No. 09-1233

IN THE

Supreme Court of the United States

GOVERNOR ARNOLD SCHWARZENEGGER, et al.,
Appellants,

vs.

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

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

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

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QUESTIONS PRESENTED

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

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

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

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In this case, a dubiously constituted panel of three judges ordered a massive reduction in the number of

1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

felons who will be locked away. Both experience and common sense tell us that such an order creates a grave danger to public safety. Yet the panel gave little weight to the danger and easily credited claims that the reduction could (not necessarily would) be achieved without an adverse impact. This risk to innocent victims of crime, who have no ability to control how the reduction is to be implemented, is contrary to the rights CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

This case arose from two separate lawsuits, presently titled[2] *Plata* v. *Schwarzenegger*, U. S. D. C. N. D., Cal. No. C01-1351 TEH and *Coleman* v. *Schwarzenegger*, U. S. D. C. E. D., Cal. No. CIV S-90-0520 LKK JFM. The *Plata* case involves health care, and the *Coleman* case involves mental health services in the state prisons of California. See Opinion and Order, JS1-App. 13a-14a, 30a-31a.[3] The *Plata* court appointed a receiver for the prison health care system, yet before the receiver had even issued his plan, the plaintiffs moved to convene a three-judge court for the purpose of considering a prisoner release order. See Brief of Appellants 14.

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2. Both cases predate the tenure of the present Governor of California, and this Court's decision will likely follow it.

3. For consistency across briefs, we adopt the document abbreviations from the Brief for Appellants 1, n. 1. The Appendix to the Jurisdictional Statement from the prior attempt to appeal in this case, No. 09-416, is cited "as 'JS1-App.' and the Appendix to the Jurisdictional Statement in this case as 'JS2-App.' The records in *Plata* . . . and *Coleman* . . . are cited by docket entry number (*i.e.*, '*Plata* D.E. __,' '*Coleman* D.E. __')." The Joint Appendix is not available as of the printing deadline for this brief.

On July 23, 2007, the two single-judge courts jointly called for the convening of a three-judge court for both cases, despite the lack of any statutory authorization for such a procedure. See *Plata* D.E. 780; *Coleman* D.E. 2320. The correctional officers' union intervened in the case on the side of the inmates. Counties, public safety officials, and state legislators intervened on the side of the State officials. *Plata* D.E. 857.

Trial was held a year and a half after the single-judge courts had issued their orders, but the three-judge court refused to admit or consider evidence regarding whether there were "current and ongoing" violations, asserting that the issue was not properly before them. See Coleman Motion to Dismiss 9. On August 4, 2009, the three-judge court issued an order that the state reduce its prison population to 137.5% of "design capacity." See Brief of Appellants 7-8. "Design capacity" is a term of art. The state corrections authorities have determined that the "maximum safe and reasonable capacity" is about 1.8 times "design capacity." JS1-App. 59a.

The defendants and intervenors attempted to appeal this order to this Court. The plaintiffs asserted that this Court had no jurisdiction because the August 9 order was not a "prisoner release order." Motion to Dismiss or Affirm in No. 09-416, p. 8.

On January 19, 2010, this Court dismissed. "Appeal dismissed for want of jurisdiction. The Court takes note that a further order has been entered in this case, but that order is not the subject of this appeal. It is also noted that the district court has stayed its further order pending review by this Court." *Schwarzenegger* v. *Plata*, 130 S. Ct. 1140, 175 L. Ed. 2d 967 (2010).

The order referred to was the order appealed in the present case, the "Order to Reduce Prison Population"

issued by the three-judge court on January 12, 2010. Both the original defendant state officials and the intervenors appealed this order, in cases numbered 09-1233 and 09-1232 respectively. On June 14, 2010, this Court ordered in No. 09-1233, "Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits." No action was taken in No. 09-1232.

