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

BRIEF OF *COLEMAN* APPELLEES

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QUESTIONS PRESENTED

1. Whether the Court's jurisdiction under 28 U.S.C. § 1253, which extends only to orders "granting or denying … an interlocutory or permanent injunction" rendered "by a district court of three judges," authorizes direct review of a single-judge court's decision to convene a three-judge panel, which does not grant or deny injunctive relief.

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

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

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JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1253 to review the three-judge court order granting prospective injunctive relief. Contrary to the State's assertion, the Court lacks jurisdiction to review the single-judge court order granting the request to convene a three-judge court.

STATEMENT OF THE CASE

Every day, psychotic, suicidal, and other severely mentally ill prisoners languish in horrific conditions in California's prisons. Amid what the lead appellant, Governor Schwarzenegger, has proclaimed to be an emergency overcrowding crisis, with acute shortages of staff, hospital beds, and crisis cells, mentally ill prisoners have been found hanged to death in holding tanks where observation windows are obscured with smeared feces, and discovered catatonic in pools of their own urine after spending nights locked in small cages.

These grisly examples come not from the original record in this suit, filed twenty years ago, but from the expansive record of current prison conditions during a 2008–2009 trial before a three-judge district court convened under the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626. After a three-week trial, at which dozens of witnesses testified about current prison conditions, the court determined that, until California addresses its unprecedented overcrowding crisis, the State will not be able to resolve the long-standing constitutional violations found by the single-judge district courts in *Coleman v. Schwarzenegger* and *Plata v. Schwarzenegger*. Those courts previously determined that California

is not providing its inmates with constitutionally adequate mental health care (*Coleman*) or constitutionally adequate medical care (*Plata*). In fact, California's failure to provide adequate care to seriously mentally ill inmates has persisted through *14 years* of *post-judgment* proceedings. Despite more than 70 previous court orders (*see* Appendix A), remedial plan after plan has been fatally undermined by severe overcrowding. Whatever modest temporary improvements the State may have made, it has failed to remedy the entrenched constitutional violations. And overall conditions are getting worse.

The three-judge court thus required California to take whatever steps it deems necessary to ensure that, within two years, its prison population is within 137.5% of its prison facilities' total design capacity as determined by the State. The court determined that this overcrowding limit is necessary to allow the State to bring its correctional facilities into constitutional compliance. The remedy is expressly authorized under the PLRA, and the court's findings of fact are supported by overwhelming record evidence.

A. The Statutory Scheme

Congress enacted the PLRA to establish standards for entering and terminating prospective relief in civil actions challenging prison conditions. *See Miller v. French*, 530 U.S. 327, 333 (2000). The principal target of the PLRA was long-term structural injunctions that left day-to-day prison management decisions in the hands of federal judges with no end in sight. *See* 141 Cong. Rec. S14,419 (1995) (Sen. Abraham) (the PLRA addresses the

problem of "continuous litigation and intervention by the court into the minutiae of prison operations"). The statute also addresses "prison release orders" and expressly contemplates that such orders may be required in certain circumstances. 18 U.S.C. § 3626(a)(3)(A). A "prisoner release order" is a term of art defined expansively to include any order that "has the purpose or effect of reducing or limiting the prison population." *Id.* § 3626(g)(4).

A "prisoner release order" may be entered only by a three-judge district court. *Id.* § 3626(a)(3). A single judge overseeing a prison case may convene a three-judge court if the single judge finds that (1) a previous order "for less intrusive relief ... has failed to remedy" the constitutional violation; and (2) the defendant has had a "reasonable amount of time" to comply with the "previous court orders." *Id.* § 3626(a)(3)(A). In turn, a three-judge court may enter a "prisoner release order" if it finds, by clear and convincing evidence, that (1) crowding is the "primary cause" of the violation; and (2) "no other relief will remedy" that violation. *Id.* § 3626(a)(3)(E). The order must be "narrowly drawn," "extend[ ] no further than necessary," and be "the least intrusive means necessary to correct" the constitutional violation. 18 U.S.C. § 3626(a)(1).

B. Failed Efforts To Remedy The Constitutional Violations

1. Twenty years ago, prisoners suffering from serious mental illness (such as schizophrenia, major depression, and bipolar disorders) filed suit because California was failing to provide them with constitutionally adequate mental health care. After a contested trial, the district court determined that

the State prison system violated the Eighth Amendment. *Coleman v. Wilson*, 912 F. Supp. 1282, 1298 (E.D. Cal. 1995). It found that California's prisons were "seriously and chronically understaffed"; that there were "significant delays in, and sometimes complete denial of, access to necessary medical attention"; and that the State lacked a minimally adequate program to identify and treat prisoners with severe mental illness. *Id.* at 1296–97, 1306–15.

2. From 1995 until 2007, the district court tried every conceivable means to prompt the State into ending the constitutional violations. The court issued "well over seventy orders concerning the matters at the core of the remedial process." JS1-App. 38a–39a; *see* Appendix A.[1] It also appointed a Special Master, who over the course of a decade and a half filed 21 monitoring reports and 58 other reports. JS1-App. 36a–38a; J.A. 758–814; *Coleman*-D.E. 3677.

None of these efforts was successful. Although the court's orders initially produced some hard-won progress, inspiring "hopes of eventually ending *Coleman*," the "steadily rising overall population" had caused "earlier gains" to "dissipate[ ]." J.A. 482.

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[1] Cites to "J.A." refer to the Joint Appendix filed by the parties in this case. "JS1-App." refers to appellants' appendix in Case No. 09-416. "JS2-App." refers to appellants' appendix to their Jurisdictional Statement in this case. The district court records in *Coleman*, No. CIV-S-90-0520-LKK (E.D. Cal.) and *Plata*, No. C01-1351-THE (N.D. Cal.) are cited by docket entry (*i.e.* "*Coleman*-D.E. __"; "*Plata*-D.E. __"). Trial exhibits are cited by the first letter of the party and by number (*i.e.*, "D-__"; "P-__").

By October 2006, California's prisons had reached over 200% of design capacity, and sustained overcrowding had reduced efforts to resolve the constitutional violations into a Sisyphean task. JS1-App. 49a, 60a; *see also* www.rbg-law.com/selected-coleman-plata-trial-materials (website of record materials, including photographs of overcrowded prison conditions).

3. In 2006 and 2007, the Special Master issued reports supporting the conclusion that resources that were "absolutely essential for the provision of adequate mental health services" were "impacted seriously by overcrowding." J.A. 476; *see also* J.A. 2011–2012 (15th Report), 2016–2018 (16th Report). The Special Master found that the lack of space for mental health treatment—clinicians' offices, rooms for interviews, and group treatment facilities—poses a "huge problem." J.A. 479. As the Special Master determined, the State's prison facilities are "hopelessly inadequate" because they are "designed to meet just half of anticipated medical needs"—without any space to accommodate mental health treatment. J.A. 477. Overcrowding made existing problems even more intractable, forcing inmates to spend "larger chunks of their days" in tighter quarters and on lockdown status, "escalat[ing] the incidence of mental illness and exacerbat[ing]" preexisting illnesses. J.A. 479; *see also* J.A. 478 ("growing problems reflect the impact of overcrowding").

The Special Master also found that, after "stalled and ineffectual efforts," whatever progress had been achieved in securing specialized beds for the "most seriously mentally ill" had evaporated due

to "severe overcrowding." J.A. 479–480. The shortfall had left large numbers of acutely ill patients with no place for treatment, causing "unmet needs [to] spiral higher and higher." J.A. 481; *see also* J.A. 429 (prison official testifying that lack of mental health beds has reached crisis levels). Because the system does not work, "harassed clinicians often choose not to undertake the frustrating struggle" for bed referrals that often see no action "for weeks or months," further increasing the numbers of psychotic patients "trapped in" outpatient programs "that cannot meet their needs." J.A. 481. Indeed, "nearly 12 years after the determination that mental health services" in California's prisons "were egregiously unconstitutional, hundreds certainly, and possibly thousands" of California's "inmates/patients … are still looking for beds at the level of treatment their mental illness requires." *Id.*

The Special Master likewise concluded that staffing is an "absolutely essential ingredient" to ending the constitutional violations. J.A. 482. The State increased staffing in the early 2000s, but "the growth of the resource" did not match "the rise in demand" and "earlier gains" dissipated. *Id*. Although the functional vacancy rate for clinicians fell to between 2% and 7% in 2003, by 2007 it had spiked to 20%. J.A. 482–483. And the vacancy rate among top managers reached a "devastating 70%." J.A. 484.

Given the lack of space, beds, and staff, the Special Master found it "easy to conclude" that the key step to fixing ongoing constitutional violations is "a reduction in the overall census." J.A. 486.

"[M]any of the achievements" of the prior decade "succumbed to the inexorably rising tide of population, leaving behind growing frustration and despair." J.A. 489. The "expanding demand for services resulting from the bulging population" caused such a "deterioration of mental health staffing" that California lacks the "clinical resources" necessary "to meet the needs of some 25 to 30 percent of" mentally ill inmates. J.A. 2016–2017; J.A. 486. The Special Master estimated that an overall reduction of 50,000 prisoners would alleviate persistent staffing shortages, while noting that more clinical staff in specialized mental health units would be required to treat prisoners requiring more intensive levels of care. J.A. 486–487.

4. The State did not object to the Special Master's conclusions. *See Coleman*-D.E. 1772, 2067. Nor could it have reasonably done so. California's Governor had already declared a "Prison Overcrowding State of Emergency." *See* Appendix B; J.A. 1693–1709. The Governor recognized that "immediate action is necessary to prevent death and harm caused by California's severe prison overcrowding." JS1-App. 61a. All 33 of California's prisons "are now at or above maximum operational capacity, and 29 of the prisons are so overcrowded" that more than 15,000 prisoners are being held "in conditions that pose substantial safety risks." *Id.* Overcrowding has overloaded the prison infrastructure. J.A. 1694–1695. Indeed, by the time of the Governor's proclamation, the suicide rate within the prisons had approached "an average of one per week." JS1-App. 61a. The crisis, the Governor declared, "gets worse with each passing

day." *Id.* The Governor's emergency declaration remains in effect.

C. The Decision To Convene A Three-Judge Court

1. In November 2006, following the Governor's emergency declaration, the *Coleman* plaintiffs filed a motion to convene a three-judge court under 18 U.S.C. § 3626(a)(3). The district court held a hearing in December 2006 and granted a six-month continuance, offering the State an opportunity to demonstrate progress and outline measures it would take to improve prison conditions. JS1-App. 63a. That opportunity was wasted.

In June 2007, the district court reconvened proceedings and found that its myriad orders for "less intrusive relief" over the last 12 years had "failed to remedy" the constitutional violations. JS1-App. 65a, 74a, 288a–304a. The court found that California's "mental health care delivery system has not come into compliance with the Eighth Amendment at any point since this action began." JS1-App. 294a. Backsliding had coincided with crisis-level population growth, leading to a 33% rate of "unmet needs" among nearly 33,000 mentally ill inmates. JS1-App. 67a–69a, 296a. The results, the court found, were "unconscionable." *Id.*

2. The State did not contend that it had remedied the constitutional violations. J.A. 446–447. It admitted ongoing deficiencies in mental health care but blamed them on "management issues" and asked for more time. J.A. 1666. The State pointed to plans for prison and jail construction, rehabilitative programs, and parole reforms. JS1-App. 283a; J.A.

458–459, 465–467. But the court found that the State's plans, even assuming they could be timely implemented, would be ineffectual in the face of severe overcrowding. For example, the construction plan, AB 900, authorized the addition of 12,000 new beds by 2009—but the State's own projections showed that it would be short thousands of beds. JS1-App. 300a–301a. Moreover, AB 900 "utterly fail[ed] to address the critical question of staffing," and the State did not explain how it would obtain the additional staff needed to handle the increased prison population. JS1-App. 301a; J.A. 1971. The court found that the State's plan would "aggravate" rather than "alleviate" the problem. JS1-App. 301a.

3. With "extreme reluctance but firm conviction," the court determined that a "reasonable time" for compliance had passed, and ordered the convening of a three-judge court. JS1-App. 74a, 304a. On July 26, 2007, the Chief Judge of the Ninth Circuit convened a three-judge court. JS1-App. 69a. Contrary to the suggestions in its brief, the State raised no objections to the composition of the panel. *See* State Br. 25 nn. 7–8.

D. Current Prison Conditions

1. In 2007, the parties began initial discovery into current prison conditions. This included undertaking prison tours in which both sides' experts observed housing and treatment areas, reviewed files, and interviewed prisoners, staff, and clinicians. *See* J.A. 1863, 1866–1897; J.A. 492–626, 627–691; *Coleman*-D.E. 3231-10. In late 2007, the three-judge court stayed discovery and referred the matter to a settlement referee, affording the State another opportunity to avoid judicial intervention. JS1-App.

69a–70a; *Coleman*-D.E. 2620; J.A. 1111–1113. These efforts proved unsuccessful.

