No. 09-1233

IN THE

Supreme Court of the United States

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

v.

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

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

BRIEF OF APPELLANTS

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August 27, 2010

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 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" 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.

PARTIES TO THE PROCEEDING

Appellees are the following:

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

Intervenor-plaintiff:

California Correctional Peace Officers' Association,

Appellants are the following five defendants:

Governor Arnold Schwarzenegger
Matthew Cate, Secretary of the California Department of Corrections and Rehabilitation
John Chiang, California State Controller
Ana J. Matosantos, Director of the California Department of Finance
Stephen W. Mayberg, Director of the Department of Mental Health

The following 144 individuals are intervenor-defendants:

Samuel Aanestad, Legislator
Anthony Adams, Legislator
Amador County Sheriff Martin Ryan
Joel Anderson, Legislator
Roy Ashburn, Legislator
Chief Probation Officer Kim Barrett

James F. Battin, Jr.*, Legislator
Tom Berryhill, Legislator
Sam Blakeslee, Legislator
Police Chief Michael Billdt
Butte County Chief Probation Officer John Wardell
Butte County Sheriff-Coroner Perry L. Reniff
Calaveras County Sheriff Dennis Downum
District Attorney Ronald L. Calhoun
Chief Probation Officer Lionel Chatman
City of Alhambra Police Chief Jim Hudson
City of Atwater Police Chief Richard Hawthorne
City of Delano Chief of Corrections George Galaza
City of Delano Police Chief Mark DeRosia
City of Fremont Police Chief Craig Steckler
City of Fresno Police Chief Jerry Dyer
City of Grover Beach Police Chief Jim Copsey
City of Modesto Police Chief Roy Wasden
City of Pasadena Police Chief Barney Melekian
City of Paso Robles Police Chief Lisa Solomon
City of Roseville Police Chief Joel Neves
City of San Bernardino Police Chief Michael Billdt
City of Santa Clara Police Chief Steve Lodge
City of Sonora Police Chief Mace McIntosh
City of Vacaville Police Chief Rich Word
City of Whittier Police Chief Dave Singer

City of Woodland Police Chief Carey Sullivan
District Attorney Gregg Cohen
Contra Costa County Chief Probation Officer Lionel Chatman
Contra Costa County Sheriff Warren Rupf
County of San Mateo
County of Santa Barbara
County of Santa Clara
County of Solano
County of Sonoma
Paul Cook, Legislator
Dave Cox, Legislator
Police Chief Mark DeRosia
Chuck DeVore, Legislator
Del Norte County Sheriff Dean Wilson
Sutter County Sheriff Jim Denney
District Attorney Bonnie M. Dumanis
Robert Dutton, Legislator
Michael D. Duvall, Legislator
El Dorado County Sheriff Jeff Neves
Bill Emmerson, Legislator
District Attorney Bradford Fenocchio
Fresno County Chief Probation Officer Linda Penner
Fresno County Sheriff Margaret Mims
Jean Fuller, Legislator
Glenn County Sheriff Larry Jones
National City Police Chief Adolfo Gonzales
Ted Gaines, Legislator
Martin Garrick, Legislator
Police Chief Richard Hawthorne
Sheriff Pat Hedges
Dennis Hollingsworth, Legislator
Shirley Horton*, Legislator
Guy S. Houston*, Legislator
Police Chief Jim Hudson
Bob Huff, Legislator
Humboldt County Sheriff Gary Philip

Inyo County Chief Probation Officer Jim Moffet
Inyo County Sheriff William Lutze
District Attorney Edward R. Jagels
Kevin Jeffries, Legislator
Sheriff Larry Jones
Rick Keene*, Legislator
Kern County Sheriff Donny Youngblood
District Attorney Robert Kochly
Doug La Malfa*, Legislator
Bill Maze*, Legislator
Lake County Sheriff Rod Mitchell
Lassen County Sheriff Steve Warren
Los Angeles County Sheriff Lee Baca
Sheriff William Lutz
Abel Maldonado, Legislator
Mariposa County Chief Probation Officer Gail Neal
Sheriff Jim Mele
Police Chief Barney Melekian
Mendocino County Sheriff Tom Allman
Merced County Sheriff Mark Pazin
Chief Probation Officer Don Meyer
Chief Probation Officer Jim Moffett
Mono County Sheriff Richard Scholl
Monterey County Sheriff Mike Kanalakis
San Joaquin County Sheriff Steve Moore
District Attorney Clifford Newell
Roger Niello, Legislator
Orange County Sheriff Coroner Michael S. Carona
District Attorney Rod Pacheco
District Attorney David W. Paulson
District Attorney Vern Pierson
Placer County Sheriff Edward N. Bonner
District Attorney John R. Poyner
District Attorney Tony Rackauckas
District Attorney Michael Ramos

District Attorney Michael Ramsey
Chief Probation Officer Brian Richart
District Attorney Todd Riebe
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Sonoma County Sheriff/Coroner William Cogbill
Todd Spitzer*, Legislator
Stanislaus County Chief Probation Officer Jerry Powers
Stanislaus County Sheriff Adam Christianson

Stanislaus County Sheriff's Department
District Attorney Christie Stanley
Chief Probation Officer Karen Staples
Audra Strickland, Legislator
District Attorney Gregory Totten
Van Tran, Legislator
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Ventura County Sheriff Bob Brooks
Michael N. Villines, Legislator
Mimi Walters, Legislator
Police Chief Rich Word
Mark Wyland, Legislator
Yolo County Sheriff Ed Prieto
Yuba County Sheriff Steve Durfor
Bill Berryhill, Legislator
Connie Conway, Legislator
Danny Gilmore, Legislator
Curt Hagman, Legislator
Diane Harkey, Legislator
Steven Knight, Legislator
Dan Logue, Legislator
Jeff Miller, Legislator
Brian Nestande, Legislator
Jim Nielsen, Legislator

* No longer in the Legislature

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

STATUTES

LEGISLATIVE HISTORY

TABLE OF AUTHORITIES—continued

OTHER AUTHORITIES Page

OPINIONS BELOW

Although the courts below have issued many opinions, appellants ("the State") note here only those containing the judgment and rulings essential to resolving the questions presented. On January 12, 2010, the three-judge district court entered the "Order to Reduce Prison Population" (JS2-App. 1a-10a[1]) now on appeal. See 2010 WL 99000. On August 4, 2009, the three-judge court made the predicate findings for that order. See 2009 WL 2430820 (JS1-App. 1a-256a). Orders granting plaintiffs' motions to convene three-judge proceedings (JS1-App. 273a-304a) are available at 2007 WL 2122657 and 2007 WL 2122636.

JURISDICTION

On July 23, 2007, over the State's objections, the District Courts for the Northern and Eastern Districts of California entered orders convening a three-judge district court pursuant to the PLRA, 18 U.S.C. § 3626(a)(3)(B), in accordance with 28 U.S.C. § 2284. JS1-App. 273a-304a. As shown *infra* § I, the three-judge court was improperly convened

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[1] The Clerk previously authorized the parties to use the appendices filed in Number 09-416. Appellants cite their Appendix from that case as "JS1-App." and the Appendix to the Jurisdictional Statement in this case as "JS2-App." The records in *Plata*, No. C01-1351-TEH (N.D. Cal.), and *Coleman*, No. CIV-S-90-0520-LKK (E.D. Cal.), are cited by docket entry number (*i.e.*, "*Plata* D.E. __," "*Coleman* D.E. __") in the Rule 33.2 version of this brief, as well as in the booklet version when the cited materials are not included in the deferred joint appendix. In the Rule 33.2 version of this brief, trial transcripts are cited as "Tr." and trial exhibits are cited by party and number, *i.e.* "Defs.' Trial Ex. __."

and therefore lacked jurisdiction to issue the judgment.

The three-judge court's "Order to Reduce Prison Population" granted injunctive relief under the PLRA. JS2-App. 1a-10a. The State timely appealed and filed its jurisdictional statement. This Court granted review but postponed consideration of jurisdiction. Pursuant to 28 U.S.C. § 1253, this Court has jurisdiction (i) to determine whether the three-judge court lacked jurisdiction, and, (ii) to review the judgment should this Court find that the three-judge court had jurisdiction.

STATUTORY PROVISIONS INVOLVED

The PLRA's relevant provisions, 18 U.S.C. § 3626, are reproduced at JS2-App. 71a-73a and in this brief's statutory addendum.

STATEMENT OF THE CASE

Congress enacted the PLRA to cabin the federal courts' role in prisoners' rights cases. See *Jones* v. *Bock*, 549 U.S. 199, 202-04 (2007). The Act restricts the availability and scope of prospective relief. 18 U.S.C. § 3626(a)(1)(A); *Nelson* v. *Campbell*, 541 U.S. 637, 650 (2004). Congress specially sought to curtail the use of prisoner release orders, making them the remedy of "'last resort'" for violations of prisoners' federal rights. JS1-App. 73a. Only three-judge district courts can order prisoner release, and they may not be convened to consider such relief unless the remedial orders entered by a single-judge district court have been given a "reasonable amount of time" to remedy the alleged violations. 18 U.S.C. § 3626(a)(3)(A). A three-judge court cannot order prisoner release unless "crowding" is the "primary

cause" of the federal violation and "no other relief will remedy the violation." *Id.* § 3626(a)(3)(E).

During remedial proceedings involving the Eighth Amendment rights of two plaintiff-classes, the three-judge court was convened and issued a prisoner release order in contravention of the PLRA's text and purpose. The single-judge district courts erred by convening three-judge proceedings because the State had not been given a reasonable amount of time to comply with significant remedial orders that had then-recently been issued, including orders compelling the State to effectuate the plans of the Receiver who had taken control of the California Department of Corrections and Rehabilitation's ("CDCR") healthcare system, as well as recent revisions to the Special Master's plans for improving mental-health care.

The three-judge court then issued its Order to Reduce Prison Population. That "prisoner release order" requires the State to cap its prison population at 137.5% of the institutions' combined design capacity as a remedy for alleged Eighth Amendment violations sustained by two discrete plaintiff-classes. The State must reduce its overall prison population by between 38,000-46,000 inmates within two years. The court ordered this massive release despite, *inter alia*, the Receiver's confirmation that care satisfying the Eighth Amendment can be provided notwithstanding prison overcrowding and appellees' experts' concurrence in that view and recognition that a prisoner release order would not extinguish the alleged federal violations. The court refused to consider current conditions in the prisons at the time of trial, let alone more than one year later when it issued judgment. Moreover, the court based its release order solely on professional goals for limiting

prison overcrowding, not any determination of the "least intrusive means necessary" to remedy the plaintiff-classes' *Eighth Amendment* rights. 18 U.S.C. § 3626(a)(1)(A). The court also failed to accord substantial weight to the adverse impact of its order on public safety. *Id.* This Court should reverse the judgment.

A. Statutory Background

The PLRA, Pub. L. No. 104-134, tit. VIII, 110 Stat. 1321, 1321-66 (1996), carefully circumscribes the federal courts' remedial powers over conditions of confinement. 18 U.S.C. § 3626. Any prospective relief must be "narrowly drawn, extend[] no further than necessary to correct the violation of the Federal right, and [be] the least intrusive means necessary." *Id.* § 3626(a)(1)(A). In considering injunctive relief, a court "shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." *Id.*

Congress imposed additional and more intrusive limits on a federal court's ability to enter a "prisoner release order" as a prospective remedy. *Id.* § 3626(a)(3); see also *id.* § 3626(g)(4) ("prisoner release order" is "any order ... that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or non-admission of prisoners to a prison"). Only a three-judge district court may issue such orders. *Id.* § 3626(a)(3)(C). A three-judge court cannot be convened:

> unless—(i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and (ii) the defendant has had a

> reasonable amount of time to comply with the previous court orders.