SUMMARY OF ARGUMENT

The whole case is properly before this Court in this appeal. Under the three-judge-court case law that was well established when Congress enacted the Prison Litigation Reform Act (PLRA) in 1996, once an injunction brings a case within this Court's appellate jurisdiction, the Court has the authority to resolve the entire case, including any predicates to the injunction. The language of PLRA does not require plaintiffs' piecemeal appeal theory, and the policy of PLRA is to the contrary.

The three-judge court erred in precluding evidence and consideration of whether there was an ongoing constitutional violation at the time of the prisoner release order and whether other remedies had been ineffective as of the date of the order. Although in some circumstances a three-judge court might have discretion to decline to reconsider an issue already litigated, this three-judge court's refusal on the theory it did not have the authority is reversible error.

This Court has the authority to require reassignment of the case to different judges upon remand. If there is to be a remand to the three-judge court, the circumstances of this case call for such a reassignment. The manner in which the three-judge court was created and the manner in which it has conducted these pro-

ceedings are more than sufficient to cause the public to doubt the fairness of the tribunal, which is a key consideration in those sensitive cases that Congress has assigned to three-judge courts.

ARGUMENT

I. The whole case, including all predicates to a prisoner release order, was properly before the three-judge court and is properly before this Court.

The *Coleman* plaintiffs aptly describe the three-judge court's view of the issues it had the authority to decide:

> "At a pre-trial conference, the three-judge court clarified the scope of its proceedings, emphasizing that its role was not to re-adjudicate the existence of the underlying constitutional violations found by the single-judge courts. The three-judge court made clear that if the State wanted to make the case that violations no longer existed, it should direct that argument to the single-judge courts. 2008-11-10 Pre-Tr. 28-29." Coleman Motion to Dismiss 9.

From this premise, plaintiffs assert that this Court has no jurisdiction to review the predicate decisions of the single-judge court, asserting that any appeal of those decisions must go to the Court of Appeals. *Id*., at 18-19; see also Plata Motion to Dismiss 16 (adopting Coleman's argument on this point). Plaintiffs thus envision a single case parceled out between single-judge and three-judge courts, with two different appeal routes in the same case, one to this Court and the other to the Court of Appeals.

That is not the law, and the contrary proposition has been settled for a long time. Once a three-judge court

is properly formed, it has jurisdiction of the whole case, not just the parcels of the case which required it to be convened. Once the three-judge court has issued an injunction that is appealable to this Court, this Court has jurisdiction to review the whole case, including any predicates to the injunction.

In *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen*, 362 U. S. 73 (1960), the Court rejected the notion that the jurisdiction of the three-judge court was limited to the parts of the case that made the three-judge court necessary, leaving the remainder of the case with the single-judge court.

> "Cases in this Court since *Louisville & Nashville R. Co.* v. *Garrett*, 231 U. S. 298 (1913), have consistently adhered to the view that, in an injunction action challenging a state statute on substantial federal constitutional grounds, a three-judge court is required to be convened and has—just as we have on a direct appeal from its action—jurisdiction over *all* claims raised against the statute." *Id.*, at 80-81 (footnote omitted).

The three-judge District Court had jurisdiction over the whole case, and the whole case was properly before this Court once an appeal was properly taken.

> " 'The jurisdiction of the District Court so constituted, and of this Court upon appeal, extends to every question involved, whether of state or federal law, and enables the court to rest its judgment on the decision of such of the questions as in its opinion effectively dispose of the case.' " *Id.*, at 82, n. 8 (quoting *Sterling* v. *Constantin*, 287 U. S. 378, 393-394 (1932) (Hughes, C. J.)).

White v. *Regester*, 412 U. S. 755 (1973), is instructive on this point. A three-judge court found the reapportionment of the Texas House unconstitutional,

but it only granted immediate injunctive relief against the plan as to two counties. *Id*., at 759. The court held that once the appeal of the injunction properly brought the case to this Court, the appellants were also entitled to review of the declaration that the statewide plan was invalid, even though they could not have appealed that decision standing alone. *Id*., at 760. "This declaration was the *predicate* for the court's order requiring Dallas and Bexar Counties to be reapportioned into single districts . . . ." *Ibid*. (emphasis added).