2. In 2008, plaintiffs sought to resume discovery into current prison conditions. In response, the State sought a protective order *prohibiting* plaintiffs' experts from conducting any further prison tours. According to the State, updated inspections were "irrelevant" and "would constitute a waste of the parties' time and resources." J.A. 1182. In addition, the State filed motions *in limine* to exclude current evidence of staffing shortages, housing conditions, inadequate suicide prevention measures, and inpatient psychiatric hospital bed shortages. *Plata*-D.E. 1559, 1564, 1566, 1576.

Over the State's objection, the three-judge court allowed additional expert tours to evaluate current conditions. *See* J.A. 1864–1865, 1898–1910; J.A. 492–626, 692–751; *Coleman*-D.E. 3231-9, 3231-13, 3231-15. The parties acquired extensive information about the current state of California's prisons, analyzing electronically stored information from over 80 state officials and deposing 16 officials with responsibility for overseeing California's prisons.

The State then moved for dismissal and/or summary judgment. *Plata*-D.E. 1479. Significantly, the State did not argue that the single-judge courts had not given it sufficient time to comply with previous court orders. *See id.* at 10–16. Plaintiffs opposed both motions and presented overwhelming evidence of continuing constitutional violations. *Coleman*-D.E. 3054–3061, 3063, 3064.

3. On November 3, 2008, the three-judge court denied the State's motion for dismissal and/or for

summary judgment, *see Coleman*-D.E. 3260, and, on November 10, 2008, denied the motions *in limine*. J.A. 1688–1690; JS1-App. 70a. The court clarified that the PLRA did not authorize it to re-adjudicate the existence of the underlying constitutional violations found by the single-judge courts. If the State wanted to argue that violations no longer existed, it should direct that argument to the single-judge courts and seek relief under Federal Rule of Civil Procedure 60(b)(5). J.A. 1691. The three-judge court nonetheless made clear that the parties could introduce evidence of current prison conditions relevant to whether section 3626(a)'s requirements were satisfied, including (1) whether crowding is the "primary cause" of constitutional violations; (2) whether "other relief" will remedy those violations; and (3) the impact of a release order on public safety. *See* J.A. 2338–2339.

E. The Three-Judge Court's Findings

The three-judge court held a three-week trial, reviewing hundreds of exhibits and testimony from nearly 50 expert and percipient witnesses. JS1-App. 70a. On February 9, 2009, the court issued a tentative ruling, finding that plaintiffs had "presented overwhelming evidence that crowding is the primary cause of the underlying constitutional violations." J.A. 1508. The court then waited six months, giving the State another opportunity to avoid judicial intervention. JS1-App. 70a. But the State made no progress and declined to negotiate a settlement.

On August 4, 2009, the three-judge court issued a 183-page opinion and order. The opinion addressed each of the PLRA's statutory requirements, carefully

cataloging the evidence and finding that (1) overcrowding is the "primary cause" of the Eighth Amendment violations; (2) "no other relief" will remedy those violations; (3) a 137.5% overcrowding limit is a necessary and narrowly tailored remedy; and (4) the overcrowding limit will not adversely impact public safety. JS1-App. 1a–256a.

1. Overcrowding Is The Primary Cause Of Ongoing Violations

1. The court accepted the State's argument that "primary cause" in section 3626(a)(3)(E) means "the cause that is 'first or highest in rank or importance; chief; principal." JS1-App. 78a. The State did not dispute the notion that overcrowding was *one* cause "imped[ing]" a remedy of these ongoing constitutional violations; the State argued only that overcrowding was not the "primary" cause. *Id.* Applying the State's own-proposed definition, the court found that "[t]he only conclusion that can be drawn from the wealth of clear and convincing evidence … is that the unconstitutional denial of adequate ... mental health care ... is caused, first and foremost, by the unprecedented crowding in California's prisons." JS1-App. 140a–141a, 143a.

2. This determination was well supported. Four of the "nation's foremost prison administrators" testified that overcrowding was the primary cause of the continuing constitutional violations. JS1-App. 81a, 141a. The current head of corrections in Pennsylvania, Jeffrey Beard, testified that "the biggest inhibiting factor right now in California being able to deliver appropriate mental health and medical care is the severe overcrowding." JS1-App. 82a, 127a–128a. The former head of Texas' prisons,

Doyle Wayne Scott, testified that "[e]verything revolves around overcrowding," which he called the "primary cause of the ... mental health care violations in California prisons." JS1-App. 127a. The former head of corrections in Pennsylvania, Washington, and Maine, Joseph Lehman, testified that crowding is the "primary cause of the inability to provide [mental health] services." *Id.* And the prior head of California's prisons, Jeanne Woodford, testified that overcrowding is "extreme, its effects are pervasive and it is preventing the Department from providing adequate mental and medical health care to prisoners." JS1-App. 84a. She "absolutely believe[d] the primary cause is overcrowding." JS1-App. 126a.

In addition, plaintiffs presented the testimony of Dr. Pablo Stewart and Dr. Craig Haney, prominent experts with decades of experience in correctional mental health, who conducted interviews with patients and clinicians, and reviewed patient files at California's prisons in 2007 and 2008. J.A. 492–626, 627–691, 692–751. They found that patients are exposed to ongoing risks of injury, death, and inadequate mental health care because the system is "plagued by severe overcrowding." JS1-App. 131a–133a. The State's own expert, Dr. Ira Packer, who also toured California's prisons in 2007 and 2008, concluded that overcrowding is the primary cause of deficient mental health care in California's prison "reception centers," JS1-App. 138a, and that the State's failure to plan for the number of acutely mentally ill inmates caused inadequacies in the overall system. JS1-App. 138a–139a.

The experts who toured the prisons witnessed symptoms of severe overcrowding, including the conversion of every available space into emergency housing crammed with bunks two and three levels high. The experts observed acutely ill patients held in makeshift spaces such as cages, supply closets, and laundry rooms, awaiting transfer to proper crisis cells. J.A. 2090–2092, 2108, 2193; J.A. 667–669; J.A. 521–525, 541–543, J.A. 554–555, 559–560; J.A. 1880–1881, 1903–1905.

Hard statistics further supported the experts' conclusions that, because of overcrowding, California is unable to provide inmates with adequate mental health care. For example, evidence showed that overcrowding has caused an increasing number of *preventable* suicides. Indeed, not only were the raw numbers of preventable suicides increasing but the suicide *rate* increased to 25.1 per 100,000 inmates—almost double the national average prison suicide rate of 14 per 100,000. JS1-App. 123a; J.A. 1779–1781. Similarly, the percentage of suicides involving "inadequate treatment or intervention" rose sharply from 45% in 2002 to 72.1% in 2006, as overcrowding spiked. JS1-App. 124a.

Beyond the statistics, the real-life details of California's prisons are horrific. For example, prison officials referred a 34-year-old suicidal male to a crisis bed but, because no bed was available, he was left in an administrative segregation cell where he hanged himself. J.A. 734–736, 1838–1847. Similarly, two prisoners were placed on suicide watch in "acute psychiatric program unit cells" that had been identified, years before, as needing a simple fix to remove attachment points that could be

used to affix a noose. *See* J.A. 1848–1853, 1854–1857, 2317–2319. The retrofits were never performed because they required "remov[ing] inmates from the cells" and there was no place to which to remove them. J.A. 2315–2316. Both prisoners hanged themselves. J.A. 2313–2314.

3. Record evidence also demonstrated that, because of space and staff shortages, overcrowding has caused mentally ill inmates to endure degrading, inhumane, and unconstitutional conditions. The court found that, while waiting for crisis beds, inmates were transferred back and forth between "'dry cells,' which are 'tiny, freestanding upright cages with mesh wiring surrounding them (and no toilet),' during the day" and "'wet cells,' which are holding cells that have toilets, at night." JS1-App. 98a–99a. One prisoner was found "completely unresponsive, virtually catatonic" in a "dry cell," standing in a pool of urine, with a fixed gaze and unable to make eye contact. J.A. 592–593.

The lack of adequate space to house and treat suicidal inmates has also caused a cascading shortage of space for inmates who are acutely ill but not suicidal. *See* J.A. 2406–2409, 2410–2411; J.A. 1880–1882, 1902–1903. Acutely ill inmates, waiting for transfer to hospital beds, are housed for months in harsh administrative segregation units, isolated and with only limited access to mental health services, a practice that the State's own expert conceded is dangerous and increases the risk of suicide. *Coleman*-D.E. 3201 at 66–69; J.A. 528–539, 550–553, 576–580, 2405–2413. Patients who should be in psychiatric hospital beds remain in crisis beds, causing patients in crisis to remain in housing units

where they fail to receive adequate treatment. JS1-App. 122a. The system continues to spiral downward, "intensify[ing] the acuity of mental illness among inmates." JS1-App. 121a. As testimony from State witnesses confirmed, overcrowding is straining the mental health system to a breaking point. *See* J.A. 2324–2325 (shortages of inpatient placements), 2313–2319 (recent suicides in acute mental health unit), 2327–2329 (turning patients away from psychiatric hospital), 2330–2331 (waiting lists), 2333–2336 (efforts to recruit and hire mental health staff), 2341–2342 (unavailability of treatment space), 2344–2347 ("terribly overcrowded" conditions affecting mental health care), 2364–2365 (staffing shortages).

4. Against this clear and convincing evidence, the only evidence the State offered was Dr. Packer's opinion that the primary cause of the ongoing constitutional violations was not overcrowding but rather the State's inadequate planning for the number of acutely mentally ill inmates. JS1-App. 138a–139a. But the three-judge court found that purported distinction illusory. JS1-App. 139a. And even Dr. Packer testified that overcrowding was the primary cause of deficient mental health care at the State's twelve prison "reception centers," JS1-App. 86a, J.A. 1892, which at any given time hold approximately 20% of the total prison population. P-135.

2. No Other Relief Will Remedy The Violations

Having found that overcrowding was the "primary cause" of the ongoing constitutional violations, the court reviewed the State's proposed

alternative remedies to determine whether the violations could be "resolved in the absence of" an order limiting overcrowding. JS1-App. 145a. It found clear and convincing evidence that they could not.

1. Several remedies available in theory were unavailable in practice. Constructing new prisons could eliminate overcrowding, but the State "ha[d] not suggested" that it had any plans "to construct additional prisons in the near future." JS1-App. 146a. Like the single-judge court, the three-judge court rejected the State's prior construction program, AB 900, as a viable alternative. The State failed to provide funding or necessary legislative fixes for the AB 900 construction program to begin. JS1-App. 147a. And, even if funded, designing and constructing new facilities would take many years. JS1-App. 147a–151a.

Similarly, the court found that, although hiring additional mental health clinicians might ameliorate some problems, the State "d[id] not suggest" that this would work in practice. JS1-App. 154a. Even with more staff, severe space and bed shortages resulting from overcrowding would make it impossible to resolve the constitutional violations. JS1-App. 154a–155a. Moreover, experience in both *Coleman* and *Plata* had shown that "crowding itself seriously impedes the recruitment and retention" of qualified staff because overcrowding leaves "almost nowhere" for staff to work. JS1-App. 155a.

2. The court also found that maintaining the status quo was not an option. More than a decade of experience with the Special Master and close court intervention had "starkly" demonstrated the

"impossibility" of complying with the Eighth Amendment "at current levels of crowding." JS1-App. 156a–157a. "For almost a decade" the *Coleman* court had "issued specific orders" directed at "each level of the mental health delivery system," but the State was "unable to meet the escalating demand for resources caused by the overcrowding." JS1-App. 157a.

3. Extensive expert testimony further indicated that reducing overcrowding was the only way forward. Dr. Stewart testified that reducing crowding was "the only remedy that would help the system to move into constitutional compliance." J.A. 2517–2518. Secretary Lehman testified that "you cannot provide adequate healthcare and mental healthcare under the current situation of crowding." J.A. 2176. Dr. Beard testified that an overcrowding limit was "the only way" to remedy the inadequacies in mental health care. J.A. 2437. The basic problem, as Director Scott testified, is that California's overcrowding is "unprecedented." JS1-App. 118a (Secretary Lehman: no state "has experienced anything close" to the overcrowding in California). In light of this and other testimony, the court found that "[o]ther forms of relief are either unrealistic or depend upon a reduction in prison overcrowding for their success." JS1-App. 168a.

3. The Remedy Is Narrowly Drawn

The court next found that an overcrowding limit of 137.5% of design capacity was "'narrowly drawn, extend[ed] no further than necessary,'" and was the "'least intrusive means'" to remedy the violation. JS1-App. 169a (quoting 18 U.S.C. § 3626(a)(1)(A)).

