No. 09-

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

JURISDICTIONAL STATEMENT

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April 12, 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" in order to issue a "prisoner release order."

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

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
Sheriff Mike Kanalakis
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
Riverside County Sheriff Bob G. Doyle
George Runner, Legislator
Sharon Runner*, Legislator
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San Diego County Sheriff William B. Kolender
San Mateo County Sheriff Greg Munks
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Santa Clara County Sheriff Laurie Smith
District Attorney Jan Scully
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Shasta County Sheriff Tom Bosenko
District Attorney Gerald T. Shea
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Solano County Sheriff Gary R. Stanton
Jim Silva, Legislator
Cameron Smyth, Legislator
Police Chief Lisa Solomon
Sonoma County Chief Probation Officer Robert Ochs
Sonoma County District Attorney Stephan Passalacqua
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
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Tehema County Sheriff Clay Parker
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

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On January 12, 2010, the three-judge district court (Reinhardt, Henderson, Karlton, J.J.) entered the "Order to Reduce Prison Population" (App. 1a-10a) that is the subject of this appeal. See 2010 WL 99000. On August 4, 2009, the three-judge court made the predicate findings for the order on appeal. See 2009 WL 2430820, reproduced in the Appendix to the Jurisdictional Statement filed in No. 09-416 at 1a-256a.[1] The *Coleman* court's January 4, 2010 order (App. 11a-16a) is available at 2010 WL 55886.

The three-judge court's order denying the State's motion to dismiss or, in the alternative, for summary judgment (09-416-App. 257a-272a) is available at 2008 WL 4813371. The orders granting plaintiffs' motions to convene a three-judge court (09-416-App. 273a-304a) are available at 2007 WL 2122657 and 2007 WL 2122636.

JURISDICTION

On July 23, 2007, over the objections of appellants ("the State"), 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. 09-416-App. 273a-304a. The State contends that the three-judge court was improperly convened and lacked jurisdiction to issue the order on appeal. *Infra* 11-18.

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[1] The Clerk of Court authorized the parties to cite the appendices filed in Number 09-416 rather than reproducing those materials. Appellants cite that appendix as "09-416-App." and this Jurisdictional Statement's Appendix as "App."

On January 12, 2010, the three-judge court's "Order to Reduce Prison Population" granted injunctive relief under the PLRA. App. 1a-10a. The State noticed its appeal on January 19, 2010. App. 17a-24a. This Court has jurisdiction under 28 U.S.C. § 1253.

STATUTORY PROVISIONS INVOLVED

The PLRA's relevant provisions, 18 U.S.C. § 3626, are reproduced at 71a-73a.

STATEMENT OF THE CASE

Pursuant to the PLRA, the three-judge district court issued an "Order to Reduce Prison Population," *i.e.*, a "prisoner release order." 18 U.S.C. § 3626(a)(3). Although that court *sua sponte* stayed the order pending resolution of this appeal, once it takes effect, the State must cap its aggregate prison population at 137.5% of the institutions' combined design capacity within two years to address allegedly unconstitutional medical and mental health care provided to two plaintiff-classes of California inmates. Ultimately, the court has required the State to reduce the population of its correctional facilities by approximately 46,000 inmates.[2] This is the first PLRA "prisoner release order" imposed over a defendant's objection and the most sweeping intrusion into a state's management of its correctional facilities in history.

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[2] The three-judge court estimated the required prisoner reduction at approximately 46,000 inmates. 09-416-App. 235a. Appellants use that figure for simplicity although the prison population—and thus the necessary reduction—fluctuates over time.

This appeal presents substantial questions concerning the availability and scope of "prisoner release orders" under the PLRA. Before Congress enacted the PLRA, this Court had repeatedly instructed lower courts to exercise extreme caution in using their equitable powers to interfere with the management of prisons, particularly state institutions. See, *e.g.*, *Lewis* v. *Casey*, 518 U.S. 343, 362-63 (1996); *Preiser* v. *Rodriguez*, 411 U.S. 475, 491-92 (1973). Lower courts recognized that ordering the political branches to release prisoners or cap their prison populations was the most intrusive form of interference. See, *e.g.*, *Inmates of Occoquan* v. *Barry*, 844 F.2d 828, 843-44 (D.C. Cir. 1988). Congress nevertheless concluded that further constraints on federal courts were necessary and enacted the PLRA.

Among other things, the PLRA permits only three-judge courts to issue "prisoner release orders," and such courts may not be convened until certain jurisdictional prerequisites are satisfied. Additionally, three-judge courts shall not order a "prisoner release" unless plaintiffs present "clear and convincing" proof that "crowding" is the "primary cause" of a violation of federal rights and that "no other relief" will remedy the violation. Finally, any "prisoner release order" is circumscribed by strict nexus and narrow tailoring requirements.

This Court's full review of the questions presented here is essential to the orderly development of law under the PLRA. This Court has exclusive jurisdiction over appeals from "prisoner release orders." Thus, any summary affirmance would give the three-judge court's order substantial, unwarranted influence. The decision below conflicts with Congress's design in the PLRA and this Court's

prison-conditions and federalism jurisprudence. Probable jurisdiction should be noted.

A. Statutory Background

The PLRA, Pub. L. No. 104-134, tit. VIII, 110 Stat. 1321, 1321-66 (1996), defines the federal courts' remedial powers over conditions of confinement. 18 U.S.C. § 3626. 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 whether such relief is appropriate, 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.*

In addition to these constraints, Congress imposed limits on a federal court's ability to enter a "prisoner release order"—*i.e.*, "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," *id.* § 3626(g)(4)—as a remedy. *Id.* § 3626(a)(3). Only a three-judge district court may grant prisoner release. *Id.* § 3626(a)(3)(C). A three-judge court cannot be convened to consider prisoner release:

> 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). Finally, a three-judge court with jurisdiction "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*, and allegations of unconstitutional prison healthcare conditions. *Plata* concerns whether healthcare provided to adult inmates with "serious medical conditions" violates the Eighth Amendment. *Coleman* involves allegations that the mental health care provided to inmates with serious mental disorders violates the Eighth Amendment.

In *Plata*, following settlement of plaintiffs' claims, Judge Henderson approved a stipulation for injunctive relief. *Plata* v. *Davis*, No. C01-1351-TEH (N.D. Cal. June 13, 2002) (D.E. 68).[3] In October 2005, after years of remedial efforts designed "'to provide only the minimum level of medical care required under the Eighth Amendment,'" 09-416-App. 16a, the court concluded that the prison medical system did not meet constitutional standards, *id.* at 14a. It therefore placed the medical health-care delivery system of the California Department of Corrections and Rehabilitation ("CDCR") into Receivership. *Id.* The court concluded that "'[d]espite the best efforts of [the State],'" *id.* at 22a,

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[3] Hereafter, appellants cite orders and other materials from the district court records in *Plata*, No. C01-1351-TEH (N.D. Cal.), and *Coleman*, No. CIV-S-90-0520-LKK (E.D. Cal.), by docket entry number, *i.e.*, "*Plata* D.E. __" and "*Coleman* D.E. __." Although the three-judge court's records typically appear on both dockets, appellants reference only one docket entry for the three-judge court materials. Trial transcripts are cited as "Tr."

inter alia, inmates lacked access to care and specialty services, and that CDCR had "serious personnel problems," "was incapable of recruiting qualified personnel," "lacked medical leadership" and necessary equipment, had not implemented tracking systems for inmates needing chronic care, and had "'a culture of non-accountability and non-professionalism.'" *Id.* at 27a-28a.

The Receiver's appointment was effective on April 17, 2006. 09-416-App. 29a-30a. Just months later, however, plaintiffs moved to convene a three-judge court to consider a "prisoner release order." *Plata* D.E. 561 (filed Nov. 13, 2006).

In *Coleman*, following a 1994 trial, the district court concluded that the mental health care provided to the class violated the Eighth Amendment. 09-416-App. 31a, 33a-35a. In December 1995, the court appointed a special master to oversee implementation of 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 revised plans. *Id.* at 37a-38a. Eight months later, the *Coleman* plaintiffs moved to convene a three-judge court. *Id.* at 304a.

2. The single-judge courts granted plaintiffs' motions to convene a three-judge court over the State's objections. See 09-416-App. 273a-304a.[4] Judges Henderson and Karlton recommended that the cases be heard by the same three-judge court. *Id.*

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

at 286a, 304a. Then-Chief Judge Schroeder assented, seating Judge Reinhardt to complete the panel. Slip op. at 1 (July 26, 2007) (*Coleman* D.E. 2328).

The State moved to dismiss the three-judge proceedings for lack of jurisdiction and, in the alternative, for summary judgment. On November 3, 2008, the three-judge court denied the motion. 09-416-App. 272a.

Trial was held between November 2008 and February 2009. During trial, the three-judge court prohibited defendants from introducing evidence "relevant only to determining whether the constitutional violations found by the *Plata* and *Coleman* courts were 'current and ongoing.'" 09-416-App. 78a n.42. Moreover, it prohibited the State from obtaining discovery from the Receiver or the Special Master, or from calling them as witnesses. See Slip op. at 3 (Sept. 5, 2008) (*Plata* D.E. 1450); Slip op. at 1-2 (June 5, 2008) (*Plata* D.E. 1226); Slip op. at 1-4 (Nov. 29, 2007) (*Plata* D.E. 988). Additionally, the State lacked a meaningful opportunity before trial to implement Assembly Bill 900 ("AB 900"), which became law in 2007 and authorizes, *inter alia*, $8 billion for construction of correctional facilities. See 09-416-App. 146a-150a.

After trial, the court concluded that crowding was the "primary cause" of the alleged violations of plaintiffs' rights and that no other relief could remedy the violations. See 09-416-App. 78a-165a; *id.* at 126a n.55. The court imposed a "prisoner release order" mandating that the population of California's prisons be capped at 137.5% of their combined design capacity within two years. *Id.* at 169a.

The court concluded that a "prisoner release order" was appropriate notwithstanding its findings that

other causes for the alleged constitutional violations exist and that the population cap would *not* remedy them. 09-416-App. 134a, 143a. The court found that the cap satisfied the PLRA's narrow tailoring and nexus requirements, and stated that it gave "substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." 18 U.S.C. § 3626(a)(1)(A); see 09-416-App. 185a-255a.

The court reached these conclusions despite its recognition that the relief "extends further than the identified constitutional violations" and "is likely to affect inmates without medical conditions or serious mental illnesses." 09-416-App. 172a. It selected the 137.5% figure solely because it was "halfway between the cap requested by plaintiffs and the wardens' estimate of the California prison system's maximum operable capacity absent consideration of the need for medical and mental health care." *Id.* at 184a. Additionally, the court acknowledged evidence 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 August 4, 2009 order required the State to submit, by September 18, 2009, a plan for meeting the 137.5% cap within two years. 09-416-App. 255a, 235a. The State timely noticed its appeal of the order, *id.* at 354a-355a, and unsuccessfully sought a stay from this Court. *Schwarzenegger* v. *Coleman*, 130 S. Ct. 46 (2009). Thereafter, without waiving its challenges to the three-judge court's jurisdiction or the order's lawfulness, 09-416-App. 315a, the State timely submitted a plan to the district court. *Id.* at 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 (proposing to meet cap within five years). On October 21, 2009, the court rejected the plan and required the State to submit a plan to timely meet the 137.5% threshold. Slip op. (Oct. 21, 2009) (*Plata* D.E. 2269). Preserving its objections, the State submitted a revised plan. App. 34a (incorporating newly enacted legislation, but stating that the required reduction "can only be accomplished if the State Legislature enacts new laws and/or this Court orders changes to State laws").

On January 12, 2010, the three-judge court issued the "Order to Reduce Prison Population" approving the revised plan. App. 3a-6a. That Order also reaffirmed the August 4, 2009 order. *Id.* at 2a. The court adhered to its conclusions that "crowding is the primary cause" of the constitutional violations and "no relief other than a 'prisoner release order' … is capable of remedying these constitutional deficiencies," and that the 137.5% cap was "narrowly drawn, would extend no further than necessary to correct the violation of California inmates' federal constitutional rights, and was the least intrusive means necessary." *Id.* 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 from its effective date, the State's systemwide prison population be "no more than 137.5% of design capacity," and that the population be "no more than" 167%, 155%, and 147% of design capacity at prior six-

month intervals. App. 6a. *Sua sponte*, the court stayed the effective date pending this Court's resolution of any 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) (noting "that a further order has been entered in this case, but that order is not the subject of this appeal.… [and] that the district court has stayed its further order pending review by this Court.").

On January 19, 2010, the State timely appealed the "Order to Reduce Prison Population." App. 17a-24a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This case presents questions of substantial importance regarding the prerequisites for issuing a "prisoner release order," in a context that has serious consequences for public safety and our federal system. The substantial, important nature of these issues is clear because Congress vested this Court with exclusive jurisdiction to review any "prisoner release order." Unless this Court notes probable jurisdiction, an unprecedented order requiring the State to reduce its prison population by approximately 46,000 inmates will escape review. Moreover, summary affirmance here would give the three-judge court's decisions unique precedential value in the PLRA's infancy. See *Hicks* v. *Miranda*, 422 U.S. 332, 344-45 (1975).

Even before the PLRA was enacted, courts recognized that population caps represent the highest level of federal court interference with state prison management and a challenge for Our Federalism.

See, *e.g.*, *Taylor* v. *Freeman*, 34 F.3d 266, 268-70 (4th Cir. 1994); *Occoquan*, 844 F.2d at 842-43. Congress sought to further restrain federal court interference with prison conditions through the PLRA. See *Woodford* v. *Ngo*, 548 U.S. 81, 93 (2006); *Taylor* v. *United States*, 181 F.3d 1017, 1027 (9th Cir. 1999) (en banc) (Wardlaw, J., dissenting). The Act takes special aim at prisoner release orders and population caps. See *Castillo* v. *Cameron County, Tex.*, 238 F.3d 339, 348 (5th Cir. 2001); 141 Cong. Rec. S14407, S14414 (daily ed. Sept. 27, 1995) (Sen. Dole) ("Perhaps the most pernicious form of judicial micro-management is the so-called prison population cap.").

Under the district court's interpretation and application of the PLRA, however, Congress's intent to make a "prisoner release order" the remedy of "last resort" will be subverted. In addition, the "Order to Reduce Prison Population" will interfere with the State's operation of its criminal justice system and severely constrain California's ability to set and fund political priorities during these difficult economic times. The PLRA was enacted to prevent such damage to federalism principles. Probable jurisdiction should be noted.

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

The question whether the three-judge court had jurisdiction to consider a prisoner release order in *Plata* and *Coleman* is substantial and worthy of this Court's review. In both cases, the courts wrongly concluded that the State had been allotted "a reasonable amount of time to comply with the previous court orders" before they convened the three-judge court to consider prisoner release. 18 U.S.C. § 3626(a)(3)(A)(ii). Specifically, they failed

to give the State a reasonable time period to effectuate the Receiver's and Special Master's recent proposals, despite, for instance, the Receiver's conviction that in time his actions would remedy the alleged constitutional violations.

1. In *Plata*, after the Receiver's appointment become effective in April 2006, the State immediately cooperated with him to address plaintiffs' complaints. On July 5, 2006, he stated that his "mission[] to bring the level of medical care … up to constitutional requirements will be done." Receiver's First Bi-Monthly Report at 33:1-3, http://www.cprinc.org/docs/court/Receiver1stBiMoR070506.pdf; see Second Bi-Monthly Report at 48:25-27 ("numerous" plans to meet his mission), http://www.cprinc.org/docs/court/Receiver/2ndBiMoR091906.pdf. Just eight months after the appointment became effective, and on the same day that the Receiver requested additional time to submit a "final corrective action plan," *Plata* D.E. 559, at 2:2-4 (Nov. 13, 2006) (capitalization omitted), plaintiffs moved to convene the three-judge court.

On December 19, 2006, the court granted the Receiver's extension request. He filed his Plan of Action on May 10, 2007. It contemplated several years of efforts to remedy the claimed violations. The Receiver attested that the "Plan of Action will work" and that it was "simply wrong" to think that "population controls will solve California's prison health care problems." 09-416-App. 282a.