> "With the Texas reapportionment plan before it, it was in the interest of judicial economy and the avoidance of piecemeal litigation that the three-judge District Court have jurisdiction over all claims raised against the statute when a substantial constitutional claim was alleged, and an appeal to us, once properly here, has the same reach." *Id*., at 761.

These cases predate the Prison Litigation Reform Act (PLRA), of course, but they were part of the legal background when PLRA was enacted. If Congress had intended for PLRA cases to have piecemeal appeals, contrary to previous practice, it would have said so expressly. There is no conceivable policy reason why Congress would have wanted piecemeal appeals, and such an intent should not be lightly inferred.

The question of whether the criteria of 18 U. S. C. § 3626(a)(3)(A) had been met initially was properly before the three-judge court, as was the question whether there was a current violation at the time that court issued the prisoner release order. These questions are also properly before this Court. Defendants contend that the questions should be characterized as jurisdictional. See Brief for Appellants 24-25. The line between jurisdictional questions and merits questions has been the subject of considerable confusion. See *Union Pacific R. Co.* v. *Locomotive Engineers*, 558 U. S.

__, 130 S. Ct. 584, 596, 175 L. Ed. 2d 428, 443 (2009). That characterization, however, does not determine the outcome. *Arthur Andersen LLP* v. *Carlisle*, 556 U. S. __, 129 S. Ct. 1896, 1901, 173 L. Ed. 2d 832, 839 (2009), noted that a decision that the Court of Appeals had no jurisdiction over a meritless appeal would reach the same result as accepting jurisdiction and then finding the appeal meritless. The subparagraph (A) question and the effect of the three-judge court's failure to address it are properly here for decision, jurisdictional or not.

II. The three-judge court's misunderstanding of its authority over the whole case is reversible error.

As described in Part I, *supra*, the three-judge court mistakenly believed it had no authority to revisit the holdings of the single-judge courts that the criteria of 18 U. S. C. § 3626(a)(3)(A) had been met initially or to determine whether they continued to be true at the time of the order. Even without considering the numerous other errors of the three-judge court, this error alone is sufficient to reverse.

Subparagraph (A) unambiguously states its criteria as conditions for a prisoner release order to be entered. Subparagraph (B) provides that only a three-judge court may enter the order. The statute was enacted with the case law background described in Part I, *supra*, that once a three-judge court is convened it has jurisdiction over the whole case, including any predicates. Neither the language nor the purpose of the statute implies that Congress intended to remove from the three-judge court the authority to consider whether the subparagraph (A) criteria remain true at the time of the prisoner release order.

Subparagraph (D) does, of course, provide for the single-judge court to find that the (A) criteria are met before calling for the three-judge court. That filter does not imply that the three-judge court is precluded from considering the same question. First, the three-judge court statute expressly says, "Any action of a single judge may be reviewed by the full court at any time before final judgment." 28 U. S. C. § 2284(b)(3). In every case, then, the three-judge court would at least have the discretion to reconsider the single judge's finding, even if it had only been entered the day before and there was no new evidence to consider. But there is more. Section 3626(a)(3)(A)(i) requires that the prior order for less intrusive relief "*has* failed to remedy . . . ." It is entirely plausible that the appointment of a receiver that *had* failed to remedy 30 months earlier[4] *has* achieved an acceptable level of compliance by the later date.

In the present case, plaintiffs maintain that they presented "overwhelming evidence" that violations of the Eighth Amendment are ongoing and therefore the prior orders have "failed to remedy" them to this day. See Coleman Motion to Dismiss 8. That may or may not be true. No finding to that effect has been made.

