No. 09-1233

IN THE

Supreme Court of the United States

GOVERNOR ARNOLD SCHWARZENEGGER, *et al.*,
Appellants,

v.

MARCIANO PLATA AND RALPH COLEMAN, *et al.*,
Appellees.

Appeal from the United States District Courts for the Eastern District of California and the Northern District of California

CONSOLIDATED REPLY BRIEF OF APPELLANTS

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CONSOLIDATED REPLY BRIEF

We begin by stating what this appeal is not about.

It is not about the undesirable and negative effects of crowding on prison staff and the general prison population, the complex public policy issues implicated by the State's attempts to address crowding, or the actions necessary to bring medical and mental health care in California's prisons to levels that comport with the best professional practices. Compare, *e.g.*, *Coleman* Br. 7, 29, 60; *Plata* Br. 5; Br. of *Amici* Corrections & Law Enforcement Personnel 6-8. The State aspires to reduce crowding and to provide medical and mental health care that meets or exceeds professional standards. But it is the Eighth Amendment that sets the standards applicable here. The issue is whether prison crowding in California is the "primary cause" of specific alleged Eighth Amendment violations in medical and mental health care, and whether no relief other than a prisoner release order will remedy those alleged violations. The three-judge district court, however, issued an order for release of 38,000-46,000 prisoners based on standards that exceed the Eighth Amendment's requirements. See Opening Br. 42-49; *Rhodes* v. *Chapman*, 452 U.S. 337, 347-51 & nn.15-16 (1981); compare, *e.g.*, Br. of *Amici* American Public Health Association et al. 7-18.

This appeal also is not about what former officials did or failed to do to address prison medical and mental health care, or the repercussions those decisions had for inmates in the past. The State's former deficiencies do not negate the State's current compliance with extensive injunctive relief, its continuing progress toward remedying any alleged Eighth Amendment violations, and the likelihood

that the significant injunctive relief already in force will succeed. Compare, *e.g.*, *Plata* Br. 48; *Coleman* Br. 3-4. Appellees' entitlement to a prisoner release order, like any injunction, must arise from current necessity, not from the desire to punish past wrongs. As Justice Jackson explained for this Court: "The sole function of an action for injunction is to forestall future violations. It is … unrelated to punishment or reparations for those past …. This established, it adds nothing that the calendar of years gone by might have been filled with transgressions." *United States* v. *Or. State Med. Soc'y*, 343 U.S. 326, 333 (1952).

I. THIS COURT SHOULD REVERSE THE JUDGMENT BECAUSE THE THREE-JUDGE COURT WAS PREMATURELY CONVENED.

A. This Court Has Power To Review The Three-Judge Court's Authority To Order Prisoner Release.

The parties agree that this Court has exclusive jurisdiction to review a three-judge court's prisoner release order. In the Opening Brief (at 24), the State demonstrated that once vested with such appellate jurisdiction, this Court also has the power to decide whether the three-judge court had authority to enter the underlying order. Appellees' contrary arguments are without merit.

1. Appellees chiefly attack the State's reliance on *Gully* v. *Interstate Natural Gas Co.*, 292 U.S. 16 (1934) (per curiam). *Coleman* Br. 37-38. *Gully* held that "by virtue of its appellate jurisdiction in cases of decrees purporting to be entered pursuant to [a statute requiring particular injunctions to be issued by three-judge district courts]," this Court

"necessarily has jurisdiction to determine whether the court below has acted within the authority conferred by that section and to make such corrective order as may be appropriate …." 292 U.S. at 18. This Court explained that the case was "analogous to those in which this Court, finding that the court below has acted without jurisdiction, exercises its appellate jurisdiction to correct the improper action." *Id.*

Appellees wrongly suggest that *Gonzalez* v. *Automatic Employees Credit Union*, 419 U.S. 90 (1974), overruled this aspect of *Gully*. *Coleman* Br. 37. In *Gonzalez*, a three-judge court was convened to address a constitutional challenge to a statute, but the court subsequently dismissed the case because the plaintiff lacked standing to raise that challenge. This Court concluded that it lacked jurisdiction to review the *standing decision* on the grounds that it was not "merely short of the ultimate merits; it was also, like an absence of statutory subject-matter jurisdiction, a ground upon which a single judge could have declined to convene a three-judge court, or upon which the three-judge court could have dissolved itself." 419 U.S. at 100; see *id.* at 101 ("when a three-judge court denies a plaintiff injunctive relief on grounds which, if sound, would have justified dissolution of the court … review of the denial is available only in the court of appeals").

Thus, in *Gonzalez*, this Court lacked jurisdiction under 28 U.S.C. § 1253 to review the three-judge court's decision because the three-judge court never decided any question within its authority *as a three-judge court*. This holding is irrelevant because the three-judge court here issued a prisoner release order, a determination that only the three-judge court could make. 18 U.S.C. § 3626(a)(3)(B). And, it

certainly does not undermine *Gully*'s holding that this Court has jurisdiction to decide whether a three-judge court was properly convened once that court issues a decree based on its purported power under the three-judge statute. Finally, *Gonzalez* expressly reaffirmed *Gully*, explaining that this Court "has not hesitated to exercise jurisdiction 'to determine the authority of the court below and "to make such corrective order as may be appropriate to the enforcement of the limitations which [28 U.S.C. § 1253] imposes."'" 419 U.S. at 96 n.12 (quoting *Bailey* v. *Patterson*, 369 U.S. 31, 34 (1962) (per curiam) (quoting *Gully*, 292 U.S. at 18)).

Appellees' *amici* acknowledge that *Gully* remains in force, Br. of *Amici* ACLU et al. 8-9 & n.3, but suggest that under *Gully*, this Court limits its review to jurisdictional questions presented on the face of the complaint. *Id.* at 9-13. Some jurisdictional issues present pure issues of law, while others do not. *Amici* cite cases in the former category, mistakenly treating what is only the particular context of those cases as a limitation on the Court's authority. Neither the cases *amici* cites nor *Gully* (reaffirmed by *Gonzalez* after all cases cited by *amici* were decided) supports the imposition of any such limitation. When this Court reviews the decision of a three-judge court, it has authority to resolve whether that court was properly convened.[1]

2. Appellees further suggest that this Court has evaluated whether a three-judge court had

[1] Appellees incorrectly assert that the State failed to preserve this jurisdictional issue in its opening brief. *See Coleman* Br. 37. The State's Opening Brief (at 24) cited and relied on both *Gully* and *Gonzalez*. The State also expounded on this issue in its Consolidated Opposition to Appellees' Motions to Dismiss or Affirm 3-4.

jurisdiction only when "the time for appeal ha[s] expired" and "the 'correct procedure' for seeking review of the single-judge court's order was not 'definitely settled.'" *Coleman* Br. 38 (quoting *Oklahoma Gas & Elec. Co.* v. *Oklahoma Packing Co.*, 282 U.S. 386, 392 (1934)). This is inaccurate.

This Court has not based its jurisdiction to decide if a three-judge court was properly convened on whether the "correct procedure" to obtain such review is settled. Instead, this Court has considered that factor in selecting the appropriate corrective action—*i.e.*, whether to dismiss or vacate and remand—*after* determining that the three-judge court was improperly convened. See *Phillips* v. *United States*, 312 U.S. 246, 254 (1941) (court will vacate and remand "where the question of jurisdiction was not obviously settled by prior decisions").[2] Here, in any event, appellees have not shown that it was "obviously" settled that the appeals courts have jurisdiction to review the propriety of convening a three-judge court to address prisoner release.

Finally, any suggestion that this Court should dismiss the appeal if it finds that the three-judge court lacked jurisdiction is wrong. Cf. *Coleman* Br. 38-39. Outright dismissal of this appeal is plainly inappropriate because

> in cases where the subordinate court was without jurisdiction and has improperly given judgment for the plaintiff ... the judgment in the court below must be reversed, else the plaintiff

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[2] "Recent opinions seem to have made such relief [vacatur and remand] almost routine," without discussing whether the Court's jurisdiction was previously settled. 17 Wright & Miller, *Federal Practice and Procedure: Jurisdiction* § 4040 n.33 (3d ed. 2010) (citing *Moody* v. *Flowers*, 387 U.S. 97, 104 (1967)).