1. There was "no serious dispute" that the constitutional violations were "'widespread enough to justify system wide relief.'" JS1-App. 170a–171a (quoting *Lewis v. Casey*, 518 U.S. 343, 359 (1996)). The State had "never contended" that the violations were "institution-specific." JS1-App. 171a. Moreover, a single system-wide limit was less intrusive than a "series of institution-specific caps." *Id.* Although institution-specific relief "would be tailored to each institution's needs and limitations," it "would interfere with the [S]tate's management of its prisons more than a single systemwide" overcrowding limit, which left the State with flexibility "to continue determining the proper population of individual institutions." *Id.*

The court emphasized that an overcrowding limit did not require the State to "throw open the doors of its prisons." JS1-App. 173a–174a. Rather, the State could "choose among many available means of achieving the prescribed population reduction." JS1-App. 174a. The order thus "maximiz[ed] the [S]tate's flexibility and permitt[ed] the [S]tate to comply" with the overcrowding limit "in a manner that best accords with the [S]tate's penal priorities." *Id.*

2. The court found ample support for the 137.5% limit. Plaintiffs had come forward with extensive evidence supporting a 130% limit, JS1-App. 179a–180a, introducing "strong evidence that a prison system operating at even 100% design capacity will have difficulty providing adequate medical and mental health care to its inmates." JS1-App. 176a–179a, 183a. (A prison with every bed filled is already "overcrowded" for purposes of mental

health treatment because there is no flexibility to make necessary transfers.) Plaintiffs drew the 130% figure from "the Governor's own prison reform personnel"—a Facilities Strike Team established to combat the declared overcrowding prison emergency. JS1-App. 179a. That Team, after an independent review, set a "long-term goal" of 130% of design capacity. *Id.* Directors Lehman, Scott, and Woodford testified in support of the 130% limit, stating that it was a "realistic and appropriate" maximum. JS1-App. 180a.

To be sure, as the State emphasizes, the Governor's hand-picked panel determined in 2004 that California's maximum "operable capacity" was 145%. State Br. 44–45; J.A. 1761–1763; JS1-App. 181a–182a; J.A. 752–754 (testimony of the review panel's principal consultant). But the 145% ceiling "did not account for programming associated with mental health or medical treatment" or the long history of entrenched constitutional violations. JS1-App. 182a; J.A. 746–749. The 145% figure was thus too high.

3. The State complains that the 137.5% limit is unsupported, but the State did not present "any evidence or arguments suggesting that [the court] should adopt a percentage other than 130% design capacity." JS1-App. 175a. Although the court asked the parties to submit evidence and argument about an appropriate percentage, the State refused. J.A. 2555. Accordingly, because the State did not present any evidence regarding the maximum population at which it could comply with the Eighth Amendment, the court was left with undisputed evidence that the population "*must* be reduced to some level between

130% and 145% design capacity." JS1-App. 183a. The court chose 137.5%, "a population reduction halfway between the cap requested by plaintiffs and the warden's estimate of the California prison system's maximum operable capacity absent consideration of the need for medical and mental health care." JS1-App. 184a. That limit was more forgiving than the only proposal by a party (130%), and was at the outer limit supported by any record evidence.

4. The Remedy Poses No Adverse Impact On Public Safety

1. The court devoted ten days of trial—and 50 pages of its opinion—to considering the impact the proposed overcrowding limit would have on "public safety or the operation of [the] criminal justice system." 18 U.S.C. § 3626(a)(1)(A). It was undisputed that the State had several means to address overcrowding without releasing prisoners: It could construct additional prisons, transfer inmates to prisons in other states, divert mentally ill patients away from prison, or implement sentencing reforms (*e.g.*, "adjusting the threshold value at which certain property crimes become felonies to reflect inflation since 1982"), as the Governor has proposed. JS1-App. 219a.

The key to the court's safety finding was what it did *not* order: a "generic early release" of prisoners. JS1-App. 196a. The court specifically noted that a "sudden mass release of one-third of California's prisoners or a ban on accepting new or returned prisoners" would affect public safety. JS1-App. 222a. But "[t]hat approach was not proposed by any party,

nor would it be approved by the court." *Id.*; *see also* JS1-App. 193a–194a.

2. The court found that the record evidence "clearly establishe[d]" that the State could comply with the overcrowding limit without having an adverse impact on public safety. JS1-App. 188a–189a. There was "overwhelming agreement among experts for plaintiffs, defendants, and defendant-intervenors that it is 'absolutely' possible to reduce the prison population in California safely and effectively." JS1-App. 192a–193a (quoting J.A. 2511 (defendant-intervenor's corrections expert)); *see also* J.A. 2488 (State expert); J.A. 2495 (Secretary Lehman); J.A. 2423 (Secretary Woodford).

Record evidence showed that at least three measures would reduce overcrowding without adversely affecting crime rates. *First*, the State itself had "proposed the expansion of earned good time credits." JS1-App. 197a. In fact, "[e]xperts presented by plaintiffs, defendants, and defendant-intervenors all supported the expansion" of the State's existing "good time credits" system. JS1-App. 196a.

Second, the State's own prison officials and experts "overwhelmingly supported" ending California's "abnormal" practice of putting *all* offenders on "parole" after they complete their sentences—without any risk assessment—and re-imprisoning them for technical parole violations. JS1-App. 204a, 208a. (In California, "parole" is a misnomer, and parolees are more analogous to federal "supervised releasees" who have not benefitted from any traditional discretionary "parole" before completing their sentence. *See* J.A. 1772–

1776. State officials testified that changes in parole revocation practices, as used in Pennsylvania, South Carolina, New Jersey, Oregon, Georgia, Iowa, Kansas, South Dakota, and Texas, would reduce both the prison population and crime. JS1-App. 206a–207a.

Third, State law enforcement officials testified that diverting low-level offenders to community correctional programs, rather than prison, could improve public safety. In Secretary Woodford's words, "'California would have safer communities if it used such [community-based] sanctions rather than incarceration in appropriate circumstances.'" JS1-App. 211a (quoting *Coleman*-D.E. 3231-15).

3. The court also found that the State could improve public safety through "evidence-based rehabilitative programming—*i.e.*, programs that research has proven to be effective in reducing recidivism." JS1-App. 214a. This finding was uncontroverted: "*Every witness*, from [the State's] Undersecretary of Programming to law enforcement officers and former heads of correctional systems," testified that an increase in the availability of such programs "would reduce the prison population and have a positive impact on public safety." *Id.* (emphasis added).

Moreover, contrary to the State's assertions, *see* State Br. 8, 10, 54–56, the court did not find that such rehabilitative programs were necessary to avoid an increase in crime. Quite the opposite. The court expressly stated that, "[e]ven if the [S]tate were not" to implement rehabilitative programs, "population reduction could be accomplished without any

significant adverse impact on public safety." JS1-App. 187a.

4. The evidence showed a proven track record for safely implementing overcrowding limits. Secretary Lehman testified that Washington reduced prison populations through the same techniques available to California—expanding good time credits, reducing imprisonment for technical parole violations, and instituting graduated sanctions—without having any "'deleterious effect on crime.'" JS1-App. 243a–244a (quoting J.A. 2489–2490, 2491–2492, 2493–2494). Dr. Beard similarly testified that Pennsylvania used evidence-based programming, graduated sanctions, and parole reform to reduce prison populations while "improv[ing] public safety." JS1-App. 244a And empirical studies showed that population reductions had been implemented without adversely affecting public safety in Colorado, Florida, Illinois, Indiana, Kansas, Maryland, Michigan, Montana, Nevada, New York, Ohio, Texas, Washington, and Wisconsin. JS1-App. 244a–245a.

In light of this "overwhelming" evidence, the court found a 137.5% limit appropriate. The State's penal policies had contributed to a 750% increase in prison population since the 1970s, but the State's "political decision-makers" had failed "to provide the resources and facilities" required to satisfy the bare constitutional minimum of mental health care. JS1-App. 254a. The courts had "proceed[ed] cautiously" for more than a decade, but "the political process has utterly failed to protect the constitutional rights" of mentally ill inmates. JS1-App. 254a-255a. As a result "the courts can, and must, vindicate those rights." JS1-App. 255a.

F. The Remedial Order and Appeal

The court gave the State 45 days to propose an overcrowding reduction plan to meet the 137.5% limit within two years. The State appealed to this Court and sought a stay, which was denied. *See California State Republican Legislators v. Plata*, 130 S. Ct. 1142 (2010); *Schwarzenegger v. Plata*, 130 S. Ct. 1140 (2010); *Schwarzenegger v. Coleman*, 130 S. Ct. 46 (2009). The State's first remedial plan was rejected by the three-judge court as woefully non-compliant. *Coleman*-D.E. 3711. Then, in November 2009, the State submitted a revised plan. JS2-App. 25a–70a. That plan incorporates many elements—including good-time credit earning enhancements, re-entry courts, and parole reforms for low-risk offenders—that are required under recently enacted state prison reform legislation (Senate Bill 18) and the State's own experts and officials had previously endorsed as *improvements* to public safety. JS1-App. 196a–216a, 319a–327a, 340a–341a.

On January 12, 2010, the three-judge court entered a final order accepting the State's second proposed plan. JS2-App. 1a–10a. Reiterating that it did not "intervene lightly in the State's management of its prisons," JS2-App. 9a, the court held that it would not mandate any specific measures in the State's plan—affording the State "maximum flexibility" to decide which options would best achieve constitutional compliance. JS2-App. 3a. The court emphasized its "hope that California's leadership will act constructively and cooperatively ... so as to ultimately eliminate the need for further federal intervention." JS2-App. 9a. The court stayed its order pending review by this Court, affording the

State an additional year to meet the overcrowding limit.

On January 19, 2010, the State appealed the three-judge court's January 2010 order as well as the single-judge court's decision to convene a three-judge court. On June 14, 2010, this Court granted review, while deferring the jurisdictional question concerning the State's challenge to the single-judge court's decision.

SUMMARY OF ARGUMENT

California's prisons are in the midst of an unprecedented, entrenched overcrowding crisis that is threatening the lives of thousands of mentally ill inmates and preventing the State from providing those inmates with the basic humane care required by the Eighth Amendment. No one can reasonably dispute that, as Governor Schwarzenegger has declared, California's prisons are overwhelmed by an overcrowding emergency. Nor has the State ever made any showing that it has resolved the long-standing constitutional violations, despite more than 70 previous court orders and numerous iterations of failed remedial plans spanning two decades of litigation. The three-judge court made extensive fact-findings about current conditions, correctly determined that the PLRA's requirements were satisfied, and ordered the State to take whatever steps it deems necessary to ensure that, within two years, prison overcrowding is reduced to within 137.5% of its prisons' total design capacity.

The State seeks to litigate arguments that were forfeited below and to sweep aside the lower court's factual findings with heavy reliance on extra-record

evidence. But it has made no showing that the lower court's factual findings are clearly erroneous. The State instead seeks to manufacture legal issues based on a strained interpretation of the PLRA. The State's proposed interpretation is inconsistent with the statute's plain terms. If this extraordinary case does not warrant relief under the PLRA, it is hard to fathom any situation where the PLRA's expressly contemplated remedy of a "prisoner release order" would be appropriate.

The State contends that the single-judge court improperly convened the three-judge court because it purportedly failed to afford the State reasonable time to comply with its latest remedial order. But the Court has no jurisdiction to consider that argument, because its jurisdiction under 28 U.S.C. § 1253 extends only to orders granting or denying an injunction rendered by a three-judge court. In any event, the single-judge court did not convene the three-judge court until long after the Governor himself had proclaimed an overcrowding emergency and did so only after making detailed findings that the State had failed to comply with more than 70 orders spanning more than a decade, and determining that the State's latest proposals for addressing the constitutional violations were not viable solutions, but more of the same.

The State next contends that the three-judge court's overcrowding limit is inappropriate because the court purportedly did not consider current prison conditions or require overcrowding to be the "primary cause" of the entrenched constitutional violations. But that is not true. Over the State's *objections*, the court below considered and relied on

extensive evidence of current prison conditions. Moreover, applying the *State's* own proposed definition of "primary cause"—as the "first or highest in rank or importance"—the three-judge court found that overcrowding was the primary cause of the ongoing, entrenched constitutional violations, and that absent a limit on overcrowding, the State will not be able to remedy the violations. The court's findings are supported by substantial record evidence and the State has made no showing that they are clearly erroneous.

Finally, relying on arguments forfeited below, the State contends that the overcrowding limit is not narrowly tailored and threatens public safety. But the three-judge court explained in detail the reasons the overcrowding limit was appropriate, and provided the State with flexibility and discretion to implement the programs it desires and to allocate resources as it sees fit. The State has made no showing that any of the options it has selected to address the overcrowding crisis will cause any threat to public safety. To the contrary, as the three-judge court determined, the ongoing, entrenched overcrowding crisis is responsible for preventable deaths and poses its own serious threats to public safety.

ARGUMENT

I. The State's Position Rests On A Distorted View Of The PLRA And This Court's Precedents.

It is hard to imagine where the PLRA's expressly contemplated remedy of a "prisoner release order" would ever be appropriate if the extraordinary and egregious facts, history, and circumstances of this case do not warrant the relief ordered here. The State nonetheless urges the Court to interpret the PLRA's provisions in a manner that would effectively strip federal courts of authority to grant necessary relief where, as here, the entrenched constitutional violations are at their worst. The Governor himself has declared an overcrowding emergency. *See* Appendix B. And the courts have confirmed not just entrenched constitutional violations, but the unnecessary loss of human life. The State pays no heed to the broader consequences of its position. Nor does it make any attempt to reconcile its position with this Court's settled precedents concerning the role of federal courts and the deference afforded to lower court fact-finding. At least three fundamental flaws pervade the State's arguments.