Id. § 3626(a)(3)(A). If properly convened, a three-judge court "shall enter a prisoner release order only if the court finds by clear and convincing evidence that—(i) crowding is the primary cause of the violation of a Federal right; and (ii) no other relief will remedy the violation of the Federal right." *Id.* § 3626(a)(3)(E).

B. Factual Background

1. The appeal involves two class actions, *Plata* v. *Schwarzenegger* and *Coleman* v. *Schwarzenegger*, concerning healthcare conditions previously determined to violate the Eighth Amendment. *Plata* implicates the healthcare provided to adult inmates with "serious medical conditions," and *Coleman* involves mental-health care provided to inmates with serious mental disorders. Each case has been in its remedial stage for years.

In *Plata*, Judge Henderson approved a stipulation for injunctive relief in 2002 requiring the State "'to provide only the minimum level of medical care required under the Eighth Amendment.'" JS1-App. 16a. In October 2005, the court concluded that the State was not satisfying its obligations under that decree. *Id.* at 14a. It therefore placed CDCR's medical care system into Receivership. *Id.* The court concluded that "'despite the best efforts of [the State],'" *id.* at 22a, Eighth Amendment violations persisted for numerous interrelated reasons, but overcrowding was not listed as one of them. *Id.* at 27a-28a (*e.g.*, CDCR had "serious personnel problems," "was incapable of recruiting qualified personnel," "lacked medical leadership," had not implemented necessary systems for tracking inmates,

and had "'a culture of non-accountability and non-professionalism'").

The court recognized that imposing the Receivership was "'a drastic measure,'" but found that "'establish[ing] [it], along with those actions necessary to effectuate it[]'" were the "'least intrusive means'" to remedy the Eighth Amendment violations. JS1-App. 28a; *id.* at 30a (granting the Receiver "'all powers vested by law in the Secretary of CDCR'"). The Receiver's appointment was effective on April 17, 2006. *Id.* at 29a-30a. Thereafter, the Receiver began gathering information necessary to formulate a plan to provide care that would satisfy the Eighth Amendment. On November 13, 2006, on the same day that the Receiver filed a motion for an extension to submit a plan of action to the court, the *Plata* appellees moved to convene a three-judge court to consider a "prisoner release order." *Id.* at 275a. The Receiver subsequently was granted the extension; he filed a proposed plan on May 10, 2007 and a final plan on November 15, 2007. JA 1071-99; *Plata* D.E. 658, 928, 930; see JS1-App. 280a.

In *Coleman*, following a 1994 trial, the court concluded that the mental-health care provided to the class violated the Eighth Amendment. JS1-App. 31a, 33a-35a. In December 1995, the court appointed a special master to oversee injunctive relief. *Id.* at 36a. In 1997, the court approved plans developed by the Special Master; and in the following years, "defendants continued to work with the Special Master to implement and revise" those plans. *Id.* at 37a. In March 2006, the court approved a revised "Program Guide" of remedial plans, policies and procedures aimed at achieving constitutional care. *Id.* at 37a-38a. Eight months later, plaintiffs moved to convene a three-judge court. *Id.* at 304a.

2. On July 23, 2007 (almost four months before the Receiver's final plan was issued in *Plata*), both single-judge courts granted plaintiffs' motions to convene a three-judge court over the State's objections. See JS1-App. 273a-304a.[2] Judges Henderson and Karlton recommended that both cases be heard by the same three-judge court. *Id.* at 286a, 304a. Then-Chief Judge Schroeder assented, seating Judge Reinhardt to complete the panel. JA 491; see 28 U.S.C. § 2284. After three-judge proceedings commenced, the State remained obligated to effectuate the Receiver's and the Special Master's plans. See, *e.g.*, JS1-App. 287a; see also *id.* at 30a (*Plata* court appointed a new Receiver in January 2008; he issued a Turnaround Plan of Action in June 2008, JA 1117-78, which the State continues to implement).

A trial on prisoner release was held between November 2008 and February 2009. The court prohibited defendants from introducing evidence concerning whether the Eighth Amendment violations were "'current and ongoing,'" JS1-App. 78a n.42, and concerning prison conditions after August 30, 2008, JA 1190 ¶ 2.e. The court also barred the State from obtaining discovery from or calling the Receiver or the Special Master to testify. See *Coleman* v. *Schwarzenegger*, No. CIV-S-90-520, 2007 WL 4276554, at *1 (E.D. Cal./N.D. Cal. Nov. 29, 2007); JA 1114-15, JA 1196-97.

On August 4, 2009, the court concluded that crowding was the "primary cause" of the alleged

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[2] The Ninth Circuit dismissed for lack of jurisdiction the State's appeals from the orders convening the three-judge court. *Coleman* v. *Schwarzenegger*, No. 07-16361, 2007 WL 2669591, at *1 (9th Cir. Sept. 11, 2007) (per curiam).

Eighth Amendment violations and that no other relief would remedy them. See JS1-App. 78a-168a; *id.* at 126a n.55. The order mandated that the State cap its system-wide prison population at 137.5% of the institutions' total "design capacity" within two years. *Id.* at 169a; see *id.* at 60a (156,352 inmates, *i.e.*, 195.9% of design capacity, in August 2008). The required reduction would be approximately 46,000 inmates. *Id.* at 235a. The court concluded that its sweeping "prisoner release order" was appropriate notwithstanding that other causes for the alleged constitutional violations exist and that the population cap alone would *not* remedy the violations. *Id.* at 134a, 143a. The court held that the cap satisfied § 3626(a)(1)(A)'s enhanced narrow tailoring requirements, see *id.* at 169a-185a, and, by not dictating how the cap should be implemented by the State, thereby gave substantial weight to any adverse impact on public safety and the operation of the criminal justice system. See *id.* at 185a-255a.

The court, however, recognized that the relief "extends further than the identified constitutional violations" and "is likely to affect inmates without medical conditions or serious mental illnesses." JS1-App. 172a. It selected the 137.5% cap solely because it was "halfway between the cap requested by plaintiffs and [a group of] wardens' estimate [in 2004] of the California prison system's maximum operable capacity absent consideration of the need for medical and mental health care." *Id.* at 184a. The court recognized, however, that, absent effective rehabilitation programs, a prisoner release of this magnitude is likely to cause a statistically significant increase in crime. *Id.* at 241a-248a.

3. The order required the State to submit, by September 18, 2009, a plan for meeting the 137.5%

cap within two years. JS1-App. 255a. The State timely appealed to this Court and unsuccessfully sought a stay. *Schwarzenegger* v. *Coleman*, 130 S. Ct. 46 (2009). While preserving its challenges to the order, the State timely submitted a population reduction plan. JS1-App. 312a-353a. The State disclosed that even if proposals pending before the legislature were enacted, it could safely reduce the population to only 151% design capacity within two years. *Id.* at 317a-318a (plan would meet 137.5% within five years). The court rejected the plan and required the State to submit a plan that would rigidly comply with the 137.5% cap within two years. JA 1525-33. Preserving its objections, the State submitted a revised plan to satisfy the 137.5% cap within two years, but could not ensure public safety. JS2-App. 34a.

On January 12, 2010, the "Order to Reduce Prison Population" approved the revised plan. JS2-App. 3a-6a. Without analyzing current conditions affecting the plaintiff-classes, the court reaffirmed that § 3626(a)(3)(E)'s requirements for a "prisoner release order" were satisfied, as were § 3626(a)(1)(A)'s rigorous narrow tailoring requirements. *Id.* at 2a. The court acknowledged that it had "not evaluated the public safety aspect of the State's proposed plan," but stated that "the evidence presented at trial demonstrated that means exist to reduce the prison population without a significant adverse impact on public safety or the criminal justice system." *Id.* at 3a-4a.

The order requires that within 24 months of taking effect, the State's systemwide prison population will be reduced to 137.5% design capacity. JS2-App. 6a. *Sua sponte*, the court stayed the order pending disposition of this appeal. *Id.* at 8a.

On January 15, 2010, this Court dismissed the State's appeal of the August 4, 2009 order for lack of jurisdiction. *Schwarzenegger* v. *Plata*, 130 S. Ct. 1140, 1140 (2010). On January 19, 2010, the State timely appealed the "Order to Reduce Prison Population," and on June 14, 2010, this Court granted review but postponed consideration of jurisdiction.

SUMMARY OF ARGUMENT

Using the guise of providing healthcare that complies with the Eighth Amendment, the court below has accepted appellees' invitation to undertake comprehensive institutional reform directed at prison crowding. If it stands, the judgment will require the State to reduce its prison population by roughly 38,000 to 46,000 inmates within two years. As the district court recognized, the release of these inmates will jeopardize the safety of California residents unless substantial investments in rehabilitation programs for released inmates are made. There is, however, no guarantee that California, which remains mired in fiscal crisis, has the financial ability to offer those services, or that the political branches would agree to direct available funds to released prisoners rather than other pressing needs. In any event, it is clear that the PLRA does not require (or even permit) what the three-judge court has ordered here and therefore its judgment should be reversed.

First, the judgment must be reversed because the three-judge court was improperly convened and thus lacked jurisdiction to issue any prisoner release order. Congress provided three-judge courts with exclusive jurisdiction to order release and forbid single-judge courts from convening three-judge

proceedings until they had afforded defendants "a reasonable amount of time to comply" with all the "previous court orders" directed at remedying plaintiffs' federal rights. 18 U.S.C. § 3626(a)(3). Here, however, the *Plata* and *Coleman* courts denied the State a reasonable opportunity to comply with remedies recently set in motion, including the implementation of the plans of a Receiver who was just taking control of CDCR's health care system. Doing so was utterly inconsistent with the prisoner release order's status as the remedy of last resort.

Second, if the three-judge court were properly convened, it committed reversible errors in holding that "crowding" is the "primary cause" of the alleged Eighth Amendment violations to the plaintiff-classes, and that "no other relief will remedy" those violations. *Id.* § 3626(a)(3)(E). The court below conducted no inquiry—either at trial or when it issued judgment approximately one year later—into current prison conditions, including the state of appellees' alleged Eighth Amendment violations. Contrary to the statute's prospective requirements, the court's conclusions were based solely on selective analyses of former conditions.

Independent of the flawed, limited inquiry, the court's § 3626(a)(3)(E) holdings are unsustainable. The court erroneously applied "primary cause" as if only "contributory cause" were required. Having concluded that crowding was slowing other remedies for the alleged Eighth Amendment violations, the court found that crowding was both their primary cause and that no other relief would remedy the violations absent a release order. It did so despite the Receiver's statements that the State could "provide constitutional levels of care *no matter what the population is*," and plaintiffs' expert's testimony

that fully effectuating the Receiver's plan alone would satisfy the Eighth Amendment.

Because the Receivership and other orders would remedy whatever Eighth Amendment violations to the plaintiff-classes persisted, and the record is plain that a release order alone will *not*, § 3626(a)(3)(E)'s requirements were not satisfied. The release order, as Judge Henderson acknowledged, "will not address the *core issue* in *Plata*, nor … alleviate the reasons for the Receivership." JA 1861 (emphasis added). Instead, it was driven by the desire for institutional reform, which is precisely what the PLRA does not allow.

Finally, the system-wide 137.5% of design capacity cap must be reversed because it fails § 3626(a)(1)(A)'s strict narrow tailoring requirements. The cap has *no nexus* to alleged Eighth Amendment violations, current or otherwise. Rather, plaintiffs sought a population reduction loosely based on the Federal Bureau of Prisons' goals for overcrowding, which are far more demanding than the Eighth Amendment. Treating these aspirations as Eighth Amendment *minima* violates the PLRA. Plaintiffs presented no evidence about what reduction was "necessary" to satisfy the Eighth Amendment, and admitted they lacked the information essential to making such a determination. Instead, as their counsel acknowledged, they sought a cap that was "a reasonable number and will get us to where we want to go," JA 2563, and "could *improve* public safety and the administration of criminal justice systems throughout the state, *Plata* D.E. 1766, at 7.