> would have the benefit of a judgment rendered by a court which had no authority to hear and determine the matter in controversy.

Assessors v. *Osbornes*, 76 U.S. (9 Wall.) 567, 575 (1869).

3. Our opponents' conflicting views of how defendants obtain review of the three-judge court's authority to order prisoner release undermine rather than advance their claim that this Court lacks jurisdiction.

Appellees and *amici* suggest that review lies in the courts of appeals *after* a prisoner release order issues. *Coleman* Br. 36-37; ACLU Br. 12-13. But, on this view, both this Court—which unquestionably has jurisdiction—and the courts of appeals would simultaneously have jurisdiction. That scenario is inefficient and could lead to conflicting rulings, outcomes which Congress could not have intended.

Moreover, under the PLRA, this Court's authority to review the three-judge court's jurisdiction ensures judicial efficiency. Under the PLRA, if the three-judge court was improperly convened, a prisoner release order is not available from *any* court. 18 U.S.C. § 3626(a)(3)(B). It makes sense, accordingly, for this Court both to resolve the three-judge court's jurisdiction and to review the prisoner release order on its merits.

CCPOA takes a different view entirely. It asserts (at 32-33) that *no* court can ever review the three-judge court's authority. It argues that the question whether § 3626(a)(3)(A)'s requirements were satisfied may harmlessly be treated as unreviewable, because review of the three-judge court's decision under § 3626(a)(3)(E) adequately protects the State's interests. CCPOA is incorrect.

First, § 3626(a)(3)(A) serves an important function, distinct from that served by § 3626(a)(3)(E). It not only prevents the waste of district court resources, CCPOA Br. 33, but also ensures that federal courts do not enter injunctive relief without providing States reasonable time to comply with underlying orders before initiating proceedings involving potentially more intrusive relief. Section 3626(a)(3)(E), in contrast, makes no reference to the safety valve in § 3626(a)(3)(A)—the requirement that a single-judge district court actually provide the State with an adequate opportunity to address a federal violation by other means before the court even considers the extraordinary remedy of prisoner release.

Second, § 3626(a)(3)(A)'s text shows that its requirements are jurisdictional. The statute is directed to the power of the court. 18 U.S.C. § 3626(a)(3)(A) ("no court shall enter a prisoner release order"). See *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 274 (1994) ("[J]urisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties.") (internal quotation marks omitted). This Court, too, has recognized that the decision whether a three-judge court was properly convened implicates that court's "authority." *Gully*, 292 U.S. at 566; *Bailey*, 369 U.S. at 34.

B. The State Did Not Have A "Reasonable Amount Of Time To Comply" With The Orders At Issue.

The single-judge courts did not afford the State a reasonable amount of time within which to comply with their previous orders, as 18 U.S.C. § 3626(a)(3) requires. Thus, the three-judge court was improperly convened and its prisoner release order must be reversed. The cases should be remanded to the

single-judge district courts for any further proceedings.

1. CCPOA (at 27-30) argues that orders such as those creating and implementing a Receivership and requiring coordination between the Special Master and the Receiver are not subject to § 3626(a)(3)(A)'s reasonable-time requirement. The statute, however, requires the court to give the defendant reasonable time to comply with "the previous court orders." 18 U.S.C. § 3626(a)(3)(A). The most natural reading of this provision is that it refers to all the court's previous orders. See Opening Br. 13-16.

CCPOA, however, says that the orders creating and implementing the Receivership and reforming the *Coleman* remedial program are not the kind of orders that require a defendant to "comply." Br. 27-28; compare Opening Br. 15-20 (receivership remedy); *id.* at 20-22 (requirements that the State, *inter alia*, implement revised program guides and other plans, and coordinate efforts with the receiver). CCPOA therefore claims that the respective courts were not required to wait a reasonable time after their issuance before convening three-judge proceedings. Br. 27. This cramped reading of the statute makes no sense, particularly in light of Congress's intent to allow States to try all other avenues before being subjected to a prisoner release order. Both the Receiver (and his plans) and the Special Master (and his plans) are or led to remedial orders issued by the single-judge district courts.

In any event, the remedies in question *do* require State compliance. For example, the orders required not only the appointment of a Receiver, but also the effectuation of the Receiver's plan of action. See *Plata* D.E. 473, at 4; JA 977, 983-84 (order imposing and requiring the State to effectuate the

Receivership); see also, *e.g.*, *Coleman* D.E. 1773, at 2 ("order[ing] defendants to immediately implement [Revised Program Guide] provisions"). The court required the State to "work closely with the Receiver to facilitate the accomplishment of his duties under this Order," *Plata* D.E. 473, at 4; to cooperate fully with the Receiver "in the discharge of his duties"; and to respond promptly "to all inquiries and requests related to compliance with the Court's orders in this case," *id.* at 8; see JA 977 (similar); JA 987 ("imbu[ing] [the Receiver] with the power and authority to act in the name of the Court"). Indeed, CCPOA correctly states (at 29-30): "To be sure, the court was required to determine whether the Receiver could remedy the violations before it convened a three-judge court ...." The only provision requiring any such determination before a three-judge court is convened is § 3626(a)(3)(A).

2. Appellees claim that the State has elevated form over substance by arguing that it is entitled to time to comply with the court's "last" order. *Coleman* Br. 41-42. But the State contends only that the statute requires that it receive reasonable time to comply with the court's "previous orders"; the definition of reasonable time turns on the nature of the order (implementing a receivership requires more time than, *e.g.*, providing data to the court), not on whether a particular order came "last." The Receivership and the revised remedial plan in *Coleman* constitute previous orders of the court, and the State was entitled to reasonable time for compliance.

3. CCPOA also suggests that the court is not required to give the State reasonable time to comply with "merely palliative order[s]" before convening a three-judge court. Br. 23. The comprehensive *Plata*

Receivership and new remedial program under the *Coleman* Special Master cannot be analogized to orders to hire additional nurses (*id.*) or to update a single prison's water system (*id.* at 25). Unlike CCPOA's examples, the remedies here systematically targeted the alleged Eighth Amendment violations. The *Plata* court's statements manifest its view that the Receivership could remedy the overarching violations. JA 917 (Receiver can "bring the delivery of health care in California prisons up to constitutional standards"); *id.* at 983 ("[T]he establishment of a Receivership, along with those actions necessary to effectuate its establishment, are narrowly drawn *to remedy the constitutional violations* at issue … [and] *correct these violations*.") (emphases added).

CCPOA cites one sentence in the *Plata* court's order convening the three-judge court as a finding that the Receivership remedy could not correct the violation "'unless something is done to address the crowded conditions in California's prisons.'" Br. 30. The convening order as a whole does not support this proposition. The court noted that overcrowding was a "substantial impediment" to the Receiver's work, concluding that population limits could speed up the process. JS1-App. 281a-283a. But these observations do not suggest that failure of the Receivership was a foregone conclusion. And to the extent they suggest that the State was not entitled to reasonable time to comply with the Receiver's plan before any prisoner release order, they would be clearly wrong. Indeed, the conditions the court highlighted as affected by crowding, JS1-App. 282a, are among those that have markedly improved without any population reduction. See Opening Br. 17-19.

Likewise, CCPOA's reliance (at 30-31) on the *Coleman* court's statement that crowding was preventing constitutionally adequate mental health care, JS1-App. 304a, is misplaced. That statement was not made in connection with the relevant orders for relief—the new remedial program and coordination with the Receiver, see Opening Br. 20-22—and the court was not passing judgment on whether those specific remedies had a likelihood of eventual success sufficient to require that the State have reasonable time to comply. Indeed, the State's previous progress in addressing the conditions at issue in *Coleman* in the face of crowding strongly supports the inference that these new remedies could have borne fruit given a fair opportunity. See JS1-App. 293a-294a. The district court acknowledged that between 1997 and 2005, the State made "commendable progress" under the Special Master. *Id.* at 294a. Yet, the prison population in 2001, for example, differed by only several thousand inmates from that in 2006 and 2007. See, *e.g.*, *id.* at 54a, 52a.

