No. 09A234

IN THE

Supreme Court of the United States

GOVERNOR ARNOLD SCHWARZENEGGER, *et al.*,

Appellants,

v.

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

Appellees.

REPLY IN SUPPORT OF APPLICATION FOR A STAY

TO THE HONORABLE ANTHONY M. KENNEDY, ASSOCIATE JUSTICE OF THE U.S. SUPREME COURT AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT

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Nothing in plaintiffs-appellees' opposition diminishes the State's showings that a stay pending appeal should be entered because there is a "reasonable probability" that this Court will note probable jurisdiction and there is a "fair prospect" that it will find one or more reversible errors. Appellees do not and cannot respond to the central reason that probable jurisdiction and reversal are unusually likely here. That is, despite Congress's desire to limit federal court interference with the states' correctional facilities through passage of the Prison Litigation Reform Act ("PLRA"), the three-judge court issued the most invasive "prisoner release order" in history. By the district court's estimate, California will be required to reduce its prison population by 46,000 inmates within two years. Neither the court's methods nor its end result can be squared with the PLRA.

Appellees also offer no convincing argument against the State's showings that the remaining requirements for a stay have been satisfied. Appellees simply ignore the ample precedent upon which the State relied to demonstrate that irreparable harms already are being inflicted on the State as the order impedes the daily operations of the various branches of government. Appellees also overlook the irreparable harm likely to result once the prison population is reduced under the order. They rely heavily on the State's efforts to reform the prison system, which includes efforts to reduce the inmate population, but they ignore the fundamental difference between an Executive or Legislative branch proposal and state changes mandated by a federal court. The former reflects the political system at its best, the latter is a profound affront to federalism. Moreover, the State's executive and

legislative proposals to reform prison practices and amend the California Department of Corrections and Rehabilitation's budget are designed to meet a variety of goals while avoiding risks to the public. In contrast, the "prisoner release order" has a single, rigid goal: a population cap of 137.5%. Finally, appellees' argument concerning the balancing of the equities fails because it understates the irreparable harms to the State and overstates the burdens to the plaintiff classes by ignoring that the order does not appear likely to prevent harm to class plaintiffs in the near term, if ever, and that the existing single-judge district courts can and should prevent the types of imminent harms that appellees suggest a stay would create.

Accordingly, the application for a stay pending appeal should be granted.

I. THE DECISION BELOW PLAINLY IS A "PRISONER RELEASE ORDER," THUS THE APPEAL AND STAY APPLICATION ARE RIPE.

The principal contention of plaintiffs-appellees' opposition is that the factors relevant to a stay heavily weigh in their favor because any appeal from the decision below is premature. See, *e.g.*, Opp. 1-3, 8, 18-19, 22, 23-24, 36, 38. They argue that the order below is merely an "interim order" that does not become an appealable "prisoner release order" until the State submits a population reduction plan that is approved by the three-judge court. *E.g.*, *id. e.g.*, at 23-24. This argument lacks merit for a number of reasons.

As a threshold matter, appellees appear to confuse the standard for appealability pursuant to 28 U.S.C. § 1253, with a requirement that a final judgment issue prior to appeal. See Opp. 24 ("the August 4, 2009 order is not

final"); see also *id.* at 2, 8, 16, 19. Section 1253, however, provides that "any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, *an interlocutory or permanent injunction* in any civil action . . . required by any Act of Congress to be heard and determined by a district court of three judges." 28 U.S.C. § 1253 (emphasis added). Here, there is no question that the order below imposes injunctive relief. The State is enjoined to produce a plan to reduce the prison population by September 18 and thereafter to reduce the prison population pursuant to that plan, if it is consistent with mandate embodied in the court's opinion. See, *e.g.*, *Coleman*/*Plata*, 2009 WL 2430820, at *84 (E.D. Cal./N.D. Cal. Aug. 4, 2009) ("The order requires the [S]tate to reduce California's prison population to 137.5% design capacity within two years and to submit a plan within 45 days to implement our order."). The "actual contours of [any] final order" entered after the State were to submit a particular reduction plan are immaterial to whether jurisdiction exists, let alone the merits of the issues presented on appeal. Opp. 2. There is no doubt at this point that the district court's 188-page opinion decides the merits of the dispute between the parties and raises fundamental legal questions that warrant this Court's review on appeal. Accordingly, this appeal will "accelerat[e] a final determination on the merits" as Congress intended under Section 1253. *Swift & Co.* v. *Wickham*, 382 U.S. 111, 119 (1965).