The court indulged plaintiffs' wishes, providing relief that not only is untethered to the Eighth Amendment, but is system-wide and expressly "extends further than the identified constitutional

violations." JS1-App. 172a. The remedy thus violates the PLRA and this Court's holdings regarding the proper scope of federal systemic decrees, and invades the political branches' prerogative to manage their own affairs. Moreover, the court tacitly acknowledged that the ordered reduction would have an adverse effect on safety unless "the state were to divert [funds] to community corrections, rehabilitation, and re-entry resources." JS1-App. 232a. This, of course, the court below has no authority to require. Thus, the order does serious violence to the PLRA's requirement that the court "give substantial weight to any impact on public safety … caused by [injunctive] relief."

ARGUMENT

I. THE THREE-JUDGE COURT LACKED JURISDICTION TO ENTER THE "PRISONER RELEASE ORDER."

The PLRA exclusively vests three-judge district courts with jurisdiction to order the release of prisoners—federal or state. 18 U.S.C. § 3626(a)(3)(B). A district court shall not convene three-judge proceedings unless (i) "a court has previously entered an order for less intrusive relief" that failed to remedy the violation of federal rights, and (ii) "the defendant has had a reasonable amount of time to comply with the previous court orders." *Id.* § 3626(a)(3)(A); see *id.* § 3626(a)(3)(C), (D).

The *Plata* and *Coleman* courts 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. Here, however, the State did not have a "reasonable amount of time to comply" with the legally relevant orders, thus the three-judge court

was not properly convened. The three-judge court's judgment should be reversed for want of jurisdiction.

A. The *Plata* Court Erred In Granting Plaintiffs' Motion To Convene.

In convening three-judge proceedings, the *Plata* court erroneously held that it was not required to give the State a reasonable amount of time to comply with the recently appointed Receiver's plans to deliver constitutional care. See JS1-App. 280a. Shortly before convening three-judge proceedings, Judge Henderson had taken the "'drastic measure'" of placing CDCR's health care system in a receivership. JS1-App. 28a. The *Plata* court found that the "'Receivership, along with those actions necessary to effectuate its establishment'" were "'necessary'" and the "'least intrusive means to correct the[] violations'" of plaintiffs' Eighth Amendment rights. *Id.*

Although the Receiver's appointment was not effective until April 2006 and the Receiver had not issued his plan for remedying the alleged constitutional violations, plaintiffs moved to convene a three-judge court on November 13, 2006. JS1-App. 275a. On July 23, 2007, the district court granted the motion, concluding that § 3626(a)(3)(A)(ii) was satisfied. *Id.* at 280a. It did so despite acknowledging that the Receiver had not commenced his duties until April 2006, had "only recently filed" his preliminary plan on May 10, 2007, and was not due to file a final plan of action for several months (a deadline extended to November 15, 2007). *Id.*[3] The

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[3] The May 2007 interim plan contemplated several years of efforts to remedy the claimed violations, and suggested that it "'w[ould] work'" without population control measures. JS1-App. 282a. The Receiver found it "'simply wrong'" to think that

court reasoned that it had given the State a reasonable amount of time to comply with orders from June 2002 and September 2004—orders wholly *unrelated* to the Receivership. See *id.* at 279a. While acknowledging that the Receiver "has made much progress" in the brief time since his appointment, *id.* at 280a, the court held that it was not "require[d] ... to wait more time … to see whether the Receiver's plans will succeed or fail," *id.* at 281a.

The court's analysis is wrong. Having established a Receivership which was implementing a plan to address alleged constitutional violations, the court was required to give the remedy of Receivership a "reasonable amount of time" to work before issuing a prisoner release order. The court's contrary holding violates § 3626(a)(3)(A)(ii), and the PLRA's requirement that "prisoner release" serves as the "'remedy of last resort.'" JS1-App. 73a; see *Roberts* v. *Mahoning County*, 495 F. Supp. 2d 713, 715 (N.D. Ohio 2006) (per curiam) (three-judge court) ("a prisoner release order [must be] the only way to stop the unconstitutional behavior"); see also, *e.g.*, JA 1057-70; *Plata* D.E. 700, 647, 590, 554, 474 (orders effectuating Receivership).

1. The court's interpretation contravenes § 3626(a)(3)(A) by ignoring the variation between subparagraphs (i) and (ii) of that section. Subparagraph (i) requires only that the court previously have "entered *an* order" seeking to remedy the violation for which prisoner release is sought. 18 U.S.C. § 3626(a)(3)(A)(i) (emphasis added). In subparagraph (ii), however, Congress stated that three-judge proceedings cannot be convened unless

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"'population controls will solve California's prison health care problems.'" *Id.*

the defendant is afforded time to comply with all of "the previous court orders" directed at remedying the alleged violation. *Id.* § 3626(a)(3)(A)(ii). By referring to the court's "orders" (plural) and using the definite article ("the"), Congress made clear its intent that a prisoner release order must be the final option, not one among many that might implement any previous order. *Id.*; see also *Kaufman* v. *Allstate N.J. Ins. Co.*, 561 F.3d 144, 155 (3d Cir. 2009) ("the definite article preceding the term 'claims' … means *all* the claims").

The requirements of subparagraph (ii) are not satisfied where, as here, the defendant has been given a reasonable amount of time to comply with an order at some earlier stage in the litigation, but not with the most relevant, recent remedial orders. If a court concludes that a less intrusive remedy may cure a constitutional violation, the PLRA commands that the court must give that remedy time to work.

2. The *Plata* court also wrongly believed that the State's prior inability to cure the alleged Eighth Amendment violations vitiated its obligation to afford the State time to effectuate the Receivership. See JS1-App. 279a-284a. No matter how the phrase "reasonable amount of time" is defined, it is clear that convening proceedings to consider whether to release prisoners two months after the Receiver issued a tentative plan—and prior to his final plan—is not "reasonable."

Indeed, the "reasonable amount of time" requirement must be assessed in light of Congress's express intent to avoid prisoner release and thus must take into account the work necessary to remedy the complained-of federal violations. Here, Judge Henderson vested the first Receiver, Robert Sillen, with authority to control CDCR's health care system with the understanding that the Receiver's work to

remedy the alleged Eighth Amendment violations could potentially take years to accomplish. *Supra* at 14-15 & n.3; see JS1-App. 24a-29a (discussing problems that precipitated Receivership).[4]

Had reasonable time been afforded, the State's substantial (and ongoing) progress toward remedying the alleged constitutional violations under the Receiver's plans would have shown that there was no basis for convening three-judge proceedings. The Receiver's task was daunting. See, *e.g.*, JA 1133 ("it [wa]s a misnomer to call the existing chaos a 'medical delivery system'—it is more an act of desperation than a system"). Yet, since Mr. Kelso's appointment as Receiver, *supra* note 4, he has clearly stated that the alleged Eighth Amendment violations can be cured by effectuating his plans without population reduction: "we believe we can provide constitutional levels of care *no matter what the population is*." Statement of J. Clark Kelso (Aug. 13, 2008), *quoted in* JA 1236 [*Plata* D.E. 1656, Ex. D (DVD) at 31:20 minutes] (emphasis added).

By June 2008, Mr. Kelso reported that "[t]here has already been significant progress" and "[s]ubstantial work has been completed at several prisons to improve conditions." JA 1127; see *e.g.*, *id.* at 1123-24, 1134-35 (plans). This progress has continued, and

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[4] In June 2008, shortly after it replaced Mr. Sillen with J. Clark Kelso, the current Receiver, the court approved a revised Turnaround Plan of Action "establish[ing] a three- to-five-year framework for addressing all of the[] problems" affecting the provision of constitutional care. JA 1125; *see* JA 2080 [Sept. 4, 2008] (plan would be accomplished in "about four years"). Mr. Kelso contrasted his "fairly aggressive time frame" for action—a time frame that is plainly "reasonable"—with one lasting "10, 15 years before [a receivership] would finish its work, [which] simply is too long a time frame." *Id.*

the State remains on track to effectuate Mr. Kelso's plans within the timeframe he originally proposed. See, *e.g.*, JA 1547 (announcing in January 2010 that "there is much that prison healthcare stakeholders and advocates can showcase as accomplishments"); *accord Lifeline Newsletter* May 25, 2010, at 1, *available at* http://www.cphcs.ca.gov/ newsletter.aspx (Receiver: the State recently has "move[d] us closer to … bringing this matter to a *final close*") (emphasis added). In implementing the Receivership, the State has greatly increased funding for and improved access to medical care, dramatically improved staffing, finalized construction plans for new healthcare facilities, and enhanced its infrastructure and ability to provide adequate care. See JA 1547-49.

Healthcare funding per inmate has nearly doubled under the Receivership. JA 1219-20 ¶¶ 7-9; JA 2293-95. The Receiver spent $1.8 billion in fiscal year 2008-09 to provide medical care to the inmate population. Office of the Inspector General, *California Prison Health Care Receivership Corporation Use of State Funds for Fiscal Year 2008-09*, at 1 (June 2010), *available at* http://documents.reportingtransparency.ca.gov/Common/Document.ashx?ID=6384&TB_iframe=true.

Moreover, although the court criticized the State's efforts prior to the Receivership, JS1-App. 280a, initiatives to improve access to care at each institution have been "ahead of schedule" since September 2008, JA 1202. The State showed "marked[] improve[ment]" throughout 2009, JA 1547; *id.* at 1553-56 ("[a]ll institutions" improved access to care). Indeed, contemporaneous with the judgment, the Receiver announced that because "[p]atient-inmate access to health care has markedly improved," "we are projecting that control of the Health Care

Access Units *can be transferred back to CDCR* as early as next fiscal year, with a target for July 2011." *Id.* at 1547 (emphasis added); see *id.* at 1553-63 (completed actions and upcoming tasks).

Similarly, although the order convening three-judge proceedings suggested that the State's medical staffing shortages were intractable, JS1-App. 284a, under the Receivership, the number of healthcare staff had increased significantly by the trial date. JA 1205-06. When trial began, the State was within five and two percent of the Receiver's goals for filling physician and registered nurse positions, respectively. JA 2249-50, 2250-51; see also JA 2066-69, 2071 (detailing exponential increases in staff). "Significant gains" have continued since trial. JA 1547-49, 1575-78. By February 2010, the Receiver had met his goal of filling over 90% of nursing positions and had filled 88% of physician positions. JA 1643-49; see also Cal. Prison Receivership, *Analysis of Year 2008 Death Reviews* 1, 23 (Dec. 14, 2009) ("*2008 Death Reviews*"), *available at* http://www.cprinc.org/docs/resources/OTRES_DeathReviewAnalysisYear2008_20091214.pdf ("significant systemic improvement[s]" in staff quality due to "wholesale transformation [of physician and nurse staff], especially between July of 2007 and August of 2008").

In effectuating the Receiver's plans, the State has improved the healthcare to the *Plata* class and will continue to do so. See, *e.g.*, JA 2249-50, 2250-52 (plaintiffs' expert Dr. Ronald Shansky testified that increased staffing has improved the quality of care); JA 2159, 2161 (plaintiffs' expert Dr. Jeffrey Beard acknowledged improvements in care). By trial, the number of deaths had been trending downward for 10 quarters, JA 2256-57, and the number of likely

preventable deaths fell from 18 in 2006 to 3 in 2007, JA 2253, 2276-77. Additionally, the Receiver reported in December 2009 that the mortality rate has decreased 13.3% over the last three years, *2008 Death Reviews* 1, and the decreases are an even "more impressive" 24.3% when normal seasonal variations are taken into account. *Id.*; see also *id.* at 19 tbl.8 (five likely preventable deaths in 2008). These rapid successes demonstrate that had the *Plata* court applied the correct standard, it could not have convened three-judge proceedings.