The three-judge court's statement that it made a finding in denying the State's motion for summary judgment, see JS1-App 77a (citing *Plata* D.E. 1757, pp. 6-7), is incorrect. The cited order rejects a challenge to the three-judge court being initially convened by referring to the findings of the single-judge courts,

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4. The order calling for a three-judge court was entered July 23, 2007, *Plata* D.E. 780, holding that the subparagraph (A) criteria were met as of that date. See § 3626(a)(3)(D). Subparagraph (A) itself requires that its criteria be met for the issuance of a prisoner release order, which was issued on January 12, 2010. JS2-App. 1a-10a.

findings which necessarily referred to conditions then existing, not later conditions.

This is not to say that every three-judge court must reconsider all the findings of the single-judge court in every instance. Particularly in light of the permissive "may" in § 2284, it would be within the discretion of that court, in proper circumstances, to decline to reopen a question already decided by another court, even if that court is one of lesser stature. Cf. *Darr* v. *Burford*, 339 U. S. 200, 215 (1950), overruled on other grounds in *Fay* v. *Noia*, 372 U. S. 391 (1963). In this case, though, the three-judge court did not exercise discretion. It mistakenly believed it had no authority to reconsider. Coleman Motion to Dismiss 9; Transcript of Hearing of Nov. 10, 2008, *Plata* D.E. 1786, pp. 28-29. Where the law provides a court with discretion, the litigant is entitled to have that discretion exercised.

In *Moore* v. *United States*, 555 U. S. __, 129 S. Ct. 4, 4, 172 L. Ed. 2d 1, 2 (2008) (*per curiam*), the defendant received a sentence for possessing cocaine base in accordance with the Sentencing Guidelines. That was a legal sentence, within the discretion of the District Court to impose. Nonetheless, it was reversible error for the District Court to impose that sentence while under the mistaken impression it had no discretion to depart. *Id*., 129 S. Ct., at 5, 172 L. Ed. 2d, at 3.

So it is in this case. Before the extreme remedy of a prisoner release order can be entered, the three-judge court must determine, among other requirements, that prior remedies have been ineffective as of the date of the order. The court might properly rely on a prior finding by a single-judge court if it is recent and there is no reason to believe conditions have changed, but no such exercise of discretion occurred in this case.

Finally, the District Court made the remarkable assertion that a motion to terminate the previously granted relief under § 3626(b) was the exclusive method for asserting that the prior relief had succeeded in remedying the violations. See J51-App. 77a. No authority or supporting rationale is provided for this assertion. While the State *may* move for termination of a remedy which has proven effective, it would not necessarily be sound policy to do so immediately. Certainly nothing in the text or purpose of the PLRA supports the idea that Congress intended that the State forfeit its ability to challenge whether the criterion of § 3626(a)(3)(A)(i) has been met merely because it elects not to move for immediate termination of a less intrusive remedy.

The order must be vacated and the case remanded. If this Court accepts defendants' jurisdictional argument, then the three-judge court will be dissolved. If not, this Court must consider what directions to give regarding the three-judge court.

III. On remand, the case should be reassigned to a new panel.

A. Reassignment and Three-Judge Courts.

Under 28 U. S. C. § 2106, this Court and other federal appellate courts have the authority to "require such further proceedings to be had as may be just under the circumstances." This statute gives the appellate court the authority to have a case assigned to a different judge on remand independently of whether the judge is disqualified under 28 U. S. C. § 455. See *Liteky* v. *United States*, 510 U. S. 540, 554 (1994). If the three-judge court is to continue, then the present case calls for the exercise of that authority.

No precedent of this Court spells out the circumstances in which reassignment should be ordered. However, *United States* v. *Robin*, 553 F. 2d 8 (CA2 1977) (*per curiam*), has been so widely quoted and followed throughout the Courts of Appeals that it comes close to being a national precedent. See, *e.g.*, *Maldonado Santiago* v. *Velazquez Garcia*, 821 F. 2d 822, 832 (CA1 1987); *Shcherbakovskiy* v. *Da Capo Al Fine, Ltd.*, 490 F. 3d 130, 142 (CA2 2007); *Armco, Inc.* v. *Steelworkers*, 280 F. 3d 669, 683 (CA6 2002); *United States* v. *Sears, Roebuck & Co.*, 785 F. 2d 777, 780 (CA9 1986).

