No. 09-1233

# In the Supreme Court of the United States

ARNOLD SCHWARZENEGGER,
Governor of California, *et al.*,
*Appellants*,

v.

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

*On appeal from the United States District Courts for the Eastern District and Northern District of California*

**BRIEF FOR THE STATES OF LOUISIANA, ALABAMA, ALASKA, ARKANSAS, COLORADO, DELAWARE, ILLINOIS, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, NEW MEXICO, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, TENNESSEE, TEXAS, AND VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS**

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September 3, 2010

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## QUESTIONS PRESENTED

The appellants have presented three questions concerning the lower court's application of the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626. Amici curiae's argument relates to the second two:

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

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

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## INTEREST OF AMICI CURIAE

This appeal concerns the propriety of a three-judge court's application of the PLRA when imposing a population cap on California's correctional system that would require the release of approximately 46,000 state prisoners.[1] Amici curiae, like any other states, may someday be forced to defend against lawsuits filed under the PLRA with the aim of forcing large-scale prisoner releases. Consequently, amici have a substantial interest in the disposition of this case, and present this brief in support of appellants, Arnold Schwarzenegger, Governor of California, *et al.*, pursuant to Supreme Court Rule 37.4.

## SUMMARY OF ARGUMENT

The three-judge court has violated the plain language of the PLRA, and needlessly threatened public safety, by ordering the release of tens of thousands of prisoners without determining whether there were any ongoing federal constitutional violations in the state's prison system.

Under the PLRA, a court may not issue a prisoner-release order unless the prisoners prove by clear and convincing evidence that such relief is necessary to remedy an ongoing violation of their federal rights, and that no narrower remedy is

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[1] *See Coleman v. Schwarzenegger*, 2009 WL 2430820, *106, 2009 U.S. Dist. LEXIS 67943, *136 (E.D. Cal. Aug. 4, 2009) ("Under the order establishing a population cap, the size of the prison population will be reduced by approximately 46,000").

possible. Thus, the starting point when considering a request for a prisoner-release order must always be the issue of whether there are in fact ongoing violations, and if so what is the nature and scope of the current violations. Until that question is answered, a court cannot determine whether any new relief is warranted, much less what the narrowest possible relief would be.

Nevertheless, the three-judge court not only refused to consider whether there were ongoing federal violations in the state's prison system, it prohibited the state from presenting evidence on the issue. Instead, the three-judge court relied on the fact that individual district courts had found violations years before, when issuing much less onerous prospective relief, and that the state had not sought to terminate that lesser relief. But those prior findings did not speak to the presence of ongoing violations at the time of the three-judge court's decision, and, in any event, were made under a lower standard of proof than is required for a prisoner-release order. Moreover, the state had no statutory burden to terminate the earlier relief; rather, the burden of proof remained with the prisoners to prove current and ongoing violations that could only be remedied with a prisoner-release order. Thus, the individual district courts' prior orders did not resolve the issue before the three-judge court.

While that error would itself be sufficient to warrant reversal, it is noteworthy that the three-judge court's own opinion offers good reason to question whether, and, if so, to what extent there are ongoing constitutional violations in the state's correctional system. The underlying claims in

these cases are that the state's treatment of the prisoners' serious medical and mental health problems is so deficient as to constitute cruel and unusual punishment, in violation of the Eighth Amendment. But the three-judge court's analysis was incompatible with the demanding standards governing such claims. Time and again, the court substituted expert opinion for constitutional minima, prior deficiencies for current conditions, and idealized practices for those demanded by contemporary standards of decency.

In addition, it follows that the three-judge court violated the PLRA's requirements that a prisoner-release order be the only possible remedy, and that it be narrowly drawn. In the first place, systemwide relief would have required ongoing, systemic violations, which, again, were not found. But even putting that aside, there would have been no justification for the scope of the three-judge court's order, which impermissibly would require the release of a great number of prisoners who have no serious medical or mental health needs, and are not even class members in the underlying lawsuits.

Finally, real-world experience with large-scale prisoner-release orders undermines the three-judge court's remarkable prediction that releasing tens of thousands of prisoners will not affect, or will even *enhance*, public safety. Prior experience shows that, even when targeted at the prisoners who are supposed to represent the best of the worst, such orders inevitably place innocent citizens at much greater risk of victimization.

## ARGUMENT

### I. The three-judge court violated the PLRA by issuing a prisoner-release order without finding an ongoing violation of a federal right.

At their essence, the issues before the Court are neither complex nor fact-bound. Under the plain language of the PLRA, the alleged violation of a federal right is what guides every step. It is the violation that makes state prison conditions a proper subject for federal review, renders prospective relief necessary, and limits the permissible extent of that relief. In particular, the PLRA expressly and repeatedly requires that any prospective relief, especially the last-resort remedy of a prisoner-release order, be narrowly tailored to correct a violation of a federal right of a specific prisoner or class of prisoners. *See* 18 U.S.C. § 3626(a)(1)(A), (a)(1)(B), (a)(3)(E).

It is thus necessary that, before ordering prospective relief, a court find an ongoing federal violation, and define the nature and scope of that current violation with reasonable specificity. Absent a specific, ongoing violation, it would be meaningless to claim that a particular form of relief is necessary and narrowly-tailored.

Nevertheless, the three-judge court refused to follow the statutorily-required procedure, erroneously declaring that it "need not … again evaluate the state's continuing constitutional violations" when issuing prospective relief in the form of a large-scale prisoner-releaser order. *Coleman*, 2009 WL 2430820, *31, 2009 U.S. Dist. LEXIS 67943, *136. Indeed, the three-judge court

went so far as to prohibit "the introduction of evidence relevant only to determining whether the constitutional violations … were 'current and ongoing.'" *Id.*, 2009 WL 2430820, *31 n.42, 2009 U.S. Dist. LEXIS 67943, *137 n.42. That approach was irreconcilable with the terms and structure of the PLRA, and has resulted in an unjustified prisoner-release order that threatens public safety.

