.S Department of Justice, Bureau of Justice Statistics, *Prisoners in 2008* (December 2000), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf.

[10] *See id*.

[11] These are defined in California law as "temporary beds" which are defined in statute as "those that are placed in

Taken together, these facts indicate that the Prisoner Release Orders go far beyond what is necessary or permissible under the PLRA.

b. The Prisoner Release Orders Violate The PLRA Because They Fail To Give Substantial Weight To Any Adverse Impact On Public Safety And Because They Affirmatively Threaten Public Safety.

The PLRA requires any three-judge court contemplating a prisoner release order to give "substantial weight" to any adverse impact on public safety or the operation of a criminal justice system. 18 U.S.C. § 3626(a)(1)(A). Likewise, the PLRA mandates that no prisoner release order should ever issue without appropriate protection of the public. *See* 18 U.S.C. § 3626(a)(1)(A); *see also* H.R. Rep. No. 104-21, at 9 (1995); 141 Cong. Rec. at S14418 (statement of Sen. Hatch). Just as the three-judge court failed to narrowly tailor the Prisoner Release Orders to remedy any current or ongoing Eighth Amendment violations, it also failed to consider meaningfully the adverse impacts on public safety that the orders would necessarily cause, abdicating its statutory responsibility and delegating it to the State. 18

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gymnasiums, classrooms, hallways, or other public spaces that were not constructed for the purpose of housing inmates." California Government Code § 15819.40(a)(3). California Assembly Bill No. 900 (Solorio/Aghazarian) (Chapter 7, Statutes of 2007) (enacted May 3, 2007), *available at* http://info.sen.ca.gov/pub/07-08/bill/asm/ab_0851-0900/ab_900_bill_20070427_enrolled.pdf , was designed, in large part, to eliminate the use of "temporary beds," though not to embrace a goal of anything approaching 100% of "design capacity" as California defines that term.

U.S.C. § 3626(a)(1)(A); JS1-App. 75a-76a, 185a; JS2-App. 3a. If the requirement to consider public safety means anything, it must require, at a minimum, the three-judge court to evaluate carefully the impact each element a proposed release order would likely have on public safety. In this case, the three-judge court admits, "we have not evaluated the public safety impact of each element of the State's proposed plan." JS2-App. 3a. The three-judge court also emphasized that, "we are not endorsing or ordering the implementation of any of the specific measures contained in the State's plan, only that the State reduce the prison population to the extent and at the times designated in this Order." *Id*. The three-judge court's admitted failure to evaluate the public safety ramifications of the specific methods by which California's prison population would be reduced necessarily violates the PLRA's requirement that "substantial weight" be given to adverse impacts on public safety. This is particularly true because the court below ignored the plain warning of the State that the prison population cap ordered by the court could not be implemented in time frame ordered by the court "without unacceptably compromising public safety." JS1-App. 317a & n.1.

The three-judge court's failure to give substantial weight to adverse impacts on public safety and operation of the criminal justice system is compounded by its failure to ensure that programs and funding are available to implement the Prisoner Release Orders in a manner consistent with public safety. Without record support, the three-judge court asserted "that means exist by which the defendants can accomplish the necessary [release of approximately 46,000

prisoners[12]] without creating an adverse impact on public safety or the operation of the criminal justice system." JS2-App. 2a. The court below acknowledges, however, that limiting such negative impacts depends on appropriate programs being "properly implemented." JS1-App. 195a, *see also* JS1-APP. 211a, 215a-216a, JS2-App. 3a-5a. Inexplicably, however, the three-judge court fails to order any of the protections that it identifies as necessary to ensure public safety. *See* JS1-App. 210a ("the CDCR could use risk assessment . . . ."; "The State might also consider implementing . . . ."), 224a ("if a risk assessment instrument were used . . . ."), 232a-233a (leaving it to the State to decide whether to divert resources to fund community rehabilitative programs), 235a (same), 253a ("a failure by the state to comply with the experts' recommendations to take these steps would . . . be contrary to the interests of public safety"). The three-judge court abdicated its responsibility for ensuring a population reduction that complies with the PLRA by delegating full responsibility for the consideration of adverse impacts to public safety to the State defendants. JS2-App. 4a ("it is appropriate for the State to exercise its discretion in choosing which specific population reduction measures to implement, and, in doing so, to bear in mind the necessity for ensuring the public safety."), *id*. (we "trust that the State will comply with its duty to ensure public safety as it implements the constitutionally required reduction."). Indeed, the court states "[s]hould the State