> "Absent proof of personal bias requiring recusation, . . . the principal factors considered by us in determining whether further proceedings should be conducted before a different judge are (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness." *Robin*, *supra*, at 10.

In a case that Congress has assigned to a three-judge court, the second factor should have more than usual weight, and the third should have less. Three-judge trial courts are inherently cumbersome and expensive, and judicial economy was a major reason for Congress's severe curtailment of the three-judge court requirement. See E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Harnett, Supreme Court Practice § 2.7, pp. 90-91 (9th ed. 2007). For the small class of cases that Congress retained or added later, Congress has implic-

itly decided to subordinate the factor of judicial economy.

Public confidence in the tribunal is the primary factor in the decision to require a three-judge court. Congress first created such a requirement in 1910 "to assuage growing popular displeasure with the frequent grants of injunctions by federal courts against the operation of state legislation regulating railroads and utilities in particular." *Swift & Co.* v. *Wickham*, 382 U. S. 111, 116 (1965). Popular discontent increased as social legislation expanded and *Ex parte Young*, 209 U. S. 123 (1908), provided a potent weapon for striking it down. *Swift*, *supra*, at 117. The three-judge court was created in the belief that the agreement of three judges that a state law was unconstitutional would meet with greater public acceptance than the decree of a single judge. See *id*., at 118-119; *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen*, 362 U. S. 73, 77-79 (1960). "The drafters of the original legislation thought three judges would be more sensitive to issues of federalism." Solimine, The Three-Judge District Court in Voting Rights Litigation, 30 U. Mich. J. L. Ref. 79, 120 (1996).

PLRA, like the acts described in *Swift*, arose from deep public dissatisfaction with the way the federal courts had handled prison litigation. See 142 Cong. Rec. S3703-40 (daily ed., April 19, 1996) (statement of Sen. Abraham). The three-judge court provision was considered among the "important new requirements," *id*., at 3704, col. 3, to curtail the abuse. See also 141 Cong. Rec. S14414 (daily ed., Sept. 27, 1995) (statement of Senator Dole) (referring to "single-handed[]" action of federal judge).

A panel of three judges, *on average*, should provide "less opportunity for individual predilection in sensitive and politically emotional areas." *Swift*, 382 U. S., at

119; see also Solimine, 30 U. Mich. J. L. Ref., at 121-122. That is not *necessarily* the case, however. It is certainly possible for a panel to be comprised of three individuals whose "individual predilections" are in sync and well off to one side of the mainstream. When that happens, or when the public has substantial reason to suspect it has happened, the three-judge court requirement has failed in its essential purpose, and corrective action is required.

There are multiple reasons why the people of California can justifiably have grave doubts as to the fairness of the panel as presently constituted. They include: (1) the highly unusual, probably unprecedented, manner in which the three-judge court was invoked; (2) the chief judge of the circuit's evident disregard of the primary purpose of the three-judge court in making the selection of judges; (3) the court's unauthorized limitation of the issues properly before it and exclusion of evidence; (4) the court's handling of the public safety requirement of the statute; and (5) the court's manipulation of its orders to postpone this Court's review jurisdiction many months past the point where it should have attached, contrary to the purpose of the direct appeal statute.