### A. The failure to determine whether the alleged violations were ongoing cannot be reconciled with the language and structure of the statute.

The first and most basic requirement of the PLRA is that any prospective relief, *i.e.*, any relief other than compensatory monetary damages, 18 U.S.C. § 3626(g)(7), "shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." 18 U.S.C. § 3626(a)(1)(A). Whenever a court orders prospective relief pursuant to the PLRA, it must find "that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." *Id.*

Thus, the starting point when considering prospective relief must always be a violation of particular prisoners' federal rights. Moreover, that violation must be current and ongoing at the time the relief is granted.[2] Otherwise, the requirement

[2] Although the phrase "current and ongoing" is used elsewhere in the PLRA, in reference to petitions to terminate prospective relief, 18 U.S.C. § 3626(b)(3), amici use it in this (continued…

that the prospective relief "extend[ ] no further than necessary to correct the violation" would be nonsensical, and the consistent use of the present tense when referring to the violation would be stripped of its ordinary significance. *See Carr v. United States*, ___ U.S. ___, 130 S.Ct. 2229, 2230-31 (2010) ("[T]he present tense generally does not include the past…."), *citing* 1 U.S.C. § 1.

In addition, the PLRA imposes special requirements for prospective relief, such as the relief at issue here, that "requires or permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law." 18 U.S.C. § 3626(a)(1)(B).[3] In this context, a court may not order prospective relief unless "(i) Federal law requires such relief to be ordered in violation of State or local law; (ii) the relief is necessary to correct the violation of a

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context only because it was the three-judge court's formulation; any word or phrase that conveys the need for present violations would serve equally well.

[3] According to the population reduction plan submitted by the state and approved by the three-judge court, many of the measures necessary to comply with the court's prisoner-release order, such as reducing the grading of certain offenses and moving inmates to private or out-of-state facilities, violate state law. J.S. App. 59a-69a. And of course, those are hardly the only respects in which the prisoner-release order intrudes in areas typically reserved to the states. Every time a state inmate is released earlier than he would have been but for a federal court's population cap, or is not admitted in the first place because of such a cap, the state's basic prerogative to establish and enforce its own criminal laws is restricted.

Federal right; and (iii) no other relief will correct the violation of the Federal right." *Id.*

While these requirements for relief that contravenes state law are similar to the general standards for all prospective relief, they are more than "absentminded duplication." *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 79 (1990); *see also Mackey v. Lanier Collection Agency & Service, Inc.,* 486 U.S. 825, 837 & n. 11 (1988). Rather, they mean precisely what they say: prospective relief that contravenes state law must be required by the pertinent federal right itself, and it must be the *only* possible means of correcting the violation of that right.

Finally, the PLRA imposes yet another set of requirements when, as is also the case here, the prospective relief is a prisoner-release order. Such orders may only be issued by a three-judge court upon a "find[ing] 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." 18 U.S.C. § 3626(a)(3)(E).

These requirements impose a new and higher standard of proof ("clear and convincing evidence"), and therefore cannot be satisfied by the individual district court's prior findings, which would have been made under a lower standard. Moreover, like the earlier provisions, they are phrased in the present tense, and applying them could only make sense if there were a current and ongoing violation to correct. Thus, they, too, require a court considering a prisoner-release order to first find, based on a complete record, that there

is an ongoing federal violation that cannot be remedied through any lesser measures.

Given these statutory requirements, the three-judge court's decision violated the plain language and structure of the PLRA, and undermined its manifest purpose of making prisoner-release orders a remedy of absolute last resort. Since the three-judge court did not determine whether the alleged constitutional violations were still ongoing, there was no basis for it to issue *any* new remedy. And since the three-judge court did not determine whether the alleged constitutional violations were extraordinary in their current form, there particularly was no basis for it to issue a remedy so unprecedented in scope that it would require the release of approximately 46,000 prisoners.

### B. The proffered explanations for the three-judge court's approach have no merit.

The three-judge court and the prisoners have offered several arguments in support of their position that it was unnecessary for the court to determine whether and, if so, to what extent the alleged constitutional violations were ongoing. As set forth below, those arguments have no statutory or logical basis.

#### *1. The three-judge court erred by relying on the individual district courts' prior findings of constitutional violations.*

The three-judge court's primary explanation for its refusal to determine whether the alleged constitutional violations were ongoing was that --

years before the prisoner-release order -- the individual district courts had found that there were then ongoing constitutional violations. *Coleman*, 2009 WL 2430820, *30-31, 2009 U.S. Dist. LEXIS 67943, *136-37.[4] Reliance on those prior decisions was error.

At the outset, while the procedural histories of these cases are lengthy, it is important to remember that *Plata* had its genesis in a stipulated remedial order that did not address whether state officials had acted with deliberate indifference, as would have been required to establish a violation of the Eighth Amendment. *See* Stipulation for Injunctive Relief, filed Jun. 13, 2002. This was not unusual, as such orders sometimes "go well beyond what is required by federal law." *Horne v. Flores*, ___ U.S. ___, 129 S.Ct. 2579, 2594 (2009).[5] Yet as a

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[4] Interestingly, the individual district court in *Plata* also found that the primary cause of the alleged failure to provide constitutionally-adequate care was not overcrowding, but poor management, leading to ill-considered staffing and record-keeping practices. *See Plata v. Schwarzenegger*, 2005 WL 2932253, *29, 2005 U.S. Dist. LEXIS 43796, *83 (N.D. Cal. Oct. 3, 2005) ("[T]he single root cause of this crisis[ ] [is] an historical lack of leadership, planning, and vision by the State's highest officials during a period of exponential growth of the prison population," manifesting itself in a failure to take measures "such as taking incompetent doctors out of patient care, hiring qualified new doctors and nurses, and providing a medical records system….").