Nonetheless, in July 2007, the court granted plaintiffs' motion to convene a three-judge court to consider release. 09-416-App. 278a-281a. While admitting that the Receiver "has made much progress," *id.* at 279a-280a, the court held that it was not "require[d] ... to wait more time, potentially years, to see whether the Receiver's plans will

succeed or fail," *id.* at 281a (concluding that the Receiver's progress was outweighed by insufficient progress before his appointment).

The court's decision to short-circuit its own remedial process cannot be squared with § 3626(a)(3)(A)(ii), or the PLRA requirement that "prisoner release" be the "'remedy of last resort.'" 09-416-App. 73a. This point is underlined by the record of steady progress in implementing the Receiver's plans *after* the three-judge court was constituted, including the period during and after trial. As the Receiver advised in June 2008, although he and the State were "at the early stages in fully implementing our goals," "[t]here has already been significant progress on some of [his] goals" and "[s]ubstantial work has been completed at several prisons to improve conditions." *Plata* D.E. 1229, at iv. And in January 2010, the Receiver proclaimed "there is much that prison healthcare stakeholders and advocates can showcase as accomplishments." *Plata* D.E. 2289-1, at 5. Indeed, the State has greatly increased funding for and improved access to medical care, dramatically improved staffing, and enhanced its infrastructure and operational capacity. *Id.*

After the Receivership was instituted, the healthcare funding per inmate nearly doubled. *Plata* D.E. 1632 ¶¶ 7-9; Tr. 734:13-736:25. Initiatives to improve access to care at each institution were "ahead of schedule" by September 2008, *Plata* D.E. 1472, at 9, and showed "marked[] improve[ment] throughout 2009, *Plata* D.E. 2289-1, at 5. See *id.* at 9-10 ("[a]ll institutions have reported improvement in patient-inmate access to scheduled healthcare appointments"); *id.* at 15-23 (improvements to medical system).

Moreover, the number of health-care staff increased significantly by the trial date. *Plata* D.E. 1472, at 25 (recruitment efforts "have been very positive" and employment goals had been met at dozens of institutions). When trial began, successful recruiting efforts had brought the State within five and two percent of the Receiver's goals for filling physician and registered nurse positions, respectively. Tr. 445:8-446:14, 447:9-448:5.[5] "Significant gains" continued after trial. *Plata* D.E. 2289-1, at 5, 24-25.

There also have been continuing improvements in operations and infrastructure. For instance, the State has made strides in establishing clinical leadership and management structures. *Id.* at 26; *Plata* D.E. 1472, at 33. It has continued to develop data collection and reporting mechanisms to enhance patient care. *Plata* D.E. 2289-1, at 29. Between the trial and January 2010, the State successfully completed the implementation of peer review programs to ensure better quality of care, and established a medical oversight unit to review potential cases of preventable death and patient harm. *Id.* at 32-35; *Plata* D.E. 1472, at 40, 42-43.

These developments directly improve the healthcare of the *Plata* class. See, *e.g.*, Tr. 445:7-446:14, 447:9-23 (plaintiffs' expert Dr. Shansky testified that increased staffing has improved the quality of care); *id.* at 242:9-243:15, 249:25-250:5 (plaintiffs' expert Dr. Beard acknowledged improve-

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[5] *See* Defs.' Trial Ex. 1235, at 3 (62 full-time physicians hired between November 2007 and August 2008); *id.* at 2 (number of full-time Chief Physicians and Surgeons almost tripled between October 2005 and August 2008); *id.* at 4 (13-fold increase in Physician Assistants over two years); *id.* at 5 (four-fold increase in Nurse Practitioners in less than three years); *id.* at 7 (licensed vocational nurses climbed from *4* to *937* in 15 months).

ments in care). By the trial date, the number of deaths had been trending downward for 10 quarters, *id.* at 454:21-455:12, and the number of alleged preventable deaths fell from 18 in 2006 to 3 in 2007, *id.* at 450:20-451:2, 486:16-487:5; Shansky Dep. at 74:7-16.

2. Similarly, in *Coleman*, plaintiffs moved to convene a three-judge court only eight months after the district court approved new remedial plans. *Coleman* D.E. 1772, 1773 (Mar. 3, 2006). The State was actively implementing those plans at the time. See, *e.g.*, *Coleman* D.E. 1950, 1951, 1990, 2061 (plans re: evaluating psychiatrists, beds, and suicide prevention). In June 2006, the *Coleman* court began ordering the State to coordinate compliance efforts with the newly appointed *Plata* Receiver. *Coleman* D.E. 2063, at 3:10-13.

"In spite of the [State's] commendable progress," 09-416-App. 294a, Judge Karlton convened a three-judge court, *id.* at 295a-296a. Like Judge Henderson, Judge Karlton concluded "[i]t has been almost twelve years since this court found widespread violations of the Eighth Amendment ... [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 297a. But like the *Plata* court, the *Coleman* court's focus on previous unsuccessful remedial efforts is inconsistent with § 3626(a)(3)(A)(ii) and with the PLRA requirement that "prisoner release" be the "remedy of last resort." See, *e.g.*, Special Master's May 31, 2007 Response to Request for Information at 6 (*Coleman* D.E. 2253) ("[i]mprovement has occurred over the past dozen years").

For instance, whereas staff vacancies ran high in mid-2007, *id.* at 10-11; Special Master's Nineteenth

Monitoring Report at 114-16 (*Coleman* D.E. 2895) (reporting, *inter alia*, vacancy rates of higher than 40% and functional rates as high as 43% in May 2007), a focused recruiting and hiring program launched in November 2007 led to significant successes in filling positions before and after trial. *Plata* D.E. 1715, ¶¶ 48, 57-60 (discussing, *inter alia*, 18% decrease in vacancy rate for psychologists over a six-month period); Special Master's Twenty-First Monitoring Report at 375 (*Coleman* D.E. 3638) ("As of October 31, 2008, the vacancy rate in mental health staffing at CDCR institutions continued the decline that had been found during the preceding monitoring period.") (footnote omitted); *id.* at 375-78 (noting, *inter alia*, vacancy rates for multiple staff categories had fallen to between 11% and 19%). Indeed, the Special Master recognized that certain facilities were fully staffed. See Tr. 929:2-6, 929:14-22.

Additionally, CDCR hired 600 and 1800 custodial staffers in 2007 and 2008, respectively, and those officers serve in dedicated "access to care" units to escort inmates to medical and mental health appointments. *Id.* at 1894:20-1895:6.[6] The staff recruiting has been so successful that 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 1895:11-18.

Furthermore, under the Special Master, the State added dedicated mental health beds at various institutions, diminishing mental health bed waiting

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[6] The three-judge court chose not to consider such progress, instead relying on plaintiffs' outdated expert reports to criticize the level of custodial staffing dedicated to provision of medical and mental health care. 09-416-App. 110a.

lists. *Plata* D.E. 1715, ¶ 74; Defs.' Trial Ex. 1186. CDCR institutions implemented functional and effective quality management programs. *Coleman* D.E. 3638, at 379, 381. Numerous institutions satisfied Program Guide requirements for suicide prevention, *id.* at 384; and as in *Plata*, an increased number of institutions improved their provision of medication for class members, see, *e.g.*, *id.* at 390-91 (noting "significant improvement").

3. The district courts' decisions to convene a three-judge court despite progress under the interim orders in *Plata* and *Coleman* cannot be reconciled with even pre-PLRA case law. See *Women Prisoners* v. *Dist. of Columbia*, 93 F.3d 910, 929 (D.C. Cir. 1996) (reversing imposition of a population cap and explaining "[t]he court ... should have determined the constitutional propriety of a population cap *at the margin*—that is to say, *after its instructions concerning health and safety measures had been complied with*") (second emphasis added). If the lower courts' approach prevails, a single-judge court may find that insufficient progress at some earlier time vitiates § 3626(a)(3)(A)(ii)'s "reasonable amount of time to comply" requirement, even if current remedial orders show significant progress. Cf. *Casey*, 518 U.S. at 363 & n.8.

Less intrusive measures to address constitutional violations often take substantial time. By enacting the PLRA, Congress made plain its intent that such measures be given a full opportunity to succeed before a three-judge court is convened to consider prisoner release. The improvements detailed above individually and cumulatively demonstrate that the single-judge courts prematurely convened the three-judge court. Accordingly, that court lacked

jurisdiction to issue the "Order to Reduce Prison Population."

II. THE COURT'S INTERPRETATION OF § 3626(a)(3)(E) IS CONTRARY TO THE PLRA AND WOULD GREATLY EXPAND THE AVAILABILITY OF "PRISONER RELEASE ORDERS."

Section 3626(a)(3)(E) 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" before issuing a "prisoner release order." The court's interpretation of § 3626(a)(3)(E) presents substantial questions for review.

In finding that overcrowding is the primary cause of constitutional violations, the court did not give the word "primary" its natural meaning. It found overcrowding a primary cause of the medical and mental healthcare inadequacies simply because crowding contributed to those problems and impeded their solution. That interpretation contravenes the statute's plain meaning and Congress's purposes. See 09-416-App. 126a n.55 (the primary cause determination is "'a question of law'"). It allowed the court to order prisoner release despite its simultaneous finding that the 137.5% cap would not remedy the alleged Eighth Amendment violations. At a minimum, the elimination of the "primary cause" of a constitutional violation should "remedy the violation of the Federal right."

Moreover, the court's finding that plaintiffs presented "clear and convincing" evidence that less intrusive measures could not remedy the alleged constitutional violations is unsustainable. All of the court's findings with respect to § 3626(a)(3)(E) were

artificial because it did not analyze—and appellants were prohibited from taking discovery from the Receiver or the Special Master, and introducing evidence about—the "current and ongoing" nature of alleged federal violations.

1. Congress did not define the statutory phrase "primary cause," nor does the legislative history address it. See 09-416-App. 79a & n.43. Although the three-judge court purported to accept the State's interpretation of the requirement, *id.* 78a ("the cause that is 'first or highest in rank or importance; chief; principal'"), it did not apply that interpretation. Instead, in finding that overcrowding was the "primary cause" of the alleged constitutional violations, the court used a standard that made crowding a *contributing cause* of the violations. 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").

The court recognized that myriad causes for the alleged violations exist, many of which pre-date the crowding at issue. See 09-416-App. 16a-17a, 31a-52a, 104a-126a. And, the court acknowledged that curing the crowding would not remedy the alleged violations because independent (primary) causes would continue to produce constitutional injury. *Id.* at 134a, 143a.

In these circumstances, crowding cannot be the primary cause of the alleged constitutional violations because it is not their proximate and "but for" cause. See *Rocco* v. *Lehigh Valley R.R.*, 288 U.S. 275, 278-80 (1933) (discussing "primary" and "proximate" causation under the Federal Employers' Liability Act); *The G.R. Booth*, 171 U.S. 450, 460-61 (1898) (discussing "proximate" and "primary causation"); *Metro. Pittsburgh Crusade for Voters* v. *City of*

Pittsburgh, 964 F.2d 244, 251 (3d Cir. 1992) (a "primary cause" encompasses "but for" and "proximate" causation; such standards are "significantly more stringent than [a] 'material contributing factor' test") (citations omitted). In other contexts, courts recognize that it is much easier for a litigant to satisfy a "contributing factor" test than to demonstrate that a particular circumstance is the "primary cause" of a statutory violation. *Hawkins* v. *Dir., Office of Workers Compensation Programs*, 907 F.2d 697, 705 n.12 (7th Cir. 1990) (Black Lung Benefits Act); *Borras* v. *Sea-Land Serv., Inc.*, 586 F.2d 881, 885-86 (1st Cir. 1978) (Jones Act).

By finding that crowding is the primary cause here, the district court effectively nullified § 3626(a)(3)(E)(ii). That provision assumes that by addressing "crowding," the prisoner release order will do what lesser relief could not: "remedy the violation of the Federal right." If overcrowding is the primary cause of any violation, then eliminating overcrowding should undo all or virtually all constitutional harm. The record makes clear that this would not be true here.

Before the three-judge court was convened, *Coleman* and *Plata* were not litigated as cases about crowding. The underlying alleged violations involved the delivery of medical and mental health care. Accordingly, the thrust of orders entered by the single-judge courts was directed, not at crowding, but at problems such as recruitment and retention of qualified personnel, medical leadership, medical equipment, screening systems, systems to track patients with needs, record keeping, and institutional culture. See 09-416-App. 16a-17a, 22a-23a, 33a-36a. The *Coleman* Special Master, the *Plata* Receiver, and plaintiffs' expert agreed that even if the crowding is

remedied, these pre-existing problems will continue to cause the alleged constitutional violations.[7]

The lower court's interpretation of § 3626(a)(3)(E) therefore allows a three-judge court to order prisoner release whenever it is frustrated with the speed or ability of less intrusive relief to remedy the violations of federal rights—even though the federal violations will continue after the release occurs. See 09-416-App. at 134a, 143a. This fails to give meaning to Congress's intent to make prisoner release the PLRA's "'the remedy of last resort.'" *Id.* at 73a.

2. The three-judge court concluded that overcrowding was the primary cause of the constitutional violations because it believed that "all other potential remedies will be futile in the absence of a prisoner release order." 09-416-App. 144a-145a. The court's view is not supported by the record, let alone clear and convincing evidence.

Initially, the three-judge court's analysis is inconsistent with the testimony of plaintiffs' experts. They repeatedly opined that constitutionally adequate medical and mental health care can be provided in severely overcrowded prisons, claiming that they had done so in the state prison systems they administer-

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[7] *See*, *e.g.*, Deposition of Dr. Shansky at 61:14-24 (Dec. 10, 2007) (*Plata* D.E. 1481, Ex. A) (testifying the CDCR will not have constitutionally adequate medical care delivery "[i]f the only improvement that was made in the next two years is … there are 40,000 less inmates"); *Plata* D.E. 673, at 42:24-43:1 (Receiver: it is "simply wrong" to believe "that population controls will solve California's prison health care problems"); Receiver's Turnaround Plan of Action at ii-iv, 1-20 (*Plata* D.E. 1229); 09-416-App. 157a-158a (Special Master: "'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'") (alteration omitted).

ed. See Tr. 241:2-6, 252:7-253:25 (Dr. Beard); *id.* at 212:5-214:10 (testifying that although it "is impossible to really do a good job" when prison population is at 150-60% of design capacity, he ran a prison at over 200% design capacity); *id.* at 285:21-286:14 (Dr. Lehman); *id.* at 457:1-13, 478:7-479:16 (Dr. Shansky).

The court's conclusion is further undermined by its failure to consider the ongoing improvements in *Plata* and *Coleman* described *supra* § I (failure to consider progress infects analysis of jurisdiction to convene a three-judge court). This evidence was plainly relevant to a determination whether plaintiffs had established, by clear and convincing evidence, that a prisoner release order was required because "no other relief" would suffice. See 09-416-App. 145a-162a (discussing purported inadequacy of less intrusive remedies). The three-judge court erred by considering each of the potential remedial measures in isolation rather than examining their cumulative effect, by unreasonably dismissing the individual effectiveness of those potential remedies, and by failing to consider the most current evidence of progress.

Additional Hiring. The court rejected additional hiring as a less intrusive form of relief. See 09-416-App. 154a-155a. As shown *supra* § I, the hiring trends affecting the *Plata* and *Coleman* class members were extremely positive between 2007 and 2008. The court declined to recognize these improvements although the State introduced evidence of such progress at trial. See, *e.g.*, *supra* 14-15 & n.5. Instead, the three-judge court relied on the state of staffing in 2007 and before, to dismiss additional hiring as a potential remedy. 09-416-App. 154a; see *id.* 47a-48a & nn.31-34 (staffing between

1998 and 2007); *id.* at 28a (staffing in 2005). But, had the court considered the actual state of hiring, it would have concluded that plaintiffs failed to establish, by clear and convincing evidence, that continued staffing increases—whether alone or in concert with other measures—would not have remedied the alleged violations of the class members' rights.