B. The Unusual Manner of Formation of the Three-Judge Court.

The manner in which this particular three-judge court was formed was unusual and tends to detract from public confidence in the impartiality of the panel. Initially, the *Plata* litigation was not assigned to Judge Henderson by random assignment. In 2001, upon filing of the complaint, the plaintiffs filed a Notice of Related Case. *Plata* D.E. 2 (April 5, 2001). The "related" case was the *Madrid* litigation, which deals with a single institution, Pelican Bay, and deals with conditions

generally, not only health care. See *Madrid* v. *Gomez*, 190 F. 3d 990, 993 (CA9 1999). Forty days later, Judge Henderson issued an order reassigning the *Plata* case from Judge Chesney to himself. Plata Docket Item 10 (May 15, 2001).

Amicus does not contend that this reassignment was improper in the sense of being a violation of the rules. It was, however, a deviation from random assignment on dubious grounds. Such deviations can create or contribute to an appearance of bias and cause a diminution of public confidence. See 145 Cong. Rec. 19410-19412 (1999) (statement of Sen. Specter).

The next step was far more unusual and far more troubling. After presiding over two separate prison conditions cases for years, Judges Henderson and Karlton held a joint hearing of two different district courts on the question of whether to convene a three-judge court. See JS1-App. 273a. The resulting order provided, "For purposes of judicial economy and avoiding the risk of inconsistent judgments, the Court recommends that this case be assigned to the same three-judge court convened to consider the issuance of a prisoner release order in *Coleman* v. *Schwarzenegger*, Case No. CIV S-90-0520 LKK JFM (E.D. Cal.)." *Id*., at 286a; see also *id.*, at 304a.

There is no authorization in the law for such a procedure. PLRA contemplates that a single judge will call for the three-judge court. See 18 U. S. C. § 3626(a)(3)(C), (D). Then, the law contemplates that *the* judge (singular) who called for the court will be one of the three, and the "chief judge of the circuit . . . shall designate *two other* judges . . . ." 28 U. S. C. § 2284(b)(1) (emphasis added).

The danger of inconsistent judgments is a red herring. A denial of an injunction in one case does not

preclude issuance in another based on the existence of different violations and a different need for and appropriateness of the remedy. If two panels came to inconsistent decisions on a question of law, the direct appeal to this Court would provide the definitive answer in short order in any event.

The law contemplates that the original judge, who has already decided a major point in favor of the plaintiffs, will be a minority of the panel, and two fresh viewpoints will be brought to the problem. This manipulation of the process, if accepted by the chief judge, guaranteed that the judges (plural) who called for the three-judge court would instead constitutes two-thirds of that court.

C. The Chief Judge's Appointment Order.

The appointment order by Chief Judge Schoeder shows no awareness that there is a problem. The order designates a circuit judge "to sit with" Judge Karlton and Judge Henderson without explaining why having both of them on the three-judge court is appropriate or consistent with the statute.

At this point, there were substantial grounds to fear that the process was being manipulated to deny a fair and unbiased tribunal to those who oppose a dramatic and large-scale forced reduction in the number of criminals removed from communities. Given these grounds, it was absolutely imperative that the chief judge choose for the third seat a circuit judge respected by law enforcement and public safety advocates. While it may sound idealistic to express confidence that all federal judges are fair and impartial, everyone knows the reality that " 'judges are not fungible.' " See *Laird* v. *Tatum*, 409 U. S. 824, 834 (1972) (Rehnquist, J., in chambers), quoting *Chandler* v. *Judicial Council*, 398 U. S. 74, 137 (1970) (Douglas, J., dissenting). "Individ-

ual predilection" does matter. Cf. *Swift*, 382 U. S., at 119. Given the two judges placed on the panel by the joint call maneuver, choosing the third to provide balance was vital to carry out the public confidence purpose of the three-judge court law. See *supra*, at 13.

Chief Judge Schoeder chose Judge Stephen Reinhardt.