4. The State was entitled to a reasonable amount of time to comply with the above-discussed remedies, *supra* at 7-11, and the single-judge courts failed to provide such time. See Opening Br. 14-24.[3]

In response to the State's showings, the *Plata* appellees rely heavily on the three-judge court's (incorrect) finding that no other relief will remedy the violation; but it is the single-judge court that was required to find that the State had reasonable time to

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[3] Appellees and CCPOA disagree about the standard of review applicable to this reasonableness inquiry. *Compare* CCPOA Br. 30 (clear error), *with Coleman* Br. 40 *and* Plata Br. 28 (abuse of discretion). This inquiry involves mixed questions of law and fact, and *de novo* review is appropriate. *Infra* at 15-17.

comply. Critically, the single-judge court expressly determined that it was *not required to wait a reasonable time* after appointing the Receiver to convene the three-judge court. JS1-App. 281a; see Opening Br. 14-15.

Appellees highlight the single-judge court's statement that it gave "'defendants every reasonable opportunity to bring its prison medical system up to constitutional standards.'" *Plata* Br. 29. But they omit that the court quoted this statement from its *October 2005* order justifying appointment of a Receiver, and failed to find that the State had been given the required opportunity *after* that appointment. See Opening Br. 15 (findings were based on June 2002 and September 2004 orders). Moreover, the *Plata* court acknowledged the Receiver's conclusion that his Plan of Action would work without population reductions and that population controls would not solve California's prison health care problems. JS1-App. 282a. The Receiver explained only that "'population limits may help effectuate a *more timely and cost effective* remedial process,'" not that his plan would fail if given a reasonable amount of time. *Id.* (emphasis added, alteration omitted).

The *Coleman* court, too, failed to address whether the State had a reasonable opportunity to comply with the newly revised remedial program, including the newly required coordination between the Special Master and the Receiver. See JS1-App. 292a-297a. In its one-paragraph discussion of the reasonable-time requirement, the court noted only that it had issued orders over a number of years. *Id.* at 297a. The court failed to acknowledge that the plaintiffs moved to convene three-judge proceedings only five months after the State was directed to coordinate its

Coleman remedial efforts with the Receiver and that the court ordered those proceedings just over one year after such coordination began.

Had the single-judge courts decided that the State had received a reasonable time to comply with the relevant orders, those decisions would have been erroneous. Opening Br. at 16-20, 22-24. The *Plata* appellees do not dispute that the Receiver has emphasized the State's progress, *id.* at 17-18; that the State has significantly increased funding and staffing, finalized construction plans and started construction, and enhanced infrastructure, *id.* at 18-19, 37; and that death rates have dropped, *id.* at 19-20. Although appellees note the decreased health care budget for 2010, *Plata* Br. 32 n.6, they do not dispute the massive influx of funds for prison healthcare during the past two years. Appellees argue only that the State's improvements did not remedy the violations. *Id.* at 32. The relevant inquiry here, however, is whether the State had a reasonable amount of time to comply with the most recent structural orders before a three-judge court properly could be convened. The numerous significant improvements show that the two months between when the Receiver's initial plan issued and three-judge proceedings were convened was not a reasonable period of time to allow the court to conclude that the Receivership remedy had failed, particularly when the Receiver himself anticipated a multi-year process.

Similarly, the *Coleman* appellees do not dispute that the State has made significant progress. They assert (at 44) that "most of the improvements represent aspirational plans, not concrete results," but they fail to address the State's evidence of significantly reduced vacancy rates for psychologists,

Opening Br. 23; the addition of designated mental-health beds, *id.* at 23-24; and decreases in the number of suicides, *id.* at 24; see also JA 1457-80, 1489-93 (detailing improvements). Given the State's progress on multiple fronts under the new remedial program and the coordinated efforts of the Special Master and the Receiver, the single-judge court erred by convening the three-judge court when it did.[4]

5. Finally, the State showed that the three-judge court's order is based on the combined cases of two plaintiff classes, and that if only one of the proceedings was properly instituted, the order must be reversed as to both classes. Opening Br. 24-25. In response, appellees cite class-specific observations and findings, such as those addressing mental health issues. *Coleman* Br. 45. But, regardless of what specifics were noted, the *merits determinations* at issue (under § 3626(a)(3)(E) and the choice of remedy) are unitary, making no distinction between the two classes.[5]

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[4] Contrary to *amici*'s assertion (ACLU Br. 13-14), because the court lacked authority to enter the order in question, harmless error review does not apply. *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 317 n.3 (1988) ("[A] litigant's failure to clear a jurisdictional hurdle can never be 'harmless' or waived by a court.").

[5] If three-judge proceedings were proper in only one case, the Ninth Circuit's Chief Judge must be allowed to effectuate the requirements of 28 U.S.C. § 2284(b)(1). The State did not waive this argument by failing to object previously, *see* CCPOA Br. 35, because the objection is ripe only if this Court holds that one of the single-judge courts improperly convened three-judge proceedings.

II. SECTION 3626(a)(3)(E)'S REQUIREMENTS HAVE NOT BEEN SATISFIED.

A. The Question Presented Is Reviewed *De Novo*.

Appellees incorrectly contend that the second question presented is reviewed for clear error. *Coleman* Br. i ¶ 2; *Plata* Br. 46; see also *supra* note 3.

As the district court recognized, JS1-App. 126a n.55, "'the primary cause issue is ultimately a question of law.'" Moreover, any application of § 3626(a)(3)(E) presents mixed questions of law and fact. Such questions are subject either to *de novo* or abuse-of-discretion review. See *Pullman Standard* v. *Swint*, 456 U.S. 273, 289 n.19 (1982) (independent review); *Pierce* v. *Underwood*, 487 U.S. 552, 559-60 (1988) (abuse-of-discretion). Here, the case for *de novo* review is strong.

This Court has held that "independent" or *de novo* review is warranted "[w]hen the standard governing the decision of a particular case is provided by the Constitution." *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 503-06 (1984).[6] Here, the legal issues under § 3626(a)(3)(E) are whether crowding is the "primary cause" of Eighth Amendment violations and whether any relief other than prisoner release will remedy those violations. The statutory interpretation is inextricably intertwined with the claimed constitutional violations. Opening Br. 28. Thus, "[i]ndependent

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[6] *See, e.g.*, *Cooper Indus.* v. *Leatherman Tool Grp.*, 532 U.S. 424, 435-36 (2001); *Lilly* v. *Virginia*, 527 U.S. 116, 136 (1999) (plurality opinion); *Ornelas* v. *United States*, 517 U.S. 690, 697-98 (1996); *Miller* v. *Fenton*, 474 U.S. 104, 112-13 (1985); *see also Wright* v. *West*, 505 U.S. 277, 306-07 (1992) (plurality opinion) (Kennedy, J., concurring).

review is ... necessary if appellate courts are to maintain control of, and to clarify, the legal principles" underlying such Eighth Amendment-based claims. *Ornelas*, 517 U.S. at 697. See also, *e.g.*, *Graham* v. *Florida*, 130 S. Ct. 2011, 2026 (2010) (citing the importance of "[t]he judicial exercise of independent judgment" in the Eighth Amendment setting). *De novo* review is also appropriate in this case because of the extraordinary nature of the relief being requested. A prisoner release order is the most extreme action a federal court can take *vis-à-vis* the State's penal system. Such relief should only be ordered when this Court is convinced that the predicate requirements of the statute are fully supported by the record.

Additionally, the timing of the remedial order here means that this Court necessarily will undertake an independent evaluation. The three-judge court determined whether prisoner release was appropriate based on the August 2008 record, instead of examining the facts in January 2010, when the order on appeal issued. See Opening Br. 7, 26-30 & n.9. Any injunction must be based on the need to remedy current harms. See *id.*; 18 U.S.C. § 3626(a)(3)(E); see also *City of L.A.* v. *Lyons*, 461 U.S. 95, 101-02 (1983) (requiring a "'real and immediate'" threat of injury). To make these determinations, a court must examine the facts at the time the injunction would issue. The court below, however, declined to account for any developments after August 2008, even though current conditions are well-documented in filings by the Receiver and the Special Master in the constituent cases, and in judicially noticeable reports of the Receiver and the Office of the Inspector General. Accordingly, this Court of necessity will be

conducting an "independent review," which for practical reasons should extend to the entire case.