If this Court holds that the three-judge court should not have been convened in the *Plata* case, then the proper course is to reverse in both cases because the three-judge court's analysis depends inextricably on *Plata* to justify the prisoner release order. If Judge Karlton in *Coleman* believes that a three-judge court is still appropriate solely for that class-action, then the court can proceed accordingly after this Court reverses.

B. The *Coleman* Court, Too, Erred When It Convened Three-Judge Proceedings.

On the same day that the *Plata* court convened three-judge proceedings, the *Coleman* court did too. JS1-App. 288a. It also erroneously held that the "reasonable amount of time" requirement was satisfied by non-compliance with some earlier orders that left unremedied the federal violations. *Id.* at 292a-297a.

The *Coleman* case has been in a remedial phase overseen by a court-appointed Special Master since before *Plata* was filed. See JS1-App. 288a; see *id.* at 36a-37a (Special Master's supervision of Program Guide). The State has made "commendable progress"

under the Special Master's direction over the years. *Id.* at 294a; see *id.* at 37a.

In January 2006, after negotiations, the Special Master recommended that the State's Revised Program Guide be approved. JS1-App. 37a, 294a. The *Coleman* court did so in March 2006. *Id.* at 38a; see *Coleman* D.E. 1772, 1773 (requiring, *inter alia*, that the State increase mental-health staffing and submit plans for reducing vacancies among psychiatrists and providing for sufficient mental-health inpatient beds). In June 2006, the remedial program changed again as Judge Karlton ordered the State to coordinate compliance efforts with the newly-appointed *Plata* Receiver. *Coleman* D.E. 2063, at 4:8-11; see also, *e.g.*, JA 1058 (agreements between Receiver and Special Master); *id.* at 1061-64 (Receiver's oversight of mental-health provider contracting and credentialing); *id.* at 1065-70 (Receiver's responsibility for mental-health records and pharmacy services); *Coleman* D.E. 1998, at 3 (requiring coordinated construction with efforts in *Plata*); cf. JA 1107-08 (coordination on construction).

Rather than allowing the State a reasonable amount of time to comply with this new remedial program, in November 2006, the *Coleman* plaintiffs moved to convene three-judge proceedings. At the time, the State was actively implementing the Revised Program Guide and plans regarding mental-health staff, beds, and suicides. See, *e.g.*, *Coleman* D.E. 1950, 1951, 1990, 1990-1.[5] The *Coleman* court nonetheless granted plaintiffs' motion.

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[5] *See also Coleman* D.E. 2061 & Attachs. 1-4 (suicide plan filed shortly after motion to convene); *Coleman* D.E. 2091 (long-range bed plan submitted in December 2006, and approved in

In finding § 3626(a)(3)(A)(ii) satisfied, the court did not examine whether the State had been given a reasonable amount of time to effectuate the Special Master and Receiver's most recent plans. JS1-App. 296a. Instead, Judge Karlton stated: "The orders of this court issued from 1995 through the present have failed to remedy the constitutionally inadequate delivery of mental health care," and "Defendants have had more than sufficient time to comply with the mandate required by the court's 1995 order and the numerous orders issued since then." *Id.* at 296a-297a. As in *Plata*, the court improperly substituted previously unsuccessful remedial efforts for the requirement that the State be afforded a reasonable amount of time to comply with the court's orders.

Additionally, as in *Plata*, the State's progress in *Coleman* suggests that the time allotted to implement the Revised Program Guide and its plans regarding mental-health staff, beds, and suicides was not reasonable. For instance, the *Coleman* court's decision to convene three-judge proceedings was driven by its view that the State's failures to provide sufficient mental-health staffing and to allocate other resources to the classmembers would be irremediable without population reduction. See JS1-App. 295a-296a & n.5; *id.* at 301a.[6] Indeed, because of these

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April 2007, *see Coleman* D.E. 2200, subject to submission of supplemental plans to address two issues).

[6] During the hearing on the motion to convene, plaintiffs argued that the State's failure to devote sufficient resources, not crowding, was the root cause of the problem. *See* JA 1659 [June 27, 2007] ("these cases, which are about—we're using the word 'overcrowding,' but it is not exactly—it doesn't exactly fit the cases that you're presiding over"); *id.* at 1665 ("[T]his is *not* a case about where prisoners sleep. It's a case about the demand and supply for services. So they're increasing the demand for

purported resource allocation problems, the *Coleman* court rejected the State's plans to construct more space for housing and treating the classmembers, finding that the alleged Eighth Amendment violations would be "aggravate[d]" by such measures. *Id.* at 301a ("[T]his utterly fails to address the critical question of staffing."). Yet, the view that the State could not provide the necessary staffing and resources absent release proved erroneous once the plans of the Special Master and Receiver were given a reasonable amount of time to take effect.

Although mental-health care staff vacancies were high when the three-judge court was convened, JA 482-83; *Coleman* D.E. 2895, at 114-16 (reporting, *inter alia*, vacancy rates of higher than 40% and functional rates as high as 43% in May 2007), a recruiting and hiring program launched in November 2007 has been extraordinarily successful. JA 1473, ¶ 48; *id.* at 1476-77, ¶¶ 57-60 (discussing, *inter alia*, 18% decrease in vacancy rate for psychologists over a six-month period). By trial, the Special Master recognized that certain facilities were fully staffed. See JA 2371, 2372. More recently, the Special Master reported that "the vacancy rate in mental health staffing at CDCR institutions continued the decline that had been found during the preceding monitoring period." JA 769 (footnote omitted). The overall vacancy rates for multiple staff categories fell to between 11% and 19% for the most recent reporting cycle. *Id.* at 769-73; see *id.* (use of contractors reduced the functional vacancy rates to as low as 6%).

Furthermore, under the Special Master's recent oversight, the State added dedicated mental-health

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services, but where's the action on the supply side?") (emphasis added).

beds at various institutions, which diminished waiting lists. JA 1483-84, ¶ 74; Defs.' Trial Ex. 1186. CDCR's institutions implemented functional and effective quality management programs. JA 773-74, 775-76; see also *id.* at 786-87 (noting "significant improvement" in providing medication). Numerous institutions have satisfied the Special Master's requirements for suicide prevention. *Id.* at 780. Additionally, the number of suicides has experienced declines, which the Receiver recently suggested may be directly attributable to "improved mental health care and improved security." *2008 Death Reviews* 23.

These improvements—*i.e.*, the State's dedication to supplying the services demanded—during the new phase of the remedial program demonstrate that the *Coleman* court's misinterpretation of § 3626(a)(3)(A)(ii) was material.

C. The Release Order Should Be Reversed For Lack Of Jurisdiction, And The Cases Should Be Remanded To Their Respective District Courts.

Because the three-judge court was not properly convened to consider prisoner release, this Court should reverse the judgment for lack of jurisdiction and dissolve the order creating the three-judge court. See *Gully* v. *Interstate Natural Gas Co.*, 292 U.S. 16, 18-19 (1934) (per curiam) (reversing judgment entered by improperly convened three-judge court and remanding to the single-judge district court); *accord Gonzalez* v. *Automatic Employees Credit Union*, 419 U.S. 90, 95 n.12 (1974); see also *Gully*, 292 U.S. at 18 (where "there was no occasion for constituting a court of three judges," "the merits [of its decision] cannot be reviewed").

Finally, if the Court concludes that a three-judge court was inappropriate in either proceeding, then it still must reverse (see *supra* at 20). This Court cannot meaningfully review the merits of the three-judge court's order arising out of the combined cases and attempt to apply it only to one of the proceedings. At plaintiffs' urging, the three-judge court did not differentiate between the two cases in determining that a "prisoner release order" satisfied § 3626(a)(3)(E), or in shaping the remedy. See, *e.g.*, JS2-App. 2a-6a; JS1-App. 171a-172a.[7] The three-judge court imposed the 137.5% cap to remedy alleged violations of *two* plaintiff-classes' Eighth Amendment rights without differentiating between them. Determining the necessary remedy for just one class would require additional fact-finding. Therefore, if this Court concludes that three-judge proceedings were improper in either case, it should reverse the judgment in both cases and require the plaintiffs or the single judge in the other case to renew the request to seat a three-judge panel. See 28 U.S.C. § 2284.[8]

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[7] Plaintiffs requested a release order that did not distinguish between the classes. *See Plata* D.E. 1766, at 3; *see also Plata* D.E. 695, at 1-2 (arguing that the two cases should be heard by the same three-judge court); *Coleman* D.E. 2254 (same); *but see Plata* D.E. 701, at 2 (opposing consolidation).

[8] In ruling that *Plata* and *Coleman* should be consolidated for three-judge proceedings, then-Chief Judge Schroeder believed that the statutory requirement that she "shall designate two other judges," 28 U.S.C. § 2284(b)(1), did not apply. *See also id.* (requiring that "the judge to whom the request [to convene] was presented" also be seated). Chief Judge Schroeder thus appointed only *one* judge, seating both Judges Henderson and Karlton. JA 490-91. But if a three-judge court is proper in just one case, § 2284 would require the appointment of *only* the

II. REVERSAL IS WARRANTED BECAUSE THE COURT'S INTERPRETATION AND APPLICATION OF § 3626(a)(3)(E) IS CONTRARY TO THE PLRA.

If three-judge proceedings were proper in both cases, the judgment nevertheless should be reversed because the three-judge court erroneously interpreted § 3626(a)(3)(E). That provision requires a 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" before issuing a "prisoner release order."

A. The Court's § 3626(a)(3)(E) Holding Should Be Reversed Because It Has No Relation To, And The Court Expressly Refused To Consider, Current Conditions.

The Order to Reduce Prison Population should be reversed first because the district court failed to assess whether crowding *currently* "*is* the primary cause" of whatever Eighth Amendment violation remains and that no other relief "*will remedy*" such violations, both prerequisites to obtaining a prisoner release order. 18 U.S.C. § 3626(a)(3)(E) (emphases added). "Congress' use of a verb tense is significant …." *United States* v. *Wilson*, 503 U.S. 329, 333 (1992); *accord Carr* v. *United States*, 130 S. Ct. 2229, 2237 (2010). Congress's intentional use of the present and future tenses in § 3626(a)(3)(E) must be given meaning. Compare 18 U.S.C. § 3626(a)(3)(E), (1)(A), with *id.* § 3626(a)(3)(A) (present perfect and past tenses). The court below failed to do so.

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district judge who presided over that case, and the Chief Judge would "designate two other judges" as § 2284 commands.

The three-judge court refused to hear evidence concerning the current status of alleged Eighth Amendment violations or whether the requirements of § 3626(a)(3)(E) presently are satisfied with respect to the current violations. See JS1-App. 78a n.42; JA 1691 [Nov. 10, 2008]. It mistakenly believed that such an inquiry was irrelevant because "defendants ha[d] never filed a motion to terminate under § 3626(b), the proper means for any challenge to the existence of 'current and ongoing' constitutional violations." JS1-App. 77a. But, the State's failure to move to terminate proceedings—which would have required a showing that *all* constitutional violations had been remedied—does not indicate either which Eighth Amendment violations had been cured or what measures are necessary to address any remaining violations.