The Receiver and the Special Master's Ability to Remedy Alleged Violations Absent Release. The court's claim that the tools available to the *Plata* Receiver and the *Coleman* Special Master were insufficient to remedy the alleged violations of plaintiffs' rights absent a prisoner release order is not supported by clear and convincing evidence. See 09-416-App. 155a-159a. For instance, as plaintiffs' expert testified: "'[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.'" Tr. 1430:2-6.

Most notably, the court apparently declined to credit Dr. Shansky, *plaintiffs' expert*, when he testified that that some prisons already may be providing constitutional levels of care, notwithstanding their overcrowding. Tr. 456:11-15. He also testified that if the Receiver's Turnaround Plan were fully implemented, it would "ensure a constitutional level of healthcare and mental healthcare" even without prisoner release. *Id.* at 491:1-492:8.

By plaintiffs' counsel's estimation, certain facilities that previously had provided constitutionally inadequate care showed marked improvements despite very large populations. For instance, plaintiffs' report following their February 2007 visit to the Central California Women's Facility, whose

population was 195.2% of design capacity, stated that "[b]ecause of the overall progress implementing the *Plata* policies and procedures," in-person monitoring visits to the facility would no longer be necessary. Defs.' Trial Ex. 1074, at 1. They noted that the facility was "fully staffed" and the prison had "eliminated" a previous backlog. *Id.* at 4-10; see also Office of the Inspector Gen., *Central California Women's Facility: Medical Inspection* Results 1-2, 7-28 (2009), *at* http://www.cprinc.org/docs/resources/OIG_CCWF_MedInspectionResults_200904.pdf (reporting multiple 100% scores for compliance with Receiver's policies and procedures as well as many other scores above 80% compliance). Similarly, plaintiffs' report of their March 2008 visit to Mule Creek State Prison, whose population exceeded 215% of design capacity, stated that its "'compliance with key access to care time frame requirements … is generally very good at present time.'" Tr. 441:18-442:12; *id.* at 440:24-25. And, following a July 2007 visit to CSP-Solano, whose population was 230.8% of design capacity, plaintiffs reported that they found just "a few areas" in which the facility was "out of compliance with the *Plata* Policies and Procedures." Letter from Zoe Schonfeld, Prison Law Office 2 (July 10, 2007).

In all events, any conclusion that the Receivership and Special Mastership would have been unable to remedy the alleged violations of the *Plata* and/or *Coleman* class members' constitutional rights must be rejected because of the evidentiary limitations imposed before and during trial. The State was unable to gather and introduce the most relevant evidence on this point, namely the Receiver's and the Special Master's views on whether a prisoner release order was necessary. *Supra* 7.

Moreover, the three-judge court gave no weight to the positive developments under the Receivership and Special Mastership that occurred between the August 30, 2008 close of evidence and the close of trial. See *supra* § I (discussing progress after that date).[8] The court precluded the State from "introduc[ing] ... evidence relevant only to determining whether the constitutional violations found by the *Plata* and *Coleman* courts were 'current and ongoing.'" 09-416-App. 78a n.42.[9] The court stated that it had no need to consider these issues because the single-judge district courts had "both found, without objection from defendants, that constitutional violations were ongoing" in July 2007, and "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." *Id.* at 77a.

The three-judge court's reasoning is unsound. Particularly in light of the successes discussed above, *supra* § I, the State's failure to dispute whether violations were ongoing *16 months before trial* says little about the status of the alleged constitutional violations during trial—let alone on August 4, 2009 or at issuance of the "Order to Reduce Prison Population" now on appeal. The State's decision not to move to terminate proceedings (requiring a showing that *all* constitutional violations had been remedied) does not indicate either which violations

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[8] Furthermore, the court did not consider evidence of the improvements between the trial and its January 12, 2010 order. *Compare supra* § I.

[9] The court repeatedly ruled that evidence would not be allowed to prove current constitutional conditions. *See*, *e.g.*, *Plata* D.E. 1786, at 28:16-29:2; Tr. at 6:24-7:9.

had been cured or what measures are necessary to address remaining violations, if any.

The record lacks the "clear and convincing" evidence required to support prisoner release.

Out-of-State Transfers. The three-judge court reasoned 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." 09-416-App. 160a. The court erred in rejecting the possibility of transferring California inmates to out-of-state facilities as a less intrusive remedy. *Id.* at 159a-162a.

The State sought to transfer greater numbers of prisoners housed in CDCR institutions to out-of-state facilities, but Judge Karlton prohibited it from doing so. See slip op. at 2 (Nov. 6, 2006) (*Coleman* D.E. 2025) (allowing 80 inmates' transfer, but ordering that "[n]o other CDCR inmates are to be transferred"); cf. Cal. Code Regs. tit. 15, § 3379(a)(9)(F)(2), (G)(1)-(2) (regulations promulgated as a result of Judge Karlton's order, prohibiting transfer of class members absent a court order). Thus, despite the findings that CDCR facilities were providing unconstitutional care, Judge Karlton refused to transfer inmates to facilities outside California—where they would have received care that satisfied the Eighth Amendment.[10] In these circumstances, the three-judge court should have refused to order prisoner release unless the district courts allowed the

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[10] Ironically—given the State's alleged "deplorable" care, 09-416-App. 20a, 280a—the court prohibited additional transfers because of the Special Master's concern, *Coleman* D.E. 2025, at 2 ¶ 3, that "the actual state of mental health services" at the *out-of-state transferee institutions* would not provide sufficiently high quality care. *See id.*, Ex. 1, at 3.

State to exhaust its avenues for prisoner transfer. Absent such an effort, plaintiffs could not have proven by clear and convincing evidence that transfers of CDCR inmates would not remedy any constitutional violations.

Construction. The court also rejected the State's argument that its desire to implement AB 900 and its willingness to construct facilities would constitute less intrusive remedies than prisoner release. See 09-416-App. 145a-154a. The court declined to credit plaintiffs' experts' testimony that prison construction helped remedy federal law violations in systems they administered, Tr. 287:10-20, 289:18-20, and that the construction of additional treatment facilities in California could remedy the alleged violations, *id.* at 254:25-256:8, 457:1-458:6.

The court dismissed the State's construction proposals as infeasible because "it will be years before any re-entry facility construction … will be completed." 09-416-App. 147a-148a; *id.* at 149-150a. 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. In this time, construction that could be a partial remedy will occur. The prisoner release order was not the "'the remedy of last resort.'" *Id.* at 144a.

The court failed properly to account for these intrusive measures individually and cumulatively, which could remedy the alleged constitutional violations. The decision below thus presents substantial questions warranting plenary review.

III. THE COURT'S INTERPRETATION OF THE PLRA'S NEXUS AND NARROW TAILORING REQUIREMENTS IS DEEPLY FLAWED.

Even if § 3626(a)(3)(E) were satisfied, the scope of the prisoner release order raises substantial questions worthy of review.

The district court has imposed an inflexible population cap, 137.5% of the prisons' combined design capacity, that must be met within two years. App. 5a-6a; see *id.* at 13a (*Coleman* order incorrectly requiring that a particular institution's population immediately satisfy the 137.5% cap). The "Order to Reduce Prison Population" is not "narrowly drawn," it extends "further than necessary to correct the [alleged] violation" of the *class members*' rights, and does not give sufficient weight to adverse impacts on public safety and the operation of the State's criminal justice system. 18 U.S.C. § 3626(a)(1)(A).

1. The three-judge court expressly stated that "the relief sought by plaintiffs extends further than the identified constitutional violations" insofar as it "is likely to affect inmates without medical conditions or serious mental illnesses." 09-416-App. 172a. The population cap addresses the prison population as a whole, not only members of the plaintiff-classes. On its face, the relief violates the PLRA because it is not "narrowly drawn" and is broader 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); see H.R. Rep. No. 104-21, at 24 n.2 (1995) ("[T]he provision stops judges from imposing remedies intended to ... provide an overall improvement in prison conditions.").

The court's holding also conflicts with the Eighth Circuit's interpretation of the statute's narrow-

tailoring requirement. See *Hines* v. *Anderson*, 547 F.3d 915, 922 (8th Cir. 2008) (decree is "not narrowly drawn" because it addressed medical care generally, not "a particular medical problem that existed at the time"). Moreover, it violates this Court's holdings 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.'" *Missouri* v. *Jenkins*, 515 U.S. 70, 98 (1995) ("*Jenkins II*"); *id.* at 90-92.

Additionally, by directing the prisoner release order at *all* California prisoners, the relief intrudes on the State's management of its criminal justice system. This contravenes § 3626(a)(1)(A)'s requirement that the court "give substantial weight to any adverse impact on ... the operation of the criminal justice system." See also 141 Cong. Rec. S2647, S2649 (daily ed. Feb. 14, 1995) (Sen. Hutchison). And this significant invasion of the State's managerial prerogatives vis-à-vis the general prison population violates this Court's limits on the scope of equitable relief generally and in prison-conditions litigation specifically. See, *e.g.*, *Turner* v. *Safley*, 482 U.S. 78, 84 (1987); *Bell* v. *Wolfish*, 441 U.S. 520, 548 (1979).

This Court should review this case to ensure that the PLRA's requirements are given the meaning Congress intended and that courts do not impose prison population caps other than as a last resort.

2. Additionally, plaintiffs failed to establish that the 137.5% of design capacity cap is "narrowly drawn, extends no further than necessary ... , and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A). The court treated design capacity as a synonym for the appropriate prison population and overcrowding as a constitutional violation; it erred in both respects.

To understand plaintiffs' failings, it is critical to understand what "design capacity" means in California's prisons. It refers to the number of inmates a prison may house based on one inmate per cell, single bunks in dormitories, and no beds in space not designed for housing. 09-416-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). Overcrowding alone does not violate the Eighth Amendment. See *Hoptowit* v. *Ray*, 682 F.2d 1237, 1249 (9th Cir. 1982). Instead, plaintiffs must show that the State is failing to provide medical and mental health care consistent with "the minimal civilized measure of life's necessities," *Rhodes*, 452 U.S. at 347, and is acting with "deliberate indifference to serious medical needs of prisoners" resulting in "'unnecessary and wanton infliction of pain.'" *Estelle* v. *Gamble*, 429 U.S. 97, 104-05 (1976); see *Wilson* v. *Seiter*, 501 U.S. 294, 298-302 (1991).

Plaintiffs' experts repeatedly recognized that constitutionally adequate medical and mental health care can be provided in prisons where the population far exceeds design capacity. *Supra* 21-22. Plaintiffs nonetheless sought a cap at 130% of design capacity—"the federal standard for prison overcrowding," 09-416-App. 180a—without linking that population level to the State's ability to satisfy its constitutional obligations. *Id.* at 183a. Put different-

ly, they failed to show that California's prisons must meet the federal standard for prison overcrowding to provide constitutionally adequate medical and mental health care.

Plaintiffs sought a population cap based on expert opinions concerning the level required for a "prison system ... to function *properly*" or "'*appropriately*.'" 09-416-App. 177a-178a (emphases added). Plaintiffs' experts denied that they could assess the population reduction required to provide inmates with care that satisfied the Eighth Amendment:

> [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.

Tr. 483:7-12 (Dr. Shansky); *id.* at 490:4-14 (he had "'no clue'" what the number would be); *id.* at 342:15-23 (Dr. Haney: "[Q.] 'Are you aware of what objective standard must be met by [CDCR] in order to show compliance with the elements of providing sufficient mental health beds for the mental healthcare population to show a constitutional compliance? … [A.] No, …. I don't know how to calculate that.'").

Instead of linking a particular population level to the abridgement of Eighth Amendment rights, Dr. Beard, like many of plaintiffs' experts, testified about the difficulties that crowding creates for a warden. See Tr. 205:12-14 ("any time that you're running over capacity ... you have more possibilities of having problems"). Critically, he also testified that he had operated prisons whose populations were 150-160% and over 200% of design capacity, opining that

doing so was "difficult"—not that the care provided was in violation of the Eighth Amendment—and that "it is impossible to really do a *good job* with prisons that large." *Id.* at 213:1-214:10 (emphasis added).[11]

On this record, the three-judge court lacked a sufficient basis to conclude 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." 09-416-App. 143a (emphasis in original). It selected a system-wide cap of 137.5% design capacity solely because it was "halfway between the cap requested by plaintiffs [*i.e.*, the federal standard for overcrowding] and the wardens' estimate of the California prison system's maximum operable capacity absent consideration of the need for medical and mental health care." *Id.* at 184a. This is the antithesis of narrow tailoring.

Without evidence of the population level at which the State could not provide "the minimal civilized measure of life's necessities," *Rhodes*, 452 U.S. at 347, the court substituted professional standards and desirable benchmarks for constitutional requirements. This conflicts with well-established requirements for assessing and remedying alleged constitutional violations. As recognized in *Rhodes*, a lower court "err[s] in assuming that opinions of experts as to desirable prison conditions suffice to establish

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[11] Plaintiffs' experts were unaware of the level of care provided to the class members and had not evaluated CDCR's delivery of care. *See*, *e.g.*, Tr. 278:4-7 (Lehman: "Q. In preparing your report, you did not know what the space needs were for medical or mental healthcare in California's prisons, did you? A. Specifically, no."); *id.* at 279:4-6 ("Q. … You did not have knowledge of the status of medical health care delivery in California's prisons as of August 2008, did you? A. No ….").

contemporary standards of decency.... '[T]hey simply do not establish the constitutional minima; rather, they establish goals recommended by the organization in question.'" *Id.* at 348 n.14 (quoting *Wolfish*, 441 U.S. at 544 n.27); *accord Occoquan*, 844 F.2d at 837; *Hoptowit*, 682 F.2d at 1249.

3. As shown *supra* § II, the order does not satisfy the PLRA's nexus and narrow tailoring requirements because it lacks any connection to the Eighth Amendment violations alleged to persist at the trial. See *Jenkins II*, 515 U.S. at 88. The mandatory starting point for analyzing the nexus between the alleged violations and their remedy was an inquiry into the nature of the current federal violations. The court failed to conduct that inquiry. As a result, the court's conclusions about the required scope of the remedy lacked sufficient basis in the record and cannot stand. See *id.* ("'federal-court decrees must directly address and relate to the constitutional violation itself'").

4. Finally, the court failed to meaningfully account for the order's adverse impacts on public safety. 18 U.S.C. § 3626(a)(1)(A). The PLRA's core purpose was to ensure that any prisoner release order provided substantial protection to the public. See *id.*; see also H.R. Rep. No. 104-21, at 9 (1995); 141 Cong. Rec. at S14418 (Sen. Hatch). The court's order fails this test.

The three-judge court candidly acknowledged that the order was likely to increase crime without substantial investment in "evidence-based rehabilitation programming," 09-416-App. 241a-248a—"*i.e.*, programs that research has proven to be effective in reducing recidivism," *id.* at 214a; see *id.* at 200a. However, the court neither found that such programming could be expanded nor calculated the costs of an expansion. Plaintiffs failed to introduce evidence on

these points, and did not carry their burden. See *Mazurek* v. *Armstrong,* 520 U.S. 968, 972 (1997) *(*per curiam*)* (to obtain injunctive relief, the movant, "'by a clear showing, carries the burden of persuasion'") (emphasis omitted); *Gomez* v. *Vernon*, 255 F.3d 1118, 1129 (9th Cir. 2001) (discussing the "public safety" consideration codified in the PLRA, and explaining that plaintiffs still bear the burden of showing an entitlement to relief) (alteration omitted). Further, in light of the State's financial condition, it is more unlikely that such programming could be made available. See 09-416-App. 11a n.4, 187a.

Moreover, in the "Order to Reduce Prison Population," the court acknowledged that it "ha[d] not evaluated the public safety aspect of the State's proposed plan," but assumed that public safety could be assured because the State's experts had previously recommended measures for safely reducing the population. App. 3a-4a. Given the State's financial condition, reliance on such previous recommenddations—which presumed cooperation of the legislature and an ability to organize its budgetary priorities without federal court assistance—is unreasonable. The court's order raises substantial questions whether § 3626(a)(1)(A) has been satisfied.