Appellees incorrectly contend that this Court should not consider ongoing case developments. See *Coleman* Br. 34-35; *Plata* Br. 14 n.3. But, this Court, like other appellate courts, may "take account of developments in the case subsequent to proceedings in the trial court," when warranted. 21B Wright & Graham, Jr., *Federal Practice and Procedure* § 5110.1 (2d ed. 2010).[7] Indeed, in *Inmates of Occoquan* v. *Barry*, the court vacated a prisoner release order where, as here, "the record [wa]s already stale" by the time of appeal. 844 F.2d 828, 840 (D.C. Cir. 1988). In doing so, the appeals court credited the defendant's representations that "it has already addressed and remedied many (if not all) of the specific 'deficiencies' enumerated by the trial court," and relied on "reports of actual improvements described in the record" post-dating the order on review. *Id.* at 840 & n.17. These principles apply equally here.

B. Appellees Are Not Entitled To A Prisoner Release Order.

Appellees' interpretations of § 3626(a)(3)(E) are incorrect, and that section's prerequisites to prisoner release were not satisfied here.

1. Appellees' mantra is that if this prisoner release order does not satisfy the PLRA, none ever will. See,

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[7] *See*, *e.g.*, *Riley* v. *Kennedy*, 553 U.S. 406, 417-18 & n.4 (2008) (discussing facts post-dating the appealed order); *Honig* v. *Students of Cal. Sch. for the Blind*, 471 U.S. 148 (1985) (per curiam) (finding issue moot due to compliance with injunction over dissent's objection that "the facts making it moot occurred subsequent to the Court of Appeals decision, and so do not appear on the record").

e.g., *Coleman* Br. at 29-31, 61; *Plata* Br. 57; CCPOA Br. 19. Appellees, however, underestimate the arsenal of structural remedies available to federal courts, which are required to respect Congress's decision that a prisoner release order may not issue until it is certain that every other remedy has failed and will fail. When, and only if, these remedies fail can prisoner release be justified.

Here, for example, the single-judge district courts decided to impose structural remedies in the form of a Receivership that controls nearly every aspect of the State's delivery of medical care to prisoners and a comprehensive remedial regime to be implemented under the Special Master with required coordination with the Receivership. Had these remedies been given a fair opportunity to succeed, but had led to a regression (rather than producing substantial progress), the argument for prisoner release would unquestionably be stronger. This appeal does not present that scenario.

2. Appellees' interpretations of § 3626(a)(3)(E) refuse to accept that Congress significantly raised the bar for obtaining prisoner release.

Pre-PLRA, inmates were required to demonstrate proximate causation to prevail on Eighth Amendment claims, and to be entitled to a remedy directed at crowding. See, *e.g.*, Opening Br. 32; *Leer* v. *Murphy*, 844 F.2d 628, 634 (9th Cir. 1988) (plaintiff must show "actual and proximate cause"); *Morgan* v. *Dist. of Columbia*, 824 F.2d 1049, 1058 (D.C. Cir. 1987); cf. CCPOA Br. 41-42. Indeed, prisoner release was already the remedy "of last resort." *E.g.*, *Plyler* v. *Evatt*, 924 F.2d 1321, 1329 (4th Cir. 1991) (early release is a "draconian last alternative"). Yet, in the PLRA, Congress sought to impose *additional* limits on the availability of prisoner release orders, see

Opening Br. 4-5, 32, 51a; Br. of *Amici* Louisiana et al. 6-8. Thus, an even more rigorous application of the proximate causation standard is required. Opening Br. 31. The court below did not apply a heightened standard.[8]

Appellees, however, contend that a "long line of precedents" supports their argument that "primary cause" is a less stringent requirement than proximate cause. *Coleman* Br. 47. The *two* cases they cite do not prove that point.

First, they rely on *New York Central Railroad* v. *White*, 243 U.S. 188, 205 (1917). In *White*, this Court interpreted workers' compensation laws, which made the employer strictly liable for employees' workplace injuries. The Court stated that "[i]n excluding the question of fault as a cause of the injury, the act in effect disregards the proximate cause and looks to one more remote—the primary cause, as it may be deemed—and that is, the employment itself." *Id.* In other words, where a statute imposes strict liability based on status, that status is the primary (*i.e.*, only) cause of liability, and the precipitating or actual cause of any injury is irrelevant to fault.

The PLRA plainly is not using the word "primary" in this sense; it does not impose strict liability (*i.e.*, allow a release order) based solely on crowding. To the contrary, it indisputably heightens the standard for prisoner release, requiring that it be the actual, or

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[8] Appellees incorrectly contend that the State's statutory construction constitutes a "new claim" that is forfeited, *Coleman* Br. 46. The State is not making a new claim; it is proffering an additional "argument to support of what has been [a] consistent claim" that § 3626(a)(3)(E)(i)'s "primary cause" requirement is not satisfied. *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

precipitating cause of the alleged constitutional violation.

Next, appellees cite *United States* v. *Hatfield*, 591 F.3d 945 (7th Cir. 2010), a decision that sheds no light on the meaning of "primary cause" here. In *Hatfield*, the court struck down as confusing a jury instruction explaining when death or serious bodily injury "results from" use of a controlled substance. The instruction simultaneously stated that the controlled substance (i) must be "'a factor that resulted in'" death or injury, (ii) "'need not be the primary cause of'" such death or injury, but (iii) "'must have at least have played a part in'" the death or injury. *Id.* at 947. The court thought the instruction should have simply used the term "results in," and explained that the concept of causation is context-specific and driven by the policy needs of particular circumstances. Its most definitive statement about "primary cause" was that in *Black's Law Dictionary*, it is "a synonym for 'proximate cause.'" *Id.* at 949.

3. Appellees argue that the three-judge court properly applied § 3626(a)(3)(E) without assessing the current state of alleged Eighth Amendment violations. Otherwise, they say, the three-judge court would be "re-determin[ing] liability during the *remedial phase*." *Plata* Br. 33 (emphasis added). That contention rests on a false premise.

Under the PLRA, proceedings before a three-judge court are not analogous to a "remedy phase." They are a separate liability phase in which plaintiffs must make a particularized showing of liability to become eligible for an exceptional remedy. Here, this particularized liability inquiry occurred more than a decade after the first-phase liability finding in *Coleman* and more than five years after the finding in

Plata; in those early phases, moreover, crowding was irrelevant to liability.

Neither this Court nor the three-judge court below can reasonably conclude that crowding is the primary cause of Eighth Amendment liability today, based on the liability findings made in 1994 and 2002. See *Coleman* Br. 33-34; Opening Br. 5-6. Conditions changed substantially between the initial findings of liability and entry of the January 2010 prisoner release order. Opening Br. 17-21, 26-30, 37-39.[9] When issuing an injunction, particularly one for prisoner release, "'the nature of the … remedy is to be determined by the nature and scope of the constitutional violation.'" *Missouri* v. *Jenkins*, 515 U.S. 70, 88-89 (1995) (quoting *Milliken* v. *Bradley*, 433 U.S. 267, 280 (1977)); see *Milliken*, 433 U.S. at 281-82. The issuance (and scope, *infra* § III) of such an order must be based on the current state of alleged Eighth Amendment violations.

4. In determining whether crowding is the "primary cause" of constitutional violations here, it is appellees' arguments, not the State's, that are

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[9] Plainly, the State's numerous efforts and investments mean that today it is differently situated with respect to the Eighth Amendment's requirement of deliberate indifference. Opening Br. 29. In fact, that requirement has never been adjudicated in *Plata*. JA 889-90, ¶ 4 (consent decree does not address subjective requirement); *cf. Horne* v. *Flores*, 129 S. Ct. 2579, 2594 (2009) ("public officials sometimes consent to … decrees that go well beyond what is required by federal law"). Indeed, appellees' *amici* suggest that release orders should be subject to additional scrutiny where, as here, they turn on "decree[s] … entered by consent … in the absence of any *judicial* finding of a constitutional violation." ACLU Br. 7 (emphasis added) (discussing Congress's concern about a pre-PLRA consent decree that led to a population cap).

inconsistent with the record. Contra *Coleman* Br. 27, 34; *Plata* Br. 24.