More significantly, crowding cannot be deemed the current "primary cause" of alleged violations to plaintiffs' federal rights without considering the specific effects that crowding allegedly *is causing*. Likewise, it is not possible to determine what remedy is "necessary" without analyzing what violations currently *are in need of correction*. See, *e.g.*, JA 2258 (plaintiffs' expert's admission that care at certain facilities may have satisfied the Eighth Amendment by the time of trial). The excluded evidence was crucial to the § 3626(a)(3)(E) determinations. Instead of conducting the required inquiry, the court below allowed plaintiffs selectively to employ any evidence of constitutional violations over a time period spanning years in *Plata* and *Coleman*. The court made the situation worse by refusing to consider evidence of prison conditions after August 30, 2008—even though the trial extended into February 2009 and the judgment did not issue until January 2010—

and by prohibiting testimony or discovery from the Receiver and the Special Master. See *supra* at 7.[9]

The limited inquiry allowed by the court was insufficient to determine whether crowding is the primary cause of "a substantial risk of serious harm" to the plaintiff-classes, *Farmer* v. *Brennan*, 511 U.S. 825, 834 (1994), and whether it is the primary cause of present "deliberate indifference" by State officials, *i.e.*, "reckless disregard," *id.* at 838, of conditions "sure or very likely to cause serious illness and needless suffering," *Helling* v. *McKinney*, 509 U.S. 25, 33 (1993); see *Wilson* v. *Seiter*, 501 U.S. 294, 302 (1991). Likewise, it was inadequate to allow the court to determine whether any other relief "will remedy" any such substantial risk or end the State's purported deliberate indifference. 18 U.S.C. § 3626(a)(3)(E).

Instead, the three-judge court's § 3626(a)(3)(E) analysis was a selective examination of what the

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[9] Although neither the Receiver nor plaintiffs objected to a noticed deposition, see *Coleman*, 2007 WL 4276554, at *1, acting *sua sponte*, the three-judge court assumed (wrongly) that the Receiver and the Special Master were protected by categorical quasi-judicial immunity. *Id.* at *1-2. The court failed to conduct the requisite functional analysis about whether all of the information sought involved mental processes within the Receiver's judicial capacity. *See Antoine* v. *Byers & Anderson, Inc.*, 508 U.S. 429, 435-36 (1993); *United States* v. *Morgan*, 313 U.S. 409, 422 (1941). This failure was significant because much of the information at issue pertained to administrative not judicial matters, and plaintiffs' expert admitted that the Receiver had "data" that was necessary to determine what would "achieve constitutional levels of care." JA 2273. It therefore was unreasonable for the court to conclude that categorical immunity applied. *Cf. Med. Dev. Int'l* v. *CDCR*, 585 F.3d 1211, 1221 (9th Cir. 2009) (reversing decision that the *Plata* Receiver was immune from suit).

alleged Eighth Amendment violations once were and a *post hoc* application of causation to those conditions. See, *e.g.*, *infra* § II.B.2; JS1-App. 9a (relying on death statistics from mid-2005, while ignoring "significant and continuous decline since 2006," *2008 Death Reviews* 31); JS1-App. 19a-20a, 24a, 90a, 94a, 107a, 111a (fixating on conditions at the former San Quentin facility, but ignoring that it has been replaced by a state-of-the-art facility, see *id.* at 333a; *Plata* D.E. 1652, at 6 ¶ 14; JS2-App. 52a; JA 1550). This violates the statute.

The error is significant because of the disparity between the findings of Eighth Amendment violations upon which the court relied, and the current conditions on which a finding of necessity must be based. This point is further illustrated by assessing whether the State is acting with deliberate indifference. The three-judge court mentioned "deliberate indifferen[ce]" just once, and that was in the context of findings from *1995*. See JS1-App. 170a (discussing *Coleman* v. *Wilson*, 912 F. Supp. 1291, 1316, 1319 (E.D. Cal. 1995)). The then-existing care and the *mens rea* of the former defendants are not comparable to those existing today. Compare, *e.g.*, JA 1133 (the State lacked a "medical delivery system" and was in "chaos" when the Receiver was appointed), and *Coleman*, 912 F. Supp. at 1322-23 (discussing weapons used against classmembers without penological justification), with, *e.g.*, *supra* at 18-19 (noting, *inter alia*, that the State now spends more than $1.8 billion per year on inmate health care), and JA 1635 (noting the "collaborative trust" forged among the Receiver, CDCR and the Governor's Office in remedying violations). The court should not have determined whether an injunction should issue today based solely on proof of violations in the past.

See *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987) (the "harm [the district court] sought to … address[] … [does not] lie[] in the present or the future, [but] in the past").

B. The Court Erred In Interpreting The PLRA's "Primary Cause" And "No Other Relief Will Remedy" Requirements.

The three-judge court misinterpreted § 3626(a)(3)(E)'s requirements that plaintiffs must present "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." The best reading of § 3626(a)(3)(E) is that as the "primary cause" crowding must be at least the "but for" cause of the federal violation, and therefore that eliminating crowding alone should "remedy the violation of the federal right." This standard was not applied and could not be satisfied here.

1. In enacting the PLRA, Congress did not define "primary cause," and the legislative history is silent. See JS1-App. 78a-79a & n.43. Congress has rarely used the phrase "primary cause" in other contexts, and those are not helpful here.[10]

Nonetheless, it is clear that "primary cause" is distinct from and more substantial than a "contributing cause." See *Black's Law Dictionary* 250 (9th ed. 2009) ("contributing cause" is "[a] factor that—though not the primary cause—plays a part in producing a result"). To give meaning to the PLRA's

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[10] *See* 42 U.S.C. § 9607(c)(2) (liability for costs of CERCLA response); Pub. L. No. 111-22, § 1002(a)(1), 123 Stat. 1663, 1664 (2009) (findings on "primary causes of homelessness"); Pub. L. No. 110-180, § 2(B), 121 Stat. 2559, 2560 (2008) (findings regarding "[t]he primary cause of delay in NCIS background checks").

intent to make prisoner release the remedy of last resort, JS1-App. 73a, "primary cause" should be read to require an elevated level of "but for" causation.

This Court and other courts consistently have distinguished between "primary causes" and "contributing factors," which do not require "but for" causation. This Court has explained that "concurrent" causes are distinct from the "primary" or "proximate efficient" cause of a particular result. *Rocco* v. *Lehigh Valley R.R.*, 288 U.S. 275, 278-80 (1933). It has held that an employee's failures could not be considered the "primary cause" of a resulting death because the acts of another could have been a cause "in whole or in part." *Id.* In *The G.R. Booth*, 171 U.S. 450 (1898), the Court concluded that the "primary and efficient cause" is that which is the "superior or controlling agency." *Id.* at 460-61. The "primary cause" is the one from which damages "proceed[] inevitably, and of absolute necessity." *Id.*

Similarly, the Third Circuit has recognized that a "primary cause" must encompass "but for" and "proximate" causation, explaining that such standards are "significantly more stringent than [a] 'material contributing factor' test." *Metro. Pittsburgh Crusade for Voters* v. *City of Pittsburgh*, 964 F.2d 244, 251 (3d Cir. 1992) (citations omitted); see also, *e.g.*, *Hawkins* v. *Dir., Office of Workers Comp. Programs*, 907 F.2d 697, 705 n.12 (7th Cir. 1990) (distinguishing contributing cause from "'principal, sole, primary, or proximate cause'" under the Black Lung Benefits Act); *Borras* v. *Sea-Land Serv., Inc.*, 586 F.2d 881, 885-86 (1st Cir. 1978) (distinguishing contributing factor from "primary cause" under the Jones Act).

Moreover, prior to the PLRA, plaintiffs already were required to show that crowding was the proximate cause of the violation of their rights to

obtain a remedy. See, *e.g.*, *Carver* v. *Knox County*, 887 F.2d 1287, 1294 (6th Cir. 1989); *Marsh* v. *Barry*, 824 F.2d 1139, 1143 (D.C. Cir. 1987) (per curiam); *Abrams* v. *Hunter*, 910 F. Supp. 620, 627 (M.D. Fla. 1995), *aff'd*, 100 F.3d 971 (11th Cir. 1996). Congress is presumed to have knowledge of existing law when it enacted the PLRA. *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 185 (1988). In enacting the PLRA, Congress's clear purpose was to limit the remedies available in prison overcrowding cases, not to make the remedy more readily available. 18 U.S.C. § 3626(a)(1), (3)(E); H.R. Rep. 104-21, at 11, 25 (1995); JS1-App. 248a. Thus, by adding "primary" to the pre-existing causation requirement, the PLRA's causation standard is best understood to require special and heightened judicial scrutiny.

The three-judge court violated these rules. Although it purported to accept the State's argument that primary cause is that which is "'first or highest in rank or importance; chief; principal,'" JS1-App. 78a, the court did not actually apply such a standard. Rather, it treated "primary cause" as if it were synonymous with a "contributory cause."

The district court acknowledged that the alleged Eighth Amendment violations resulted from numerous causes, many of which pre-dated the crowding at issue. See, *e.g.,* JS1-App. 16a-17a, 31a-52a, 85a-95a, 104a-126a. The complete lack of a *system* for providing care and a troubled institutional culture at the outset of these litigations were the driving forces resulting in constitutional violations. See, *e.g.*, JA 1124 ("pervasive, fundamental organizational weaknesses and failures"); *id.* at 1133 ("it is a misnomer to call the existing chaos a 'medical delivery system'"); *Coleman*, 912 F. Supp. at 1298-99; *Plata* v. *Schwarzenegger*, No. C01-1351-TEH, 2005

WL 2932253, at *29 (N.D. Cal. Oct. 3, 2005) (identifying the "historical lack of leadership, planning, and vision by the State's highest officials") [*reproduced at* JA 974].

Addressing these systemic issues has been a substantial task, see *supra* at 17, and crowding can strain reform efforts. See, *e.g.*, *Plata* D.E. 2031, at 2:13-16. The fact that crowding may slow the progress of other remedies does not make it the "primary cause," or indicate that prisoner release is "necessary." On the contrary, the existence of multiple and interrelated conditions necessary to remedy the alleged constitutional violations should have foreclosed prisoner release. The district court acknowledged that curing the crowding would not remedy the alleged violations because independent (*i.e.*, primary) causes would continue to produce constitutional injury. JS1-App. 134a, 143a. Yet, by treating crowding's contribution to other causes as sufficient to make it the "primary cause," the district court eviscerated § 3626(a)(3)(E)(ii)'s requirement that "*no other relief* will remedy the Federal right." (emphasis added). If overcrowding is the primary cause, then eliminating overcrowding should undo all or virtually all of the constitutional harm.[11]

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[11] Plaintiffs claimed that because crowding slows multiple remedial efforts, it must be the primary cause of the Eighth Amendment violations. "[A]ll of the evidence shows that overcrowding is inhibiting the remedial efforts of both the courts and the Special Master and the Receiver in this case. And therefore, it is delaying the constitutional remedy." JA 1659 [June 27, 2007]; JA 1377, ¶ 4 (Shansky: "[T]he inadequate system will continue to exist for longer than it would otherwise unless there is a significant reduction in the population."). In virtually any systemic prison conditions case, crowding would make remedying existing violations more difficult. But under the three-judge court's reading, crowding automatically would

The record makes clear that this would not happen here. The Special Master, for instance, explained that "'even the release of 100,000 inmates would likely leave the defendants with a largely unmitigated need to provide intensive mental health services to program populations.'" JS1-App. 157a (alteration omitted); see *Plata* D.E. 2031, at 23-26 (most *Coleman* classmembers are housed in crowded conditions, and suicides are most prevalent in single-cell conditions). Plaintiffs' expert Dr. Shansky agreed that CDCR will not have constitutionally adequate medical care "[i]f the only improvement that was made … is … there are 40,000 less inmates." *Plata* D.E. 1481-1, at 61:14-24; see also JS1-App. 282a (Receiver explained that it was "'simply wrong'" to believe "'that population controls will solve California's prison health care problems'").

In contrast, the Receiver concluded that the State could "provide constitutional levels of care *no matter what the population is*" once his plan was fully implemented. *Supra* at 17. Likewise, Dr. Shansky repeatedly has conceded that "the full implementation of the [T]urnaround [P]lan will ensure a constitutional level of healthcare and mental health care in California." JA 2280-81; JA 1376-77, ¶ 4.[12]

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be the "primary cause" in those circumstances and, contrary to the PLRA, a prisoner release order could issue whenever a three-judge court is frustrated by the speed of less intrusive relief.