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[12] Given ordinary inmate population fluctuations, it is estimated that the Prisoner Release Orders will require the release of 38,000 to 46,000 inmates. For simplicity, the Intervenors will approximate the release at 46,000 inmates.

determine that any of the specific measures that it has included in its plan cannot be implemented without significantly affecting the public safety or the criminal justice system, we trust that it will substitute a different means of accomplishing the constitutionally required population reductions." JS2-App. 4a.[13] Boiled to their essence, the Prison Release Orders require the State to reduce the population to 137.5% of design capacity regardless of how that reduction is achieved, and impermissibly foists upon the State the court's statutory responsibility for ensuring that the Prisoner Release Orders can be implemented in a manner consistent with public safety. This approach is particularly problematic since there was no showing that the State possesses the proper analytic tools to determine with precision – to the extent that is even possible – which inmates can be released safely into the community in sufficient number to meet the three-judge court's mandatory two-year time frame.[14] *See Samson v. Califor-*

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[13] The district court's confidence, however, is clearly misplaced because it was informed prior to issuance of the second Prisoner Release Order that, "The State . . . believe[s] that reducing the prison population to 137.5% within a two-year period cannot be accomplished without unacceptably compromising public safety." JS1-App. 317a & n.1.

[14] For example, a recent notorious sex offender, John Gardner, who drew national headlines and pled guilty to the murder of 17 year-old Chelsea King and 14 year-old Amber Dubois was originally rated low-risk by the state's static risk assessment of sex offenders. *See, e.g.*, Union Tribune Editorial Board, *Much work to be done; Chelsea's Law only the start to protect against sexual predators*, San Diego Union Tribune, June 5, 2010, *available at* http://www.signonsandiego.com/news/2010/jun/05/much-work-to-be-done/ (last visited August 26, 2010). A parolee deemed low risk enough to be placed on unsupervised parole, Javier Rueda, despite his known gang affiliation and firearms-

nia, 547 U.S. 843, 850 n.2 (2006) (recognizing that California's parolees present special dangers to the public, recognizing that they "are more akin to prisoners than probationers"); *id*. at 853-54 (crediting statistics that 68 percent of adult parolees are returned to prison, 13 percent for the commission of new felonies, and thus "grave safety concerns . . . attend recidivism").

Moreover, the court below never addresses meaningfully the issue of funding for the programs that it believes are necessary to mitigate the risks to the public posed by the contemplated prisoner release, other than to acknowledge that counties "may well require additional resources from the State in order to ensure that no significant adverse public safety impact results from the State's population reduction measures," JS2-App. 5a. While the three-judge court ordered the State to "calculate the amount of additional funds that the counties may require from the State in order to maintain the level of public safety at or about the existing level," (JS2-App. 8a), the Prisoner Release Orders do nothing to ensure that such funds can or will be made available.

In the end, the three-judge court appears unconcerned about implementation of the Prisoner Release Orders and funding for programs to mitigate threats to public safety because it does not believe the massive prisoner release that it has ordered will

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related convictions was recently killed in a shootout with Los Angeles police after shooting an officer. *See* Andrew Blankstein, *Parolee suspect in shooting of LAPD officer not monitored despite alleged gang membership*, Los Angeles Times, July 15, 2010, *available at*: http://latimesblogs.latimes.com/lanow/2010/07/street-gang-affiliation-not-criteria-in-decision-to-.htm1 (last visited August 26, 2010).