In discussing inmates' injuries and deaths over the years, appellees manipulate the record to attribute these events to crowding and then wrongly imply that crowding is the "primary cause" of injuries currently being incurred. See *Plata* Br. 7-10. For instance, appellees suggest that crowding caused a patient's October 2007 death that the Receiver considered "likely preventable." *Id.* at 9 (discussing JA 2042-43). The report in question notes "prison medical staff['s] 'fail[ure] to properly evaluate'" the patient's symptoms and a lack of "communication between the discharging physician and the receiving physician" as appellees suggest. *Id.* at 8-9 (quoting Def. Ex. 1233 at 14 [JA 2042] and citing JA 2042-43). But it says nothing about crowding and does not suggest that an "overwhelmed … prisons' medical records system" was the cause. Compare *id.*, with JA 2042-43. Appellees also fail to mention the report's statement that a *civilian* (*i.e.*, *non*-prison) hospital discharged the patient to CDCR without giving the State's physicians sufficient instruction, JA 2042-43, and that the patient died at a *second civilian* hospital as a consequence of the omissions of the first civilian hospital, *id.* at 2043; see also *id.* at 2042-43 (documenting other errors by the first hospital).

Similarly, appellees imply that crowding caused delayed care and a preventable death in 2006. *Plata* Br. 10 (citing JA 1999). Yet, they do not include the report's explanation that the delay resulted, *not* from crowding, but from the failure of an individual

physician to report to the facility while on call. JA 1999.[10]

Moreover, the general claim that preventable deaths in the CDCR system demonstrate that *crowding* is the primary cause of Eighth Amendment violations is untenable. Here, it is undisputed that the level of preventable deaths in CDCR today is comparable to, or better than, the norm for even non-prison medical care. See Tr. 1204:23-1206:5 (testimony based on Institute of Medicine study that as many as 98,000 preventable deaths occur in United States hospitals every year); Instit. of Med., *To Err is Human* 26 (L.T. Kohn et al., eds., 2000) ("deaths in hospitals due to preventable adverse events exceed the number attributable to the 8th-leading cause of death"); see also Cal. Prison Receivership, *Analysis of Year 2009 Death Reviews* 8 (Sept. 2010) ("*2009 Death Review*") (lapses in care are "unavoidable" in the non-prison healthcare setting and lead to injury). The Receiver has pointed to

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[10] The *Coleman* appellees take similar liberties. Br. 15 (discussing JS1-App. 98a and JA 492-627). For example, they describe their expert's experience with a mentally ill patient at Wasco State Prison ("WSP") on August 1, *2008* and attribute poor care to crowding and staffing shortages. See *id.*; JA 585-86. They ignore, however, that WSP remains crowded (196.7% of design capacity, *see* CDCR, *Monthly Report of Population* 2 (Jan. 5, 2010) ("*Monthly Report of Population*"), and yet fulfilled 97% of inmates' mental health care appointments in December 2009 (4,141 total appointments). *See* Fed. Receiver, *Turnaround Plan of Action: Monthly Report* 12 (Feb. 28, 2010) (hereinafter "*Receiver's Monthly Report(s)*"). Of the 83 inmates not seen, none was due to "not enough holding space"; the majority resulted from provider-specific cancellations (46 total). *Id.*; *see also* Office of the Inspector General (OIG), *Wasco State Prison Medical Inspection Results* 1 (Nov. 4, 2010) (awarding institution 75.9% of the total points possible for adherence to Receiver's policies and procedures).

studies suggesting that up to 6% of all civilian hospital deaths are "definitely preventable," and 23% are "possibly preventable." Cal. Prison Receivership, *Analysis of Year 2008 Death Reviews* 6 (Dec. 14, 2009) ("*2008 Death Review*") & *2009 Death Review* at 4.

In the Receiver's most recent annual death review, he classified just three inmate deaths (of 395 total) as "likely preventable," *i.e.*, .07%. *2009 Death Review* at 13; see *id.* at 11 (43 or 11% of the deaths were "possibly preventable").[11] The three "likely preventable deaths" included one in which the inmate-patient was treated and died in a civilian hospital, *id.* at 14, and another in which the inmate died from head trauma due to a failure to protect the patient from injury during transportation, *id.* at 13. Compare *Plata* Br. 9 (citing *2009 Death Report* at 13 regarding the third death, wrongly implying that it was related to crowding because it "could have been prevented by timely specialist care"). Notably, moreover, approximately 400,000 medical and mental health appointments occur *every month* in the State's prisons. See, *e.g.*, *Receiver's Monthly Report* 4 (Oct. 31, 2010); *Receiver's Monthly Report* 4 (Dec. 30, 2009). Nonetheless, the rate of death and the number of suicides have declined significantly in recent years. Opening Br. 24; compare *Coleman* Br. 14 (relying on increase in suicides in 2006, but ignoring newly launched suicide prevention programs, see Opening

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[11] Even if a preponderance standard applied, the court could not rely on "possibly preventable deaths" to show that crowding currently is the "primary cause" of Eighth Amendment violations. *See Plata* Br. 7 (relying on such deaths); JS1-App. 9a, 123a-124a (same); *Saelzler* v. *Advanced Group 400*, 23 P.3d 1143, 1152 (Cal. 2001) ("'mere possibility of … causation is not enough'").

Br. 21-22 & n.5, and falling rates).[12] As the Receiver's most recent death review explained, "t[he] significant reduction in the number of attributed preventable deaths in 2009 continues a trend which shows that the overall quality of care in the California prison system is improving." *2009 Death Review* at 20. While CDCR continues to face challenges in this area, the relevant evidence does not demonstrate that crowding is proximately or primarily causing the alleged denial of the plaintiff-classes' Eighth Amendment rights.

5. The Receiver's *Amicus* brief and previous filings do not support a holding that crowding is the "primary cause" of any constitutional violations.

The Receiver first claims that although "facilitat[ing] inmate access to care for previously scheduled appointments" has been "successful," it "does not guarantee that all other elements of the plan will be equally successful at current population density levels." Receiver Br. 12. But, of course, appellees had the burden of showing that other elements of the plan would *not* be successful due to crowding. 18 U.S.C. § 3626(a)(3)(E)(ii). More significantly, the State's success in providing inmate access despite crowding illustrates why § 3626(a)(3)(E) has not been satisfied.

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[12] Indeed, the rates of "likely preventable" and "possibly preventable" deaths in the CDCR system have been consistently low for years. *2008 Death Review* at 8-9 (five (*i.e.*, 1%) of 369 total deaths reviewed were likely preventable and 61 (17%) were possibly preventable); JA 2034 (*2007 Death Review*) (stating that three (1%) of 395 reviewed deaths were "preventable" and 65 (16%) were "possibly preventable"); *but cf.* JA 1995-96 (*2006 Death Review*) (18 (or 4.7%) of 381 reviewed deaths were adjudged "preventable" and 48 (12.6%) were classified as "possibly preventable").

Specifically, the access the Receiver now describes as "one small element" of his plan, Receiver Br. 12, is depicted in markedly different terms in the Receiver's Turnaround Plan of Action and subsequent reporting. The Turnaround Plan stated that "our mission is a simple one: Reduce avoidable deaths and illness," JA 1134, explaining:

> Constitutionally adequate health care occurs when patient-inmates are given
>
> ● *timely access* to competent medical and clinical personnel … and
>
> ● *timely access* to prescribed medications, treatment modalities, specialists and appropriate levels of care.

Id. at 1125 (emphases added); see *id.* at 1136 ("Goal 1. Ensure Timely Access to Health Care Services"). The Receiver's staff also noted that delayed access to care can contribute to potentially preventable deaths, and concluded that *the most important steps for reducing such delays* were the Receiver's (1) "access-to-care initiative" and (2) "health care access units"—*not* population reduction. JA 2051-53 (*2007 Death Review*) (capitalization omitted); see also *Plata* Br. 7-10 (relying on the same document). These two important initiatives are those that the Receiver has described as successes which "will have the necessary resources to support healthcare operations at the current level of service." JA 1555; see also JA 1655 (the State "continue[s] to be highly effective in facilitating inmate access to scheduled appointments"); Opening Br. 19.

The State recognizes that the "required timelines for access" are not satisfied in all circumstances. Receiver Br. 12 (pointing to an OIG report identifying

a "'comparatively low'" score on an access measure).[13] But those findings do not show that crowding is "the primary cause" of unconstitutional care or that the number and extent of any delays rise to a level of unconstitutionality. See OIG, *Summary & Analysis* at 1. Missed timelines do not constitute Eighth Amendment violations. See *Wilson* v. *Seiter*, 501 U.S. 294, 298 (1991) (deprivation objectively must be "sufficiently serious"). In the same OIG report, moreover, facilities scored very high on more constitutionally significant individual categories measuring access. For instance, 13 of 15 institutions scored 100% on whether emergency "medical staff arrive[d] on scene in five minutes or less." OIG, *Summary & Analysis* at 124, 128 (category 15.282).