1. *First*, the Court should reject the State's suggestions, made in various guises, that the PLRA's provisions should be interpreted as effectively extinguishing the ability of federal courts to grant appropriate relief when dire constitutional violations require intervention. *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986) (Congress "cannot bar all remedies for enforcing federal constitutional rights") (citation omitted). There is a critical difference between reserving

overcrowding limits as a remedy for intractable constitutional problems (as Congress did) and eliminating such orders as a viable remedy (as the State urges). The former raises few difficulties; the latter implicates separation-of-powers concerns of the first order.

As this Court has recognized, absent the "clearest command," Congress should not be assumed to restrict the equitable powers of the federal courts. *Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010) (citation omitted). The "essence" of a court's equity power "lies in its inherent capacity to adjust remedies in a feasible and practical way to eliminate the conditions or redress the injuries caused by unlawful action," and "equitable remedies must be flexible if these underlying principles are to be enforced with fairness and precision." *Freeman v. Pitts*, 503 U.S. 467, 487 (1992). Rather than take a necessary remedy off the table, there is thus every reason to interpret the PLRA's provisions as written—not to prohibit orders directed at overcrowding, but to reserve such orders for the rare case (like this one) where the remedy of last resort is necessary.

There is no dispute that the PLRA establishes certain requirements that must be satisfied before a court enters an order that "has the purpose or effect of reducing or limiting the prison population." 18 U.S.C. § 3626(g)(4). But Congress did not erect insurmountable barriers to granting effective relief where extensive proceedings prove that prisoners continue to be exposed to life-threatening inadequacies in basic mental health care, and the State itself concedes that its prisons remain in an

emergency "overcrowding crisis." JS1-App. 61a. To the contrary, Congress plainly intended that, in these circumstances, federal courts would have authority to impose appropriate equitable relief. *See* H.R. Rep. No. 104-21, at 25 (1995) (a "court still retains the power to order" population reduction when it "is truly necessary to prevent an actual violation of a prisoner's federal rights"). The Court should reject the State's strained interpretation that, instead of limiting federal courts' exercise of equitable authority, would effectively eliminate that authority altogether. Congress has substantial authority, but it may not render federal courts powerless to remedy life-threatening constitutional violations.

2. *Second*, the Court should recognize that the remedy ordered by the court below is more consistent with federalism principles than the State's preferred alternatives. The PLRA was intended to establish a process that allows a federal court to take assertive action in egregious cases to remedy constitutional violations once and for all. It cabins that authority by ensuring that, once the constitutional violations are remedied, the court must end its supervision and promptly restore control over the prisons to local officials. *See* 18 U.S.C. § 3626(b) (establishing procedures for terminating relief). But the thrust of the Act is to prevent perpetual structured injunctions that take prison administration away from accountable, elected officials.

The order here is the antithesis of the detailed structural injunctions micro-managing every aspect of prison administration that were the principal target of the PLRA. Instead, the order provides the

State with "maximum flexibility" to decide how best to address the overcrowding crisis and put itself on a path to remedying its long-standing constitutional violations. Indeed, the order is striking for what it does not require: *It does not mandate the release of any prisoner or require that the State adopt any particular remedial measure.* The State may select any mix of options that it deems appropriate to address the overcrowding crisis, including constructing new facilities, transferring prisoners out-of-state or to private prisons, mandating that short sentences be served in county jails, or improving rehabilitative programming. By requiring the State to make these choices, the order promotes transparency and helps ensure that state officials will be held accountable for the decisions they make for running California's prisons. *See Frew v. Hawkins*, 540 U.S. 431, 442 (2004).

In contrast, the State urges the federal courts to double-down on a decades-long pattern in which the State's repeated failures to fix prison conditions required ever more-specific direction from the federal courts—a pattern doomed to failure by the State's proven inability to address the primary cause of the crisis conditions and the primary obstacle to remedying the constitutional violations: out-of-control overcrowding. In urging the Court to jettison the three-judge court's order, the State is seeking to extend remedies that would further blur the lines of accountability, leaving the federal courts, but not the State, responsible for making the difficult decisions required to fix California's broken prison system. That approach would allow the State to oppose needed reforms and complain that federal courts are micromanaging California's prisons, while still

failing to take steps necessary to address the ongoing constitutional violations.

As this Court has recognized in other contexts, there are "powerful incentives" that lead state officials to oppose injunctive relief that requires transparency and accountability. *New York v. United States*, 505 U.S. 144, 182 (1992). Indeed, state officials may well "prefer the supervision of a federal court to confronting directly its employees and the public." *United States v. Miami*, 2 F.3d 1497, 1507 (11th Cir. 1993). Rather than responding to the "priorities and concerns of their constituents," especially in circumstances where developing "solutions to problems of allocating revenues and resources" has been made difficult by years of neglect, state officials may prefer to leave the business of running the prisons under the supervision of the federal courts, even while life-threatening prison conditions continue to sink far below minimally humane standards and the structural problems that make the constitutional problems intractable go unaddressed. *Horne v. Flores*, 129 S. Ct. 2579, 2594 (2009) (citing *Frew*, 540 U.S. at 442). Nowhere is this temptation likely to be greater than in a state like California, where long-entrenched fiscal problems make it tempting to blur lines of accountability rather than face and make hard choices.

3. *Third,* the Court should reject the State's repeated attempts to re-litigate the existence of the underlying constitutional violations. Although the State tries to manufacture a few legal disputes, most of which were forfeited below, what the State really seeks is to re-litigate the facts. Those facts were

found by the lower courts in two full trials (the 1994 *Coleman* trial and the 2008 *Coleman/Plata* trial), as well as numerous evidentiary and motion hearings, and resulted in scores of failed remedial orders and unfulfilled plans that preceded convening the three-judge court. This Court should not engage in its own appellate fact-finding based on arguments that were forfeited below. *See Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986) (discussing problems of appellate fact-finding).

The three-judge court's order includes extensive and detailed findings that support its order for injunctive relief. Those findings provide the factual basis for the court's determinations that overcrowding is the primary cause of the ongoing, entrenched constitutional violations, and that no other appropriate relief will remedy those violations. On page after page of its brief, however, the Governor's lawyers rely on selective citations to the record and extra-record evidence in an attempt to convince this Court that California's prisons are not in the continuing state of emergency declared by the Governor himself. But the State cannot rely on extra-record evidence, and it has made no showing that any of the facts found by the lower court are "clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985).

Similarly, although the State repeatedly touts purported improvements in California's prisons and suggests that the long-standing constitutional violations are not as dire as the courts found and the evidence establishes, the State has never pursued readily available avenues for seeking appropriate relief. If circumstances really have changed, the

proper approach is not for this Court to interpret the PLRA in a strained fashion based on new fact-finding undertaken for the first time on appeal. *See Cutter v. Wilkinson*, 544 U.S. 709, 718, n.7 (2005) ("we are a court of review, not of first view"). Instead, the proper remedy is for the State to seek relief under Rule 60(b)(5). Under this Court's settled precedents, lower courts apply a "flexible approach" and will modify injunctions when circumstances have significantly changed and the ordered injunction is no longer needed to remedy constitutional violations. *See Horne*, 129 S. Ct. at 2584. As this Court has recognized, prospective relief under the PLRA "is subject to the continuing supervisory jurisdiction of the court" and may be modified under Rule 60(b)(5) in appropriate circumstances. *Miller*, 530 U.S. at 347–48.

II. The Single-Judge Court's Decision To Convene A Three-Judge Court Was Correct And Is Not Reviewable Under 28 U.S.C. § 1253.

The State argues that the three-judge court lacked jurisdiction because it was purportedly convened before California had "a reasonable amount of time" to comply with previous court orders. *See* State Br. 20–24. That issue is not properly before the Court. And, in any event, the State's fact-based objection is meritless.

A. The Decision To Convene A Three Judge Court Is Not Properly Before The Court.

1. Under 28 U.S.C. § 1253, this Court's appellate jurisdiction is limited to orders "*granting*

or denying … an interlocutory or permanent injunction in any civil action, suit or proceeding required … to be heard and determined *by a district court of three judges*." 28 U.S.C. § 1253 (emphases added). A decision to convene a three-judge court does not satisfy the statutory prerequisites because it is neither an order "granting or denying" injunctive relief nor a determination made by a "district court of three judges." *Hicks v. Pleasure House, Inc.*, 404 U.S. 1, 2 (1971).

2. The Court's section 1253 jurisdiction is "narrowly" construed. *In re Slagle*, 504 U.S. 952, 952 (1992) (White, J., concurring) ("we narrowly view our appellate jurisdiction in three-judge court cases"). It extends only to "orders actually entered by three-judge courts," *Gonzales v. Automatic Employees Credit Union*, 419 U.S. 90, 97 n.14 (1974), and only to orders that rest "upon resolution of the merits" of the underlying constitutional claim. *MTM, Inc. v. Baxley*, 420 U.S. 799, 804 (1975). This construction is consistent with "the historic congressional policy of minimizing" the Court's "mandatory docket … in the interest of sound judicial administration." *Id*.

The Court has thus held that when a three-judge court is improperly convened, the court is entitled to dissolve itself—a decision that is reviewable only in the court of appeals. *See Mengelkoch v. Industrial Welfare Comm'n,* 393 U.S. 83, 83 (1968); *Wilson v. City of Port Lavaca*, 391 U.S. 352, 352 (1968); *see also McLucas v. DeChamplain*, 421 U.S. 21, 30 (1975) (orders denying three-judge panel appealable only to court of appeals). Any issues short of the merits—including "justiciability, subject-matter jurisdiction, equitable jurisdiction, and abstention"—

are not subject to this Court's review on "direct appeal." *Gonzalez*, 419 U.S. at 295. Non-merits issues must be reviewed in the first instance by a court of appeals. *Id.*[2]

3. The State fails to engage in any meaningful analysis of the Court's authority to review a single-judge court's order. Instead, the State addresses jurisdiction in a single sentence, citing *Gully v. Interstate Natural Gas Co.*, 292 U.S. 16 (1934). *See* State Br. 24. By presenting essentially no argument on the issue, the State forfeits its position. *See Joint Stock Soc'y v. UDV N. America, Inc.*, 266 F.3d 164, 178 n.9 (3d Cir. 2001) (Alito, J.).

In any event, *Gully* cannot bear the weight the State places on it. That decision predates this

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[2] In earlier briefing, the State asserted that plaintiffs' position on this issue has changed because plaintiffs moved to dismiss the State's appeal to the Ninth Circuit as premature. *See* Opp. to Mot. To Dismiss or Affirm at 3. In fact, plaintiffs have consistently maintained that the orders referring *Coleman* and *Plata* to the three-judge court were subject to review in the court of appeals at the appropriate time and pursuant to the appropriate vehicle. In 2007, plaintiffs successfully argued that the appellate court lacked jurisdiction because no final decision had issued, the orders were not immediately appealable under the collateral order doctrine, and the State had not taken the steps necessary to perfect its appeal, by either waiting for a final judgment, pursuing an interlocutory appeal under 28 U.S.C. § 1292(b), or petitioning for a writ of mandamus. *See* Mot. To Dismiss at 11–15, No. 07-16361 (9th Cir. Aug. 20, 2007); *cf. Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 607 (2009) ("several potential avenues of review" for non-final orders). Plaintiffs never argued that the State could bypass those legitimate avenues of review and appeal the district courts' referral orders directly to this Court.

Court's authoritative interpretations of the statute making clear that preliminary issues decided by a single-judge court are properly reviewed in the courts of appeals. Moreover, *Gully* is part of a line of decisions that granted discretionary review because the time for appeal had expired and "the correct procedure" for seeking review of the single-judge court's order was not "definitely settled at the time the appeal to this Court was attempted." *Oklahoma Gas & Elec. Co. v. Oklahoma Packing Co.*, 282 U.S. 386, 392 (1934) (had "correct procedure" been clear, it would be proper to dismiss the appeal); *Phillips v. United States*, 312 U.S. 246, 251 (1941) (same). *Gully* was not purporting to determine whether the PLRA's specific provisions were satisfied—a fact-intensive inquiry as to whether a defendant has had "reasonable" time to comply with previous court orders. Instead, *Gully* determined that the three-judge statute was wholly inapplicable as a threshold matter of law. 292 U.S. at 18.

The PLRA's structure is different from other statutes that contemplate the use of three-judge courts, because convening a three-judge court under the PLRA does not divest the single-judge court of jurisdiction over the underlying cause of action. Instead, the PLRA is a remedial statute that imposes additional procedures that must be satisfied before injunctive relief may be granted in the context of prison litigation. 18 U.S.C. § 3626; c*f. Jones v. Bock*, 549 U.S. 199, 212 (2007) (PLRA's exhaustion requirement is an affirmative defense, not a jurisdictional prerequisite to suit). Because only the remedy question, not the entire cause of action, is before the three-judge court, it makes sense that this

Court's review is limited to considering only the merits of the three-judge court's remedial order.

The State here does not argue that section 1253 is inapplicable. Nor can it claim that the "correct procedures" for seeking review to the court of appeals are unclear. In these circumstances, the Court lacks jurisdiction to consider whether the single-judge courts properly decided to convene the three-judge court.