[5] For an explanation of why public officials may enter such agreements, even when they are not constitutionally required, see Gerald N. Rosenberg, "The Politics of Consent: Party Incentives in Institutional Reform in Consent Decrees," in *Consent and Its Discontents: Policy Issues in Consent Decrees*, (continued…

predictable consequence, while the individual district court stated as a general matter that unconstitutional conditions in the state's correctional system had not been corrected as of 2005, it did not distinguish between conditions that were a result of the deliberate indifference required for a constitutional violation, and conditions that were merely contrary to the stipulated order. *See Plata v. Schwarzenegger*, *supra*, 2005 WL 2932253, 2005 U.S. Dist. LEXIS 43796.

But even putting that aside, the individual district courts in *Plata* and *Coleman* did not purport to make their findings of constitutional violations under a "clear and convincing" standard of proof, nor was there any reason for them to do so. The PLRA imposes that standard only for prisoner-release orders, 18 U.S.C. § 3626(a)(3)(E), and thus requires the three-judge court to make an independent finding before issuing such relief.

Finally, even if there had been clear and convincing evidence of "ongoing" constitutional violations when the cases were before the individual district courts years earlier, it would not follow that there also must have been ongoing violations when the three-judge court issued its decision in August 2009, much less when it issued its final order in January 2010. A correctional system can change a great deal over a period of years. The three-judge court itself recognized as much when issuing its prisoner-release order, which would be implemented over the course of two

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13-38 (2006), *available at* http://www.princeton.edu/prior/publicatons/docs/consent.pdf.

years. And, more importantly, the terms and structure of the PLRA recognize such realities with their consistent requirement of ongoing violations. Thus, contrary to the three-judge court's view, the issue of whether the alleged constitutional violations were "current and ongoing" could not be divorced from the question of whether the drastic remedy of a large-scale prisoner-release order was necessary.

Even under traditional limitations on prospective injunctive relief, the three-judge court's failure to tailor its prisoner-release order to a current and ongoing constitutional violation would have been error. *See Imprisoned Citizens Union v. Ridge*, 169 F.3d 178, 188 (3d Cir. 1999) (Alito, J.) ("[C]onsistent with well-established limitations on the courts' authority to issue prospective injunctive relief to remedy constitutional violations…, the remedy imposed must be tailored -- temporally as well as substantively -- to redress the constitutional wrong at issue"), and cases cited therein. *See also O'Shea v. Littleton*, 414 U.S. 488, 493 (1974) (absent ongoing constitutional harm, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief...."). *A fortiori*, that failure was error under the PLRA's requirements for prospective relief, which are at least as demanding.

*2. The denial of the state's summary judgment motion did not resolve the question of whether there were ongoing constitutional violations.*

The three-judge court offered a *non sequitur* when it claimed in the alternative that, "even if [it]

were required to find independently that the requirements of § 3626(a)(3)(A) -- including its requirement that prior orders have 'failed to remedy the deprivation of the Federal right' -- have been met, [it] did so in denying defendants' motion for summary judgment." *Coleman*, 2009 WL 2430820, *31, 2009 U.S. Dist. LEXIS 67943, *137. In the first place, it was simply incorrect to claim that the order denying the state's motion for summary judgment included a finding of ongoing constitutional violations. *See Coleman v. Schwarzenegger*, 2008 WL 4813371, *4 (E.D. Cal. Nov. 3, 2008) (not available on Lexis) (relying on three- and thirteen-year-old findings by individual district courts). But even if the three-judge court had made such a finding for purposes of the motion for summary judgment, it would have done so before any witnesses testified at trial, and under a standard that required the court to view the facts in the light most favorable to the prisoners. *Scott v. Harris*, 550 U.S. 372, 378 (2007). Thus, as would seem elementary, a finding of an ongoing violation at the summary-judgment stage would not have resolved the issue at the subsequent trial.

3. *It was the prisoners' burden to prove ongoing violations warranting new and greater relief, not the state's burden to terminate earlier relief.*

The three-judge court's failure to determine whether there were ongoing constitutional violations also was not excused by its observation that the state had not moved to terminate other, less onerous prospective relief, which had been entered years before by the individual district courts. *Coleman*, 2009 WL 2430820, *31, 2009 U.S.

Dist. LEXIS 67943, *137. At the outset, this observation again ignored the fact that two years had passed since the cases were before the individual district courts, and thus that the earlier proceedings did not necessarily reflect current conditions.

Moreover, under circuit precedent, if the state had moved to terminate the earlier prospective relief, it would have had the burden to prove the absence of an ongoing violation. The Ninth Circuit stands alone in placing the burden on the state to prove the absence of an ongoing violation when it files a motion to terminate prospective relief. *Compare Gilmore v. Enomoto*, 220 F.3d 987, 1007 (9th Cir. 2000) ("[T]he burden of proof … [lies with] the party seeking to terminate the prospective relief"), *with Guajardo v. Tex. Dep't of Crim. Justice*, 363 F.3d 392, 395-96 (5th Cir. 2004) (per curiam) (stating, with respect to motions to terminate prospective relief, "We agree with the great majority of courts to address this issue: a plain reading of the PLRA, including its structure, imposes the burden on the prisoners"); *and Laaman v. Warden, N.H. State Prison*, 238 F.3d 14, 20 (1st Cir. 2001) (stating, with respect to petition to terminate prospective relief, "[T]he burden remains on the plaintiffs to show that such violations [of their federal rights] persist"). Nevertheless, circuit precedent would have bound the district courts had the state sought to terminate the earlier prospective relief.