Additionally, the Receiver attempts to step back from his statement that he could "provide constitutional levels of care no matter what the population is," counterintuitively asserting that the statement was conditioned on acceptance of his former construction plan. Br. 9-10.[14] The Receiver

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[13] The OIG report in question concerns the first round of inspections of CDCR facilities, which were completed between September 2008 and October 2009. OIG, *Summary & Analysis of the First 17 Medical Inspections of California Prisons* 1 (Aug. 2010) ("OIG, *Summary & Analysis*"). Many facilities subsequently have been evaluated and typically have achieved higher scores. *See infra* at 35 & n.16. Moreover, despite the Receiver's statement that OIG's scores on some access measures reflect the effect of crowding, *see* Receiver Br. 12, the 143-page OIG report does not mention crowding or overpopulation or attribute delays in access to those factors.

[14] The Receiver's willingness to share his thoughts here, when the State was not allowed to obtain his views or testimony below, is deeply unfair. Opening Br. 27-28 & n.9.

Additionally, appellees' claims that the State did not sufficiently preserve its challenges to the limitations the district

stops short of saying that he cannot provide care that comports with the Eighth Amendment at the population levels that will result after the facilities are expanded under current plans. *Id.* at 11. Any doubt on this issue should be resolved against appellees. 18 U.S.C. § 3626(a)(3)(E)(ii).

Finally, the Receiver does not address whether the State's current conduct constitutes "deliberate indifference" to a substantial risk of significant harm to the plaintiff-classes. See *Seiter*, 501 U.S. at 302-04; *supra* at 21 & n.9. The State's recent $2.35 billion expenditure on prison care and other efforts belie any such claim. See Opening Br. 18-19, 29-30.

6. Section 3626(a)(3)(E)(ii) authorizes prisoner release only if two conditions are satisfied: "no other relief will remedy" the constitutional violation and crowding is its "primary cause." The State reads the two requirements in tandem to mean that "eliminating crowding should undo all or virtually all the constitutional harm." Opening Br. 33 (*quoted, in part, in Coleman* Br. 47). That is the best reading of the provisions because it gives independent meaning to each prong. Indeed, under the State's

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court placed on its ability to obtain testimony or evidence from the Receiver and the Special Master are baseless. *Plata* Br. 36-37 n.8; *Coleman* Br. 49-50. After the court precluded the State from deposing the Receiver, *see* Opening Br. 7, 28 n.9, it categorically held that "both the Plata Receiver and the Coleman Special Master have assumed duties and obligations of a judicial officer and are acting as surrogates of the *Plata* and *Coleman* courts, respectively." JA 1115. It emphasized "[n]othing in this order shall be construed … to permit any party to these proceedings to request formal testimony from the Receiver or the Special Master or any of their staff members *at any stage of these proceedings*." *Id.* (emphasis added). Pressing an objection further would have been futile. *Cf. MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 125 (2007).

interpretation a release order is truly a remedy of last resort, because the three-judge court would specifically determine what level of reduction is necessary to extinguish any violations which remain after all other avenues have been pursued.

In contrast, appellees fail to offer any reading that gives § 3626(a)(3)(E)(ii) independent meaning. Their reading also leads to results incompatible with Congress's intent.

First, under appellees' interpretation, any time crowding is impeding multiple remedial efforts (as it nearly always will, see Opening Br. 33-34 n.11), § 3626(a)(3)(E) will be satisfied and prisoner release may be ordered.

Second, under appellees' interpretation, release can be ordered whenever lesser measures have failed, regardless of whether the release order itself would "remedy" the alleged federal violation. See, *e.g.*, CCPOA Br. 36-38, 45-46; *Plata* Br. 41, 45-46; *Coleman* Br. 47-48. This reading collapses § 3626(a)(3)(E)'s second prong into the first, making the inquiry entirely about "primary causation," and authorizing prisoner release that will achieve no purpose. A prisoner release order that fails to remedy the alleged constitutional violation is not a remedy at all. Indeed, the PLRA requires that any release order must be the narrowest, least intrusive means to "*remedy*" and "*to correct* the violation of the Federal right." 18 U.S.C. §§ 3626(a)(1)(A), 3626(a)(3)(E)(ii) (emphases added); cf. *Plata* Br. 31. Yet, here, if the release order is fully implemented, that will not itself "remedy" or extinguish the alleged constitutional violations. JS1-App. 134a, 143a; see Opening Br. 30, 33-35; *id.* at 34 (Special Master's belief that release of 100,000 inmates would not remedy the alleged violations).

CCPOA, too, claims that no other relief can remedy the constitutional violations because single-judge courts "could at most provide only partial alleviation of the unconstitutional conditions." Br. 18. Likewise, however, as appellees and the district court recognize, the prisoner release order can do no more than that. This is why crowding is, at most, *a* contributory cause rather than "*the* primary cause" of any constitutional violation, 18 U.S.C. § 3626(a)(3)(E)(i) (emphasis added), and why appellees have not shown that "no other relief will remedy" the violations.

Third, appellees concede that it will be necessary for these cases to return to the single-judge courts for more injunctive relief in addition to the release order. *Plata* Br. 41-42; *Coleman* Br. 50-53; CCPOA Br. 44, 50-51; Tr. 2933:23-2940:22; *accord* JS1-App. 134a. That concession reveals that their interpretation of § 3626(a)(3)(E) defeats Congress's intent to make prisoner release orders the "'remedy of last resort.'" JS1-App. 73a; *Coleman* Br. 30. It instead makes a prisoner release order no more than a way station. Congress required the courts to allow less intrusive remedies to run their course and authorized prisoner release only if other, fully-implemented remedies failed to cure federal violations. See *Women Prisoners of D.C. Dep't of Corrections* v. *Dist. of Columbia*, 93 F.3d 910, 929 (D.C. Cir. 1996) (reversing prisoner release order pre-PLRA because "[t]he court … should have determined the constitutional propriety of a population cap *at the margin*—that is to say, after its instructions [regarding lesser injunctive relief] had been complied with"); cf. *Occoquan*, 844 F.2d at 843 (prisoner release order cannot be used "as 'a last resort remedy as a first step'").

III. THE 137.5% POPULATION CAP IS NOT NARROWLY TAILORED.

A. Appellees' Nexus And Narrow Tailoring Arguments Are Fanciful.

In its Opening Brief, the State showed that the district court should be reversed because its population cap of 137.5% of the institutions' design capacity cap lacks any nexus to the alleged Eighth Amendment violations, and fails to satisfy the PLRA's heightened tailoring requirements. Opening Br. 40-53. Appellees' contrary arguments are wrong. See *Coleman* Br. 55-58; *Plata* Br. 49-55; CCPOA Br. 53-56.

1. Appellees first suggest that the 137.5% cap was "justified ... based on the evidence at trial." *Coleman* Br. 55. See also *Plata* Br. 50-51 (claiming "voluminous" supporting evidence). But appellees failed to connect the 137.5% cap to the alleged Eighth Amendment violations against the plaintiff-classes. Appellees' request for a 130% cap was based on policy concerns, not the Eighth Amendment:

- the (unmet) goals of the Federal Bureau of Prisons, see Opening Br. 42-44;
- California government staff's aspirations for implementing a recently enacted construction plan (neither the legislation nor the implementation plans related to Eighth Amendment standards), see *id.* at 43; JA 1786-87, 1793; JA 1783-85.
- a group of wardens' study recommending population reductions to achieve a range of policy concerns (not Eighth Amendment requirements), see Opening Br. 44-45; JA 1794-96; and
- expert testimony based on the above

> recommendations (and unconnected to the Eighth Amendment), see Opening Br. 45-47; *id.* at 47-50 ("reasonableness" testimony).

Accord Plata Br. 49-50 (referring to the same professional standards evidence identified by the State); *Coleman* Br. 55 (same).