[12] Dr. Shansky stated that the Receiver's plan alone would be sufficient unless the prison population "wildly increases again." JA 2280-81. Irrespective of the relief ordered here, California is committed to reducing crowding and recently has been the most successful jurisdiction in the country in doing so. *See* U.S. Dep't of Justice, *Prison Inmates at Midyear 2009—Statistical Tables* 1-2 & fig.2 (June 2010); Pew Ctr. on the States, *Prison Count 2010*, at 5 (Apr. 2010).

Indeed, Judge Henderson's comments show that the three-judge court's determinations did not satisfy § 3626(a)(3)(E)'s requirements:

> [R]educ[ing] the prison population will not address the *core issue* in *Plata*, nor will it alleviate the reasons for the Receivership and my oversight over the prison's medical health care delivery system. Instead, a reduction in the prison population would simply resolve the plaintiffs' argument that overcrowding is the primary cause of the constitutional violations.

JA 1861 (emphasis added). This use of "primary cause" illustrates that the court below treated the phrase as if the PLRA merely required a "contributing cause" showing.

In sum, plaintiffs' experts, the district court, the Receiver, and the Special Master agree that the Eighth Amendment violations will *not* be cured by relief directed at crowding alone. They recognize that the other remedies are *necessary* and, indeed, may be sufficient to bring about constitutional care, while relief directed at crowding, at most, may expedite those other remedies. In these circumstances, a prisoner release order may not issue. Instead, the trial court must focus on the other remedies that will remedy Eighth Amendment violations, if any remain, in due course, and it is the problems to which those remedies are directed that are the primary cause of the alleged Eighth Amendment violations.

2. Finally, the court's conclusion that "all other potential remedies will be futile in the absence of a prisoner release order" is not supported by clear and convincing evidence. JS1-App. 144a-145a. The three-judge court considered and rejected four potential types of remedies as inadequate:

(1) construction, *id.* at 145a-154a; (2) additional hiring, *id.* at 154a-155a, (3) ongoing efforts of the Receiver and Special Master, *id.* at 155a-159a, and (4) transferring inmates, *id.* at 159a-162a. The court erred by analyzing and rejecting the potential measures in isolation rather than examining their cumulative effect and by unreasonably dismissing their individual effectiveness. See *id.* at 144a-162a.

Construction. The court rejected the State's argument that its implementation of legislation enacted shortly before trial (AB 900) and willingness to construct facilities would constitute less intrusive remedies than prisoner release. See JS2-App. 2a; JS1-App. 145a-154a.

The court first erred by declining to credit plaintiffs' experts' testimony that prison construction helped remedy federal law violations in systems they administered, JA 2182-83, 2185, and that the construction of additional treatment facilities in California could remedy the alleged violations, *id.* at 2165-66, 2259-60; see also Fed. Bureau of Prisons ("BOP"), *State of the Bureau 2008*, at 6 (2008) (agency "reduc[es] crowding by adding additional bed space"). It compounded that error by reasoning that the State's construction proposals were infeasible because "it will be years before any re-entry facility construction … will be completed." JS1-App. 147a-148a. The court's reasoning is internally inconsistent. The court *sua sponte* stayed its prisoner release order pending appeal; once effective, that order will take *two years* to implement. JS2-App. 8a-9a.

During that time, construction that could be a partial remedy will occur. Prior to judgment, the State filed construction plans to satisfy the Receiver's proposals and the *Coleman* court's orders requiring that the State implement a long-range bed plan to

provide sufficient housing and treatment facilities for the classes, including waiting lists affecting portions of the *Coleman* class. *Coleman* D.E. 3724 & Attach. A. The Receiver called those construction plans "'an extraordinary milestone.'" *Lifeline Newsletter* Nov. 24, 2009, at 1, *available at* http://www.cphcs.ca.gov/newsletter.aspx; *Plata* D.E. 2325, at 1 (noting legislature's approval of construction); JS2-App. 11a-16a (approving plans, but ordering changes to the activation schedules for several facilities). Under these plans, thousands of new beds are to be added to the CDCR system. See *Coleman* D.E. 3724, Attach. A, at 10-11. The facilities will begin accommodating inmates this year, see, *e.g.*, *id.* Ex. 16; *Coleman* D.E. 3866, and all facilities are to be completed by 2014.[13]

Additional Hiring. The court rejected additional hiring as a less intrusive form of relief. See JS1-App. 154a-155a; JS2-App. 2a. As shown *supra* § I, the relevant hiring trends were extremely positive between 2007 and 2008. The court declined to recognize these improvements despite the evidence of such progress at trial. See, *e.g.*, *supra* at 19, 23. Moreover, by the time of the Order to Reduce Prison Population, the Receiver had met his goals for staffing the health care system. *Id.* at 19. Nonetheless, the three-judge court relied on the staffing levels in 2007 and before to dismiss this potential remedy. JS1-App. 154a; see, *e.g.*, *id.* at 28a, 47a-48a & nn.31-34.

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[13] *Coleman* D.E. 3724, Attach. A; *Coleman* D.E. 3830 (revising activation schedule for one facility as ordered); *Coleman* D.E. 3794 & Ex. A (expediting activation schedule for another facility); JA 835-36, 848-51 (revising activation schedules); *Coleman* D.E. 3866 (approving revised activation schedules and waiving state regulations to expedite activation).

Emblematic is the court's crediting of outdated evidence that: "[CDCR] lacks sufficient custodial staff 'to keep prisoners safe from harm' or 'to provide … timely access to care.'" JS1-App. 110a; see *id.* at 101a. This ignores that CDCR hired 600 and 1800 custodial staffers in 2007 and 2008, respectively, and that officers serve in dedicated "access to care" units to escort inmates to medical and mental-health appointments. JA 2483-84. Indeed, by trial, CDCR "literally filled up all of [its] prisons with correctional staffing" and planned to cancel academies for additional staff because "we are actually overfilled." *Id.* at 2484.

Thus, by the time of trial and when the judgment issued, the court had no basis to conclude that continued staffing increases—whether alone or in concert with other measures—would not remedy the alleged violations.

The Receiver and the Special Master's Ability to Remedy Alleged Violations Absent Release. Clear and convincing evidence does not support the court's claim that the tools available to the Receiver and the Special Master are insufficient to remedy the alleged violations absent a prisoner release order. See JS1-App. 155a-159a; JS2-App. 2a.

As discussed, the Receiver and Dr. Shansky have acknowledged that full implementation of the Receiver's plans *alone* will be sufficient to ensure Eighth Amendment care. *Supra* at 17, 34-35; see also JA 2434 (plaintiffs' expert Dr. Austin: "'[Q.] Is it your opinion that no matter what resources he has or what actions he takes, the Receiver cannot provide for constitutional levels of medical care at current population levels? [A.] No.'"). The three-judge court's failure to give any weight to the positive developments under the Receivership and Special

Mastership that occurred between the August 2008 close of evidence and the judgment makes matters worse. See *supra* §§ I, II.A.

Out-of-State Transfers. Finally, the three-judge court erred in rejecting the possibility of transferring inmates to out-of-state facilities as part of a remedy. JS1-App. 159a-162a; see JS2-App. 2a. It asserted that the number of transfers to-date and proposed in the future were "too small to significantly affect the provision of medical and mental health care to California's inmates." JS1-App. 160a.

This overlooks that Judge Karlton erroneously blocked the State's efforts to transfer mental-health prisoners to out-of-state facilities to address crowding. See JA 435, , ¶¶ 1, 5 (allowing CDCR to transfer only 80 non-*Coleman* classmembers, and ordering that "[n]o other CDCR inmates are to be transferred" unless pre-transfer screening requirements proposed by the Special Master were satisfied). Judge Karlton prohibited transfers based on the Special Master's concern, *id.* ¶ 3, that "the actual state of mental health services" at the *out-of-state transferee institutions* would not provide sufficiently high quality care, see JA 439-40. It was mistaken to *presume* that the mental-health care at out-of-state facilities does not satisfy the Eighth Amendment. In these circumstances, the three-judge court should have refused to order prisoner release unless the district courts allowed the State to exhaust its avenues for prisoner transfer.

The three-judge court failed to account for these various remedial measures individually and cumulatively. Even if it were appropriate to discount the Receiver's belief that, as discussed above, the tools available to him alone would be sufficient to remedy any alleged Eighth Amendment violations, it

certainly is the case that the combination of the remedial measures discussed here could be a sufficient remedy and the three-judge court was obliged to deal with their cumulative effect before ordering prisoners released from confinement.

III. THE RELEASE ORDER VIOLATES THE PLRA'S HEIGHTENED REQUIREMENTS OF NARROW TAILORING AND FAILS TO GIVE SUBSTANTIAL WEIGHT TO PUBLIC SAFETY.

Even if § 3626(a)(3)(E) were satisfied, the order capping the system-wide population of CDCR's facilities at 137.5% of their design capacity must be reversed. The remedy violates the PLRA's heightened requirement of narrow tailoring, *i.e.*, that injunctive relief shall be "narrowly drawn," extend "no further than necessary to correct the violation of the [Eighth Amendment] right[s] of … plaintiffs," and be "the least intrusive means necessary to correct the violation." 18 U.S.C. § 3626(a)(1)(A); JS1-App. 75a (calling these requirements the "need-narrowness-intrusiveness" standard); see JS2-App. 2a; JS1-App. 168a-185a. The order also fails to give sufficient weight to adverse impacts on public safety and the State's operation of its criminal justice system. 18 U.S.C. § 3626(a)(1)(A); see JS2-App. 4a; JS1-App. 185a-254a.

A. The 137.5% Cap Lacks Any Nexus To The Alleged Violations Of Plaintiffs' Eighth Amendment Rights, Is Not Narrowly Drawn, And Is Highly Intrusive

The order requires that the population of California's prisons be capped at 137.5% of their combined design capacity within two years. JS2-App. 5a-6a. The State must reduce its prison population

by between 38,000 and 46,000 inmates, depending on CDCR's ordinary population fluctuations. JS1-App. 235a; *Plata* Appellees' Mot. Dismiss, No. 09-1233, at 3-4 n.1 (U.S. May 14, 2010). The court claimed that "California's prisoner population *must* be reduced to some level between 130% and 145% design capacity if the CDCR's medical and mental health services are ever to attain constitutional compliance." JS1-App. 183a. It selected a system-wide cap of 137.5% design capacity because it was "halfway between the cap requested by plaintiffs and [a group of] wardens' estimate of the California prison system's maximum operable capacity" *in 2004*. *Id.* at 184a.

None of these three figures has any nexus to the alleged Eighth Amendment violations in this case. Each of the reasons below is individually sufficient to require reversal. Collectively, they demonstrate that the three-judge court used its prisoner release order to effectuate broad policy goals that are incompatible with the PLRA and ignored federalism concerns and the necessary separation of powers in doing so.

1. The 137.5% cap should be reversed because it has no connection to current prison conditions, including any alleged Eighth Amendment violations that continue to exist. See *supra* § II.A; 18 U.S.C. § 3626(a)(1)(A) (present tense). Moreover, "'the nature and scope of [an injunctive] remedy are to be determined by the violation.'" *Missouri* v. *Jenkins*, 515 U.S. 70, 88 (1995). Thus, any current violations should have provided the starting point for the nexus analysis. See *id.* They did not. As discussed above, the three-judge court refused to consider evidence of prison conditions subsequent to August 30, 2008. The court could not lawfully craft a prisoner release order that met the PLRA's heightened tailoring requirements without considering the conditions that

existed at the time it imposed that remedy. For example, whatever population reduction may have been necessary in light of evidence about conditions prior to August 2008, that number surely declined after the State's intensive remedial regime took effect. The 137.5% cap should be vacated on this basis alone.