* * *

The court below entered an unprecedented order that intrudes on the State's authority over its prison system and constrains the State's ability to respond to problems within its prison system and more broadly throughout California. The three-judge court has dictated to the State the single method it must use (prisoner release) to address alleged constitutional violations involving healthcare without fulfilling the PLRA's requirements–a statute Congress enacted to protect the State's prerogatives with

respect to prisoner release so that the State can protect its citizens.

Because Congress recognized the federalism concerns inherent in such an order, it mandated appellate review by this Court. Every issue decided by the court below is one of first impression. This alone provides a sufficient basis for this Court to note probable jurisdiction. But what makes the need for review particularly acute is that the court below has provided any court frustrated by the pace of judicial remedies in prison litigation with a roadmap to use to order prisoner release, instead of remedies trained on the constitutional violation at issue. This Court's plenary review is necessary to forestall that result.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

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April 12, 2010

APPENDIX A

IN THE UNITED STATES DISTRICT COURTS FOR
THE EASTERN DISTRICT OF CALIFORNIA AND
THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
COMPOSED OF THREE JUDGES

PURSUANT TO SECTION 2284,
TITLE 28 UNITED STATES CODE

[Filed 1/12/10]

No. CIV S-90-0520 LKK JFM P
THREE-JUDGE COURT

RALPH COLEMAN, *et al*.,

Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, *et al*.,

Defendants.

No. C01-1351 TEH
THREE-JUDGE COURT

MARCIANO PLATA, et al.,

Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, et al.,

Defendants.

ORDER TO REDUCE PRISON POPULATION

On August 4, 2009, this three-judge court issued an Opinion and Order finding, by clear and convincing evidence, that crowding is the primary cause of the constitutional inadequacies in the delivery of medical and mental health care to California inmates and that no relief other than a "prison release order," as that term is broadly defined by the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626(g)(4), is capable of remedying these constitutional deficiencies. We further concluded that relief requiring the State to reduce the population of its thirty-three adult prisons to 137.5% of their total design capacity was narrowly drawn, would extend no further than necessary to correct the violation of California inmates' federal constitutional rights, and was the least intrusive means necessary to correct that violation. Accordingly, in consideration of this court's limited role and the State's "wide discretion within the bounds of constitutional requirements," *Bounds v. Smith*, 430 U.S. 817, 832-33 (1977), we ordered the State to provide "a population reduction plan that will in no more than two years reduce the population of the CDCR's adult institutions to 137.5% of their combined design capacity." Aug. 4, 2009 Opinion and Order at 183. As required by the PLRA, we also gave "substantial weight to any adverse impact on public safety or the operation of a criminal justice system," 18 U.S.C. § 3626(a)(1)(A), and determined, based on the evidence presented at trial, that means exist by which the defendants can accomplish the necessary population reduction without creating an adverse impact on public safety or the operation of the criminal justice system.

The State submitted a proposed prison population reduction plan on September 18, 2009, but that proposed plan would have reduced the prison population to only 166% of design capacity in two years absent further legislation, and 151% of design capacity in two years if all of the proposals were granted legislative approval. Defs.' Sept. 18, 2009 Plan at 15, 19 (tables showing projected prison populations and crowding rates based on defendants' proposed population reduction mechanisms). Because the plan that the State provided did not comply with our August 4, 2009 Order, we rejected the plan and ordered the State to submit a revised population reduction plan that complied with our August 4 Order. On November 12, 2009, the State timely submitted a revised plan. In accordance with our Orders, this revised plan proposed measures estimated to reduce the prison population to the required 137.5% of design capacity by December 2011.

On December 7, 2009, plaintiffs agreed that the State's revised plan satisfied the requirements of our August 4, 2009 Order and proposed that we enter an order requiring the defendants to achieve the six-month population reduction benchmarks set forth in the revised plan without ordering implementation of any specific population reduction measures. We agree that such an order is appropriate because it would afford the State maximum flexibility in its efforts to achieve the constitutionally required population reduction.

As defendants and county intervenors observe in their December 18, 2009 replies to plaintiffs' response, we have not evaluated the public safety impact of each individual element of the State's proposed plan. However, 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. Certain of the measures suggested by the State, such as raising the threshold for grand theft and limiting the maximum sentence for certain enumerated felonies to 366 days to be served in county jail, were not included within the means we considered in our August 4 Opinion and Order, and were thus not evaluated from the standpoint of public safety. We noted, however, that they had previously been endorsed by state officials, and thus, presumably, "would not have an adverse effect on public safety." Aug. 4, 2009 Opinion and Order at 156. Certain measures that we concluded would substantially reduce the prison population that we did evaluate positively from a public safety standpoint, such as changes with respect to the churning of technical parole violators, appear to be included only in part in the State's plan. We believe, as we did when we issued our prior Order, that it is appropriate for the State to exercise its discretion in choosing which specific population reduction measures to implement, and, in doing so, to bear in mind the necessity for ensuring the public safety. We are satisfied that, as we previously held, the reduction in prison population that we have ordered can be implemented safely and trust that the State will comply with its duty to ensure public safety as it implements the constitutionally required reduction. Should the State determine that any of the specific measures that it has included in its plan cannot be implemented without significantly affecting the public safety or the criminal justice system, we trust that it will substitute a different means of accomplishing the constitutionally required population reductions.

We emphasize here that we are not endorsing or ordering the implementation of any of the specific measures contained in the State's plan, only that the State reduce the prison population to the extent and at the times designated in this Order. We also emphasize that we do not intend by this Order to prohibit the State from taking actions that may have the effect of reducing the prison population, whatever their impact on public safety, should those actions be taken for reasons other than compliance with our Order.

The concerns that county intervenors express regarding funding may have merit. Counties may well require additional financial resources from the State in order to ensure that no significant adverse public safety impact results from the State's population reduction measures. Counties may, for example, need additional financial resources in order to fund the additional costs of ongoing rehabilitation, re-entry, drug or alcohol, educational, and job training programs. Reducing the number of persons it imprisons should result in significant savings to the State. We do not now decide whether and to what extent the State should allocate part of its savings from such reductions to the counties; instead, we note that whether public safety requires such a reallocation demands serious consideration by the State, both under its general responsibilities to the public and in accord with the PLRA.

In light of all of the above, as well as our August 4, 2009 Opinion and Order, IT IS HEREBY ORDERED that:

1. In accordance with the figures in defendants' November 12, 2009 revised population reduction plan,

defendants shall reduce the population of California's thirty-three adult prisons as follows:

a. To no more than 167% of design capacity by six months from the effective date of this Order.

b. To no more than 155% of design capacity by twelve months from the effective date of this Order.

c. To no more than 147% of design capacity by eighteen months from the effective date of this Order.

d. To no more than 137.5% of design capacity by twenty-four months from the effective date of this Order.

"Design capacity" for purposes of these benchmarks may not remain static. For example, an increase in design capacity through construction would decrease the number of inmates by which the prison population must be reduced. Conversely, a decrease in design capacity, such as would result from the closing of a prison, would increase the numeric reduction required.

2. All population reduction measures undertaken by defendants must comply not only with our Orders and the PLRA, but also with any relevant orders entered by other courts, including the individual *Plata* and *Coleman* courts.

3. Within fourteen days following each of the deadlines described above, defendants shall file a report advising the court whether the estimated population reduction has been achieved. This report shall include the total reduction in the population of California's adult prisons that has been achieved; the current population of those institutions, both in absolute terms and as a percentage of design capacity; and the reductions associated with each of the in-

dividual measures that defendants described in their November 12, 2009 plan as well as any additional or alternative population reduction measures that it may have subsequently adopted. If the State has failed to achieve the required population reduction, defendants shall advise the court as to the reasons for such deficiency and what measures they have taken or propose to take to remedy it. They also shall advise the court as to whether such deficiency could have been avoided by the exercise of executive authority, such as that invested in the Governor and other officials by the California Emergency Services Act. Finally, defendants shall advise the court whether legislative changes are required to remedy any deficiency and, if so, what efforts defendants have made to obtain such changes, including specific proposals made to the legislature and the legislative responses to such proposals. Defendants are advised that we may also order the submission of interim reports informing the court of what specific tasks defendants intend to undertake during each six-month period and the specific persons responsible for executing those tasks.

4. If, at any time, the State believes that the waiver of state law by this court is necessary to permit it to meet any of the above population reduction deadlines, defendants shall promptly file a statement with this court, explaining the reasons that they believe such waiver to be necessary; whether they have considered and rejected all other available remedies; if they have rejected such remedies, the reasons therefor; and why the proposed waiver is permissible under the PLRA and the Constitution of the United States.

5. To the extent that population reduction measures implemented by the State increase the need for re-entry, rehabilitation, education, job training or other community services provided by the counties, or necessitate other measures be under-taken by such counties, defendants shall, in cooperation with the counties, calculate the amount of additional funds that the counties may require from the State in order to maintain the level of public safety at or about the existing level. Within thirty days of the effective date of this Order, defendants shall file with this court a statement setting forth (1) the amounts agreed upon or, should there be no agreement, the parties' respective positions as to such amounts, and (2) what steps defendants have taken or plan to take to fulfill their obligations to the counties in connection with the implementation of the prison population reduction measures, including the allocation to the counties of a portion of any budgetary savings resulting from such implementation. It would be in the interest of both the State and the counties to commence such discussions prior to the effective date of this Order.

6. The effective date of this Order is STAYED pending the United States Supreme Court's consideration of the appeal of our August 4, 2009 Opinion and Order and any appeal of this Order. Unless this Order is rendered moot by the Court's disposition of any such appeal, the effective date of this Order shall be the day following the final resolution by the Court of a timely-filed appeal of this Order or, if no such appeal is filed, the later of the day following the expiration of defendant's time for filing an appeal and the day following the Court's final resolution of the appeal of our August 4 Opinion and Order.

7. We note that this stay grants the State additional time in which to reduce the population of its adult prisons, which Defendant Governor Arnold Schwarzenegger has proclaimed are in a state of emergency due to overcrowding. *See* Ex. P1 (Oct. 4, 2006 Prison Overcrowding State of Emergency Proclamation). In addition, the stay affords defendants the time and opportunity to seek legislation enacting those prisoner population reduction measures that they proposed in their November 12, 2009 revised plan, but asserted that they lacked the authority to implement. We also note that defendants represented in their November 12, 2009 plan that they would seek legislation affording them such authority. Accordingly, within fourteen days of the effective date of this Order, defendants shall file a report advising this court whether they have obtained the requisite authority for such measures or for other alternative measures that would achieve equal or greater reductions in the prison population, and, if not, what efforts they have made towards obtaining such authority, including what specific proposals they have made and what specific responses have been received from the legislature, if any.

As we have repeatedly stated, we do not intervene lightly in the State's management of its prisons. However, the State's long-standing failure to provide constitutionally adequate medical and mental health care to its prison inmates has necessitated our actions, and our prison population reduction Order is the least intrusive remedy for the constitutional violations at issue. We reiterate our "hope that California's leadership will act constructively and cooperatively . . . so as to ultimately eliminate the need for further federal intervention." Aug. 4, 2009 Opinion and Order at 182. We do, however, nec-

essarily reserve the right, and indeed we have the obligation, to order additional steps to implement our August 4 Order should the actions taken by the State fail to meet any six-month reduction goal set forth in this Order.

IT IS SO ORDERED.

DATED: 01/12/10

/s/ STEPHEN REINHARDT
STEPHEN REINHARDT
UNITED STATES CIRCUIT JUDGE
NINTH CIRCUIT COURT OF APPEALS

DATED: 01/12/10

/s/ LAWRENCE K. KARLTON
LAWRENCE K. KARLTON
SENIOR UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF CALIFORNIA

DATED: 01/12/10

/s/ THELTON E. HENDERSON
THELTON E. HENDERSON
SENIOR UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF CALIFORNIA

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CIV S-90-0520 LKK JFM P

RALPH COLEMAN, *et al.*,
Plaintiffs,

vs.

ARNOLD SCHWARZENEGGER, *et al.*,
Defendants.

ORDER

Following a hearing on September 22, 2009, defendants were directed to file within forty-five days a detailed long-range bed plan, including activation schedules. *See* Sept. 24, 2009 Order, at 3. On November 6, 2009, defendants filed a long-range bed plan. On November 30, 2009, plaintiffs filed a response to defendants' plan and a request for evidentiary hearing on certain aspects of the plan. On December 11, 2009, defendants filed a response to plaintiffs' response, and on December 18, 2009, plaintiffs filed a reply and a renewed request for evidentiary hearing. The court has reviewed all of the papers filed by the parties, and has consulted with the special master.

Several areas of defendants' plan are not in dispute and will be approved by the court. Three areas of dispute require resolution. First, pursuant to the court's September 24, 2009 order, all projects in the long-range plan are to be "fully staffed and activated by the 2013 target date" previously established by

defendants. Sept. 24, 2009 Order, at 3. The activation schedules for three of the projects in the long-range plan, the Consolidated Care Center (CCC)[1], that part of the Stark conversion project that plans for additional enhanced outpatient program (EOP) beds for both general population (GP) and administrative segregation unit (ASU) inmates (hereafter referred to as the Stark EOP conversion project), and the DeWitt conversion project, reflect "activation" dates in 2013 or 2014, with patient admissions not completed at any of these sites until 2014. For the reasons set forth *infra*, the court will not approve the Stark EOP conversion project at this time. The special master reports that the mental health crisis bed project proposed for Stark is adequate and recommends its approval. That will be the order of the court. The CCC and the DeWitt conversion project will be approved subject to submission within thirty days of new activation schedules that reflect patient admissions completed to full occupancy for each of these projects by 2013.[2]

With respect to the Stark EOP conversion project, the papers before the court give rise to a concern that this project may not be sufficient to meet the needs of the plaintiff class. The special master reports that

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[1] Defendants also refer to this facility as the Consolidated Care Facility (CCF). *See* Cover Sheet to Exhibit # 1 to defendants' Long-Range Mental Health Bed Plan.

[2] In their December 11, 2009 response, defendants represent that on December 7, 2009, the California Department of Finance authorized the California Department of Corrections and Rehabilitation to use a procurement process for the CCC that will enable defendants to complete patient admissions to the CCC by December 24, 2013. Defendants' Response, filed December 11, 2009, at 5.

this project will require either an increase in the amount of out of cell time for class members housed in that program, or reduction in the number of admissions, or some combination of the two. Defendants report that they "expect[] to double cell up to 141% capacity" in the EOP program at Stark. Declaration of Deborah Hysen in Support of Defendants' Responses to Plaintiffs' Response to Defendants' Long-Range Mental Health Bed Plan and Request for Evidentiary Hearing, filed December 11, 2009, at ¶ 11. The three judge court has ordered defendants to "reduce the population of the CDCR's adult institutions to 137.5% of their combined design capacity" as a necessary prerequisite to the provision of constitutionally adequate medical and mental health care. *See* Opinion and Order filed Aug. 4, 2009. This court will not approve the Stark EOP conversion project as long as the project calls for a projected population in excess of 137.5% of the facility's design capacity. Defendants will be directed to file, within forty-five days, an amended proposal for the Stark EOP conversion project that limits the population accordingly and that meets the concerns for this project identified by the special master.

Finally, defendants have failed to provide a detailed plan to meet the identified need for the female EOP population. Defendants' plan is described generally as a plan to convert existing inmate housing to EOP beds, and defendants represent that they are "currently working with the *Plata* Receiver on a health care improvement program at the three women's institutions to determine how best to meet" the needs of this female inmate population. Defendants also indicate that they anticipate that "any parole, sentencing, and/or credit reforms, and the Three-Judge Court's prisoner release order, will sig-

nificantly impact the female population." Defendants' Long-Range Plan, filed Nov. 6, 2009, at 10. The court will consider proposed revisions to the long-range plan should reductions in the inmate population warrant such consideration. Until the population is reduced, however, defendants will be required to comply with this court's orders concerning long-range planning. For that reason, defendants will be directed to file, within forty-five days, a detailed plan with activation schedules to meet the long-range bed needs of female EOP inmates identified in the Navigant 2009 spring population projections.

Defendants include in their long-range bed plan a request for approval of their plan to replace two court-ordered projects, the Salinas Valley State Prison (SVSP) 72-Bed EOP-ASU project and the SVSP 96-Bed EOP-GP Treatment and Office Space and Housing Unit Conversion Project, with one project identified as the SVSP 300 EOP-GP Treatment and Office Space A-Quad Project. Defendants' request will be granted.