B. The Courts Below Afforded The State A "Reasonable Amount Of Time" To Comply With Previous Court Orders.

The prudence of not revisiting the single-judge court's decision to convene a three-judge court back on a date certain over three years ago is underscored by the Court's ability to review a clearly related and far more relevant question: whether the three-judge court's ultimate remedial order was fatally premature. Although this Court lacks jurisdiction to consider whether the three-judge court was properly convened, it plainly has jurisdiction to determine whether, at the time of the three-judge court's "prisoner release order," the State had been given reasonable time to comply with previous court orders. 18 U.S.C. § 3626(a)(3)(A)(ii) ("no court shall enter a prison release order unless … the defendant has had a reasonable amount of time to comply with the previous court orders"). The State never addresses this issue because it strains credulity to suggest that the three-judge court acted prematurely. When the single-judge court convened the three-judge court in July 2007, the State had already proclaimed an overcrowding emergency and had been given 12 years to comply with previous

court orders. Even if that were somehow not a reasonable amount of time, the three-judge court afforded the State an additional two years of time to correct the entrenched constitutional violations. As the three-judge court properly recognized, the State still had not complied with the previous court orders by the time the court entered its "prison release order" on August 4, 2009. The State is not entitled to any more time.

1. Through the course of this decades-long litigation, the State has been afforded more than reasonable time to end its life-threatening constitutional violations. When plaintiffs moved to convene the three-judge court, the single-judge court stayed the matter for six months and sought input from the Special Master, who reported that the few areas of improvement had "succumbed to the inexorably rising tide of population." J.A. 489. Only then did the district court convene the three-judge court. That decision was neither unreasonable nor precipitous. And it was supported by extensive findings of fact. The single-judge court provided a detailed description of its reasons for concluding that the State had failed to comply with more than 70 previous orders and that the State's latest plans for compliance were not viable. *See* JS1-App. 291a–297a.

2. The State has not even attempted to show that the single-judge court abused its discretion in determining that the State was afforded reasonable time to comply with previous court orders. Instead, it contends that the court "mistakenly interpreted the PLRA to allow three-judge proceedings so long as the State had been given a reasonable amount of

time to comply with *any* prior remedial order." State Br. 13. Not so. The court never held that it was enough that reasonable time had elapsed since any single order. It held that "reasonable time" had passed since the State had failed to comply with the "orders of this court" issued "through the present," including the latest order in 2006. JS1-App. 296a–297a.

The State's position rests on a strained reading of the statutory requirements. *See* State Br. 16. In the State's view, even though it failed to cure the constitutional violations notwithstanding "well over seventy orders concerning the matters at the core of the remedial process" over the span of 12 years, JS1-App. 38a–39a, and was in the midst of a self-proclaimed emergency, it should have been given more time to comply with the very *last* of the district court's remedial orders. According to the State, the clock for convening the three-judge court restarts with each new order.

The State's reading of the statute is untenable. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 9 (2000) (party seeking to avoid "most natural reading" of a statute bears an "exceptionally heavy" burden) (citations omitted). Contrary to the State's suggestions, a single judge court is not required to cease issuing remedial orders and allow serious constitutional violations to fester before convening a three-judge court. This is especially true given the reality that a judge that determines that a situation with unremedied constitutional violations has reached extremes may well need to issue separate orders addressing the exigency before convening a three-judge court. *See*

Miller, 530 U.S. at 355, 357 (Breyer, J., dissenting) (typical that a single-judge court attempting to resolve constitutional violations will have entered a "complex system of orders entered over a period of years"). So, for example, the appointment of a receiver and the convening of a three-judge court could be related responses to a system having reached a breaking point, rather than discrete orders that must be separated by a discrete interval.

If Congress had intended the decision to convene a three-judge court to turn on only the last remedial order issued by the single-judge court, it could have phrased the statutory language to indicate that intent and would not have referred to "the previous court orders" in the plural. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.,* 484 U.S. 49, 57 (1987) (Congress's failure to "choose this readily available option" in phrasing statutory language confirms that proposed reading is implausible). Indeed, under the State's interpretation, it is illogical for Congress to have referred to "previous court orders" in section 3626(a)(3)(A)(ii), because the only relevant order on the State's view is the most recent order issued by the single-judge court.

Interpreting the PLRA as preventing a court from ever convening a three-judge court as long as the single-judge court continues to issue remedial orders also cannot be reconciled with the Court's long-standing recognition that the "opaque terms and prolix syntax" of the PLRA should not be given an impractical interpretation. *Gonzalez*, 419 U.S. at 97. Nor can it be reconciled with the bedrock principle that, absent an especially clear statement

of congressional intent, a statute should not be construed to restrict the equitable powers of federal courts. *Miller*, 530 U.S. at 336. The State's approach requires concluding that Congress intended to tie the judiciary's hands in precisely those cases where relief is most urgently needed—namely, in cases where prison systems are in the worst condition and district court judges have issued multiple orders seeking to correct ongoing and entrenched constitutional violations. *Cf. Martin v. Hadix*, 527 U.S. 343, 354 (1999) ("it stretches the imagination to suggest that Congress intended through the use of this one word" to apply statute retroactively).

3. In any event, the State was afforded more than reasonable time to comply with previous orders. The 2006 orders referenced by the State were part of a succession of (unsuccessful) escalating measures imposed since 1997. That the single-judge court continued to issue remedial orders as late as 2006 is not a sign that the State had inadequate time to comply; instead, it is proof the court's previous orders were not working and the district court was diligent in exhausting alternatives. As the district court explained, the State had been given more than sufficient time "to comply with the mandate required by the court's 1995 order *and the numerous orders issued since then*." State Br. 22 (emphasis added).

4. The State points to its December 2006 mental health bed plan as purported evidence to the contrary. *See* State Br. 21–22 n.5. But that plan was abandoned; the State even asked the district court and Ninth Circuit to rule that the medical and

mental health construction on which it was based was unlawful. *See* Tr. 1688–90.

The State also contends that recent purported "improvements" in California's prison system suggest that, with more time, the court's latest remedial orders would have prompted the State to correct the constitutional violations. But most of the improvements represent aspirational plans, not concrete results. And the district court's decade-plus experience with this case made it appropriately skeptical of grandiose plans to remedy conceded constitutional violations. Moreover, the State's assertion was not only rejected by the single-judge court, but also by the three-judge court, which found that no other relief could remedy the constitutional violations without requiring the State to address its overcrowding crisis. The State has made no attempt to show that those findings are "clearly erroneous." Fed. R. Civ. P. 52. Nor has the State ever filed a Rule 60(b)(5) motion or made any showing that the underlying constitutional violations are sufficiently remedied to obviate the need for further relief. The overwhelming evidence shows, and the State's judicial admissions confirm, that life-threatening constitutional violations persist because of the intolerable overcrowding crisis. *See* J.A. 821–824 (2010-04-14 order finding rising rate of preventable suicides), 863–868 (high rate of suicides in 2010).

5. Finally, the State asserts in passing that if a three-judge court "was inappropriate in either proceeding," the Court should reverse because it "cannot meaningfully review the merits of the three-judge court's order arising out of the combined cases." State Br. 25. That is not correct. The three-

judge court's order makes findings that separately address the current, ongoing violations in the delivery of mental health care from the current, ongoing violations in the delivery of medical care. *See* JS1-App. 30a–52a (failure to remediate mental health care), 90a–91a (failures of mental health screenings), 97a–100a (dangerous shortages of mental health placements), 103a–104a (effect of non-traditional housing on mentally ill inmates), 108a–109a (mental health staffing), 112a–114a (psychotropic medication), 118a (effect of constant lockdowns on mental health care), 121a–123a (increase acuity of mental illness due to overcrowding), 123a–124a (overcrowding major cause of lapses in mental health care in suicide cases), 130a–133a, 137a–140a (testimony of expert psychologists and psychiatrists whose investigations were conducted independently from medical experts). It also includes separate findings regarding the feasibility of "other relief." *See* JS1-App. 154a, 156a–158a, 164a–168a (testimony and evidence on overcrowding control as prerequisite to other remedies). Accordingly, even if the State should have been given more time to comply with the previous orders in *Plata*, the mentally ill inmates in *Coleman* should not be required to wait any longer before action is taken to remedy the continuing constitutional violations. *See Johnson v. Manhattan R. Co.*, 289 U.S. 479, 497 (1933) (consolidation for convenience does not merge suits into a single cause).

III. The Three-Judge Court's Remedial Order Complies With The PLRA.

The State contends that the three-judge court "misinterpreted" the PLRA's requirements. State Br. 30. There is no merit to these contentions. In a detailed opinion the three-judge court explained why the PLRA's requirements were satisfied.

A. The Order Complies With 18 U.S.C. § 3626(a)(3)(E).

Under 18 U.S.C. § 3626(a)(3)(E), a court may order prospective relief when (1) overcrowding is the "primary cause" of the violation of federal rights, and (2) "no other relief" will remedy that violation. Contrary to the State's assertions, the court correctly applied both requirements and its factual findings are entitled to deference.

1. The Court Properly Applied The "Primary Cause" Requirement.

1. The State begrudgingly acknowledges that the three-judge court accepted—*verbatim*—its own definition of "primary cause." State Br. 32. It was undisputed at trial that "primary cause" is defined as the "first or highest in rank or importance; chief; principal." *See* State Br. 32, JS1-App. 78a. The State nonetheless offers two new definitions of "primary cause," which it urges the Court to consider. Because they were not pressed below, these arguments are forfeited. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002).

In any event, neither proposed definition can withstand scrutiny. The State first posits that "primary cause" means "'but for' and 'proximate' causation." State Br. 31. Recognizing that "the

PLRA … did not define 'primary cause,'" that "the legislative history is silent," and declaring Congress's references to the term "in other contexts … not helpful here," the State asserts that a "but-for" definition would generally promote "the PLRA's intent to make prisoner release the remedy of last resort." State Br. 30–31. But that outcome-driven reading is neither compelled by the text; nor is it a prerequisite to being the "first or highest" cause. It is also contrary to the long line of precedents that, while acknowledging occasional overlap between the two concepts, carefully distinguish "primary" and "proximate" cause. *See N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 205 (1917) (act "disregards the proximate cause and looks to one more remote,—the primary cause"); *United States v. Hatfield*, 591 F.3d 945, 949 (7th Cir. 2010) (Posner, J.) (equating primary and proximate cause "confuses things"). Nor does the State's criticism of a "contributing cause" test justify a "but-for cause" test; that straw-man is beside the point because the three-judge court never relied on a "contributing cause" test.

The State also defines "primary cause" as a cause whose elimination "undo[es] all or virtually all of the constitutional harm." State Br. 33. That stringent standard is not supported by a single citation because it is a creature of the State's own imagination. It also makes no sense. It would mean that no remedy could issue unless the court simultaneously resolved every deficiency at once, rendering the courts' remedial powers their weakest in addressing egregious prison conditions where the courts' powers are needed the most.

2. Nor does the State's proposed definition take into account the broader statutory structure. In the context of a provision that the State itself submits is reserved for exceptional cases when alternatives have been exhausted, interpreting primary cause to mean but-for cause makes little sense. The statute clearly seeks reassurance that overcrowding is the primary cause for the persistence of the constitutional violations, or the primary obstacle to eliminating the entrenched constitutional violations. Here, there is no doubt that this requirement is satisfied. The three-judge court adhered to the State's own undisputed definition of "primary cause" and—with 46-pages of detailed fact-finding—found it satisfied. Clear and convincing evidence showed that severe overcrowding was the "first and highest" cause of horrific, inhumane conditions, including deteriorating mental health care, increasing spread of infectious diseases, unnecessary deaths, and preventable suicides.

3. The State does not dispute that overcrowding is *a cause* of the violations. The State also does not dispute that overcrowding is the *primary cause* of at least some violations. *See* J.A. 2402–2403, 2557–2558; JS1-App. 138a. Nor does the State make any showing that the facts found by the three-judge court are clearly erroneous. The State instead picks at the margins. It alleges, for example, that the court insufficiently considered "evidence concerning the current status of alleged Eighth Amendment violations." State Br. 27.

In fact, however, the three-judge court grounded its order in updated evidence. *See, e.g.*, JS1-App. 85a–95a (space findings based on 2007–2008 tours);

JS1-App. 93a (space findings based on November 2008 analysis of deaths); JS1-App. 97a–98a (mental health crisis bed shortages based on 2008 reports); JS1-App. 98a–99a (alternative crisis placement findings based on 2007 and 2008 suicides); JS1-App. 101a (testimony on non-traditional beds as of trial); JS1-App. 108a (mental health staffing data from 2007–2008); JS1-App. 111a (custodial staffing data from 2008); JS1-App. 113a–114a (findings of psychotropic medication system failures based on 2008 data). Although the three-judge court rejected attempts to re-litigate the underlying constitutional violations, it made clear that evidence of current prison conditions would be considered "to the extent that it illuminates questions that are properly before the court." J.A. 2338–2339. As the State's counsel recognized, there is a critical distinction between re-trying the single-judge case and "inform[ing] the [three-judge] court of exactly the impact of overcrowding on the mental health services delivery system" both in the past and "as the population exists today." *Id.*

Contrary to the State's suggestions, it was not barred from presenting evidence from either the *Coleman* Special Master or the *Plata* Receiver. In fact, the three-judge court ordered the Receiver's most current report, including 15 items requested by the State, entered into evidence. J.A. 1194–1198. The State itself made extensive use of the Special Master's updated reports, even though it never sought discovery from the Special Master or listed him as a witness. Although it opposed the 2008 prison inspections, the State ultimately sent its experts to inspect the prisons, and they offered testimony on current prison conditions. *See* J.A.