2. In any event, plaintiffs failed to demonstrate the required connection between the 137.5% of design capacity population cap and any effort to remedy the State's alleged *Eighth Amendment* violations. Plaintiffs were required to show that a 137.5% cap is necessary to prevent a "substantial risk of serious harm," *Farmer*, 511 U.S. at 834, and to extinguish the State's purported "deliberate indifference," *id.* at 838. Plaintiffs did not carry their burden.

To understand the error of the 137.5% of design capacity cap, it is first critical to comprehend what "design capacity" means in California's prisons. "Design capacity" is a term of art that refers to the number of inmates CDCR's prisons may house based on one inmate per cell, single bunks in dormitories, and no beds in space not designed for housing. JS1-App. 57a. California, however, "has never limited its prison population to 100% design capacity," because, *inter alia*, its prisons frequently were planned and built to double-cell inmates. *Id.* A facility intended to house two inmates per cell that houses two inmates in each cell (and thus is not overcrowded) is nonetheless at 200% of "design capacity." Equally important, housing two inmates in a cell designed for one does not violate the Eighth Amendment. *Rhodes* v. *Chapman*, 452 U.S. 337, 348 (1981). Neither plaintiffs' proofs at trial, nor the court's findings, take these realities into account.

At trial, plaintiffs requested a system-wide cap of 130% of design capacity. They did so because 130% of design capacity purportedly is "the federal standard for prison overcrowding," JS1-App. 180a—it is not. Regardless, plaintiffs did not link that population level to the State's ability to satisfy its obligations under the Eighth Amendment. *Id.* at 183a. Nor is there any nexus between the Eighth Amendment and the 145% cap that the district court treated as the outer bounds for any population reduction. See *id.* at 143a, 184a.

First, the so-called "federal standard for prison overcrowding" is actually a goal that the BOP set shortly before this trial. In 2005, BOP announced a "population management" goal, stating that it would "work toward *ultimately achieving* an overall crowding level in the range of 30 percent [*i.e.*, 130% overcrowding]." BOP, *State of the Bureau 2005*, at 7 (2005) (emphasis added); see also JS1-App. 179a-180a (CDCR's "long-term" goal that population not exceed 130% design capacity).[14] There is no evidence that BOP's aspirations have any connection to Eighth Amendment *minima* for medical and mental-health care. On the contrary, BOP clearly aims to exceed the Eighth Amendment: "The BOP delivers mental health services comparable to mental health care in the community." *State of the Bureau 2008*, at 32; see *id.* at 7-8 (quality of health care).

BOP's population levels, however, routinely exceed its goals. For instance, in 2003, the crowding rate for

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[14] BOP does not measure crowding using "design capacity." It uses a different term of art, "rated capacity," as "the baseline for the statistical measurement of prison crowding." BOP, *Program Statement: Rated Capacities for Bureau Facilities* 1, No. 1060.11 (June 30, 1997). Critically, "[r]ated capacity is not necessarily the same as any institution's design … capacity." *Id.* at 2.

BOP's prisons increased from 33 to 39 percent, and crowding at high and medium security prisons was "significantly higher at 59 percent apiece." BOP, *State of the Bureau 2003*, at 7 (2003); see also, *e.g.*, BOP, *State of the Bureau 2004*, at 7 (2004) (41% percent crowding). In 2008, three years after setting the "population management" goal, BOP still had a crowding rate of 36 percent, with high- and medium-security facilities at 50 and 44 percent, respectively. *State of the Bureau 2008*, at 2. None of these reports links BOP's conditions or goals to constitutional *minima*.

Second, the 145% of design capacity cap that the district court considered likewise has no connection to the Eighth Amendment. See JS1-App. 59a, 181a. The 145% figure was drawn from a study conducted by California's Corrections Independent Review Panel, a group of wardens. See *id.* That Panel determined *in 2004*—before numerous subsequent improvements, *supra* §§ I, II—that CDCR's "operable capacity" was 145% of its design capacity. See JS1-App. 59a. "'[O]perable capacity,' refers to 'the maximum capacity of the prisons to house inmates safely and securely while providing *effective education, training, and treatment*.'" *Id.* (emphasis added) (operable capacity "'takes into account space needed for effective programming'"). Therefore, "operable capacity" plainly is not aimed at any Eighth Amendment standard. See, *e.g.*, *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 35 (1973) (public education is not a right guaranteed by the Constitution); *Hoptowit* v. *Way*, 682 F.2d 1237, 1255 (9th Cir. 1982) ("There is no constitutional right to rehabilitation."); cf. *Lewis* v. *Casey*, 518 U.S. 343, 350 (1996). See also JS1-App. 181a ("Operable capacity [as used in the study] d[id] not take into account the

ability to provide [medical and mental-health] care [that would satisfy the Eighth Amendment].").

Accordingly, the three-judge court erred in treating the 130% and 145% figures as the poles for assessing constitutionality. Indeed, this Court has held that a lower court "err[s] in assuming that opinions of experts as to desirable prison conditions suffice to establish contemporary standards of decency.... *'[T]hey simply do not establish the constitutional minima*; rather, they establish goals recommended by the organization in question.'" *Chapman*, 452 U.S. at 348 n.14 (emphasis added) (quoting *Bell* v. *Wolfish*, 441 U.S. 520, 544 n.27 (1979)). Because the court treated these goals as Eighth Amendment *minima*, the judgment should be reversed.

Finally, plaintiffs' experts' testimony cannot support the judgment. They relied on the same professional goals noted by the court and uniformly denied that they could assess the population reduction required to provide care consistent with the Eighth Amendment.

For example, Dr. Ronald M. Shansky, the former Medical Director of the Illinois State Prison System, testified:

> [Q.] Isn't it true ... that you hesitate today to come up with a figure to which the prison population needs to be reduced to achieve constitutional levels of care, because ... that would require doing a study that requires data from the *Plata* Receiver?
>
> A. Yes, that's correct.

JA 2273. Dr. Shansky added that he had "no clue" what population reduction would be necessary to bring about care that satisfied the Eighth

Amendment. *Id.* at 2279-80. Jeanne Woodford, a former CDCR warden, similarly testified that she was unaware of any study that determined what population reduction would be necessary "to provide constitutionally-adequate medical and mental healthcare in California's prisons." JA 2424-25. Additionally, Dr. Craig Haney, a professor who serves as an expert in prison conditions cases, admitted that he did not "'know how to calculate'" what CDCR would need to do to show compliance with the Eighth Amendment. Tr. 342:15-23; see also JA 2393. Instead, like the court, he treated the wardens' estimate that operable capacity was 145% of design capacity as a constitutional benchmark, although he had no idea how the wardens calculated that number. JA 2388-89; compare JS1-App. 183a (nonetheless relying on Dr. Haney's report as evidence of what was necessary to eliminate Eighth Amendment violations).[15]

Indeed, plaintiffs effectively confessed that their remedies case was not linked to satisfying the Eighth Amendment. Their experts were unaware of the level of care provided to the class members, and had not evaluated CDCR's ability to provide constitutional care. See, *e.g.*, JA 2179 (Lehman: "Q. In preparing your report, you did not know what the space needs were for medical or mental healthcare in California's

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[15] Even if plaintiffs' experts had addressed the relevant nexus to the Eighth Amendment, their admissions that they were able to provide constitutional health care in more overcrowded prison systems would have undercut their testimony. *See* JA 2138, 2141, 2142, 2163-65 (Dr. Beard provided constitutional care when Pennsylvania's system was 150-160% of design capacity, including at a facility "over … two hundred percent of capacity"); JA 2177, 2181 (Lehman: constitutional care in Washington and Pennsylvania at 150% crowding and above); JA 2271-72 (Shansky: constitutional care in Illinois at 140% crowding).

prisons, did you? A. Specifically, no."); *id.* at 2180 ("Q. … [Y]ou did not have knowledge of the status of medical health care delivery in California's prisons as of August 2008, did you? A. No …."); JA 2122 (same from plaintiffs' expert Wayne Scott); JA 2218, 2219 (similar from Ms. Woodford). Thus, their testimony was not relevant to the critical issue under the PLRA—the reduction *necessary* to provide care that complies with the Eighth Amendment floor. See, *e.g.*, *Farmer*, 511 U.S. at 834; *Chapman*, 452 U.S. at 347.

Instead, the experts testified only that the requested reductions would prove beneficial to the wardens, their staff and the inmates. As the three-judge court acknowledged, plaintiffs' request was based on testimony regarding the level required for a "prison system ... to function *properly*" or "'*appropriately*.'" JS1-App. 177a-178a (emphases added). Dr. Beard, for instance, testified that it "is impossible to really do a good job" as warden when prison population exceeds 150% of design capacity. JA 2142; see *id.* at 2141. When pressed by the court about what this meant, Dr. Beard did not point to any Eighth Amendment benchmark. *Id.* at 2143; see *id.* at 2137-38, 2157.

Plaintiffs' closing argument at trial is telling:

> In terms of the 130 percent issue, we agree with your comments yesterday that it's not an exact science. But what it is, is a consensus among experts that we've used and, … Jeanne Woodford, who ran the prison system and who worked there 28 years, thinks *it's a reasonable number and will get us to where we want to go. It seems to me that's a pretty reliable piece of evidence upon which to base a decision.*

JA 2563 (emphasis added). The PLRA does not allow a prisoner release order to issue based on what experts deem *reasonable*; it requires that release be the "least intrusive means *necessary*" to remedy alleged Eighth Amendment violations. The evidence here does not satisfy § 3626(a)(1)(A).

In sum, the three-judge court imposed the 137.5% of design capacity cap even though the record contains no evidence supporting a nexus between plaintiffs' request and the alleged Eighth Amendment violations. Instead, the court usurped the role of the political branches, erroneously substituting its own policy preferences about prison conditions for what the PLRA and the Eighth Amendment require. See *Chapman*, 452 U.S. at 349 (professional standards may "reflect an aspiration toward an ideal environment for long-term confinement," but "properly are weighed by the legislature and prison administration rather than a court"). Plaintiffs did not satisfy the PLRA; they sought systemic prison reform. *Accord Plata* D.E. 1766, at 1-7 (plaintiffs' trial brief) (failing to explain why reductions are *necessary* to remedy Eighth Amendment rights, but focusing on how a "population reduction order could *improve* public safety and the administration of criminal justice systems throughout the state"). The district court's order should be reversed on this basis alone.

3. The court below failed to limit the prisoner release order to what is necessary to remedy the violation of *plaintiffs*' rights, thereby violating not only the PLRA, but also the requisite constraints on injunctive relief and fundamental principles of federalism. In fact, the court acknowledged that the relief "extends further than the identified constitutional violations" insofar as it "is likely to

affect inmates without medical conditions or serious mental illnesses." JS1-App. 172a.

First, as a result, the injunction contravenes the PLRA which provides that injunctive relief shall "extend[] *no further* than necessary to correct the violation of the Federal right of ... particular ... plaintiffs," *i.e.*, the class members. 18 U.S.C. § 3626(a)(1)(A) (emphasis added); see also H.R. Rep. No. 104-21, at 24 n.2 ("[T]he provision stops judges from imposing remedies intended to ... provide an overall improvement in prison conditions."); cf. *Casey*, 518 U.S. at 364 (Thomas, J., concurring).