To call this choice astonishing would be an understatement. Judge Reinhardt is nationally known for his disproportionate share of the decisions reversed by this Court. The cases include, just in the last several years, *Ford* v. *Hubbard*, 330 F. 3d 1086 (CA9 2003), reversed in *Pliler* v. *Ford*, 542 U. S. 225 (2004); *Belmontes* v. *Woodford*, 350 F. 3d 861 (CA9 2003), vacated in *Brown* v. *Belmontes*, 544 U. S. 945 (2005); *Belmontes* v. *Brown*, 414 F. 3d 1094 (CA9 2005), reversed in *Ayers* v. *Belmontes*, 549 U. S. 7 (2006); *Musladin* v. *LaMarque*, 427 F. 3d 653 (CA9 2005), reversed in *Carey* v. *Musladin*, 549 U. S. 70 (2006); and *Belmontes* v. *Ayers*, 529 F. 3d 834 (CA9 2008), reversed in *Wong* v. *Belmontes*, 558 U. S. __, 130 S. Ct. 1122, 175 L. Ed. 2d 931 (2009). Significantly, *all* of these reversed decisions erred in favor of the convicted felon; not a single one erred in favor of public safety.

Reversal, by itself, is no shame to the judge whose opinion is reversed. Legitimate differences of opinion can result in even the most competent and conscientious judges being reversed at times. See *Brown* v. *Allen*, 344 U. S. 443, 540 (1953) (Jackson, J., concurring in the judgment). However, a long string of reversed decisions, *always* in favor of the convict, raises legitimate doubts of fairness in the minds of those on the other side of the aisle.

If counsel for the prisoners could have chosen the panel themselves, this is very likely the panel they

would have chosen. The central purpose of the three-judge court law was defeated by the appointment order.

D. The Decision and Order.

An additional issue of grave concern is the manner in which the District Court dealt with the public safety requirement of the PLRA. This issue is addressed in the Brief for Appellants and the Intervenor's Opening Brief, and we understand it will also be addressed in the brief for the *amici* States, so we will not duplicate that discussion here.

Finally, there is the manner in which the District Court manipulated its orders with the evident goal of postponing this Court's review as long as possible. The order of August 4, 2009, resolved all the major issues in plaintiffs' favor, decided there would be a prisoner release order, and decided how large the release would be. However, the court stopped just short of actually ordering release, enabling the plaintiffs to argue successfully that this Court's appellate jurisdiction had not attached. See *Schwarzenegger* v. *Plata*, 130 S. Ct. 1140, 175 L. Ed. 2d 967 (2010). The purpose of the statute providing for direct review in this Court is "accelerating a final determination on the merits . . . ." *Swift & Co.* v. *Wickham*, 382 U. S. 111, 119 (1965). The manner in which this determination was delayed smacks of an intent to defeat the public's right to prompt review.

For all these reasons, the people of California have reason to doubt the impartiality of the panel selected to hear this case. Assignment of new judges on remand would, of course, involve a substantial loss in judicial economy. However, given the magnitude of the case, the enormous amount of public funds at stake, and the potentially disastrous increase in victimization of innocent people if the court is wrong, that loss pales in comparison.

Ideally, it would be best to have an entirely new panel. *Amicus* must acknowledge, however, that 28 U. S. C. § 2284(b)(1) does provide that "the judge to whom the request [for a three-judge court] was presented, shall serve as [a] member[]. . . ." The mandatory word "shall" in a statute is not to be dismissed lightly. On the other hand, the statute refers to the original appointment and does not necessarily override this Court's reassignment authority under § 2106. If the Court decides that retention of one of the original district judges is required by § 2284(b)(1), then the prisoner population case can continue under either the *Plata* case *or* the *Coleman* case with the original judge from that case, that aspect of the other case can be stayed, and the chief judge of the Ninth Circuit can designate one new district judge and a new circuit judge to complete the panel.

CONCLUSION

The order of the District Court of January 12, 2010, and the predicate order of August 4, 2009, should be vacated. If the case is remanded to the three-judge court, the order appointing the judges should be vacated and the chief judge of the circuit directed to enter a new order, appointing a different circuit judge and at least one different district judge.

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Respectfully submitted,

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