2395–2413, 2414–2420. The State likewise presented testimony regarding current medical and mental health expenditures, staffing, and results, J.A. 2289–2301, 2302–2336, 2339–2377, presumably because most of plaintiffs' evidence addressed the current state of California prisons' medical and mental health care. *See* J.A. 2087–2109, 2185–2205, 2229–2287.

Less than six weeks before trial, the evidence was current. In response to the State's own request, the three-judge court set a discovery cut-off and limited plaintiffs' ability to tour the prisons after August 30, 2008. *See* J.A. 1683–1684; J.A. 1188–1193. The State never moved to update the evidence of current conditions after the close of evidence and before the court's final judgment.

2. The Court Correctly Concluded That "No Other Relief" Would Remedy The Ongoing Violations.

1. The State also disputes the determination that "no other relief" would remedy the longstanding constitutional violations, listing alternative measures to which it claims the court gave short shrift. State Br. 36–40. But, here again, the State makes no showing of clear error. Moreover, characterizing construction, hiring, the Special Mastership, and transfers as *alternative* remedies misses the point. Nothing in the overcrowding limit precludes the State from utilizing any or all of those tools.

More fundamentally, these are the same tools that the State has unsuccessfully employed in its attempts to remedy the constitutional violations for

more than a decade. The three-judge court thus determined that none of these alternatives would work unless overcrowding was first addressed. JS1-App. 145a–168a; *see also* 18 U.S.C. § 3626(a)(3)(E)(ii). It had already delayed the matter for more than a year, from the convening orders in July 2007 through the commencement of trial in November 2008, during which the State again tried and again failed to apply the same set of tools. The court thus reasoned that overcrowding, as the "first and highest" cause of the constitutional violations, had to be addressed. Nothing in the State's extended discussion of tentative gains detracts from that conclusion.

2. The State complains that the three-judge court insufficiently credited its commitment to construct more facilities. But the court relied on clear and convincing evidence that the State could not build itself out of the problem in any reasonable time-frame commensurate with the emergency conditions. JS1-App. 145a–154a. Because "the [S]tate could, in theory, always build more prisons," JS1-App. 146a, the more relevant question was the State's ability to follow through on "actual, feasible, sufficiently timely" construction plans. JS1-App. 146a, 153a–154a.

The State's own witnesses testified that the plans it offered at trial—the Receiver's plan for dedicated healthcare facilities, and AB 900's prison construction plan—would not work. Although the State counted the Receiver's plan as part of its strategy to fix overcrowding, *see* Tr. 1688–90, it actively blocked funding for the project and the plan was subsequently scrapped. *See* JS1-App. 150a–

151a. Similarly, AB 900, the 40,000 bed construction program the State once touted as the overcrowding solution, had already failed by the time of trial. The State voted to deny the money necessary to build the beds, *see* Tr. 1689–90, and preliminary construction planning had not even begun. J.A. 755; P-750; *see also* J.A. 756–757. Eight months after trial, AB 900 remained unfunded and construction had not begun on a single new facility. JS1-App. 147a, 150a.

Instead of addressing the evidence presented at trial, the State focuses on its latest in a long line of ineffectual construction plans. But even the latest plan the State cites will, by its own concession, not be completed until 2014 at the earliest. The State's claim that new facilities "will begin accommodating inmates this year" is thus tentative and vague for good reason. Building projects and funding efforts have repeatedly been proposed and repeatedly stalled; on October 19, 2010, the State filed its latest delay notice, informing the single-judge *Coleman* court that the 2,840-bed centerpiece of its new mental health building plan has been indefinitely delayed by the legislature. J.A. 873–883. This is just the latest instance of the legislative intransigence that the Governor himself lamented in his emergency proclamation back in 2006. *See* Appendix B. The court did not clearly err in holding that the latest proposed construction plans would not obviate the necessity of an overcrowding limit.

3. The State also invokes "positive" trends on the staff hiring front, singling out certain goals met by the *Plata* Receiver. *See* State Br. 37–38. But those steps in the right direction hardly undermine the court's judgment that hiring reforms would have

limited success absent an overcrowding fix. Indeed, the *Coleman* court had issued staffing orders for years, and the Special Master reported that modest gains were overwhelmed by overcrowding. JS1-App. 295a–296a. It was thus reasonable to conclude that lasting and truly significant hiring gains were unrealistic without more space. JS1-App. 154a–155a.

4. The State also suggests that the convening of the three-judge court somehow interrupted a veritable "surge" by the Special Master. *See* State Br. 20–24. But his efforts were also swallowed up by the overcrowding crisis. *See* JS1-App. 49a (noting "troubling reversal in the progress of the remedial efforts" and "profound impact of population growth"); JS1-App. 52a, 142a, 155a–159a, 303a; J.A. 489. Expert testimony likewise indicated that "tentative progress" had been "overwhelmed by the massive population expansion" despite "more than ten years of intensive monitoring and other remedial efforts." J.A. 743–744, 2195–2196.

5. Finally, the State asserts that it could solve the overcrowding crisis by transferring prisoners out of state. But out-of-state transfers is not "other relief" because it too constitutes a "prisoner release order" under the PLRA. JS1-App. 159a n.58. Moreover, the State contends that the court below "reject[ed] the possibility." State Br. 39. That overstatement has no bearing in fact. Far from "block[ing]" transfers, the single-judge court issued one order—at the Special Master's urging—limiting the transfer of *seriously mentally ill* prisoners due to inadequate mental health services. That order set no limits on the number of prisoners that California

may transfer out-of-state. J.A. 435. Indeed, the State has steadily increased its use of out-of-state prisons, where it now houses almost 10,000 prisoners. The State has offered no basis to dispute the court's conclusion that the State's transfer proposals were "too small to significantly affect the provision of medical and mental health care to California's inmates." JS1-App. 160a. And, in all events, nothing stops the State from employing increased out-of-state transfers to comply with the overcrowding limit.

B. The Court's Order Complies With 18 U.S.C. § 3626(a)(1)(A).

The State argues that the overcrowding limit violates the PLRA because it is insufficiently "narrowly drawn" and gives inadequate consideration to "public safety." 18 U.S.C. § 3626(a)(1)(A). But the court struck a careful balance between enforcing the "basic … minimally adequate" standards required by the Eighth Amendment, while refraining from undue interference with the State's prerogatives. Indeed, even though the overcrowding limit may be deemed a "prisoner release order" under the PLRA, *see* 18 U.S.C. § 3626(g), the limit does not mandate the physical release of any prisoners. Instead, the court—considering the State best-positioned to make judgments as to its budget priorities and public safety—allowed the State to choose whatever combination of measures would be most effective, safe, and financially feasible to resolve the overcrowding crisis and the ongoing constitutional violations.

1. The Overcrowding Limit Has An Obvious Nexus To The Ongoing Violations.

1 The State's brief tries to sow confusion by questioning the nexus between the overcrowding limit and ongoing constitutional violations. But given the more than 14 years of remedial proceedings and 70 court orders that preceded this appeal, the State should not be allowed to rewrite history. Even the Intervenors' expert concurred that "the necessary constitutional medical and mental health services can't be provided with today's overcrowding." J.A. 2516; *see also* J.A. 2511–2512.

Whatever the inevitable line-drawing difficulties that arise when imposing an overcrowding limit, a line must be drawn. There is no "exact science" to that line, as the court duly recognized. *See* JS1-App. 175a. But when the three-judge court justified the 137.5% limit, it did so based on the evidence at trial—not some utopian vision of what would "prove beneficial" as a matter of policy. State Br. 47. The State never challenged the 137.5% number. The court credited recommendations of a 130% cap by the State's construction manager, the Governor's own prison reform personnel, and current and former heads of prison systems in five states. And upon finding that a 130% limit would "comport[] with the PLRA," it raised the limit to 137.5% to afford the State greater flexibility. JS1-App. 169a.

2. The State's allusions to "design capacity" and "double-celling" are distractions. The State has conceded that California's prisons were not built to provide adequate medical and mental health care above 100% design capacity. *See* JS1-App. 56a–58a;

D-1007 ¶ 72; J.A. 2349–2350, 2419–2420. And California's prison overcrowding is widely recognized as a radical outlier. *See* JS1-App. 78a (experts reporting "almost unheard of" levels of overcrowding); J.A. 2111–2112, 2174–2177, 2181–2182, 2186–2189 (same). In any event, neither "double-celling" nor the percentage overcapacity are themselves constitutional violations. Rather, the violations involve the adjudicated failure to provide constitutionally adequate medical and mental health care to inmates—and the primary cause of those intractable violations is overcrowding.

3. The State's suggestion that the limit is overbroad because it should have targeted only class members represents another shift in position. At trial, the State rejected relief focused solely on the classes, arguing that the three-judge court should *exempt* mentally ill prisoners from any population reduction order. JS1-App. 236a. As the State no doubt recognized, a class-members-only mandate would restrict the pool of prisoners who could be assessed and impair the State's flexibility to account for whether prisoners are high- or low-risk, which prisoners warrant transfers or parole, and so forth. *Cf.* JS1-App. 224a. The State thus submitted a plan that elected to reduce the prison population for the benefit of low-risk prisoners. JS1-App. 312a–353a; *see also* JS1-App. 175a (deferring to "state expertise" to limit judicial intrusion into "minutiae of prison operations"). And that system-wide relief makes sense because the underlying violations are systemic deficiencies. Mentally ill inmates are not limited to specific facilities, nor likely to remain in one facility for long periods of time. The critical scarce resources—inpatient psychiatric beds, short-term

crisis beds, and sheltered housing—are shared among California's prisons on a regional and statewide basis. JS1-App. 41a–42a. Even a prison that may have capacity to treat patients at low levels of care becomes a place of grave danger when an inmate whose condition worsens must wait months or even years to transfer to a higher level of care. JS1-App. 45a–47a, 97a–100a.

4. Ultimately, the 137.5% overall benchmark gives the State maximum flexibility consistent with federalism principles in redressing the constitutional violations. *See Missouri v. Jenkins*, 515 U.S. 70, 98 (1995). The overcrowding limit allows the State to balance population pressures at different institutions based on facility-specific discretionary judgments.

The State attempts to downplay its discretion by pointing to a single-judge order regarding a now-abandoned plan to retrofit a dilapidated former juvenile prison into what would have been the largest prison mental health outpatient unit in the State. State Br. 53; *Coleman*-D.E. 3734 at 3; J.A. 825–828, 858–861. But that now-moot order concerned specific conditions in one project, for a highly specialized mental health population. And it left unaltered the flexibility that the three-judge court's order leaves the State over the *entire prison system*. The three-judge court expressly declined to interfere with the management of individual prisons, ordering a system-wide overcrowding limit that "permits the [S]tate to continue determining the proper population of individual institutions." JS1-App 171a. And rather than micromanage the State's financial resources, the court's order allows the State to draw from any tools it wishes and acknowledges

that the benchmarks would not remain "static." JS2-App. 4a–6a. For example, if the State were to build or contract for new facilities, that "increase in design capacity through construction would decrease the number of inmates by which the prison population must be reduced." *Id.*

That the State nonetheless complains of harms to "federalism" and the "separation of powers" to ward off the court's remedy comes as little surprise. State Br. 49–53. That move is consistent with the State's long-standing efforts to shield itself from accountability. Rather than assume responsibility for remedying the violations, the State has for years "not taken … seriously" its inhumane prison conditions, shifted blame, and resisted the hard choices that a constitutional remedy necessarily entails. J.A. 1815. Serious federalism concerns do not credibly hang in the balance when the State arguably enjoyed even less discretion under the specific court mandates issued over the course of a decade. California cannot further prolong its foot-dragging on devising a solution for the widespread violations of its inmates' constitutional rights. The State's suggestion that the court "usurped the role of the political branches" rings hollow, State Br. 48, when the very basis of the order is to stir the political branches from their longstanding inaction.

2. The Overcrowding Limit Serves The Interests Of Public Safety.

1. The State's contention that the three-judge court disregarded public safety is wrong. The court examined hundreds of exhibits related to public safety and devoted nearly ten days of trial. JS1-App. 185a. The State itself represented that it could

"safely reach a population level of 137.5%" of design capacity. JS1-App. 317a. The Governor, in presenting his proposal to the State legislature, has declared that a reduction of 37,000 prisoners could be accomplished safely in two years. *See* J.A. 1522–1524; *see also* J.A. 2559–2561. The court thus appropriately found that the State could "comply with [the] population reduction order *without a significant adverse impact upon public safety*." JS1-App. 187a (emphasis added).