Second, the relief violates the permissible scope of a federal decree. The order breaches the rule that "only if there has been a systemwide impact may there be a systemwide remedy." *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 420 (1977). In *Jenkins*, this Court held that "'federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation.'" 515 U.S. at 98. There, the Court reversed an interdistrict desegregation remedy, explaining that "[t]he proper response to an intradistrict violation is an intradistrict remedy." *Id.* at 90; see *id.* at 90-92. Similarly, in *Casey*, the Court struck down a systemwide injunction that sought to remedy multiple inadequacies in prison administration, not merely those found to "have harmed … plaintiff in th[e] lawsuit." 518 U.S. at 357-58 (rejecting argument that class action authorized broader relief); see also *id.* at 359.

These principles apply here. The alleged constitutional violations affect two discrete plaintiff-classes. Yet, rather than specifically addressing the alleged Eighth Amendment violations sustained by members

of the two classes, the court ordered prison-wide relief. There is no basis for a systemwide remedy for the alleged Eighth Amendment violations in this case because the quality of care varies by facility and plaintiffs conceded that the conditions in some facilities already may satisfy the Eighth Amendment despite their overcrowding. See, *e.g.*, JA 2258 (Dr. Shansky). Moreover, a remedy spanning both classes is not narrowly tailored because crowding does not affect individuals with severe medical problems and the mentally ill (let alone different types of mentally ill prisoners) in the same manner. Indeed, it is unclear whether a prisoner release order that does not differentiate between class members and the prison population as a whole can be deemed narrowly tailored in light of the violations at issue.

Third, the "Order to Reduce Prison Population" contravenes principles of federalism and the prerogatives of the political branches generally. See *Jenkins*, 515 U.S. at 98-99; *id.* at 114, 124-34 (Thomas, J., concurring); 18 U.S.C. § 3626(a)(1)(A). In *Jenkins*, the Court reaffirmed that courts must be especially cautious in imposing injunctive relief that threatens "'the interests of state and local authorities in managing their own affairs.'" 515 U.S. at 98; see *id.* at 99; *Horne* v. *Flores*, 129 S. Ct. 2579, 2593-94 (2009).

Here, the state and local interests are at their zenith: "It is difficult to imagine an activity in which the State has a stronger interest … than the administration of its prisons." *Preiser* v. *Rodriguez*, 411 U.S. 475, 491-92 (1973); see also, *e.g.*, *Casey*, 518 U.S. at 362-63; *Chapman*, 452 U.S. at 352; *Turner* v. *Safley*, 482 U.S. 78, 84 (1987); *Wolfish*, 441 U.S. at 548. The PLRA further emphasizes those interests, requiring the court to "give substantial weight to any

adverse impact on ... the operation of the criminal justice system" in considering injunctive relief. 18 U.S.C. § 3626(a)(1)(A). See 141 Cong. Rec. S2648, S2649 (daily ed. Feb. 14, 1995) (Sen. Hutchison) ("[t]his bill will curb the ability of Federal courts to take over the policy decisions of State prisons").

In ordering a systemwide remedy, the three-judge court did not consider the burden placed on the State as it simultaneously must comply with the court's order and the less intrusive, but nonetheless robust remedies previously imposed by the Receiver and Special Master—remedies which directly affect the classmembers. Additionally, because it is not feasible, as Judge Karlton recognized, to accomplish population reduction by releasing class members alone, see JA 2389-90, 2450-51, the court's order requires the State to reform how it incarcerates criminals outside the plaintiff-classes. See JS2-App. 39a-42a, 45a, 63a-64a (parole reforms and alternative custody).

Finally, the court attempted to justify the imposition of the prisoner release order on the basis that it was more protective of the State's interests. This assertion is misguided. The court claimed that "a systemwide population reduction … is preferable to an order … requiring particular methods of population reduction," as it purportedly exhibits "deference to state expertise." JS1-App. 174a-175a (internal quotation marks omitted); JS2-App. 3a. The court *rejected* institution-specific relief, claiming that the State "ha[d] never contended that the problems at issue in *Plata* and *Coleman* are institution-specific." JS1-App. 171a. The court was mistaken. In fact, the State elicited testimony from plaintiffs' experts that certain institutions may be in constitutional compliance notwithstanding their populations.

Supra at 50. The State also adduced evidence that the problems about which plaintiffs complained were unique to and variable among specific CDCR institutions. See, *e.g.*, JA 2104-05 (discussing Special Master's findings, *Coleman* D.E. 3029-1, at 6, that several institutions were in substantial compliance with the court-approved policies and procedures for providing mental-health care); JA 2122-25, 2127 (plaintiffs' expert's testimony that he was unfamiliar with the staffing levels or quality of care provided at a number of specific institutions); Defs.' Trial Ex. 1074, at 1 (in-person monitoring of California Women's Facility was no longer necessary). The PLRA requires consideration of the fact that certain facilities were in compliance.

The claim that the order provides the State with flexibility is likewise misplaced. Although the court did not dictate specific measures for achieving population reduction, its order is not deferential. It compels the State to reform its correctional practices on the whole rather than targeting relief at *either* of the plaintiff classes. Moreover, in implementing the three-judge court's ruling prior to its *sua sponte* stay of relief, Judge Karlton held that he would not approve a housing plan in *Coleman* "as long as [it] calls for a projected population in excess of 137.5% of the facility's design capacity." JS2-App. 13a; see JA 860-61 (delaying imposition of the facility-specific mandate pending this appeal). Under Judge Karlton's understanding, the 137.5% cap does not give the State flexibility to implement the population reductions systemwide, but instead acts as a facility-by-facility ceiling that deprives the State of meaningful discretion to manage particular facilities. In sum, the operation of California's prisons is now under the clear control of a federal court and the

court's purported "deference" to how the State does the federal court's bidding does not alter that fundamental fact.

B. The Court's Order Does Not Give "Substantial Weight" To The Adverse Impacts On Public Safety That The Prisoner Release Order Will Cause.

The court failed to "give substantial weight to any adverse impact on public safety" caused by the Order to Reduce Prison Population. 18 U.S.C. § 3626(a)(1)(A); see also H.R. Rep. No. 104-21, at 9 (discussing murder committed by individual released due to population cap); 141 Cong. Rec. S14407, S14418 (daily ed. Sept. 27, 1995) (Sen. Hatch).

First, the Order clearly does not satisfy § 3626(a)(1)(A) because it states that the court "ha[s] not evaluated the public safety impact of each individual element of the State's proposed [population reduction] plan." JS2-App. 3a; see *id.* at 4a ("Certain of the measures suggested by the state … were … not evaluated from the standpoint of public safety."). Moreover, unlike the first population reduction plan submitted by the State, which the three-judge court flatly rejected, the State was unable to attest in its second plan that public safety would be assured. Compare *id.* at 32a-33a, with JS1-App. 317a & n.1 ("The State … believe[s] that reducing the prison population to 137.5% within a two-year period cannot be accomplished without unacceptably compromising public safety."). The court nonetheless accepted that plan in the face of clear public safety risks.

Second, the court's assertion that the population reduction measures offered sufficient protections because "they had previously been endorsed by state

officials, and thus, presumably, 'would not have an adverse effect on public safety'" cannot withstand scrutiny. JS2-App. 4a (quoting JS1-App. 219a); *id.* at 3a-4a ("[T]he evidence presented at trial demonstrated that means exist to reduce the prison population without a significant adverse impact on public safety or the criminal justice system."). There is a marked difference between implementing measures under compulsion of a court order and doing so under a time frame chosen (and that can be revisited) by the political branches.

Moreover, the endorsements referenced by the court occurred in 2008 and in budgeting for 2009-2010, see JS1-App. 219a, when California's economy was less troubled than it later became. Cf. *id.* at 187a (noting California's "serious fiscal crisis"). This is critical because the court conceded that the measures it deemed necessary to ensure public safety will require substantial expenditures by the State or local governments. See, *e.g.*, JS2-App. 5a ("additional financial resources from the State [may be required] to ensure that no significant public safety impact results"); JS1-App. 200a (expanded rehabilitation programming would be necessary). It acknowledged that there would be an adverse impact on crime rates without expanded rehabilitation programming for individuals no longer incarcerated by the State. JS1-App. 242a. See also *Samson* v. *California*, 547 U.S. 843, 850 n.2 (2006) (recognizing that California's parolees present special dangers to the public, recognizing that they "are more akin to prisoners than probationers"); *id.* at 853-54 (crediting statistics that 68 percent of adult parolees are returned to prison, 13 percent for the commission of new felonies, and thus "grave safety concerns … attend recidivism"). Nonetheless, the court presumed that the

services necessary to protect the public could be provided, suggesting that "[r]educing the number of persons it imprisons should result in significant savings to the State." JS2-App. 5a; see JS1-App. 187a. Although the court asserted that it was not dictating "whether and to what extent the State should allocate part of its savings" to these programs, JS2-App. 5a, it previously acknowledged that assuring public safety *requires* that the State appropriate funds in this manner. "[T]he proposed population reduction measures would have no adverse effect … *if the state were to divert some portion of the savings* generated by the population reduction to community corrections, rehabilitation, and re-entry resources." JS1-App. 232a (emphasis added). Compelling the State to divert any such savings in this manner is a severe, unlawful intrusion on the State authority. See 18 U.S.C. § 3626(a)(1)(A).

California cannot protect public safety under the order without seriously compromising the ability of its political branches to set the State's priorities. "Federalism concerns are heightened when … a federal court decree has the effect of dictating state or local budget priorities." *Horne*, 129 S. Ct. at 2593-94. "When a federal court orders that money be appropriated for one program, the effect is often to take funds away from other important programs." *Id.* at 2594. Here, the three-judge court acknowledged that the State already has been forced to "reduce[] spending on education, health care, the social safety net, and services for the needy, the blind, and children to the breaking point." JS1-App. 11a n.4. The release order effectively requires California to spend its money on rehabilitation instead of on improving conditions for the State's citizens. The

PLRA does not allow the court to put California to this choice where, as here, the prisoner release order has not satisfied the requirements that the Act imposes.

The 137.5% cap on the State's general prison population should be set aside.

CONCLUSION

The Court should reverse the judgment for lack of jurisdiction and dismiss the three-judge court. In the alternative, the Court should reverse the judgment of the district court.

Respectfully submitted,

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STATUTORY ADDENDUM

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FEDERAL STATUTE

18 U.S.C. § 3626: Appropriate remedies with respect to prison conditions

(a) Requirements for Relief.—

(1) Prospective relief.—(A) Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds 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. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

(B) The court shall not order any prospective relief 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, 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 Federal right; and

(iii) no other relief will correct the violation of the Federal right.

(C) Nothing in this section shall be construed to authorize the courts, in exercising their remedial powers, to order the construction of prisons or

the raising of taxes, or to repeal or detract from otherwise applicable limitations on the remedial powers of the courts.

* * * *

(3) Prisoner release order.—(A) In any civil action with respect to prison conditions, no court shall enter a prisoner release order unless—

(i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and

(ii) the defendant has had a reasonable amount of time to comply with the previous court orders.

(B) In any civil action in Federal court with respect to prison conditions, a prisoner release order shall be entered only by a three-judge court in accordance with section 2284 of title 28, if the requirements of subparagraph (E) have been met.

(C) A party seeking a prisoner release order in Federal court shall file with any request for such relief, a request for a three-judge court and materials sufficient to demonstrate that the requirements of subparagraph (A) have been met.

(D) If the requirements under subparagraph (A) have been met, a Federal judge before whom a civil action with respect to prison conditions is pending who believes that a prison release order should be considered may sua sponte request the convening of a three-judge court to determine

whether a prisoner release order should be entered.

(E) The three-judge court shall enter a prisoner release order only if the court finds by clear and convincing evidence that—

(i) crowding is the primary cause of the violation of a Federal right; and

(ii) no other relief will remedy the violation of the Federal right.

* * * *

(g) Definitions.—As used in this section—

* * * *

(3) the term "prisoner" means any person subject to incarceration, detention, or admission to any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program;

(4) the term "prisoner release order" includes any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison;

* * * *