Finally, the special master reports that the parties have agreed that defendants should not be required to describe departures from timeframes, as required by paragraph 2 of the court's June 18, 2009 order, or to report impediments to timely completion of a project, as required by paragraph 6 of the court's September 24, 2009 order, unless a departure or an impediment will delay completion of a project by more than thirty days. That interpretation is hereby approved for both the June 18, 2009 order and the September 24, 2009 order, and incorporated in the requirements of this order, *infra*.

In accordance with the above, IT IS HEREBY ORDERED that:

1. All projects in defendants' long-range plan, including the mental health crisis bed project at Stark, are approved with the following exceptions:

a. Defendants' proposed Consolidated Care Center is approved subject to submission within thirty days of a new activation schedule for this project that reflects patient admissions completed to full occupancy by 2013.

b. Defendants' proposed DeWitt conversion project is approved subject to submission within thirty days of a new activation schedule for this project that reflects patient admissions completed to full occupancy by 2013.

c. Defendants' proposed Stark EOP conversion project is not approved. Within forty-five days from the date of this order, defendants shall file an amended proposal for the Stark EOP conversion project that limits the population for that facility to no more 137.5% of the facility's design capacity and that meets the concerns identified by the special master.

d. Defendants have not adequately described their plan to meet the projected needs of the female EOP population. Within forty-five days from the date of this order defendants shall file a detailed plan with activation schedules to meet the long-range bed needs of female EOP inmates identified in the Navigant 2009 spring population projections.

2. Beginning on March 1, 2010, defendants shall report to the special master on a monthly basis all action taken on each project and whether each project remains on schedule or has been or can be ac-

celerated. Defendants' report shall be in the form of updates to the activation schedules for these projects. For any project that has departed from the promised timeframes defendants shall describe with specificity the reason or reasons for the departure and shall identify individuals or agencies whose acts or failures to act contributed to the departure. These projects shall be reviewed quarterly in conjunction with the court-ordered projects approved by this court on June 18, 2009.

3. Defendants are not required to describe departures from timeframes, as required by paragraph 2 of the court's June 18, 2009 order and paragraph 2 of this order, or to report impediments to timely completion of a project, as required by paragraph 6 of the court's September 24, 2009 order, unless a departure or an impediment will delay completion of a project by more than thirty days.

4. Defendants' request to replace the two court-ordered projects, the SVSP 72-Bed EOP-ASU project and the SVSP 96-Bed EOP-GP Treatment and Office Space and Housing Unit Conversion Project, with one project identified as the SVSP 300 EOP-GP Treatment and Office Space A-Quad Project is granted. The provisions of this court's June 18, 2009 order that governed the replaced projects shall apply in full to the new project.

5. Plaintiffs' request for evidentiary hearing is denied.

DATED: January 4, 2010

/s/ LAWRENCE K. KARLTON
LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
AND THE NORTHERN DISTRICT OF CALIFORNIA
UNITED STATES DISTRICT COURT
COMPOSED OF THREE JUDGES
PURSUANT TO SECTION 2284, TITLE 28
UNITED STATES CODE

No. 2:90-cv-00520 LKK JFM P
THREE-JUDGE COURT

RALPH COLEMAN, *et al*.,
Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, *et al*.,
Defendants.

No. C01-1351 TEH
THREE-JUDGE COURT

MARCIANO PLATA, *et al*.,
Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, *et al*.,
Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES
To: Three-Judge Panel

Notice is hereby given that Defendants Arnold Schwarzenegger, John Chiang, Ana J. Matosantos, Matthew Cate, and Stephen W. Mayberg appeal to the Supreme Court of the United States from the January 12, 2010 Order of the Three-Judge Court, which imposed injunctive relief under the Prison Litigation Reform Act ("PLRA"). *See* 18 U.S.C. § 3626(a)(3), (g)(4). This appeal is taken pursuant to 28 U.S.C. § 1253.

As previously explained, the three-judge court was improperly convened under the PLRA and its January 12, 2010 order imposing injunctive relief, like its previous order of August 4, 2009, violates the PLRA.

Moreover, after the Three-Judge Court rejected the State's September 18, 2009 plan to reform the prisons and safely reduce the prison population over time, on November 12, 2009, the State submitted a revised plan to the Court that complied with the strict parameters of the Court's order to reduce the prison population to 137.5% of design capacity within two years. But the State emphatically pointed out that it could not implement the revised plan without waivers of state laws, and in response to the Court's order, the State identified which state laws the Court would need to waive for the State to implement the revised plan.

The Court on January 12, 2010 issued its "Order to Reduce [the] Prison Population," but the Court did not adopt any of the specific measures or requested state law waivers identified in the State's revised plan. (1/12/10 Order, *Plata* Dkt. No. 2287, *Coleman*

Dkt. No. 3767 at 3.) Instead, it again ordered the State to reduce its prison population to 137.5% of design capacity in six month increments over a two-year period. The Court stated that such an order "would afford the State maximum flexibility in its efforts to achieve the constitutionally required population reduction." (*Id*. at 3:1-2.) However, the Court did not provide the State with the requested state law waivers needed to implement its revised plan and meet these benchmarks. Specifically, the Court did not give the State authority to accelerate prison construction and operate private prisons, did not expand the State's ability to transfer inmates out of state, did not permit the State to implement the alternative custody program, and did not preclude CDCR from admitting certain inmates.

For these reasons, the State appeals from the Court's January 12, 2010 order.

DATED: January 19, 2010 HANSON BRIDGETT LLP

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
AND THE NORTHERN DISTRICT OF CALIFORNIA
UNITED STATES DISTRICT COURT
COMPOSED OF THREE JUDGES
PURSUANT TO SECTION 2284, TITLE 28
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As previously explained, the three-judge court was improperly convened under the PLRA and its January 12, 2010 order imposing injunctive relief, like its previous order of August 4, 2009, violates the PLRA.

Moreover, after the Three-Judge Court rejected the State's September 18, 2009 plan to reform the prisons and safely reduce the prison population over time, on November 12, 2009, the State submitted a revised plan to the Court that complied with the strict parameters of the Court's order to reduce the prison population to 137.5% of design capacity within two years. But the State emphatically pointed out that it could not implement the revised plan without waivers of state laws, and in response to the Court's order, the State identified which state laws the Court would need to waive for the State to implement the revised plan.

The Court on January 12, 2010 issued its "Order to Reduce [the] Prison Population," but the Court did not adopt any of the specific measures or requested state law waivers identified in the State's revised plan. (1/12/10 Order, *Plata* Dkt. No. 2287, *Coleman* Dkt. No. 3767 at 3.) Instead, it again ordered the State to reduce its prison population to 137.5% of design capacity in six month increments over a two-

year period. The Court stated that such an order "would afford the State maximum flexibility in its efforts to achieve the constitutionally required population reduction." (*Id.* at 3:1-2.) However, the Court did not provide the State with the requested state law waivers needed to implement its revised plan and meet these benchmarks. Specifically, the Court did not give the State authority to accelerate prison construction and operate private prisons, did not expand the State's ability to transfer inmates out of state, did not permit the State to implement the alternative custody program, and did not preclude CDCR from admitting certain inmates.

For these reasons, the State appeals from the Court's January 12, 2010 order.

DATED: January 19, 2010 HANSON BRIDGETT LLP

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DATED: January 19, 2010 EDMUND G. BROWN JR.
Attorney General of
the State of California

By: /s/ Kyle Lewis

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APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
AND THE NORTHERN DISTRICT OF CALIFORNIA
UNITED STATES DISTRICT COURT COMPOSED
OF THREE JUDGES PURSUANT TO
SECTION 2284, TITLE 28 UNITED STATES CODE

No. 2:90-cv-00520 LKK JFM P
THREE-JUDGE COURT

RALPH COLEMAN, *et al.*,
Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, *et al.,*
Defendants.

No. C01-1351 TEH
THREE-JUDGE COURT

MARCIANO PLATA, *et al.*,
Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, *et al.,*
Defendants.

DEFENDANTS' RESPONSE TO THREE-JUDGE
COURT'S OCTOBER 21, 2009 ORDER
To: Three-Judge Court

In its order dated October 21, 2009, this Three-Judge Court rejected Defendants' September 18, 2009 Population Reduction Plan and ordered Defendants to submit a new population reduction plan that complies with the Three-Judge Court's August 4, 2009 Order. Specifically, Defendants were ordered to create a new plan that "provides for a reduction of the prison population to 137.5% of design capacity within two years." (Oct. 21, 2009 Order at 2:24-25.) In addition, the October 21, 2009 Order also requires Defendants to respond to several inquiries by the Court relating to: (1) the calculations with respect to Defendants' proposed population reduction measures included in the new plan; (2) the effect, if any, of the September 17, 2009 California Department of Corrections and Rehabilitation's (CDCR) reduced budget in rehabilitation programs; (3) measures the State will take to ensure public safety through reentry and diversionary programs; and (4) Governor Schwarzenegger's budget proposal submitted to the California State Legislature aimed at addressing California's historic budget deficit that could provide for a population reduction of up to 37,000 inmates.

As required by the Three-Judge Court's October 21, 2009 Order, Defendants submit the following documents:

1. Attached as Exhibit A is "State Defendants' November 12, 2009 Response to the Court's October 21, 2009 Order to Reduce Prison Population to 137.5% of Design Capacity" (Defendants' Response).

2. Attached as Exhibit B is the declaration of Jay Atkinson, Research Manager II for the Estimates and Statistical Analysis Section, Offender Information Services Branch,

CDCR. Mr. Atkinson's declaration is responsive to the Three-Judge Court's first inquiry regarding the calculations through which Defendants obtained the estimates of the population reductions associated with the proposed actions in Defendants' Response.

3. Attached as Exhibit C is the declaration of David Lewis, Deputy Director, Fiscal Services for CDCR. Mr. Lewis's declaration is similarly responsive to the Three-Judge Court's first inquiry regarding the calculations through which Defendants obtained the estimates of the population reductions associated with the proposed actions in Defendants' Response. Mr. Lewis's declaration is also responsive to the Three-Judge Court's second inquiry regarding whether the September 17, 2009 CDCR budget reduction of $250 million in rehabilitation programs will affect any estimated reductions included in Defendants' Response, to the extent Defendants' Response relies on rehabilitation programs. Lastly, Mr. Lewis's declaration is responsive to the Three-Judge Court's fourth inquiry regarding Governor Schwarzenegger's budget proposal previously submitted to the California Legislature that called for a reduction of up to 37,000 inmates over a two-year period aimed at addressing California's historic budget deficit.

4. Attached as Exhibit D is the declaration of Scott Kernan, Undersecretary of Operations for CDCR. Mr. Kernan's declaration is responsive to the Three-Judge Court's first

inquiry regarding the calculations through which Defendants obtained the estimates of the population reductions associated with the proposed actions in Defendants' Response.

5. Attached as Exhibit E is the declaration of Sharon Aungst, Chief Deputy Secretary of the Division of Correctional Health Care Services for CDCR. Ms. Aungst's declaration is responsive to the Three-Judge Court's second inquiry regarding all budget reductions, announced or implemented in 2009, that affect CDCR's provision of medical or mental health services and otherwise affect the size of the inmate population.

6. Attached as Exhibit F is the declaration of Robert Ambroselli, Acting Director, Division of Adult Parole Operations for CDCR. Mr. Ambroselli's declaration is responsive to the Three-Judge Court's third inquiry regarding the specific measures that the State will take to ensure public safety through reentry and diversionary programs, including a catalogue of current programs.

7. Attached as Exhibit G is the declaration of Elizabeth Siggins, Acting Chief Deputy for Adult Programs, CDCR. Ms. Siggins's declaration is similarly responsive to the Three-Judge Court's third inquiry regarding the measures that the State is taking to support and assist counties and other community-level providers of rehabilitation and reentry programs and of any steps it will take or has taken to increase, reduce, or eliminate support or assistance.

The submission of the attached Defendants' Response and declarations, as required by the Three-Judge Court's October 21, 2009 Order, is not an admission that this Court's order meets the requirements of the Prison Litigation Reform Act (PLRA). Nor is the submission of the attached documents an admission that Defendants' September 18, 2009 Population Reduction Plan was not in compliance with this Court's August 4, 2009 Order.

As will be argued in the U.S. Supreme Court, the Three-Judge Court erred in its rulings and orders. Thus, the submission of these attachments, including Defendants' Response, does not constitute waiver of any issue previously raised before this Court and which may be raised in the U.S. Supreme Court, including, but not limited to, whether the Three-Judge Court was properly convened; whether the Three-Judge Court misconstrued the PLRA's requirement that crowding is the primary cause of the violation of a federal right; whether the population cap of 137.5% of design capacity satisfies PLRA's "least intrusive" and "narrowly drawn" requirements; and whether the Three-Judge Court improperly refused to permit the State from introducing evidence "relevant only to determining whether the constitutional violations found by the *Plata* and *Coleman* courts were 'current and ongoing.'" (Aug. 4, 2009 Opinion and Order, at 54 fn. 42.)

DATED: November 12, 2009 HANSON BRIDGETT LLP

By: /s/ Paul B. Mello
PAUL B. MELLO
Attorneys for Defendants
Arnold Schwarzenegger, et al.

DATED: November 12, 2009 EDMUND G. BROWN JR.
Attorney General of
the State of California

By: /s/ Kyle Lewis
KYLE LEWIS
Deputy Attorney General
Attorneys for Defendants
Arnold Schwarzenegger, et al.

EXHIBIT A

State of California—
Department of Corrections and Rehabilitation
Arnold Schwarzenegger, Governor

OFFICE OF LEGAL AFFAIRS
Benjamin T. Rice
General Counsel
P.O. Box 942883
Sacramento, CA 94283-0001

[LOGO]

November 12, 2009

Mr. Paul Mello
Hanson Bridgett LLP
425 Market Street
San Francisco, CA 94244-2550

Dear Mr. Mello:

Attached please find Defendants' response to the October 21, 2009, Three-Judge Court Order.

Sincerely,

/s/ Benjamin T. Rice
BENJAMIN T. RICE
General Counsel, Office of Legal Affairs
California Department of Corrections
and Rehabilitation

Attachments

STATE DEFENDANTS' NOVEMBER 12, 2009 RESPONSE TO THE THREE-JUDGE COURT'S OCTOBER 21, 2009 ORDER TO REDUCE PRISON POPULATION TO 137.5% OF DESIGN CAPACITY

BACKGROUND AND SUMMARY OF RESPONSE

On August 4, 2009, this Court ordered the State to produce a prisoner reduction plan that would, within two years, reduce the State's prison population to 137.5% of design capacity—i.e., a reduction of more than 40,000 prisoners over a two-year period.[1] Defendants subsequently presented the Three-Judge Court with a plan to safely reduce the State's prison population over time. It did not achieve the prisoner reduction that the Court desired on the timeframe the Court ordered, because the State's plan (the September 18, 2009 Plan) reflected the State's goal to implement long-term prison reform that enhanced public safety and reduced the prison population. Although the State's plan significantly reduced the prison population over time while the number of State prisoners was projected to increase, to be sure, this plan was not designed as a short-term fix for prison crowding. But the Court rejected the State's plan and ordered the State to present a new plan that, "most important, provides for a reduction of the prison population to 137.5% of design capacity within two years."

Without waiving any appellate rights, conceding the appropriateness of the Three-Judge Court's prior rulings and findings, or admitting that the prisoner

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[1] Based on the evidence at the time of trial, the Three-Judge Court estimates the prisoner reduction to be approximately 46,000 inmates. Because the actual prison population fluctuates over time, the estimated reduction does as well.

release order issued by the Three-Judge Court can be implemented without substantially adversely impacting public safety and the operation of the criminal justice system, Defendants submit this Response as required by the Three-Judge Court's October 21, 2009 order to meet the court-selected population figure of 137.5% of design capacity for California's prisons by the end of 2011.