increase crime in California. According to the court, "empirical evidence from California's communities demonstrates that early release programs – as well as diversion . . . do not increase crime." JS1-App. 202a. The three-judge court reasoned, "[s]hortening the length of stay in prison thus affects only the timing and circumstances of the crime, if any, committed by a released inmate – *i.e*., whether it happens a few months earlier or a few months later." JS1-App. 201a. The court below made these conclusion despite the fact that most offenders, except perhaps child molesters,[15] tend to become less criminally active and less violent as they age. *See* Freda Adler, *et al*., CRIMINOLOGY, (1991) at 42. Prisoners receiving early release under the Prison Release Orders will be released at a younger age than if they had completed their sentences and, accordingly, can be expected to commit more crimes and cause more of an adverse effect on public safety than had they completed their terms. Moreover, these conclusions of the three-judge court regarding the possibility of a 46,000 inmate release without any adverse impact on public safety is impossible to reconcile with the undisputed trial testimony that California has an approximately 70% recidivism rate (*see* JS1-App. 189a) and that research shows that each inmate commits approximately 12 crimes before being

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[15] "It has long been observed that those who victimize adult women (rapists) tend to be younger than those who target children (child molesters)." R. Karl Hanson, Department of the Solicitor General Canada, *Age and Sexual Recidivism: A Comparison of Rapists and Child Molesters*, (2001), *available at*: http://www.blueshifthome.com/Recidivism/studies/Canada%20-%20Age%20and% 20Sexual%20 recidivism%20a %20comparison%20of%20rapists%20and%20child%20molesters%20-%202000-01.pdf, (last visited Aug. 26, 2010).

apprehended, tried, convicted and sentenced to state prison. *See* DJA Vol. VI 2526-2529 (Trial Tr. (Police Chief Jerry Dyer) 2315:04-2318:20 (E.D. Cal./N.D. Cal. Dec. 12, 2008)). The court's reasoning fails to take into account that inmates released early will have more time in the community to commit additional crimes and also fails to recognize the basic fact that crimes that would not have occurred because of the continued incapacitation of prisoners during their incarceration, will occur if the Prisoner Release Orders are implemented and inmates gain early release. The three-judge court's conclusions also fail to account for the fact that early release emboldens offenders and accelerates the occurrence and, in some cases, the gravity, of re-offense. *See, e.g.*, *Jack Leonard, et al., Releasing Inmates Early has a costly Human Toll*, Los Angeles Times, May 14, 2006, *available at* http://articles.latimes.com/2006/may/14/local/me-jail14; Brad Branan, *Early releases blamed in Fresno Crimes, Offenders taking advantage of jail's revolving door*, Modesto Bee, May 24, 2010, *available at* http://www.modbee.com/2010/05/24/1179391/early-releasesblamed-in-fresno.html. All of these factors taken together indicate that early release under the Prisoner Release Orders will substantially increase crime in California. In contrast, scholarly studies consistently show that incarcerating felons reduces crime. One study found that incarcerating one additional prisoner reduces the number of crimes by approximately 15 per year. *See* S. D. Levitt, *The Effect of Prison Population Size on Crime Rates*: *Evidence from Prison Overcrowding Litigation*, Quarterly Journal of Economics 3 (1996), 319-351. Another study found that between sixteen and twenty-five FBI Index crimes are averted per year per each additional prisoner. *See* T.B. Marvell and

C.E. Moody, *Prison Population Growth and Crime Reduction*, Journal of Quantitative Criminology 10 (1994), 109-140; *see also* C.A. Visher, *Incapacitation and Crime Control: Does a 'Lock 'em up' Strategy Reduce Crime*?, Justice Quarterly 4 (1987), 513-543. Noted expert James Q. Wilson summarizes these, and similar, findings as follows, "the weight of scholarly opinion is that prison sentences do deter crime. Steven Levitt, Daniel Nagin, and other scholars have produced studies that convincingly show that, even after controlling statistically for other factors, a higher risk of going to prison in states is associated with lower crime rates in those states." James Q. Wilson, "Criminal Justice," in Peter H. Schuck and James Q. Wilson (eds.), UNDERSTANDING AMERICA – THE ANATOMY OF AN EXCEPTIONAL NATION, (2008) at 478. For the above reasons, the Prisoner Release Orders not only fail to give "substantial weight" to public safety, they affirmatively threaten public safety.

CONCLUSION

The Court should reverse the determination of the three-judge court, and remand for further proceedings in accordance with guidance from this Court.

Respectfully submitted,

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