In contrast, for new prospective relief, particularly a prisoner-release order, the PLRA places the burden of proof on the prisoners, who must establish by clear and convincing evidence,

*inter alia*, that there is an ongoing violation, and that previous remedial attempts have failed to correct it. 18 U.S.C. § 3626(a)(3)(E). Thus, by relying on the fact that the state had not sought to terminate the earlier prospective relief, the three-judge court misallocated the burden of proof, again contravening the plain language of the statute.

*4. The three-judge court prohibited the state from presenting evidence on whether there were ongoing constitutional violations, but even if it had, the court's failure to determine whether there were such violations would have been error.*

The *Coleman* appellees suggested at the jurisdictional stage that, because the district court heard testimony from certain experts who had recently toured the prisons, the three-judge court did not erroneously prohibit the state from presenting evidence on whether the alleged constitutional violations were current and ongoing. *Coleman* Mot. to Dismiss, 30-31. That claim was simply incorrect, but, regardless, it could not remedy the three-judge court's principal error, which was much deeper than a simple evidentiary misstep. Again, the three-judge court's basic error was in failing to determine (even on the evidence before it) whether and, if so, to what extent the alleged constitutional violations were ongoing.

The prisoners' suggestion that the three-judge court did not prohibit evidence on the question of whether the alleged constitutional violations were "current and ongoing" would surely come as a surprise to the three-judge court. Prior to trial, the state argued that the issue of whether

the alleged constitutional violations were ongoing was central, and requested permission to present evidence on the point, but the three-judge court denied that request. Pretrial Tr. 28:16-29:2. Thereafter, the state sought reconsideration, arguing that the three-judge court's preclusion of evidence on that issue was irreconcilable with the terms of the PLRA, but the court denied that request as well, again ruling that evidence of whether there were ongoing constitutional violations would not be admitted. Trial Tr. 6:24-7:9. *See also id.* at 57:11-58:13.[6] In addition, as explained above, the three-judge court expressly acknowledged in its opinion that it did not permit evidence relevant only to the question of whether the alleged constitutional violations were still ongoing. *Coleman*, 2009 WL 2430820, *31 n.42, 2009 U.S. Dist. LEXIS 67943, *137 n.42.

But in any event, even if the three-judge court had permitted the state to present evidence on the question of whether the alleged constitutional violations were ongoing, that would not have excused the court's failure to make a determination on the issue, and to hold the prisoners to their statutory burden of proof when doing so. Again, the PLRA does not require the

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[6] Even in the limited portion of the transcript cited by the prisoners in ostensible support of their claim that the state was not precluded from presenting relevant evidence, the three-judge court reiterated that evidence would not be received to the extent that it addressed only "the question of whether or not there's a continuing constitutional violation" because that supposedly was not among the "questions that are properly before the court…." Trial Tr. 837:16-837:24.

state to prove a negative, *i.e.*, the absence of any constitutional violations in its entire correctional system. Rather, it requires the prisoners to prove by clear and convincing evidence -- and the three-judge court to find -- that crowding is the primary cause of such violations, and that no remedy short of a prisoner-release order could possibly correct the violations. 18 U.S.C. § 3626(a)(3)(E). Obviously, one cannot determine the "cause" of a violation without knowing whether the violation exists in the first place, and cannot create the narrowest possible "remedy" for the violation without knowing the scope of the violation. Thus, there can be no meaningful application of those statutory requirements unless the three-judge court determines for itself whether and, if so, to what extent there are ongoing violations.

### C. The three-judge court's own opinion creates serious doubts about whether and, if so, to what extent there were ongoing constitutional violations.

Because the three-judge court contravened the PLRA by issuing relief that was not tethered to any finding of an ongoing violation of the prisoners' federal rights, the three-judge court's judgment would be untenable even if the prisoners' underlying constitutional claims had any current merit. That issue is for the three-judge court in the first instance, and it has yet to address the question. Nevertheless, it is noteworthy that the three-judge court's own opinion creates serious doubts about whether the alleged violations actually were ongoing, and, if so, whether they were so extraordinary in their current form that

the only possible remedy was to release tens of thousands of prisoners.

The underlying constitutional claim in this case is that the state's treatment of the prisoners' serious medical and mental health needs is so contrary to minimum standards of decency as to constitute cruel and unusual punishment, in violation of the Eighth Amendment. And, of course, the standard for such claims is demanding.

An inmate alleging that prison officials have engaged in cruel and unusual punishment by failing to provide essential health care cannot obtain relief "simply on the ground that the prison medical facilities [are] inadequate…." *Lewis v. Casey*, 518 U.S. 343, 350 (1996). Rather, he must prove that he has suffered actual harm as a result of the officials' "deliberate indifference to [his] serious illness or injury," *Estelle v. Gamble,* 429 U.S. 97, 105 (1976); or that, because of the officials' deliberate indifference, he is being involuntarily exposed to a health risk that is "'*sure or very likely* to cause serious illness and needless suffering,' and give rise to 'sufficiently *imminent* dangers.'" *Baze v. Rees*, 553 U.S. 35, 50 (2008) (plurality), *quoting Helling v. McKinney,* 509 U.S. 25, 34-35 (1993) (emphasis added by this Court). Similar to criminal recklessness, "deliberate indifference" requires that the prison officials be aware of, and disregard, an "excessive risk to inmate health or safety[.]" *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

When the three-judge court's decision is considered in light of this standard, the most striking aspect of the court's approach is that it

relied neither on objective measures of community expectations for prison health care, nor on evidence of deliberate indifference by the state defendants. Instead, at nearly every turn, both when discussing alleged inadequacies in particular facets of the prison health care system, and when blaming overcrowding for those perceived deficiencies, the three-judge court explained its decision by reference to expert opinion testimony from prison administrators. *See*, *e.g.*, *Coleman*, 2009 WL 2430820, *36, 2009 U.S. Dist. LEXIS 67943, *151-52 (accepting expert testimony that prisoners should not be examined in areas where their privacy is protected only by a fabric screen); 2009 WL 2430820, *36, 2009 U.S. Dist. LEXIS 67943, *153 (accepting expert testimony that prisoners should undergo "a physical exam, as opposed to a medical interview," when they are admitted).