In this Response to the Three-Judge Court's October 21, 2009 order, Defendants continue to propose the following items from their September 18, 2009 Plan, for which they already had the authority through legislation or executive or administrative powers:

1. Pre-Custody Reforms: California Community Corrections Performance Incentives Act of 2009.
2. In-Custody Reforms: Credit-Earning Enhancements.
3. Parole Reforms: (a) "Summary Parole;" (b) Parole Violation Decision Making Instrument; and (c) Reentry Courts.
4. Administrative Changes: (a) California Out-of-State Correctional Facility Expansion; (b) Community Correctional Facilities Utilization; (c) Commutations of Sentences; (d) Discharge of Deported Parolees; and (e) Alternative Sanctions for Violations of Parole.
5. Increased capacity through construction of new infill projects, healthcare projects, conversion of former Division of Juvenile Justice sites, and reentry projects.

Several of the reforms identified above were recently enacted by the State's executive and legislative branches. Moreover, the Defendants committed in their September 18, 2009 Plan, and remain committed now, to seeking additional State law changes through the State Legislature. Nonetheless, in rejecting the State's September 18, 2009 Plan, the Court ordered the State to identify State laws that limit the Defendants' ability to implement population reduction measures, and suggested that it might waive State laws to achieve the reduction it desires. Although the Defendants have complied with the Court's order, they do not believe it is appropriate for this federal Court to waive State laws. However, the prisoner reduction that this Court seeks—a reduction of more than 40,000 prisoners in two years—can only be accomplished if the State Legislature enacts new laws and/or this Court orders changes to State laws, as discussed in this Response. Thus, Defendants present the following proposals to reach the court-ordered population figure of 137.5% of design capacity within two years. Some of these proposals were included in the September 18, 2009 Plan, but the State Defendants had no ability to implement them at that time absent additional legislation or court orders:

1. Additional inmates housed in out-of-state facilities.

2. Changing of property crime thresholds.

3. Establishing alternate custody options for low-risk offenders.

4. Accelerating construction projects under AB 900.

5. Additional use of private in-state facilities.

6. County jail time for enumerated felonies.

The following discussion contains two sections: (1) a section discussing the proposals from the September 18, 2009 Plan that require no additional legislation or court orders; and (2) a section discussing the additional proposals, some of which were originally included in the September 18, 2009 Plan, that require either legislation or court orders to accomplish. The Table at the end of this Response sets forth the population reduction figures in six-month increments as required by the Three-Judge Court's order. In general, these estimates represent CDCR's best effort to project future impacts to a population that is dynamic and will change in ways that are not known today. Submitted concurrently with this Response are declarations addressing the Court's questions posed in its October 21, 2009 Order.

SECTION ONE

PROPOSALS FROM THE SEPTEMBER 18, 2009 PLAN THAT REQUIRE NO ADDITIONAL LEGISLATION OR COURT ORDERS TO IMPLEMENT

Defendants maintain that the September 18, 2009 Plan is the most effective way to safely and responsibly reduce its population and the elements of that plan are the foundation for this Response. Below, Defendants summarize the proposals of the September 18, 2009 Plan and address the questions from the Three-Judge Court's October 21, 2009 order. (Other answers are in the concurrently-filed declarations.) Specifically, this Court directed Defendants to set forth effective dates and to estimate reductions in

population expected after six, twelve, eighteen, and twenty-four months after implementation. (Oct. 21, 2009 Order at 2:25-28.) Also, this Court ordered Defendants to "(1) explain the calculations through which they obtained the estimates of the population reductions associated with each action that they propose; (2) identify the assumptions underlying those calculations; and (3) explain why those assumptions are reasonable." (*Id*. 3:2-5.)

To respond to the Three-Judge Court, Defendants submit a Table that estimates the impact of the proposals in six month increments. As demonstrated in the Table, there will be a period of time during which Defendants will ramp up the programs and therefore it appears as though there is a delayed realization of the population reduction.

For each eligible number, in generating estimates of the impact on the reduction in average daily population (ADP), Defendants generated estimates based on eligible populations and factored in a ramp-up period, overlap with other programs, etc., in an attempt to obtain the most reasonable and reliable population reduction estimates. For the population reduction measures, CDCR chose to conservatively estimate the impact in order to pick the most reliable and achievable numbers. (*See* generally Decl. of Jay Atkinson describing the methodology employed by CDCR in calculating its population reduction estimates, filed concurrently.)

I.

LEGISLATIVE AND ADMINISTRATIVE REFORMS

A. PRE-CUSTODY REFORMS: California Community Corrections Performance Incentives Act of 2009

The recent passage of Senate Bill 18 (SB 18)[2] creates a system of rewards for probation success by establishing the California Community Corrections Performance Incentives Act of 2009. The community corrections program created by this act will authorize counties to receive funding for implementing and expanding evidence-based programs for felony probationers. Counties will be required to track specific probation outcomes and, depending on the success of those outcomes, may be eligible for "probation failure reduction incentive payments" or "high performance grants." The new funding model created by SB 18 will sustain funding for improved, evidence-based probation supervision practices. By incentivizing probation success, California will lower the number of probationers sent to prison each year.

Defendants estimate this program will net an approximate 1,915 reduction in CDCR's ADP by December 31, 2011. Defendants were able to estimate this reduction by utilizing information in CDCR's Offender Information Services Branch's (OISB) data warehouse. CDCR's OISB compiles and retains summary statistical information about inmates and parolees. The OISB data reflected that CDCR receives

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[2] Sen. Bill No. 18 (2009 3d Ex. Sess.). The third extraordinary legislative session ended on October 26, 2009. These proposals become law and operative on January 25, 2010.

approximately 19,150 new admissions as a result of felony probation revocations in a calendar year. CDCR then made the assumption that the average return for revocation was one year and took the conservative estimate that this program would have a ten percent success rate.

B. IN-CUSTODY REFORMS: Credit Earning Enhancements

The passage of SB 18 also provides a number of credit earning enhancements. First, it provides one day of sentence credit for every day served in county jail from the time of sentencing. Prior to the passage of SB 18, the law provided one day of credit for every two days served in county jail. Second, it provides eligible inmates up to six weeks of credit per year for completion of approved programs. This approach to incentivizing good behavior for program completions has been suggested by several experts, including in the Expert Panel Report. Third, it provides that all parole violators returned to custody who are otherwise eligible should receive one day of credit for each day served. Prior to the new law, only some violators received such credit. Fourth, it provides two days of credit for every one day served once the inmate is endorsed to transfer to a fire camp, rather than providing such credit only after the inmate actually participates in the camp. Finally, it provides a consistent rule of one day of credit for every day served for all eligible inmates, whether those inmates are on a waiting list for a full-time assignment, participating in college, or undergoing reception center processing, so long as the inmate is discipline-free during that time. Previously, the law provided a similar credit structure, but did so through the existence, for example, of a "bridging program," whereby inmates in

reception centers sign up for self-study programs and receive credit. This legislation makes credit earning consistent while obviating the need for a bridging program.

Defendants estimate this program will net an approximate 2,921 reduction in CDCR's ADP by December 31, 2011. The reduction in ADP for this proposal at the six, twelve, eighteen and twenty-four month mark can be found on Table 1. Defendants estimated the ADP reduction for this legislation by utilizing data at CDCR's OISB. CDCR has a simulation model that is used to create population projections for the future. This particular proposal is one that can use the simulation model to determine a net effect on the population on a month by month basis. Insofar as this proposal overlaps the proposal to house individuals in county jail who are convicted of certain enumerated offenses, CDCR discounted the reduction from this proposal by 15%.

C. PAROLE REFORMS

1. "Summary Parole"

The enactment of SB 18 creates a new program of "summary parole" whereby CDCR is prohibited from returning to prison, placing a parole hold, or reporting to the Board of Parole Hearings, any parolee who meets all of the following conditions: (1) is not a sex offender;[3] (2) has not been committed to prison for a sexually violent offense;[4] (3) has no prior conviction for a sexually violent offense; (4) has no instant or

[3] California Penal Code, § 290, et seq. Subsequent references will be to the Penal Code unless otherwise noted.

[4] California Welfare and Institutions Code, section 6600(b).

prior convictions that are violent[5] or serious;[6] (5) has not been found guilty of a serious disciplinary offense as defined by CDCR during his or her current term of imprisonment; (6) is not a validated prison gang member or associate, as defined in CDCR regulations; (7) has not refused to sign any written notification of parole requirements or conditions; and (8) has not been determined to pose a high risk to reoffend pursuant to a validated risk assessment tool.[7] Other offenders will be subject to traditional parole supervision upon release from prison.

Defendants anticipate that "summary parole" will reduce CDCR's institutional population because, when fully implemented, CDCR will be precluded from revoking parole and returning low risk parolees to prison for parole violations.

Defendants estimate this program will net an approximate 4,556 reduction in CDCR's ADP by December 2011. Defendants estimated the 4,556 reduction in ADP by first identifying the total number of adult parolees in 2008 that were non-serious, non-violent, non-sex offenders, with no prior serious or violent offenses, which was converted to a percentage and applied to the Spring 2009 Population Projections number of parolees to give an updated number of applicable parolees. Then using data from OISB, the percentage of this population that were low and moderate risk were applied to estimate the applicable

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[5] § 667.5 (c).

[6] § 1192.7 (c).

[7] CDCR intends to employ the California Static Risk Assessment tool, a validated tool that predicts an offender's risk to reoffend on the basis of static information received from CDCR and the California Department of Justice.

parole population. Then it was assumed that a like percentage of the total number of parole violators who return to custody (PV-RTC) would not go to prison, and this determined the total expected prison ADP reduction. Then it was assumed that it would take approximately five months for the total impact of the ADP reduction to be realized so that was calculated to reduce the ADP in 2009-10. The 4,556 number is based on the best knowledge available at the time. Of course, actual implementation may vary from these numbers. Factors that could not be accounted for include: 1) crimes that do not show up on OBIS such as those committed in other states that may render an individual ineligible; and 2) changes in local prosecutorial behavior resulting in some of these offenders coming to prison with a longer sentence as a parole violator with a new term (PV-WNT).

2. The Parole Violation Decision Making Instrument

Senate Bill 18 requires that CDCR employ a parole violation decision making instrument (PVDMI) to determine the most appropriate sanctions for parolees who violate conditions of parole. As stated in more detail in the September 18, 2009 Plan, the PVDMI is an effective tool in placing parolees in the right programs and returning the high risk parole violators to prisons thereby increasing public safety while decreasing recidivism.

At this time, CDCR does not have sufficient information upon which to base a reduction in population. However, the decision making instrument has produced uniform, policy driven responses to violations of parole. In this way, CDCR can effect a cultural change at the field level to afford security to field staff that the CDCR administration supports and

encourages the use of interim sanctions in response to violations of parole. It is too early in its implementation to identify a drop in returns to custody at this time though CDCR is hopeful that it will begin to see the impact of this policy in the near future.

3. Reentry Courts

Senate Bill 18 also authorizes CDCR to collaborate with the California Administrative Office of the Courts to establish and expand drug and mental health reentry courts for parolees. These reentry courts will provide an option for parolees with drug and mental health needs to receive highly structured treatment in the community, under the close supervision of their parole agent and the court, rather than being returned to prison for violations that may be related to those needs. The legislation provides that for participating parolees, the court, with the assistance of the parolee's parole agent, "shall have exclusive authority to determine the appropriate conditions of parole, order rehabilitation and treatment services to be provided, determine appropriate incentives, order appropriate sanctions, lift parole holds, and hear and determine appropriate responses to alleged violations."

The implementation of the reentry courts may have a significant impact on reducing the number of mentally ill inmates in CDCR because it should reduce the number of parolees with mental illness returning to prison.

Defendants anticipate a reduction of 435 ADP by December 2011. This ADP estimate was developed during the budget process, and it was associated with a $10 million budget reduction. CDCR does not have any additional information to provide on how effec-

tive this program will be in reducing returns to custody.

D. ADMINISTRATIVE CHANGES

1. California's Out-of-State Correctional Facility Expansion

Defendants will expand the California Out-of-State Correctional Facility (COCF) program, which has as its primary purpose removing non-traditional beds and relieving crowding by transferring CDCR inmates to contracted out-of-state facilities. The COCF program was established in October 2006 under the Governor's Prison Overcrowding State of Emergency Proclamation. Assembly Bill 900 similarly authorized CDCR to transfer inmates out of state, but imposed additional restrictions on the transfer of inmates with medical and mental health conditions. CDCR currently maintains approximately 8,000 inmates in out-of-state facilities. Beginning in approximately February 2010, the COCF program will expand and CDCR has signed contracts to include up to 2,416 new Level III beds. By approximately January 2011, CDCR anticipates housing a total of 10,468 inmates at out-of-state facilities. The COCF program has been tremendously successful.

2. Community Correctional Facilities Utilization

Defendants intend to better utilize existing private Community Correctional Facilities (CCFs) in California to assist in the reduction of the prison population. CDCR established thirteen CCFs throughout California to house low-level inmates. CCFs prepare these inmates for their return to the community on parole. Robust oversight of the CCFs is already in place. However, CCFs have been underutilized by CDCR in the past, primarily because appropriate male inmates

are also eligible for other types of housing, including minimum security facilities and camps. Yet, there appears to be an abundance of female inmates who are eligible for placement into these facilities.

Accordingly, CDCR recently closed three of these male facilities. The Information for Bid (IFB) will be sent out on or about January 27, 2010, with the last day for bidders' letters of inquiry on February 12, 2010.

Defendants estimate this program will net an approximate 800 inmate reduction by December 31, 2011.

3. Commutations of Sentence

The Governor will review cases of certain deportable inmates under his discretionary constitutional clemency authority. A commutation of sentence would result in an inmate's release from State custody into federal custody and deportation.

Defendants estimate this program will reduce CDCR's ADP by approximately 600 by December 31, 2011.

4. Discharge of Deported Parolees

Earlier this year CDCR implemented a new policy to discharge from parole the over 12,000 criminal aliens who have served their full state prison sentences and, upon release to parole, have been deported by the federal government. Previously, California had retained those criminal aliens on parole, even after their deportation. Under CDCR's new policy, those parolees have been discharged and additional parolees will be discharged from parole on an ongoing basis as CDCR receives confirmation of their deportation from the federal government. This

new policy has resulted in fewer parolees being returned to state prison for parole violations and provides an incentive for federal prosecution of these offenders.

This proposal was in effect earlier this year and was accounted for in the new Fall 2009 Population. Projections set forth in the Table at the end of this Response. Accordingly, the numbers previously stated in the September 18, 2009 Plan (at pp. 14, 19.) are not set forth separately in the Table.

5. Alternative Sanctions for Violations of Parole

CDCR will make greater use of electronic monitoring systems such as global positioning systems (GPS), for parole violators in lieu of revocation and re-incarceration. The expanded use of GPS and other electronic monitoring systems will permit CDCR to monitor those offenders outside of state prison for parole violations.

Defendants estimate this program will net an approximate 1,000 reduction in CDCR's ADP by December 31, 2011. This reduction reflects an assumption that CDCR will begin diverting offenders in March 2010, and that it will be able to acquire 300 GPS units per month until September 2010, when there will be 2,000 units in use. If the system truly diverted inmates for every day they would have otherwise spent in prison, the reduction in ADP would actually be 2,000. The 50% discount assumes that there will be processing time between offenders that wear the device and that, on average, a revocation action to prison would have been shorter than the time given to an inmate to wear GPS as a sanction.

II.

INCREASED CAPACITY

Assembly Bill 900 (AB 900) was passed by a bipartisan Legislature and signed into law by Governor Schwarzenegger on May 3, 2007. AB 900 allocates $7.6 billion, of which $6.4 billion is designed to reform CDCR by reducing prison overcrowding, increasing rehabilitation programs, and providing more beds for all inmates, including those requiring medical and mental health care. AB 900's comprehensive plan immediately relieved overcrowding by providing for additional out-of-state transfers. AB 900 also provides for new rehabilitation programs and reentry facilities to ease parolees' transition back into California communities, thereby reducing recidivism, relieving prison overcrowding, and ensuring public safety.

The descriptions below are almost entirely the same as was presented to this Court in the State's September 18, 2009 Plan. Where numbers or timelines have changed, Defendants identify the discrepancy for the relevant project(s).