2. Appellees claim that the remedy satisfied the PLRA's narrow-tailoring requirements because it resembled the Governor's previous population reduction proposals. See *Plata* Br. 50; *Coleman* Br. 55. But the Governor's public policy goals for California's prison are not coextensive with the actions *necessary* to remedy the alleged Eighth Amendment violations at issue. See, *e.g.*, *Chapman*, 452 U.S. at 351-52 & n.16.

3. Appellees also assert that the State cannot object to the 137.5% cap because it did not propose a different cap. *Plata* Br. 50; *Coleman* Br. 55. But appellees bear the burden of demonstrating that the 137.5% cap is narrowly tailored; they cite no authority that supports shifting that burden to the State.

Appellees' related claim that the "[t]he State never challenged the 137.5% number," *Coleman* Br. 55, ignores the fact that the three-judge court came up with that number *after* trial. JS1-App. 184a. The court did so by splitting the difference between plaintiffs' proposed 130% cap and a 145% figure proposed years before trial by professionals in a context unrelated to Eighth Amendment concerns. *Id.*

Neither appellees nor the district court linked either the 130% or 145% figures to the Eighth Amendment. Appellees claim that the 130% figure is narrowly tailored because State prison officials

recommended it after "consider[ing] the federal standard" and conducting a study. *Plata* Br. 52 n.17. However, the question the State studied was not whether that prison population remedied Eighth Amendment violations, but how best to implement new construction plans. JA 1786, 1794-96.[15]

Similarly perplexing are appellees' arguments that the 145% cap proposed by a professional panel as "maximum operable capacity" is a relevant constitutional benchmark. *Plata* Br. 53. The recommendation had nothing to do with the Eighth Amendment. JA 1759-63, 1771 n.3; Opening Br. 44-45; JS1-App. 59a, 182a-184a. It sought to achieve policy goals. Opening Br. 44-45. By including those goals in the recommended population cap, the authors' professional, not constitutional, recommendation was inflated, an error that infected the decision below.

4. Independent of their failure to show that the 137.5% cap is narrowly tailored, appellees' arguments that a systemwide population cap is appropriate also fall short.

Preliminarily, appellees incorrectly claim that the State "rejected relief focused solely on the classes" and "argu[ed] that the three-judge court should *exempt* mentally ill prisoners from any population

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[15] The court states: "we cannot determine from the evidence whether the national standard selected by the Governor's strike team represents a judgment regarding the mandates of the Constitution or whether it merely reflects a policy that ensures desirable prison conditions." JS1-App. 183a-184a. There was *no indication or evidence* that it was the former. Professional recommendations are not a proxy for Eighth Amendment requirements. *E.g.*, *Chapman*, 452 U.S. at 348 n.14; *cf. Bobby* v. *Van Hook*, 130 S. Ct. 13, 16-17 (2009) (per curiam); *id.* at 20 (Alito, J., concurring).

reduction order," but appellees (like the court below) fail to identify any such statement. *Coleman* Br. 56 (citing JS1-App. 236a). They distort the State's observation that release of seriously mentally ill inmates was likely to create special dangers because of their recidivism rates, which is relevant to the PLRA's public-safety inquiry. *Plata* D.E. 2031, ¶¶ 109-111; JA 2479-80, 2538-39.

Next, appellees claim that systemwide relief satisfies the narrow tailoring requirements because the district court found that Eighth Amendment violations exist throughout the California prison system. *Plata* Br. 54 (citing JS-1 App. 171a). Below, however, the State showed that individual institutions were differently situated as to any constitutional violations at the time of trial, Opening Br. 50-53, and its showing was based on more than "one sentence from the cross-examination of one of plaintiffs' experts." *Plata* Br. 53.

For instance, plaintiffs failed to present evidence specifying the conditions at particular facilities, the causes of those conditions, or what particular remedies would be necessary. See, *e.g.*, JA 2117 (expert opinion was based on visits to only eight of 33 prisons); *id.* at 2122-25, 2127 (lack of familiarity with care at particular institutions); *id.* at 2155 (expert only visited one institution but did not evaluate its care); *id.* at 2179 (expert issued reports without visiting the prisons).

Moreover, the OIG reports—upon which appellees otherwise rely, see *Plata* Br. 14, 37—have long showed variable conditions across the system. Although the Receiver's Turnaround Plan is still being implemented, multiple facilities have already reached levels of "moderate adherence" (75% or greater) overall to the Receiver's policies and

procedures, as well as "high adherence" (85% or greater) on key individual measures.[16] Moreover, the population of the three facilities referenced in note 16 ranged between 177.9% and 193% of design capacity at the time of the order on appeal. *Monthly Report of Population* at 2; see also Opening Br. 42-43 (explaining meaning of "design capacity" in California system). This demonstrates both that the cap lacks the requisite nexus to the prison conditions that exist systemwide, and that crowding is not closely related to (let alone "primarily causing") Eighth Amendment violations.

5. Among the legal deficiencies of the 137.5% figure is its overbreadth. See Opening Br. 49-52; see also Tr. 2915:16-2916:2 (Judge Karlton expressing concern about "protecting [only] the class members. And maybe that's the appropriate thing to do. ... But it would be … difficult for me to say [']Yes, and the hell with everybody else.[']").

In response, appellees rely upon the district court's assertion that the relief ordered is the "narrowest ruling possible" because it gives the State "flexibility" to determine how to implement the systemwide

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[16] *See*, *e.g.*, Office of the Inspector General ("OIG"), *Central California Women's Facility: Medical Inspection Results* 1-2 (Apr. 2009) (77.9% overall score, with high adherence scores for urgent services, staffing, pharmacy services and other categories, and scores above 80% for health screening, emergency services, and diagnostic services); OIG, *Valley State Prison for Women: Medical Inspection Results* 1-2 (May 2010) (80% overall score and high adherence scores on emergency services, health screening, pharmacy services, staffing and other benchmarks); OIG, *California Institution for Men: Medical Inspection Results* 1-2 (Oct. 2010) (81.4% overall score and numerous individual high adherence scores).

population cap. *Plata* Br. 55-56; see *Coleman* Br. 57-58; *accord* JS2-App. 3a. That reliance is misplaced.

First, granting a defendant some leeway in implementing sweeping relief does not insulate an overbroad injunction from review. Rather, as one PLRA sponsor explained, a population cap is "the most pernicious form of judicial micromanagement." 141 Cong. Rec. S14407, 14414 (daily ed. Sept. 27, 1995) (Sen. Dole). Put differently, a court ordering a population cap is necessarily micromanaging prison operations.

Under the PLRA and this Court's precedents, injunctive relief must be narrowly tailored to remedy the specific violations found. 18 U.S.C. § 3626(a)(1)(A); *Miller* v. *French*, 530 U.S. 327, 347 (2000) (injunction under the PLRA must be "precisely tailored"). And such relief must respect the states' interests in operating their prisons without excessive judicial meddling. See, *e.g.*, *Lewis* v. *Casey*, 518 U.S. 343, 362-63 (1996); *Chapman*, 452 U.S. at 351-52. A court cannot deprive a state of flexibility in remedying constitutional violations separate from crowding by capping the state's prison population unless doing so is both the only way to achieve constitutional compliance and a direct, focused response to those violations. See, *e.g.*, *Jenkins*, 515 U.S. at 90-92, 97-98; *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 410, 417 (1977) (noting the "vital national tradition" of local autonomy while holding that a systemwide remedy was not "tailor[ed] commensurate to the … specific violations"); *Occoquan*, 844 F.2d at 835 n.14 (rejecting claim "that a population cap represented a less intrusive remedy than a more detailed order").

Neither appellees nor the courts can avoid the requirement that a prisoner release order be

narrowly tailored by giving defendants discretion as to the precise manner in which they implement the mandatory population reduction.

Second, appellees' claim that the State has flexibility is mistaken. A population cap "directly implicates decisions with which the political process is charged," including "how many prisons to build and how large to build them," and which convicts to house in them. *Occoquan*, 844 F.2d at 842-43; *accord Chapman*, 452 U.S. at 350-51 & nn.15-16. Here, moreover, appellees deny reality by suggesting that the order on appeal is not accurately viewed as a "prisoner release order" because "the court left it to the State to determine whether the population should be reduced at all." *Plata* Br. 56; see also *id.* at 58; *Coleman* Br. 32. A population cap undoubtedly constitutes a "prisoner release order." *E.g.*, JS2-App. 2a; 18 U.S.C. § 3626(g)(4). All parties and the district court recognized that true population reduction would occur, Tr. 2988:8 (Judge Reinhardt: "We'll not be building prisons."); JS1-App. 195a-196a ("plaintiffs' … proposed population reduction measures" included "early release"); and the proposal that the State submitted under duress had to include outright release to satisfy the court's requirements. JS2-App. 26a, 32a, 63a-64a, 68a-70a.