2. The State did not bring forth any evidence below of the public safety concerns it now emphasizes. The State notes that, unlike its first plan, in its *second* plan, the State omitted a sentence vouching that the plan would comport with public safety. State Br. 54. But deleting that single sentence has all the hallmarks of an empty litigation tactic. If the State believes there is a public safety threat posed by any of the choices it has made to address prison overcrowding, it should have stepped forward and substantiated its concern to the court below. It is up to the State to select among the various options it put forth in its plan and, if necessary, to bring issues to the attention of the three-judge court. JS2-App. 4a–5a.

Moreover, as the court suggested, the State's substantial savings from a manageable prison population could be redirected towards "rehabilitative and reentry programming in the prisons" and community re-entry programs, which have been shown to *promote* public safety. JS1-App. 187a, 235a. Drawing on that suggestion, the State contends that the order below seeks to "'dictat[e]" its budget priorities. State Br. 55. But the three-judge

court's order affords the State broad discretion to implement the programs it desires and to allocate its resources as it sees fit.

3. Dozens of other jurisdictions throughout the country have safely implemented reductions in prison and jail populations without seeing increases in recidivism or crime. JS1-App. 202a–203a, 243a–246a. Similarly, numerous county jails in California have released prisoners (without endangering public safety) to maintain capacity around or below 100% due to safety concerns and/or court-imposed overcrowding limits. JS1-App. 224a–227a & n.84, 202a–203a. During a decade of operation from 1996 through 2006, such local overcrowding limits in California did not result in a higher crime rate. JS1-App. 203a. California's unprecedented overcrowding crisis is an outgrowth, in part, of its distinct criminal laws and parole system, which put thousands in prison who would not be there at all in other states. Should the State elect to change its system, empirical evidence shows no significant risk of public harm. JS1-App. 243a–246a.

4. Finally, the continuing constitutional violations, resulting from inundated prison facilities themselves pose a serious threat to public safety. Prison staff cannot operate effectively in such overcrowded conditions. And there is a reasonable societal expectation that individuals should suffer condign punishment for the crimes they commit without facing the additional risk of untreated severe illness or death in prison.

* * *

The three-judge court's narrowly tailored order, which holds state officials accountable by requiring them to decide how to address California's emergency overcrowding crisis, complies with the PLRA. This is an unusual order, but this is an unusual case. After 20 years of continuing constitutional violations that, despite more than 70 previous court orders, the State has failed to remedy, the State should not be allowed to further delay taking actions to address overcrowding that it concedes can be safely implemented in two years. And the State has not even attempted to demonstrate that any of the lower courts' factual findings are clearly erroneous. When Congress enacted the PLRA, it expressly contemplated that there would be circumstances where a "prisoner release order" is required when other efforts to remedy constitutional violations have failed. If the remedy of an overcrowding limit is not appropriate in this extreme case, it is hard to imagine any case where the PLRA would apply.

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted,

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November 17, 2010

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2. 1996-05-09 Order [Docket # 693] (concerning Special Master powers)
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5. 1997-06-27 Order [Docket # 858] (Program Guide accepted and monitoring of implementation to begin)
6. 1998-05-21 Order [Docket # 945] (adding specialized treatment beds, access to Department of Mental Health hospital beds)
7. 1998-06-16 Order [Docket # 948] (clinical staffing, use of force, discipline, involuntary medication, screening, administrative segregation)
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9. 1998-08-25 Order [Docket # 968] (clinical staffing, discipline, and use of force)
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11. 1998-11-19 Order [Docket # 991]
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12. 1998-12-09 Order [Docket # 1003]
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13. 1999-04-09 Order [Docket # 1021]
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15. 1999-07-26 Order [Docket # 1055]
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16. 1999-12-09 Order [Docket # 1097]
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21. 2000-04-27 Order [Docket # 1155]
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22. 2000-07-03 Order [Docket # 1176]
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24. 2000-08-28 Order [Docket # 1198]
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25. 2000-09-14 Order [Docket # 1201]
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26. 2000-12-22 Order [Docket # 1229]
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27. 2001-04-04 Order [Docket # 1262]
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28. 2001-06-27 Order [Docket # 1278]
(deficiencies at specific prisons for various issues, tracking of transfers to higher levels of care, construction report, access to Department of Mental Health inpatient beds)

29. 2001-10-01 Order [Docket # 1306]
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30. 2001-10-26 Order [Docket # 1309]
(staffing ratios for segregation units and deficiencies at specific prisons)
31. 2001-12-20 Order [Docket # 1323]
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32. 2002-04-09 Order [Docket # 1367]
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33. 2002-04-25 Order [Docket # 1372]
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38. 2002-10-08 Order [Docket # 1431]
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39. 2002-10-2 Order [Docket # 1440]
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40. 2002-12-09 Order [Docket # 1478]
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41. 2003-07-25 Order [Docket # 1536]
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42. 2003-10-20 Order [Docket # 1548]
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43. 2004-01-12 Order [Docket # 1559]
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44. 2004-07-09 Order [Docket # 1594]
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45. 2004-07-27 Order) [Docket # 1598]
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46. 2004-10-05 Order [Docket # 1607]
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47. 2004-10-29 Order [Docket # 1624]
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48. 2005-01-27 Order [Docket # 1638]
(adding specialized treatment beds, access to Department of Mental Health beds)

49. 2005-03-08 Order [Docket # 1654]
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50. 2005-06-10 Order [Docket # 1667]
(deficiency at specific prison, clinical staffing and recruitment plans)

51. 2005-06-10 Order [Docket # 1668]
(requiring cell modifications, emergency life support for suicide prevention)

52. 2006-03-03 Order [Docket # 1772]
(clinical staffing, recruitment and retention)

53. 2006-03-03 Order [Docket # 1773]
(Revised Program Guide adopted and implemented)

54. 2006-03-09 Order [Docket # 1774]
(deficiency at specific prison, clinical staffing)

55. 2006-05-02 Order [Docket # 1800]
(adopting defendants' long term bed plan to add specialized treatment beds, ordering emergency short and intermediate projects, access to Department of Mental Health beds, state licensing issues)

56. 2006-05-02 Order [Docket # 1802]
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57. 2006-05-02 Order [Docket # 1803]
(enhanced access to necessary levels of care in reception centers)

58. 2006-06-08 Order [Docket # 1830]
(suicide prevention plan for administrative segregation units)

59. 2006-06-28 Order [Docket # 1855]
(Department of Mental Health Director as party defendant)

60. 2006-07-20 Order [Docket # 1904]
(adding emergency specialized treatment beds and waiving state law and regulations)

61. 2006-08-01 Order [Docket # 1929]
(adding state director of finance as official capacity defendant)

62. 2006-08-23 Order [Docket # 1962]
(access to Department of Mental Health beds)

63. 2006-10-20 Order [Docket # 1998]
(population projection process for future needs for specialized treatment beds and plan for construction of necessary specialized beds, emergency short and intermediate term construction projects, access to higher levels of care, acceleration of construction projects)

64. 2006-11-06 Order [Docket # 2025]
(screening for transfers to out of state prisons)

65. 2006-12-15 Order [Docket # 2083]
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66. 2007-01-25 Order [Docket # 2119]
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67. 2007-02-12 Order [Docket # 2139]
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68. 2007-03-01 Order [Docket # 2154]
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69. 2007-03-09 Order [Docket # 2156]
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70. 2007-03-12 Order [Docket # 2157]
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71. 2007-03-12 Order [Docket # 2158]
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72. 2007-03-27 Order [Docket # 2173]
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73. 2007-03-28 Order [Docket # 2178]
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74. 2007-04-17 Order [Docket # 2200]
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75. 2007-05-23 Order [Docket # 2236]
(clinical staffing, access to Department of Mental Health beds, compensation and clinical staffing for Department of Mental Health)

76. 2007-05-23 Order [Docket # 2237]
(access to necessary levels of care, Department of Mental Health beds)

77. 2007-06-28 Order [Docket # 2301]
(clinical staffing, compensation for Department of Mental Health clinicians, access to care)

Appendix B

Prison Overcrowding State Of Emergency Proclamation

PROCLAMATION
October 4, 2006

PROCLAMATION

by the

Governor of the State of California

WHEREAS, the California Department of Corrections and Rehabilitation (CDCR) is required by California law to house inmates committed to state prison; and

WHEREAS, various trends and factors, including population increases, parole policies, sentencing laws, and recidivism rates have created circumstances in which the CDCR is now required to house a record number of inmates in the CDCR prison system, making the CDCR prison system the largest state correctional system in the United States, with a total inmate population currently at an all-time high of more than 170,000 inmates; and

WHEREAS, due to the record number of inmates currently housed in prison in California, all 33 CDCR prisons are now at or above maximum operational capacity, and 29 of the prisons are so overcrowded that the CDCR is required to house more than 15,000 inmates in conditions that pose substantial safety risks, namely, prison areas never designed or intended for inmate housing, including, but not limited to, common areas such as prison gymnasiums, dayrooms, and program rooms, with

approximately 1,500 inmates sleeping in triple-bunks; and

WHEREAS, the current severe overcrowding in 29 CDCR prisons has caused substantial risk to the health and safety of the men and women who work inside these prisons and the inmates housed in them, because:

With so many inmates housed in large common areas, there is an increased, substantial risk of violence, and greater difficulty controlling large inmate populations.

With large numbers of inmates housed together in triple-bunks, there is an increased, substantial risk for transmission of infectious illnesses.

The triple-bunks and tight quarters create line-of-sight problems for correctional officers by blocking views, creating an increased, substantial security risk.

WHEREAS, the current severe overcrowding in these 29 prisons has also overwhelmed the electrical systems and/or wastewater/sewer systems, because those systems are now often required to operate at or above the maximum intended capacity, resulting in an increased, substantial risk to the health and safety of CDCR staff, inmates, and the public, because:

Overloading the prison electrical systems has resulted in power failures and blackouts within the prisons, creating increased security threats. It has also damaged fuses and transformers.

Overloading the prison sewage and wastewater systems has resulted in the discharge of waste

beyond treatment capacity, resulting in thousands of gallons of sewage spills and environmental contamination.

And when the prisons "overdischarge" waste, bacteria can contaminate the drinking water supply, putting the public's health at an increased, substantial risk.

WHEREAS, overloading the prison sewage and water systems has resulted in increased, substantial risk of damage to state and privately owned property and has resulted in multiple fines, penalties and/or notices of violations to the CDCR related to wastewater/sewer system overloading such as groundwater contamination and environmental pollution; and

WHEREAS, overcrowding causes harm to people and property, leads to inmate unrest and misconduct, reduces or eliminates programs, and increases recidivism as shown within this state and in others; and

WHEREAS, in addition to all of the above, in the 29 prisons with severe overcrowding, the following circumstances exist:

Avenal State Prison has an operational housing capacity of 5,768 inmates, but it currently houses 7,422 inmates, with 1,654 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 64 incidents of assault/battery by inmates—31 of them against CDCR staff—along with 15 riots/melees, and 27 weapon confiscations.

The California Correctional Center has an operational housing capacity of 5,724 inmates, but it currently houses 6,174 inmates, with 450 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 128 incidents of assault/battery by inmates—16 of them against CDCR staff—along with 34 riots/melees, and 21 weapon confiscations.

The California Correctional Institution has an operational housing capacity of 4,931, but it currently houses 5,702 inmates, with 771 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 125 incidents of assault/battery by inmates—79 of them against CDCR staff—along with 5 riots/melees, and 57 weapon confiscations.

Centinela State Prison has an operational housing capacity of 4,368, but it currently houses 4,956 inmates, with 588 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 141 incidents of assault/battery by inmates—30 of them against CDCR staff—along with 10 riots/melees, and 151 weapon confiscations.

The California Institution for Men has an operational housing capacity of 5,372, but it currently houses 6,615 inmates, with 1,243 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 170 incidents of assault/battery by inmates—57 of them against CDCR staff—along with 21 riots/melees, and 47 weapon confiscations.

The California Institution for Women has an operational housing capacity of 2,228, but it

currently houses 2,624 inmates, with 396 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 65 incidents of assault/battery by inmates—26 of them against CDCR staff—and 6 weapon confiscations.

The California Men's Colony has an operational housing capacity of 6,294, but it currently houses 6,574 inmates, with 280 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 151 incidents of assault/battery by inmates—33 of them against CDCR staff—along with 11 riots/melees, and 29 weapon confiscations.

The California State Prison at Corcoran has an operational housing capacity of 4,954, but it currently houses 5,317 inmates, with 363 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 147 incidents of assault/battery by inmates—58 of them against CDCR staff—along with 5 riots/melees, and 111 weapon confiscations.

The California Rehabilitation Center has an operational housing capacity of 4,660, but it currently houses 4,856 inmates, with 196 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 65 incidents of assault/battery by inmates—28 of them against CDCR staff—9 riots/melees, and 34 weapon confiscations.

The Correctional Training Facility has an operational housing capacity of 6,157, but it currently houses 7,027 inmates, with 870 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 85 incidents

of assault/battery by inmates—26 of them against CDCR staff—along with 9 riots/melees, and 27 weapon confiscations.