A. INFILL PROJECTS

Construction projects will result in new annex housing units and renovation of existing facilities. These projects will add bed capacity as well as additional office and treatment space to relieve operational pressures throughout CDCR institutions.

Newly constructed facilities are planned in standalone units and will operate semi-autonomously from the main institutions, though some space and/or functions, such as administrative services, may be shared by the main institutions to ensure the newly

constructed facilities are fully serviced. Each newly constructed facility will have appropriate programming space and staffing for the population to be served.

Renovated facilities primarily represent current or former juvenile correctional facilities that are being repurposed to serve an adult male population. All renovated facilities will also provide for the reduction of nontraditional beds, and will have the requisite amount of programming space and staff for their intended populations. A description of each project follows by phase of funding as outlined in AB 900.[8] There are a few projects that are not funded through the AB 900 appropriation and those projects are noted.

1. *Kern Valley State Prison*

This project will result in 930 new beds in a Level IV semi-autonomous facility at the existing Kern Valley State Prison site, with the addition of five housing units on 33 acres using the 270 design celled-bed prototype. This construction will include space for rehabilitative programming (i.e., vocational, academic, substance abuse), work opportunities, and a health services building of approximately 22,000 square feet. A portion of these beds will be wheelchair-compliant beds.

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[8] CDCR is currently pursuing legislation to redirect $1 billion from its infill funding appropriation under AB 900 to the healthcare funding appropriation. The time lines set forth in this Response may change depending upon passage of that legislation. In addition, Defendants anticipate funding the proposed Consolidated Care Facility with the $1 billion in funds redirected from the infill appropriation.

This project will be submitted to the Joint Legislative Budget Committee (JLBC) for its approval in early 2010 with a request for State Public Works Board (PWB) approval and interim financing from the Pooled Money Investment Board (PMIB) to immediately follow. Necessary environmental impact review (EIR) documents are already underway. If requisite approvals are obtained, there are no legal challenges, and there are no construction delays, these beds should come on line in or about Fiscal Year 2012-2013.

2. *Reception Center—Southern California*

This project will result in 943 new beds in a cell-design semi-autonomous facility with five housing units, including the support space necessary to house reception center inmates. This project will also include a health services building to accommodate this population. Its location will be on the grounds of the California Institute for Men in Chino where CDCR's need for additional reception center beds is greatest. A portion of these beds will be wheelchair-compliant beds.

The Reception Center Prototype planning is being coordinated with the proposed renovation at the Heman G. Stark facility. If requisite approvals are obtained, there are no legal challenges, and there are no construction delays, these beds should come on line in or about Fiscal Year 2012-2013.

3. *Wasco State Prison—Level IV Celled Facility*

This project builds a 1,896 bed Level IV semi-autonomous celled facility based on CDCR's 180-design prototype. This project includes eight housing units, with support and programming space planned for available land located on the unused land at the

existing prison in Wasco. This project will also include a Correctional Treatment Center (CTC) to serve the population and a portion of the overall beds will be wheelchair-compliant.

This project is currently proposed for funding in Phase 2 of AB 900. If requisite approvals are obtained, there are no legal challenges, and there are no construction delays, these beds should come on line in or about Fiscal Year 2012-2013.

B. DIVISION OF JUVENILE JUSTICE RENOVATIONS

1. *Heman G. Stark Conversion*

This project renovates an existing 1,200-cell Department of Juvenile Justice facility in Chino. It includes the installation of design elements necessary to house an adult male population (i.e., lethal electrified fence, guard towers, etc.), ADA improvements, expanded or new administrative support buildings, and a new health services building. This plan provides for double-celling a portion of the facility and envisions approximately 1,800 beds. If requisite approvals are obtained, there are no legal challenges, and there are no construction delays, 700 beds should come on line in or about December 2010, and 1,100 beds in or about June 2011.

The description above, submitted as a part of the September 18, 2009 Plan, differs slightly from the November 6, 2009 long-range bed plan submitted in the *Coleman* court. The September 18, 2009 Plan set out to establish the net gain of 1,800 beds to the adult male population. These beds are being phased into CDCR's design capacity based on the vacancy of DJJ's ward population at Stark. The November 6, 2009 *Coleman* filing, on the other hand, reflects that

these beds will be renovated to provide bed and treatment space for a designated EOP and medical population and reflects only the number of beds specific to the *Coleman* population. These mental health beds will come on line in or about Fiscal Year 2013-2014. CDCR continues to work on developing the scope of this project with the *Plata v. Schwarzenegger* Receiver and the *Coleman* Special Master. The activation schedule submitted in the *Coleman* filing reflects full activation for the *Coleman* population.

2. *Department of Juvenile Justice Conversion—Paso Robles*

This project renovates a former juvenile justice facility located in Paso Robles. This facility currently includes both dorms and an existing 270-celled prototype. The intended capacity is approximately 899 beds which includes some double-celling of the population. This is intended for a general population facility with a health-care mission and will serve elderly inmates with healthcare needs. The scope of work would include a new lethal electrified fence to increase the security level of the facility from a Level I to a Level II, as well as building code updates, ADA improvements, and an expanded healthcare facility. A portion of these beds will be wheelchair-compliant beds.

This project is anticipated to be submitted to the JLBC in Fall 2009 for approval and will subsequently be submitted to the State PWB and the PMIB for approval and financing. The EIR document is already underway. If requisite approvals are obtained, there are no legal challenges, and there are no construction delays, these beds should come on line in or about Fiscal Year 2012-2013.

3. *Department of Juvenile Justice Conversion—DeWitt*

This project renovates a former juvenile justice facility located in Stockton. The intended capacity is approximately 1,133 beds which includes some double-celling of the population. The facility is intended for a general population facility with a health care mission and will serve inmates with medical outpatient needs and inmates requiring Enhanced Outpatient Program mental health services. CDCR is consulting with the *Plata* Receiver to identify the appropriate scope for the project.

This project is currently proposed for funding in Phase 1 of AB 900. If requisite approvals are obtained, there are no legal challenges, and there are no construction delays, these beds should come on line in or about Fiscal Year 2013-2014.

C. HEALTHCARE PROJECTS

The healthcare projects described below include renovation and expansion of existing facilities to add housing, office, and/or treatment space to further meet the healthcare needs of CDCR's adult inmates at its existing prisons. Several of these projects are being constructed pursuant to specific court orders. Also, many of these projects are being planned in consultation with the *Plata* Receiver.

1. *Northern Consolidated Care Facility*

This project provides for a large healthcare facility serving a medical and mental health population to include specialized housing, treatment, and support space at the site of the former Karl Holton Juvenile Correctional Facility in Stockton and for which an environmental document has been filed with the State Clearinghouse. This facility would provide ap-

proximately 1,722 new beds serving high acuity medical and mental health patients, including mental health crisis beds.

The population number and occupancy dates for this project have been refined since the September 18, 2009 Plan. The bed number has increased from 1,702 to 1,722 and the occupancy date for the project has been set out to Fiscal Year 2013-2014. The original schedule submitted in the September 18, 2009 Plan was predicated on the *Plata* Receiver's delivery method. The current schedule, however, is based on that authority currently maintained by CDCR for design bid/build approach to construction.

2. *San Quentin State Prison—Correctional Treatment Center (Building 22)*

This project is a renovation and replacement of the existing infirmary at San Quentin State Prison and will include a Correctional Treatment Center providing 41 medical and mental health beds. Assuming no obstacles arise, anticipated completion is in or about January 2010.

3. *California Men's Colony—Mental Health Crisis Beds*

This project builds a 50-bed mental health crisis facility on available land at the California Men's Colony in San Luis Obispo. This project scope and schedule are being coordinated with the Special Master in the *Coleman* case. If requisite approvals are obtained, there are no legal challenges, and there are no construction delays, Defendants anticipate first occupancy in these beds in August 2012 with full occupancy by October 2012 as reflected in the activation schedule submitted with the *Coleman* November 6, 2009 long-range bed plan.

4. *California State Prison, Lancaster—Enhanced Outpatient Program*

This project builds additional treatment and office space to increase by 150 the number of Enhanced Outpatient Program mental health inmate patients served at California State Prison, Lancaster. This project's scope and schedule are being coordinated with the Special Master in the *Coleman* case. If requisite approvals are obtained, there are no legal challenges, and there are no construction delays, Defendants anticipate activation of this treatment and office space in July 2012 with full activation by mid September 2012 as reflected in the activation schedule submitted with the *Coleman* November 6, 2009 long-range bed plan.

5. *California Medical Facility—Intermediate Care Facility*

This project builds a 64-bed Intermediate Care Facility to serve mental health patients on the grounds of the California Medical Facility. This project scope and schedule are being coordinated with the Special Master in the *Coleman* case. If requisite approvals are obtained, there are no legal challenges, and there are no construction delays, anticipated completion is in or about November 2012 as reflected in the activation schedule submitted with the *Coleman* November 6, 2009 long-range bed plan.

6. *California Medical Facility—Enhanced Outpatient Program*

This project adds 67 Enhanced Outpatient Program—General Population beds and builds office and treatment space to serve 600 Enhanced Outpatient Program—General Population inmate-patients on the grounds of the California Medical Facility. This

project's scope and schedule are being coordinated with the Special Master in the *Coleman* case. If requisite approvals are obtained, there are no legal challenges, and there are no construction delays, anticipated completion is in or about April 2013 as reflected in the activation schedule submitted with the *Coleman* November 6, 2009 long-range bed plan.

7. *California State Prison, Sacramento—Enhanced Outpatient Program*

This project builds office and treatment space to serve 192 Enhanced Outpatient Program mental health inmate patients on the grounds of California State Prison, Sacramento. This project scope and schedule are being coordinated with the Special Master in the *Coleman* case. This project is not funded through AB 900. If requisite approvals are obtained, there are no legal challenges; and there are no construction delays, anticipated completion is in or about November 2011 as reflected in the activation schedule submitted with the *Coleman* November 6, 2009 long-range bed plan.

8. *San Quentin State Prison—Condemned Inmate Complex Correctional Treatment Center*

This project builds 1,152 beds in a new Condemned Inmate Complex on the grounds of San Quentin. This project will include a 24-bed Correctional Treatment Center serving the medical and mental health needs of the inmate population. CDCR will submit this project for funding in Fall of 2009 and expects to award contracts and break ground in March 2010. This project is not funded through AB 900. If requisite approvals are obtained, there are no legal challenges, and there are no construction delays,

anticipated completion is in or about Fiscal Year 2011-2012.

9. *Salinas Valley State Prison—Enhanced Outpatient Program*

Defendants identified two Salinas Valley State Prison (SVSP) projects in their September 18, 2009 Plan: 1) a 96-Bed Enhanced Outpatient Program—General Population (EOP-GP) project that would convert an existing housing unit to provide EOP-GP housing for 96 EOP-GP inmates, and would expand the existing mental health services building to provide the additional treatment and office space needed for this increased EOP-GP capacity;[9] and 2) a 72-bed EOP Administrative Segregation Unit (ASU) that would provide housing, treatment, and office space for 72 EOP-ASU inmate-patients.

After careful analysis and, in consultation with the *Coleman* Special Master as well as the *Plata* Receiver, CDCR determined that the most feasible alternative would be to replace the two SVSP projects with a new consolidated project that will provide treatment and office space for 300 inmate-patients.

This new project, known as the 300 EOP-GP Treatment and Office Space A-Quad Project, will require the design and construction of a new treatment and office building on "A" yard and the relocation of all EOP-GP inmate-patients to that yard. This project will result in 12 more EOP-GP beds than CDCR's previous plan.[10] The 72-bed EOP-ASU unit

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[9] This project was scoped to include the existing 192 EOP-GP inmate-patients, plus an additional 96 EOP-GP beds.

[10] The current EOP-GP Treatment and Office Space and Housing Unit Conversion Project is designed to provide treatment and office space for the existing 192 EOP-GP inmate-

will stay in its current location; that is, Buildings D1 and D2.[11] The existing Mental Health treatment space located on Facility D will accommodate the 72-bed EOP-ASU unit, and thereby negate the need for construction of treatment space for that population.

On November 6, 2009, Defendants sought approval from the *Coleman* Court to replace the two SVSP court-ordered projects with the new SVSP 300 EOP-GP Treatment and Office Space A-Quad Project. If requisite approvals are obtained, there are no legal challenges, and there are no construction delays, anticipated completion is in or about October 2013.

10. *California Institute for Women—Psychiatric Services Unit*

This project intends to renovate existing housing at the California Institute for Women in Chino to provide housing and treatment for a 20-bed Psychiatric Services Unit serving the mentally ill offender population. This project scope and schedule are being coordinated with the Special Master in the *Coleman* case. This project is not funded through AB 900. If requisite approvals are obtained, there are no legal challenges, and there are no construction delays, anticipated completion is in or about February 2011 as reflected in the activation schedule submitted with the *Coleman* November 6, 2009 long-range bed plan.

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patients, plus an additional 96 inmate-patients, for a total of 288 beds. The new 300 EOP-GP Treatment and Office Space A-Quad Project is designed to serve 300 inmate-patients, for an increase of 12 beds.

[11] The 72-bed EOP-ASU unit consists of 45 existing EOP-ASU beds as well as the 27 new beds that are part of Defendants' short-term bed plan filed on May 26, 2009, and which Defendants propose to make permanent.

11. *California State Prison, Sacramento—Psychiatric Services Unit*

This project provides office and treatment space to serve 152 Psychiatric Services Unit mental health inmate patients on the grounds of the California State Prison, Sacramento. This project scope and schedule are part of the construction projects proposed in the *Coleman* case.

If requisite approvals are obtained, there are no legal challenges, and there are no construction delays, anticipated completion is in or about May 2013 as reflected in the activation schedule submitted with the *Coleman* November 6, 2009 long-range bed plan.

12. *California State Prison, Corcoran—Enhanced Outpatient Program*

This project will add office and treatment space to serve an additional 45 Enhanced Outpatient Program mental health inmate patients on the grounds of California State Prison, Corcoran.

If requisite approvals are obtained, there are no legal challenges, and there are no construction delays, anticipated completion is in or about April 2013 as reflected in the activation schedule submitted with the *Coleman* November 6, 2009 long-range bed plan.

13. *Southern California Crisis Beds*

This project will site a new 60-bed unit, 30 beds of which will be designed as mental health crisis beds, at the Heman Stark facility in Chino. These beds were to be located initially at the Consolidated Care Facility. If requisite approvals are obtained, there are no legal challenges, and there are no construction

delays, these beds should come on line in or about Fiscal Year 2013, as reflected in the activation schedule submitted with the *Coleman* November 6, 2009 long-range bed plan.

14. *California Institute for Women—45 Bed Intermediate Care Facility*

This project will build a new 45-bed intermediate care facility at the California Institute for Women to serve the mental health population for female adults in the custody of CDCR. Preliminary plans are complete with this project and it is currently in the working drawings phase, with construction to be funded by AB 900 funds. The project scope and schedule are being coordinated with the *Coleman* Special Master. If requisite approvals are obtained, there are no legal challenges, and there are no construction delays, anticipated completion is in or about March 2012, as reflected in the activation schedule submitted with the *Coleman* November 6, 2009 long-range bed plan.

D. REENTRY PROJECTS

Pursuant to AB 900, reentry projects provide for the design and operation of secure community reentry facilities located in communities throughout the state. These facilities will hold a maximum of 500 inmates who are within 6-12 months of being released. These facilities will be autonomous facilities and have been designed to facilitate an intensive rehabilitative programming environment and include healthcare treatment space for the population to be served.

To date, eleven counties have agreed to locate a reentry facility to serve their population. The first reentry facilities are being planned in the counties of

Kern, Madera, San Joaquin (to also serve Amador and Calaveras), San Luis Obispo (to also serve Santa Barbara and San Benito), and San Bernardino. A reentry facility planned for San Diego is currently being sited. Additional counties have expressed interest in supporting reentry facilities in their communities.