Put simply, the State cannot implement a systemwide 137.5% cap without reductions across CDCR's facilities. Thus, the State must reduce the population of high-performing facilities that are likely meeting the requirements of the Eighth Amendment despite crowding. See *supra* at 35 n.16. As a practical matter, the State lacks flexibility; it must reduce its population without regard to whether those reductions correspond to improvements in the particular facility's constitutional compliance.

Indeed, because the population cap is permanent, see JS2-App. 6a, the State will have little room to maneuver for the foreseeable future. See *Jenkins*, 515 U.S. at 99 (discussing problems with open-ended relief); 141 Cong. Rec. at S14419 (Sen. Abraham) (expressing concern about open-ended injunctive relief resulting from consent decrees). Those repercussions may be profound. See Tr. 2889:1-3 (Judge Karlton: "[T]he reality [is] that if we release people, it will have a very profound effect … upon the counties' ability to function."); *id.* at 2887:21-23 (same).

Each time the State must refuse prisoners whose incarceration would push the population over the cap, its social safety net will be strained and the additional burden will fall on already overwhelmed local correctional facilities and community services. With any significant increase in crime, the State's lack of flexibility could have significant public safety effects because inmates that California decided to confine will have nowhere to go. Indeed, despite appellees' reliance on the Governor's Emergency Proclamation, *Plata* Br. 4-6; *Coleman* Br. 1, they ignore its most relevant provisions. The proclamation recognizes that the State's local jails are overcrowded, that 20 of 58 counties operate under court-imposed population caps, and that "[m]ost of California's jail population consists of felony inmates, but when county jails are full, someone in custody must be released before a new inmate can be admitted." JA 1703-04, *reproduced in Coleman* Br., App-21.

Finally, the *Coleman* appellees' attempt (at 57) to portray the facility-specific cap Judge Karlton imposed as moot is baseless and conflicts with appellees' longstanding position that certain facilities'

populations must be subject to lower caps than the systemwide cap imposed. See Tr. 2915:12-15 ("we are urging 130 percent … system-wide, but that the specialized programs have to be below their percentage."). In sum, there is far less flexibility than appellees suggest.

6. CCPOA urges this Court not to address the tailoring issues presented here because the three-judge court might revisit the remedy and tether it to the alleged Eighth Amendment violations. Br. 59. This suggestion, while revealing, lacks any basis in the record or in current circumstances in the trial courts. Instead, it is discredited by the actions of the three-judge court, which:

> (1) *sua sponte* sought to cure appellees' deficient case for a 130% cap by ordering a quasi-legislative compromise at 137.5%, *supra* at 32;
>
> (2) invited plaintiffs to "ask this court to impose a lower cap," JS1-App. 184a, and;
>
> (3) intimated that a population cap "at or near only 100% design capacity" ultimately may be required, *id.* at 176a, despite this Court's clear holding that double-celling is not a constitutional violation. *Chapman*, 452 U.S. at 347-51.[17]

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[17] Indeed, without explaining its nexus to constitutional violations, CCPOA argues that a 90% cap may be necessary. Br. 53; *id.* at 54 (invoking an expert's claim that a "*5% vacancy rate is necessary* to providing adequate care") (emphasis added); *cf. Coleman* Br. 55 (erroneously claiming "'design capacity' and "double-celling" are distractions" here).

B. The Court's Order Does Not Give "Substantial Weight" To Adverse Impacts On Public Safety.

The three-judge prisoner release order failed to give "substantial weight to an adverse impact on public safety," 18 U.S.C. § 3626(a)(1)(A). Appellees' contrary contentions do not cure this serious deficiency. See Opening Br. 53-54; Def.-Intervenors' Br. 21-28; *Amici* Louisiana et al. Br. 23-33.

First, appellees and the district court are wrong to suggest that it is the State's burden to show that population reduction cannot be accomplished safely. See JS2-App. 4a; *Coleman* Br. 59 (suggesting the State had to "bring forth … evidence" showing a lack of safety). The PLRA's "public safety" requirement is one specific component of plaintiffs' burden to demonstrate that the traditional balance of the hardships and public interest requirements favors issuance of the relief requested. See *Monsanto Co.* v. *Geertson Seed Farms*, 130 S. Ct. 2743, 2756 (2010).

Second, the court compelled the State to propose reduction measures, which the State *did show* would implicate significant public safety concerns. See *supra* at 37-38. To prevent increased crime under the court-mandated population reduction measures, the State would be required to make a substantial investment in "evidence-based rehabilitation programming," JS1-App. 241a-248a—"*i.e.*, programs that research has proven to be effective in reducing recidivism," *id.* at 214a; see *id.* at 200a; see *Plata* D.E. 1708, ¶¶ 135-136 (plaintiffs' expert's reliance on the alleged availability of mental health rehabilitation programs to prevent re-offense, while stating these "programs are currently underfunded"); *id.* ¶¶ 141-145 (outlining "improvements the State should make to its provision of care for mentally ill

inmates released to parole"). Appellees' *amici*'s lengthy discussion of such programs strongly suggests their necessity. See, *e.g.*, Br. of *Amici* Center on the Administration of Criminal Law et al. 2, 6-7, 29, 33; ABA Br. 9, 13, 14-16; Corrections & Law Enforcement Personnel Br. 31.

Nonetheless, appellees suggest that if the court did not specifically order those investments (even if they are necessary to guarantee safety) and if the State were theoretically capable of making them, the order satisfies the PLRA. Their view is that the State is to blame if it fails to implement programs necessary to ensure safety. *Plata* D.E. 1766, at 5 (the lack of rehabilitation programs should not concern the court because it "is the state's responsibility to provide funding for such programs, and it is the state's failure to do so that has caused this dearth of programs"); Tr. 2892:4-2894:17 (appellees' counsel: "I personally think [providing additional funding] would be a rational thing to do if the State is concerned about public safety."); *id.* at 2909-2911. In fact, when Congress required a three-judge court to give "substantial weight" to "any adverse impact on public safety," 18 U.S.C. § 3626(a)(1)(A), it plainly did not intend the Court to make the determination in a theoretical world.

Third, appellees acknowledge that no matter what investments are made, individuals will commit crimes during the period they otherwise would have been in prison. See JS1-App. 201a. Appellees and the district court minimize these effects by claiming that early release "affects only the timing and the circumstances of the crime … committed by a released inmate—*i.e.*, whether it happens a few months earlier or a few months later." *Id.* That odd argument rests on the false premise that time in

prison and the aging of the prisoner have no effect on recidivism. But see Tr. 1474:1-6, 3122:8-3124:7 (recidivism risk falls as inmates age); CDCR, *2010 Adult Institutions Outcome Evaluation Report* 15 & fig.6 (Oct. 11, 2010) (same).

In all events, this fatalism is irrelevant to the victims of crime and inconsistent with the PLRA, which asks whether the *prisoner release order* will affect public safety, not whether release of an inmate at any point will do so. See Opening Br. 53; *Amici* Louisiana et al. Br. 27-32; 141 Cong. Rec. at S14418 (Sen. Hatch) (stating that caps lead to "vicious crimes committed by individuals who should have been locked up"); 141 Cong. Rec. S2648, S2649 (daily ed. Feb. 14, 1995) (Sen. Hutchison) (absent population caps, "we could [imprison] people who … would not be going out on the streets of Texas murdering, raping, and injuring the people of my State"); see also *Samson* v. *California*, 547 U.S. 843, 854 ("parolees ... are most likely to commit future criminal offenses"); cf. JS1-App. 201a.

CONCLUSION

For these reasons and those stated in the opening brief, the Court should reverse the judgment for lack of jurisdiction and dismiss the three-judge court. In the alternative, the Court should reverse the judgment of the district court.

Respectfully submitted,

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