The problem with this approach is that the issue on which the expert witnesses actually opined -- whether the state's correctional system comported with their understanding of professional standards -- is not of constitutional significance. *See Rhodes v. Chapman*, 452 U.S. 337, 348 n.13 (1981) ("[O]pinions of experts as to desirable prison conditions…. 'simply do not establish the constitutional minima; rather, they establish goals recommended by the organization in question'"), *quoting Bell v. Wolfish*, 441 U.S. 520, 543-44 n.27 (1979); *Inmates of Occuquan*, 844 F.2d 828, 837 (D.C. Cir. 1988) ("It is cruel conditions, defined by reference to community norms, to which the Constitution speaks; neither 'deficient' conditions nor conditions that violate 'professional standards' rise to the lofty heights of constitutional

significance"). *See also Bobby v. Van Hook*, ___ U.S. ___, 130 S.Ct. 13, 16-17 (2009) (*per curiam*) (reversing judgment that treated professional standards as constitutional minima); *id*. at 20 (Alito, J., concurring) (explaining that it is the responsibility of the courts, not professional organizations, to determine the requirements of the Constitution). Consequently, such heavy reliance on expert opinion not only is unwarranted, it has a corrupting tendency to lead courts away from the discrete Eighth-Amendment questions before them, and toward the larger world of prison administration (and criminal-justice policy), where they do not belong. *See Lewis v. Casey*, 518 U.S. at 350 (distinction between courts and prison officials "would be obliterated" if, despite absence of constitutional harm, courts intervened merely because prisoners were "being subject to a governmental institution that was not organized or managed properly"); *Inmates of Occuquan*, 844 F.2d at 837 ("[T]he obvious danger of employing professional standards as benchmarks is that they ineluctably take the judicial eye off of core constitutional concerns and tend to lead the judiciary into the forbidden domain of prison reform").

Moreover, many of the three-judge court's particular observations and findings were deeply suspect for additional reasons if they were supposed to be components of Eighth Amendment violations (as they would have had to be to support the remedy). For example, the court claimed that, according to expert testimony, "[*a*]*s of mid-2005*, a California inmate was dying needlessly every six or seven days." *Coleman*, 2009 WL 2430820, *1, 2009

U.S. Dist. LEXIS 67943, *39 (emphasis altered). But while that would indeed have been highly troubling if it were true, the constitutional question concerned current conditions, not conditions "as of mid-2005," and current conditions were dramatically better by the three-judge court's chosen measure.

According to the court-appointed receiver, who now includes definitely-preventable deaths in the broader category of "likely" preventable deaths, there were just three likely-preventable deaths in 2007 (one every 121 or 122 days), the last year for which the three-judge court would have had statistics. *See* Jurisdictional Statement, 15.[7] Moreover, the three-judge court did not claim that any of the likely-preventable deaths from 2007 or later were attributable to Eighth Amendment violations. Thus, there is good reason to question whether, and, if so, to what extent, even the three-judge court's most disturbing claim was of ongoing constitutional significance.

The three-judge court also focused on the fact that, because of limited space and personnel, the state often conducted medical interviews, rather than full medical and dental examinations, when admitting new prisoners. According to the three-

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[7] In December 2009, after the three-judge court issued its decision, the court-appointed receiver published statistics for 2008, when there were five likely-preventable deaths for the year. *See* Kent Imai, M.D., *Analysis of Year 2008 Death Reviews*, Dec. 14, 2009, at 8, *available at* http://www.cprinc.org/docs/resources/OTRES_DeathReviewAnalysisYear2008_20091214.pdf. Those are the most recent figures available to amici.

judge court, "This violates the 'basic principle that incoming prisoners must undergo a comprehensive exam upon arrival so that an adequate treatment plan may be developed and implemented. A physical exam, as opposed to a medical interview, is necessary because some conditions can be identified and confirmed only through physical examination of the patient.'" *Coleman*, 2009 WL 2430820, *36, 2009 U.S. Dist. LEXIS 67943, *153 (citations to record omitted). But whatever the source of this "basic principle," it was not the Eighth Amendment's proscription of cruel and unusual punishments. Treating the failure to comply with such "principles" as components of an Eighth Amendment violation would ignore this Court's holdings that prison officials do not violate their constitutional duties unless they disregard a known risk that is *sure or very likely* to cause *imminent* harm, *Baze v. Rees*, 553 U.S. at 50, and would establish as a constitutional minimum a level of care far beyond even community standards for non-incarcerated individuals. *See*, *e.g.*, Ateev Mehrotra, M.D., *et al.*, *Preventive Health Examinations and Preventive Gynecological Examinations in the United States*, Archives of Internal Med., Sep. 24, 2007, Vol. 167, at 1876-83 (reporting that only 21% of Americans undergo preventive health exams, and that prominent clinical organizations, including the American College of Physicians, do not recommend such exams for asymptomatic patients).

Another area that the three-judge court singled out for attention was the supposed lack of medical privacy enjoyed by prisoners. *See Coleman*, 2009 WL 2430820, *39, 2009 U.S. Dist.