Chuckawalla Valley State Prison has an operational housing capacity of 3,443, but it currently houses 4,292 inmates, with 849 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 50 incidents of assault/battery by inmates—11 of them against CDCR staff—along with 5 riots/melees, and 21 weapon confiscations.

Deuel Vocational Institution has an operational housing capacity of 3,115, but it currently houses 3,911 inmates, with 796 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 114 incidents of assault/battery by inmates—54 of them against CDCR staff—along with 7 riots/melees, and 37 weapon confiscations.

High Desert State Prison has an operational housing capacity of 4,346, but it currently houses 4,706 inmates, with 360 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 351 incidents of assault/battery by inmates—44 of them against CDCR staff—along with 6 riots/melees, and 289 weapon confiscations.

Ironwood State Prison has an operational housing capacity of 4,185, but it currently houses 4,665 inmates, with 480 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 96 incidents of assault/battery by inmates—19 of them against CDCR staff—along with 14 riots/melees, and 52 weapon confiscations.

Kern Valley State Prison has an operational housing capacity of 4,566, but it currently houses 4,686 inmates, with 120 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 146 incidents of assault/battery by inmates—60 of them against CDCR staff—along with 10 riots/melees, and 46 weapon confiscations.

The California State Prison at Los Angeles has an operational housing capacity of 4,230, but it currently houses 4,698 inmates, with 468 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 211 incidents of assault/battery by inmates—123 of them against CDCR staff—along with 4 riots/melees, and 101 weapon confiscations.

Mule Creek State Prison has an operational housing capacity of 3,197, but it currently houses 3,929 inmates, with 732 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 65 incidents of assault/battery by inmates—35 of them against CDCR staff—along with 1 riot/melee, and 28 weapon confiscations.

North Kern State Prison has an operational housing capacity of 5,189, but it currently houses 5,365 inmates, with 176 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 135 incidents of assault/battery by inmates—43 of them against CDCR staff—along with 16 riots/melees, and 70 weapon confiscations.

Pelican Bay State Prison has an operational housing capacity of 3,444, but it currently houses 3,604 inmates, with 160 inmates housed in areas designed for other purposes. At the same time, in the

last year, there were 256 incidents of assault/battery by inmates—88 of them against CDCR staff—along with 9 riots/melees, and 106 weapon confiscations.

Pleasant Valley State Prison has an operational housing capacity of 4,368, but it currently houses 5,112 inmates, with 744 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 205 incidents of assault/battery by inmates—59 of them against CDCR staff—along with 12 riots/melees, and 26 weapon confiscations.

The Richard J. Donovan Correctional Facility has an operational housing capacity of 4,120, but it currently houses 4,720 inmates, with 600 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 244 incidents of assault/battery by inmates—118 of them against CDCR staff—along with 11 riots/melees, and 96 weapon confiscations.

The California State Prison at Sacramento has an operational housing capacity of 2,973, but it currently houses 3,213 inmates, with 240 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 264 incidents of assault/battery by inmates—159 of them against CDCR staff—along with 5 riots/melees, and 118 weapon confiscations.

The California Substance Abuse Treatment Facility and State Prison at Corcoran has an operational housing capacity of 6,360, but it currently houses 7,593 inmates, with 1,233 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 120 incidents of assault/battery by inmates—53 of them against

CDCR staff—along with 20 riots/melees, and 124 weapon confiscations.

The Sierra Conservation Center has an operational housing capacity of 5,657, but it currently houses 6,107 inmates, with 450 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 61 incidents of assault/battery by inmates—18 of them against CDCR staff—along with 19 riots/melees, and 50 weapon confiscations.

The California State Prison at Solano has an operational housing capacity of 5,070, but it currently houses 5,858 inmates, with 788 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 60 incidents of assault/battery by inmates—26 of them against CDCR staff—along with 4 riots/melees, and 114 weapon confiscations.

San Quentin State Prison has an operational housing capacity of 4,933, but it currently houses 5,183 inmates, with 287 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 262 incidents of assault/battery by inmates—123 of them against CDCR staff—along with 15 riots/melees, and 118 weapon confiscations.

Salinas Valley State Prison has an operational housing capacity of 4,200, but it currently houses 4,680 inmates, with 480 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 181 incidents of assault/battery by inmates—82 of them against CDCR staff—along with 7 riots/melees, and 91 weapon confiscations.

Valley State Prison for Women has an operational housing capacity of 3,902, but it currently houses 3,958 inmates, with 56 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 125 incidents of assault/battery by inmates—75 of them against CDCR staff — and 15 weapon confiscations.

Wasco State Prison has an operational housing capacity of 5,838, but it currently houses 6,098 inmates, with 260 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 226 incidents of assault/battery by inmates—97 of them against CDCR staff—along with 32 riots/melees, and 82 weapon confiscations.

WHEREAS, some of these 29 severely overcrowded prisons may even be housing more inmates, because the inmate population continually fluctuates among the CDCR prisons; and

WHEREAS, in addition to the 1,671 incidents of violence perpetrated in these 29 severely overcrowded prisons by inmates against CDCR staff last year, and the 2,642 incidents of violence perpetrated in these prisons on inmates by other inmates in the last year, the suicide rate in these 29 prisons is approaching an average of one per week; and

WHEREAS, the federal court in the Coleman case found mental-health care in CDCR prisons to be below federal constitutional standards due in part to the lack of appropriate beds and space; and

WHEREAS, the use of common areas for inmate housing has severely modified or eliminated certain

inmate programs in the 29 prisons with severe overcrowding; and

WHEREAS, the severe overcrowding has also substantially limited or restricted inmate movement, causing significantly reduced inmate attendance in academic, vocational, and rehabilitation programs; and

WHEREAS, overcrowded prisons in other states have experienced some of the deadliest prison riots in American history, including:

In 1971, the nation's deadliest prison riot occurred in Attica, New York, resulting in the death of 43 people. On the day of this riot, the prison—which was built for 1600—housed approximately 2,300 inmates.

In 1981, a riot occurred in the New Mexico State Penitentiary. More than 30 inmates were killed, more than 100 people were injured, and 12 officers were taken hostage, some of whom were beaten, sexually assaulted, and/or raped. On the day of this riot, the prison—which was built for 900—housed approximately 1,136 inmates.

In 1993, a riot occurred in Lucasville, Ohio. One officer was murdered, four officers were seriously injured, and nine inmates were killed. On the day of this riot, the prison—which was built for 1600—housed approximately 2,300 inmates.

WHEREAS, I believe immediate action is necessary to prevent death and harm caused by California's severe prison overcrowding; and

WHEREAS, because of the housing shortage in CDCR prisons, the CDCR has current contracts with

four California counties to house 2,352 additional state inmates in local adult jails, but this creates the following overcrowding problem in the county jails:

According to a report by the California State Sheriffs' Association in June 2006, adult jails recently averaged a daily population of approximately 80,000 inmates. On a typical day, the county jails lacked space for more than 4,900 inmates across the state.

Based on the same report, 20 of California's 58 counties have court-imposed population caps resulting from litigation brought by or on behalf of inmates in crowded jails and another 12 counties have self-imposed caps.

Most 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.

The 2006 Sheriffs' Association report states that last year, 233,388 individuals statewide avoided incarceration or were released early into local communities because of the lack of jail space.

WHEREAS, overcrowding conditions are projected to get even worse in the coming year, to the point that the CDCR expects to run out of all common area space to house prisoners in mid-2007, and will be unable to receive any new inmates; and

WHEREAS, in January 2006, I proposed $6 billion in the Strategic Growth Plan to help manage inmate population at all levels of government by increasing the number of available local jail beds and providing for two new prisons and space for 83,000

prisoners to address California's current and future incarceration needs; and

WHEREAS, the California Legislature failed to act upon this proposal; and

WHEREAS, in March 2006, a proposal was submitted as part of my 2006-07 budget to enable the CDCR to contract for a total of 8,500 beds in community correctional facilities within the state; and

WHEREAS, the California Legislature denied this proposal; and

WHEREAS, on June 26, 2006, I issued a proclamation calling the Legislature into special session because I believed urgent action was needed to address this severe problem in California's prisons, and I wanted to give the Legislature a further opportunity to address this crisis; and

WHEREAS, the CDCR submitted detailed proposals to the Legislature to address the immediate and longer-term needs of the prison system in an effort resolve the overcrowding crisis; and

WHEREAS, the California Legislature failed to adopt the proposals submitted by the CDCR, and also failed to adopt any proposals of its own; and

WHEREAS, in response, my office directed the CDCR to conduct a survey of certain inmates in California's general population to determine how many might voluntarily transfer to out-of-state correctional facilities; and

WHEREAS, the CDCR reports that more than 19,000 inmates expressed interest in voluntarily

transferring to a correctional facility outside of California; and

WHEREAS, the overcrowding crisis gets worse with each passing day, creating an emergency in the California prison system.

NOW, THEREFORE, I, ARNOLD SCHWARZENEGGER, Governor of the State of California, in light of the aforementioned, find that conditions of extreme peril to the safety of persons and property exist in the 29 CDCR prisons identified above, due to severe overcrowding, and that the magnitude of the circumstances exceeds the capabilities of the services, personnel, equipment, and facilities of any geographical area in this state. Additionally, the counties within the state are harmed by this situation, as the inability to appropriately house inmates directly impacts local jail capacity and the early release of felons. This crisis spans the eastern, western, northern, and southern parts of the state and compromises the public's safety, and I find that local authority is inadequate to cope with the emergency. Accordingly, under the authority of the California Emergency Services Act, set forth at Title 2, Division 1, Chapter 7 of the California Government Code, commencing with section 8550, I hereby proclaim that a State of Emergency exists within the State of California's prison system.

Pursuant to this proclamation:

I. The CDCR shall, consistent with state law and as deemed appropriate by the CDCR Secretary for the sole purpose of immediately mitigating the severe overcrowding in these 29 prisons and the

resulting impacts within California, immediately contract for out-of-state correctional facilities to effectuate voluntary transfers of California prison inmates to facilities outside of this state for incarceration consisting of constitutionally adequate housing, care, and programming.

II. The CDCR Secretary shall, after exhausting all possibilities for voluntary transfers of inmates, and in compliance with the Interstate Corrections Compact and the Western Interstate Corrections Compact, and as he deems necessary and appropriate to mitigate this emergency, effectuate involuntary transfers of California prison inmates, based on criteria set forth below, to institutions in other states and those of the federal government for incarceration consisting of constitutionally adequate housing, care, and programming. In such instance, because strict compliance with California Penal Code sections 11191 and 2911 would prevent, hinder, or delay the mitigation of the severe overcrowding in these prisons, applicable provisions of these statutes are suspended to the extent necessary to enable the CDCR to transfer adult inmates, sentenced under California law, to institutions in other states and those of the federal government without consent. This suspension is limited to the scope and duration of this emergency.

A. The CDCR Secretary shall prioritize for involuntary transfer the inmates who meet the following criteria:

1. Inmates who: (a) have been previously deported by the federal government and are criminal aliens subject to immediate deportation; or (b) have

committed an aggravated felony as defined by federal statute and are subject to deportation.

2. Inmates who are paroling outside of California.

3. Inmates who have limited or no family or supportive ties in California based on visitation records and/or other information deemed relevant and appropriate by the CDCR Secretary.

4. Inmates who have family or supportive ties in a transfer state.

5. Other inmates as deemed appropriate by the CDCR Secretary.

B. No person under commitment to the Division of Juvenile Justice may be considered for such transfer.

III. The CDCR Secretary shall, before selecting any inmate for transfer who has individual medical and/or mental-health needs, consult with the court-appointed Receiver of the CDCR medical system and/or the court-assigned Special Master in the Coleman mental-health case, depending on the healthcare needs of the inmate, to determine whether a transfer would be appropriate.

IV. The CDCR Secretary shall, before effectuating any inmate transfer, carefully and thoroughly evaluate all appropriate factors, including, but not limited to, the cost-effectiveness of any such transfer and whether an inmate selected for transfer has any pending appeals or hearings that may be impacted by such transfer.

V. The CDCR shall, as deemed appropriate by the CDCR Secretary, contract for facility space,

inmate transportation, inmate screening, the services of qualified personnel, and/or for the supplies, materials, equipment, and other services needed to immediately mitigate the severe overcrowding and the resulting impacts within California. Because strict compliance with the provisions of the Government Code and the Public Contract Code applicable to state contracts would prevent, hinder, or delay the mitigation of the severe overcrowding in these prisons, applicable provisions of these statutes, including, but not limited to, advertising and competitive bidding requirements, are suspended to the extent necessary to enable the CDCR to enter into such contracts as expeditiously as possible. This suspension is limited to the scope and duration of this emergency.

I FURTHER DIRECT that as soon as hereafter possible, this proclamation be filed in the Office of the Secretary of State and that widespread publicity and notice be given of this proclamation.

IN WITNESS WHEREOF I have hereunto set my hand and caused the Great Seal of the State of California to be affixed this 4th day of October 2006.

ARNOLD SCHWARZENEGGER

Governor of California

ATTEST:

BRUCE McPHERSON

Secretary of State