If requisite approvals are obtained, there are no legal challenges, and there are no construction delays, Defendants estimate this program will build approximately 500 beds in or about Fiscal Year 2010-2011, 500 additional beds in or about Fiscal Year 2012-2013, 1,500 additional beds in or about Fiscal Year 2013-2014, and 5,500 additional beds in or about Fiscal Year 2014-2015.

SECTION TWO

ADDITIONAL REFORMS THAT REQUIRE EITHER FURTHER LEGISLATION OR FEDERAL COURT ORDERS

The Administration has demonstrated its willingness to reform the State's prisons, and the Administration will continue to push for meaningful reforms like the reforms adopted in SB 18. The following measures, however, cannot be accomplished administratively, and they will require legislative changes or federal court orders. The Defendants believe that it is not appropriate for this Federal Court to effect State law changes, and that such changes should be implemented by the State's executive and legislative branches. Moreover, as the Defendants pointed out in the September 18, 2009 Plan, they believe that State law waivers are not permissible here.[12] Nonetheless,

[12] The Court's August 4, 2009 order stated, "[s]hould any of defendants' proposed population reduction measures require the

pursuant to the Court's October 21, 2009 order, Defendants now identify, wherever possible, State laws that, if waived or changed by federal court order, would allow the Defendants to implement additional reduction measures.

A. ADDITIONAL CALIFORNIA OUT-OF-STATE CORRECTIONAL FACILITY EXPANSION

In addition to the 2,416 bed expansion set forth above, Defendants will work with the Legislature to remove the existing clause that calls for the termination of the out-of-state program. The 2006 Prison Overcrowding State of Emergency Proclamation suspended the consent provisions of Penal Code section 11191. However, it is unclear the extent to which CDCR will be able to rely on the Emergency Proclamation in the future for out of state transfers, and section 11191, which becomes operative on July 1, 2011, makes clear that inmates must consent to out of state transfers. This Court could immediately

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waiver of any provisions of state law, the state shall so advise the court, and shall explain why the requested waiver is permissible under 18 U.S.C. § 3626(a)(1)(b)." The State's September 18, 2009 Plan pointed out that this Court did not permit Defendants to introduce evidence regarding whether there are any current and ongoing violations of federal rights. Plaintiffs were also not required to prove, nor did they prove, that there are any current and ongoing violations. Thus, the State Defendants continue to preserve their objection that state law waivers are impermissible here, because State Defendants believe that the statutory requirements authorizing such waivers have not been satisfied. Furthermore, because the recent improvements to healthcare and the plans set forth throughout this submission provide a form of relief correcting alleged federal violations, the State Defendants have not and do not affirmatively seek the waiver of any State law under the PLRA (*see* 18 U.S.C. § 3626(a)(1)(B)(ii)-(iii)).

and indefinitely waive the consent provisions in section 11191 to allow out of state transfers to continue uninterrupted. Additionally, this Court could immediately waive the provisions in section 11191 requiring attorney consultations, which entails a costly and time consuming process. The Court could also waive the provisions of section 11191 that restrict CDCR's ability to transfer out of state inmates with serious medical and mental health conditions, and inmates in the mental health delivery system at the Enhanced Outpatient Program level of care or higher. These waivers would allow CDCR to continue to transfer inmates out of state indefinitely, expand the pool of inmates eligible for transfer, and expedite the transfer process. They would also facilitate CDCR entering into additional contracts, or establishing long-term contracts, with out-of-state facilities willing to house CDCR inmates.

With these changes, State Defendants estimate they will be able to expand the out-of-state program by approximately 1,500 beds by December 31, 2011, reducing its ADP by that amount.

B. PROPERTY CRIME THRESHOLDS

Numerous property crimes in California are punishable alternatively as a misdemeanor or a felony, depending on the dollar amount of the taking. For example, grand theft is punishable as a felony when the amount stolen exceeds $400, but is punishable as a misdemeanor when the amount stolen is $400 or less. In most cases, the threshold for determining the type of sentence imposed was established over 20 years ago. As time has passed and inflation risen, increasing numbers of these wobblers have become prosecutable as felonies, thereby resulting in

greater numbers of offenders eligible for prison sentences rather than jail sentences.

For thirty-nine of these property crimes, SB 18 increased the dollar threshold to present-day values. For example, property crimes where the threshold was set at $400 were increased to $950. The aim was to expose fewer offenders to felony prosecution and prison terms and thereby reduce the prison population. However, SB 18 left the threshold for grand theft itself unchanged, an omission that does not capture the impact of that offense, and also undermines the effect of having changed many other property crimes because they could alternatively be charged as grand theft. Defendants seek legislation to increase the threshold of grand theft to $950. If fully implemented, Defendants estimate this program will net an approximately 2,152 reduction in CDCR's ADP.

This is not a proposal for which a Court order could waive the appropriate change in state law as an affirmative action is required. Absent additional legislation, Defendants would require a court order requiring them to refuse admission of any person into state prison who was convicted of a felony that did not meet the $950 threshold. This proposal would reduce the ADP at CDCR's adult institutions by 2,152 in December 2011.

The estimates for this proposal were obtained by a file review of 577 cases of inmates who were sent to prison based on the violations of specific state code sections. The files were then reviewed to determine the number of inmates that would not have been returned to custody if the property threshold was raised in value. This number was then projected out to all of similarly situated inmates to arrive at an anticipated reduction in ADP.

C. ALTERNATIVE CUSTODY PROGRAM

The Administration will seek legislation to establish a program of alternative custody options for lower-risk offenders. Certain offenders would be eligible to serve the last 12 months of their sentence under house arrest with GPS monitoring. House arrest may include placement in a residence, local program, hospital, or treatment center. Eligible inmates include inmates with 12 months or less remaining to serve, elderly inmates, and medically infirm inmates. The custody criteria is:

- non-violent (current and prior terms)
- non-serious (current and prior terms)
- no sex offenders
- low or moderate risk on the California Static Risk Assessment
- no immigration hold
- did not serve a Security Housing Unit term during current term of incarceration
- no guilty finding for serious rules violations listed in Title 15, section 3315, subdivision (a)(3)(A) through (a)(3)(C), during current term of incarceration
- no history of escape
- no holds, warrants, detainers
- no stay in a Psychiatric Services Unit housing during current term of incarceration

Absent additional legislation, this Court would need to waive Penal Code section 1170(a), which requires a term of imprisonment in State prison. Additionally, the Court may need to waive article I,

sections 28(a)(5) and 28(f)(5) of the California Constitution.

The State estimates that this program will net an approximate 4,800 reduction in ADP by December 2011. The 4,800 ADP number is an estimate based on both eligible inmates in prison at the time (in July 2009, when the estimate was completed) and eligible new admissions projected to come into prison. The latter projection is based on a FY 08/09 intake cohort from court. This 4,800 ADP estimate also reflects a 35% discount for file review ineligibility (based on sample file reviews), a 3% discount to account for homeless parolees (based on Division of Adult Parole Operations' records for homeless parolees who would otherwise meet the criteria), and a 10% discount for those who would be unwilling to volunteer. The ADP figure is also based on an estimated length of sentence for the eligible population.

D. AB 900 CONSTRUCTION ACCELERATION

CDCR has cooperated with the *Plata* Receiver to develop CDCR's plan for healthcare beds, and has drafted legislation to enable CDCR to accelerate all of its construction authorized under AB 900 using alternative delivery methods. If the Legislature authorizes these amendments, CDCR would be able to expedite the construction of new capacity, including new healthcare facilities, and the construction of treatment and other support spaces to meet the needs of the *Plata* and *Coleman* class members.

Further, if so ordered by the Three-Judge Court, the following waivers of state laws may allow the State to complete some previously identified projects more expeditiously:

1. California Environmental Quality Act (CEQA) (Public Resources Code sections 21000-21177): The State's environmental review process is lengthy, and it invariably extends the timeframe to complete any of CDCR's construction projects. For example, with respect to the projects proposed in the State's November 6, 2009 Long-Range Mental Health Bed Plan, the CEQA process in many instances lengthens the construction timeline by more than 200 days, and in one instance (the Heman G. Stark conversion) by more than 450 days. Additionally, the environmental review process may result in litigation, which can further extend the timeframe for completing construction projects.

Waiving the CEQA process could potentially expedite construction on these projects. However, it is unknown whether the Joint Legislative Budget Committee would approve a project or if bond counsel would offer an unqualified bond opinion regarding the validity of AB 900 bonds if the Court waived the State's environmental review process. The authorization in AB 900 provides the only funding available for many of CDCR's projects. Joint Legislative Budget Committee approval is required under AB 900 and an unqualified bond opinion is necessary to market the bonds.

2. Public Contract Code (PCC) sections generally covering the approval and competitive bidding rules and requirements for State contracts:

a. Part 1 (sections 1100 et seq.)—General Administrative Provisions.

b. Part 2, Chapter 2, Article 2 (sections 10295 et seq.)—Approval of Contracts.

c. Part 2, Chapter 2, Article 3 (sections 10300 et seq.)—Competitive Bidding and Other Acquisition Procedures.

d. Part 2, Chapter 2, Article 4 (sections 10335 et seq.)—Contracts for Services.

e. Part 2, Chapter 3 (sections 12100 et seq.)—Acquisitions of IT Goods and Services.

f. Part 2, Chapter 3.5 (sections 12120 et seq.)—Acquisitions of Telecommunication Goods and Services.

E. HOUSE INMATES IN PRIVATE FACILITIES

An additional possible method to reduce the population to 137.5% of design capacity is to rapidly increase the number of available prison beds by expediting leasing, building, and/or operating new beds through establishment of private vendor contracts to house inmates and operate private correctional facilities in the State. Such waivers of state law would help expedite the contracting process and make available private correctional facilities ready for operation by a private vendor by August 2011.

The following is the list of waivers that would be required to achieve the most expedited establishment of newly constructed prison beds:

1. California Environmental Quality Act (CEQA) (Public Resources Code sections 21000-21177)—In order for the vendor to provide housing and operation services pursuant to the above-described contract with CDCR, the vendor would need to construct one or more correctional facilities. CEQA applies to discretionary "projects" proposed to be carried out or approved by public agencies. Arguably, the contract

between CDCR and the vendor may trigger CEQA in that the contract may be deemed an approval by CDCR of CEQA "projects" (including construction of a new facility). The CEQA compliance process is a time-consuming process and construction of new correctional facilities by the vendor would be further delayed if legal actions are brought to challenge the adequacy of CEQA compliance.

2. Public Contract Code (PCC) sections generally covering the approval and competitive bidding rules and requirements for State contracts (except for public works projects):

a. Part 1 (sections 1100 et seq.)—General Administrative Provisions.

b. Part 2, Chapter 2, Article 2 (sections 10295 et seq.)—Approval of Contracts.

c. Part 2, Chapter 2, Article 3 (sections 10300 et seq.)—Competitive Bidding and Other Acquisition Procedures.

d. Part 2, Chapter 2, Article 4 (sections 10335 et seq.)—Contracts for Services.

e. Part 2, Chapter 3 (sections 12100 et seq.)—Acquisitions of IT Goods and Services.

f. Part 2, Chapter 3.5 (sections 12120 et seq.)—Acquisitions of Telecommunication Goods and Services.

3. Article VII of the California Constitution—Civil service hiring requirements.

4. State Civil Service Act (Government Code sections 18500 et seq.)—The purpose of this Act is to

facilitate the operation of Article VII of the Constitution.

5. Government Code section 19130—Enumerated exceptions to the civil service hiring requirements. Waiver of this section would be needed to avoid any potential argument, even after waiver of the Article VII and the State Civil Service Act, that the existence of this section implies that contracting for personal services is not permissible unless the conditions under section 19130 are met.

The above list is a preliminary list of State laws that, if waived, would allow Defendants to expedite the process of contracting with vendors to operate private correctional facilities. However, given more time, other state law waivers or other federal court orders may be needed to accomplish this proposal.

If these waivers were obtained, it is estimated that CDCR could build, lease or contract for facilities for private vendors and reduce the population at the existing 33 adult institutions by 5,000 ADP by December 31, 2011.

F. JAIL TIME FOR ENUMERATED FELONIES

The Administration will seek legislation for the following enumerated offenses listed below that would allow the offenses to be charged as felonies, but would limit the maximum sentences to 366 days which could only be served in county jail. Thus, while convictions would result in imprisonment in county jail, the offenses would remain felonies within the meaning of section 17 of the Penal Code. This proposal does not apply to anyone who has a prior conviction set forth in Penal Code Section 1192.7(c) or have not suffered a strike within the meaning of Penal Code Section 667.5.

Absent legislation, the Court would have to order that CDCR not accept to State prison those enumerated crimes listed in this proposal.

The crimes for this proposal would be as follows:

- Health and Safety Code section 11350, subdivision (a). Possession of a controlled substance, including cocaine.
- Health and Safety Code section 11377, subdivision (a). Possession of a controlled substance, including methamphetamine.
- Penal Code section 476a. Check fraud.
- Penal Code section 487, subdivisions (b) and (c). Miscellaneous grand theft provisions involving agriculture, labor and real property.
- Penal Code sections 496 and 496d. Receiving stolen property.
- Penal Code section 666. Petty theft with a prior conviction of a certain offense.
- Penal Code section 667.5. Theft with a prior felony conviction of a certain offense.

The reduction in the ADP as a result of this proposal would be 11,815 by December 2011. To determine the reduction of ADP for this proposal, CDCR utilized data in OBIS. Specifically, CDCR looked at the number of admits to CDCR for these particular crimes. CDCR then estimated a reduction in ADP based on the average length of sentence for these individuals.

Three Judge Court-Ordered Response: Table 1

Fiscal Year		Current	Jun-2010	Dec-2010	Jun-2011	Dec-2011	Dec-2012	Dec-2013
Fall Population Projections[1]		168,427	167,453	167,535	169,345	170,164	171,940	174,001
Institution Population Reduction Measures								
	Probation Reform							
	Community Corrections	0	0	900	1,915	1,915	1,915	1,915
	Sentencing Reform							
	Enhanced Credit Earning	0	2,814	3,021	2,807	2,921	3,142	3,419
	Executive Authority							
	Expansion of Out-Of-State Placements[2]	0	1,434	2,352	2,416	2,416	2,416	2,416
	Expanded Utilization of Private Prisons	0	0	0	400	800	800	800
	ICE Commutations	0	300	600	600	600	600	600
	Parole Reform							
	Summary Parole	0	3,323	4,556	4,556	4,556	4,556	4,556
	Alternative Parole Sanctions	0	119	600	1,000	1,000	1,000	1,000
	Parole Reentry Courts	0	0	50	435	435	435	435
	New Construction[3]							
	DJJ Renovations	0	700	700	1,800	1,800	2,700	2,700
	Reentry	0	0	0	500	500	500	1,000
	Infill (including Healthcare)	0	64	125	125	125	1,436	7,111
	Further Legislation/Court-Ordered Authority							
	Property Crime Thresholds	0	425	1,700	2,121	2,152	2,152	2,152
	Alternative Custody	0	0	1,200	3,000	4,800	4,800	4,800
	No-Prison Felonies	0	7,753	11,633	11,815	11,815	11,815	11,815
	Private In-State Prisons	0	0	0	2,000	5,000	5,000	5,000
	Expansion of Out-Of-State	0	0	0	0	1,500	2,500	3,600
Total Population Reduction		0,000	16,932	27,437	35,490	42,335	45,767	53,319
Institution Population[4]		150,978	133,072	123,623	117,298	109,462	107,806	99,720
Institution Crowding Rate		190%	167%	155%	147%	137.5%	135%	125%

[1] The current population is based on the actual population count on November 4, 2009. The projections in June 2010 and thereafter assume the transfer of any backlogged inmates into state custody.
[2] Assumes cooperation from *Plata*, *Coleman*, *Perez*, and *Armstrong* courts.
[3] The beds identified on this table reflect the actual capacity for which they are being built. The double celling rate of these facilities vary by project. However, whatever the double celling rate, the beds or projects are being designed with an appropriate amount of program and clinical space to accommodate that number of inmates. Additionally, increases in capacity in 2014 and 2015 are not reflected in this chart.
[4] Excludes inmates in camps, private facilities and out-of-state facilities.

APPENDIX E

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;

* * * *