LEXIS 67943, *161 (crediting expert testimony that state violated "fundamental medical confidentiality rights" by using only fabric screens to protect privacy); 2009 WL 2430820, *67, 2009 U.S. Dist. LEXIS 67943, *243 (faulting state for allegedly ignoring, *inter alia*, "the need for clinical privacy"). But to state the obvious, privacy rights in prison must often give way to the need for institutional security in prison, *see generally Hudson v. Palmer*, 468 U.S. 517 (1984); any embarrassment that might accompany being overheard speaking with a prison doctor is a far cry from the "wanton infliction of pain" prohibited by the Eighth Amendment, *see*, *e.g.*, *Farmer v. Brennan*, 511 U.S. at 834; and the mental state involved in using only fabric screens to shield inmate privacy cannot reasonably be characterized as knowing disregard of a risk that is "*sure or very likely*" to lead to "*imminent*" harm. *Baze v. Rees*, 553 U.S. at 50.

Much of the remainder of the three-judge court's opinion focused on a litany of respects in which, according to expert opinion, the state correctional system had insufficient personnel, equipment, and recordkeeping. *See*, *e.g.*, *Coleman*, 2009 WL 2430820, *43-49, 2009 U.S. Dist. LEXIS 67943, *175-91. But as was typical of the lower court's decision as a whole, those alleged deficiencies were not tied to any current, specifically-identified constitutional violations. And in any event, even if the claimed shortage of manpower and other resources were causing ongoing constitutional violations, the obvious remedy would be to increase their supply by hiring more doctors, custodians, and record-keepers, not to decrease demand by releasing prisoners.

Such examples demonstrate the extraordinary disconnect between the standards of the Eighth Amendment and the PLRA on the one hand, and the approach taken by the three-judge court on the other. While this Court has explained that *some* prison conditions may have a mutually re-enforcing effect for purposes of the Eighth Amendment, *Wilson v. Seiter*, 501 U.S. 294, 304-05 (1991), that was not license for the three-judge court to aggregate *inappropriate* factors by, for example, treating expert opinions as constitutional minima, selectively relying on stale data rather than current conditions, and demanding a standard of care that would be uncommonly high even outside the prison context.

But regardless, as explained at the outset, the three-judge court's fundamental error was in not even *considering* the question of whether and, if so, to what extent there were ongoing constitutional violations. Consequently, there is no need for this Court to decide how that question should have been answered. Amici raise the underlying Eighth Amendment issue only to illustrate one of the chief dangers of the three-judge court's procedural error -- that it may well be cloaking an even bigger substantive error.

## II. The remedy of releasing thousands of prisoners whose constitutional rights have not been violated was not necessary and narrowly drawn.

As is implicit in the foregoing discussion, the three-judge court's order requiring the release of approximately 46,000 prisoners -- many of whom likely have no serious medical or mental health

needs, and thus are not class members in the underlying lawsuits -- also violates the PLRA's requirements that prisoner-release orders may not be issued unless "no other relief will remedy the violation of the Federal right," 18 U.S.C. § 3626(a)(3)(E)(ii); and that, when issued, they must be "narrowly drawn, [and] extend[ ] no further than necessary to correct the violation of the Federal right…." 18 U.S.C. § 3626(a)(1)(A).

At the outset, this Court has made clear that any systemwide remedy, even one far short of a mass prisoner-release, is "patently" inappropriate when only a few isolated constitutional violations are established. *Lewis v. Casey*, 518 U.S. at 359-60. *See also Rizzo v. Goode*, 423 U.S. 362, 373 (1976) (twenty violations insufficient to justify sweeping equitable relief affecting 7,500 local officers). All the more so, such a remedy was grossly inappropriate here, as there were no findings of *any* ongoing constitutional violations.[8]

Moreover, even if there were current violations, the challenged relief would be overbroad in that it would force the release of prisoners who have no serious medical or mental health needs, and consequently are not class members in the underlying lawsuits. The three-judge court acknowledged that its population cap was "likely" to require the release of an unspecified number of

[8] It should go without saying that the factual allegations in these cases were more extensive than those in *Lewis* or even *Rizzo*, but again the most disturbing finding here concerned *past* conditions, and none of the findings here has been determined to involve an ongoing constitutional violation.

inmates who are not even arguably victims of the alleged constitutional harm. *Coleman*, 2009 WL 2430820, *77, 2009 U.S. Dist. LEXIS 67943, *272. But the vagueness of that statement obscured just how remarkable -- and indefensible -- the court's approach was.

The three-judge court not only offered no estimate of how many class members were among the prisoners who would be released, it offered no estimate of how many class members there were to begin with. Thus, under the three-judge court's approach, it is possible that *none* of the class members would be among the 46,000 or so prisoners who would be released because of the court's order. And, perhaps even more troublingly, it is possible that *all* of the class members would be among the 46,000. For example, it is possible that there were only 35,000 class members to begin with, and that those 35,000 would be released along with 11,000 healthy prisoners.[9]

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[9] 35,000 is a purely hypothetical number, and likely dwarfs the number of prisoners with truly intensive needs, who present the most demand for the correctional system's healthcare resources. To amici's knowledge, no one -- not the three-judge court, nor even the parties themselves -- has a reliable, record-based estimate of the size of the total plaintiff class. While the prisoners presumably would attempt to put the number as high as possible, it is difficult to imagine how even they could reach 46,000 (to pick a less random number), except by double-counting prisoners who are members of both classes or by failing to distinguish between those prisoners who require very little care and those who require a great deal of care.

Of course, whether because of the state's legitimate choices or simple chance, the actual balance of class members and non-class members released pursuant to the three-judge court's order almost certainly would fall somewhere between those two extremes. But they nevertheless illustrate just how inconsistent the three-judge court's approach was with the terms of the PLRA, which again make clear that prisoner-release orders are prohibited unless they are the only possible relief, 18 U.S.C. § 3626(a)(3)(E)(ii); and that, when issued, they must be "narrowly drawn" and "extend[ ] no further than necessary to correct the violation of the Federal right…." 18 U.S.C. § 3626(a)(1)(A).[10]

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[10] Because the three-judge court failed to comply with the requirements of the PLRA, there is no need to rely on general caselaw on structural injunctions, which precedent has often developed in very dissimilar factual contexts. But even under such authority, the three-judge court's order again would be unsupportable. This is not a situation in which injunctive relief merely would have some "collateral" or "incidental" spillover effect benefiting individuals who are not victims of the alleged wrong. *Compare Missouri v. Jenkins*, 515 U.S. 70, 110-11 (1995) (O'Connor, J., concurring). Rather, the three-judge court's order would *directly* benefit non-victims, and would do so on a massive scale. There is no legitimate basis for such an approach. *See* 42 U.S.C. § 1983 (state officials can only be liable "to the party injured…."); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 419-20 (1977) (scope of remedy is limited to scope of constitutional violation). And it would have the practical effect of doing indirectly what is forbidden directly -- expanding the classes to include prisoners who have suffered no injury, and consequently have no standing. *Cf. Schlesinger v. Reservists to Stop the War,* 418 U.S. 208, 222 (1974); *Blum v. Yaretsky*, 457 U.S. 991, 1001-02 (1982).

This is not to say, of course, that the three-judge court should have ordered the mass-release of prisoners with serious mental or physical illnesses. But if there was to be a remedy at all, it should have been narrowly drawn to directly address only the needs of such inmates. The three-judge court's order, which instead would most directly benefit prisoners who, unless by coincidence, are not even class members, is unsupportable under the PLRA.

## III. Real-world experience with large-scale prisoner releases suggests that the three-judge court's order poses a significant threat to public safety.

The three-judge court's failure to decide these cases in a manner consistent with the requirements of the PLRA is troubling for many reasons, but the most palpable is the resulting threat to public safety. While the three-judge court has confidently declared that the state can release approximately 46,000 prisoners in a manner "that will not have an adverse impact on public safety, and that in fact may improve public safety," *Coleman*, 2009 WL 2430820, *84, 2009 U.S. Dist. LEXIS 67943, *293, real-world experience with large-scale prisoner releases shows otherwise. The documented effects of such an order in Philadelphia, which were well known to Congress when it enacted the PLRA,[11] are illustrative.

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[11] *See*, *e.g.*, Statement of Sen. Abraham, 141 Cong. Rec. 26352, 26448 (1995) ("American citizens are put at risk every day by court decrees. I have in mind particularly decrees that cure prison crowding by declaring that we must free dangerous criminals before they have served their time, or not (continued…

Pursuant to a consent decree in effect from 1986 until after the adoption of the PLRA in 1995, a federal district court judge enforced a population cap on the Philadelphia prison system that required the release or non-admittance of several hundred inmates per week.[12] Like her colleagues from California, the district court judge in Pennsylvania did not require local officials to indiscriminately "throw open the doors of [their] prisons." *Coleman*, 2009 WL 2430820, *78, 2009 U.S. Dist. LEXIS 67943, *274. Rather, she did essentially what the three-judge court proposes to do here, and what courts invariably have done when enforcing population caps: leave officials with no choice but to release (or not admit) the

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incarcerate certain criminals at all because prisons are too crowded. The most egregious example is the city of Philadelphia. For the past 8 years, a Federal judge has been overseeing the wholesale release of up to 600 criminal defendants per week…."); Statement of Sen. Dole, 141 Cong. Rec. 26476, 26549 (Sep. 27, 1995) ("Perhaps the most pernicious form of micromanagement is the so-called prison population cap. … [For example,] there's the case of Philadelphia, where a court-ordered prison cap has put thousands of violent criminals back on the city's streets, often with disastrous consequences").

[12] The consent decree was entered over the objection of local prosecutors (who had no guaranteed right of intervention prior to the PLRA), and despite the absence of any finding of ongoing constitutional violations in Philadelphia's prisons. *See Harris v. Pernsely*, 820 F.2d 592 (3d Cir. 1987); Prison Reform: Enhancing the Effectiveness of Incarceration: Hearings on S. 3, S. 38, S. 400, S. 866, S. 900 Before the Committee on the Judiciary, United States Senate, 104th Cong. 1st Sess. (Jul. 27, 1995) (testimony of Lynne Abraham, District Attorney of Philadelphia).

criminals seen as the best of the worst, such as those who had committed non-violent drug or property crimes, and those incarcerated because of probation or parole violations. *See* Violent Criminal Incarceration Act of 1995, Hearings on H.R. 667 Before the Committee on the Judiciary, United States House of Representatives, 104th Cong. 1st Sess. (Jan. 19, 1995) (testimony of Lynne Abraham, District Attorney of Philadelphia) (hereafter "Abraham House Testimony").

Yet the effect of the population cap on public safety was not the neutral or favorable one the three-judge court has predicted here. Rather, it was an extraordinary crime wave. During an eighteen-month period from January 1993 through June 1994 in which local officials took it upon themselves to document the consequences of the population cap, Philadelphia police rearrested 9,732 prisoners who had been released because of the cap. The new crimes those defendants were charged with committing during their premature releases included 79 murders, 1,113 assaults, 959 robberies, 701 burglaries, 90 rapes, 14 kidnappings, 264 firearms violations, 2,748 thefts, 2,215 drug-dealing offenses, and 127 counts of driving under the influence. Abraham House Testimony, *supra*; Statement of Sen. Dole, 141 Cong. Rec. at 26448.

Many of the victims of those crimes were residents of crime-plagued inner-city neighborhoods, whose suffering all too often escapes the notice of decisionmakers. *Cf. United States v. Pineda-Moreno*, 2010 WL 3169573 *3, 2010 U.S. App. LEXIS 16708, *9 (9th Cir. Aug. 12, 2010) (Kozinski, C.J., joined by Reinhardt, J., *et al.*, dissenting from denial of rehearing *en banc*)

(observing that judges are among the members of society least likely to encounter the effects of court rulings that affect the public at large). But outrage over the population cap grew, and the need for prison litigation reform became glaringly apparent, when Daniel Boyle, a 21-year-old rookie police officer, was gunned down by Edward Bracey, a recently-released prisoner.

After his premature departure from jail, Bracey, a career car thief, promptly returned to his trade. When Officer Boyle attempted to stop him after one of his heists, Bracey led the young officer on a chase that ended with the thief crashing into a building. Unwilling to surrender even at that point, Bracey jumped out of his stolen car with a gun and fired eight times at Officer Boyle, including a fatal shot to the right temple. *See Commonwealth v. Bracey*, 662 A.2d 1062 (Pa. 1995); Violent Criminal Incarceration Act of 1995, Hearings on H.R. 667 Before the Committee on the Judiciary, United States House of Representatives, 104th Cong. 1st Sess. (Jan. 19, 1995) (testimony of Detective Patrick Boyle, father of Officer Boyle).

Several other police officers narrowly avoided similar fates. Officer Donald McMullen survived, albeit with a significant loss of vision, when released prisoner James Leath shot him in the face. *See* Wanda Motley and Julia Cass, *Council Hearings Examine Limit on Prison Population: Victims and Rendell vs. Guards and Inmates*, Philadelphia Inquirer, Sep. 29, 1994, at p. B1; Joseph A. Slobodzian, *Man Who Wounded Officer in '91 Gets Added Sentence: Life*, Philadelphia Inquirer, May 27, 1994, at p. B3. Similarly, Officer Bernard Murphy and his brother,

Officer Shawn Murphy, survived the gunshot wounds they sustained when re-arresting Eddie Byrd, a released drug offender. *See* Dave Rascher, *Man Gets 20 Years for Shooting 2 Cops*, Philadelphia Daily News, Dec. 3, 1994, at p. 10. And Officer Raymond Shaw's bullet-proof vest saved his life when Robert Kirby, a drug-dealer freed thanks to the population cap, shot him during a marijuana bust. *See* Frank Dougherty, *Cop-Shooting Suspect Was Out of Jail on Cap*, Philadelphia Daily News, Nov. 8, 1995, at p. 7; Dave Racher, *Bulletproof Vest Saved Cop's Life -- And Spared Teen From a Murder Rap*, Philadelphia Daily News, May 15, 1996, at p. 15.

Of course, it was neither the intention nor the expectation of the district court in Philadelphia that imposing a population cap on the local prison system would lead to such violence against police and other innocent victims. Judicial intervention into prison affairs invariably begins with the best of intentions, often motivated by concerns over seemingly harsh sentencing practices or failures to comply with preferred standards for prison administration. But what the Philadelphia experience shows is that such concerns are best left to the people to address through the elected representatives responsible for shaping prison and criminal-justice policies.

At least some of the former prisoners who fired on Philadelphia police likely would have qualified for release under the three-judge court's order as well, as they all had been incarcerated in connection with non-violent offenses when they were freed because of the Philadelphia population cap. Indeed, the idea of such prisoners having been

incarcerated at all for their drug and property crimes might well have been in tension with the three-judge court's view of enlightened criminal-justice policy. And yet those released prisoners and thousands of others in Philadelphia proved the prescience of then-Judge Alito's warning that, when, as here, the prosecuting authority does not believe that a large-scale prisoner release can be accomplished safely, "a court cognizant of its responsibilities to the community would hesitate to require the [state or local government] to follow a course of action that is antithetical to [its] most basic obligations and contrary to the public safety." *Harris v. City of Philadelphia*, 47 F.3d 1342, 1359 (3d Cir. 1995) (Alito, J., dissenting).

Unfortunately, the three-judge court's decision, for all its lengthy discussion of expert opinion, comes across as almost cavalier in its prediction that the public will be, if anything, *safer* with 46,000 more criminals on the streets. The lower court relied heavily on expert opinion to the effect that modestly-shorter prison terms would reduce deterrence only slightly. *See*, *e.g.*, *Coleman*, 2009 WL 2430820, *89, 2009 U.S. Dist. LEXIS 67943, *309. But compliance with the three-judge court's population cap would not be a discrete, one-time event. Rather, the state would have to comply with the cap indefinitely.[13] Thus, short-term

[13] The three-judge court made clear, albeit not in the context of discussing the public-safety consequences of its order, that it expected the population cap to force a long-term reduction in the number of prisoners the state may hold. *See Coleman*, 2009 WL 2430820, *68, 2009 U.S. Dist. LEXIS 67943, *245. Under the court's decision, while the number of released (continued…

deterrence, or even incapacitation, on an individual level is not the issue.

If the three-judge court's order were allowed to stand, the state would *constantly* have thousands more criminals on its streets than it would but for the order. That is not hyperbole; rather, it is the simplest explanation of what the order under review would mean in practice. To assert that such a state of affairs "will not have an adverse impact on public safety, and [ ] in fact may improve public safety," *Coleman*, 2009 WL 2430820, *84, 2009 U.S. Dist. LEXIS 67943, *293, is to depart from the PLRA, *see* 18 U.S.C. § 3626(a)(1)(A) ("The court shall give substantial weight to any adverse impact on public safety…."), and to forget the hard-earned lessons of history.

The simple and unambiguous terms of the PLRA make prisoner-releaser orders a remedy of last resort by restricting them to cases in which they are necessary and narrowly tailored to remedy an ongoing federal violation, and do not unreasonably threaten public safety. Because the three-judge court's decision does not comport with those basic statutory requirements, reversal is imperative.

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prisoners will fluctuate over time, and may even come down somewhat because of new prison construction or transfers of inmates to other states' facilities, it will remain very substantial for the foreseeable future.

## CONCLUSION

The decision of the three-judge court should be reversed.

Respectfully submitted,

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September 3, 2010