Moreover, the three-judge court's own language makes plain that it already has issued a "prisoner release order" as defined by the PLRA. To be sure, further proceedings will flesh out the details of the burdens that will be imposed on the

State, but none of that matters if the district court erred, for instance, in holding that crowding is not the "primary cause" of appellees' alleged constitutional violations, or if this Court concludes that the three-judge district court acted prematurely or did not adopt the least restrictive remedy. *Contra* Opp. 24. As appellees acknowledge, see *id.*, the PLRA defines a "prisoner release order" as "any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or the effect of reducing or limiting the prison population." 18 U.S.C. § 3626(g)(4). The decision below, at minimum, has that purpose, even if not that immediate effect. As the three-judge court stated: "[W]e order defendants to reduce the prisoner population to 137.5% of the adult institutions' total design capacity." *Coleman*/*Plata*, 2009 WL 2430820, at *75. Indeed, similar examples abound. See, *e.g.*, *id.* at *115 ("the population cap *we order here* . . . is required by the United States Constitution") (emphasis added); *id.* at *114 (referring to the "reduction . . . we order"); *id.* at *2 (acknowledging that its "order requir[es] . . . a population cap," and finding that the relief ordered already "is narrowly tailored"); *id.* at *72 (rejecting the State's arguments as "too speculative to suggest that we should abstain from entering the type of prisoner release order *set forth below*.") (emphasis added).[1]

[1] Appellees' argument is especially attenuated given that the three-judge court repeatedly made clear that no matter what the State proposes, the proposal must comply with a population cap whose outer bounds are inflexible. *See*, *e.g.*, *Coleman*/*Plata*, 2009 WL 2430820, at *75 ("we are convinced that a cap of no higher than 137.5% is necessary"); *id.* at *83 ("plaintiffs may ask this court to impose a lower cap").

II. APPELLEES FAIL TO OVERCOME THE STATE'S SHOWINGS THAT THE REQUIREMENTS FOR A STAY HAVE BEEN SATISFIED.

A. There Remains A "Reasonable Probability" That The Court Will Note Jurisdiction.

In its application, the State showed that the three-judge court determined issues of exceptional importance, imposed unprecedented relief in the form of a required reduction of California's prison population by tens of thousands of inmates, and that summary affirmance would be imprudent in light of its precedential impact on issues of first impression. See Application at 13-17. This appeal parallels the situation—but far exceeds the gravity—that faced Justice Harlan when the Court stayed an order for injunctive relief of "'drastic' character" in favor of preserving the status quo while it interpreted novel legal rulings on appeal. *Int'l Boxing Club* v. *United States*, 78 S. Ct. 4, 5 (1957) (Harlan, J., in chambers). Appellees' opposition fails to refute these points, and simply ignores Justice Harlan's contrary opinion. See Opp. 23-25. Aside from their jurisdictional objections, appellees baldly claim that it is unlikely that this Court will exercise jurisdiction because the "appeal raises no substantive legal questions." *Id.* at 25. That assertion is irreconcilable with the three-judge court's prisoner release order, see, *e.g.*, *Coleman*/*Plata*, 2009 WL 2430820, at *3 (discussing the "legal questions" presented); *id.* at *54 n.55, and its order on the State's motion for dismissal or, alternatively, summary judgment, 2008 WL 4813371, at *4-6 (E.D. Cal./N.D. Cal. Nov. 3, 2008). Indeed, although appellees (like the court below) attempt to reconcile their reading of the phrase "primary cause" with that of the State, statutory interpretation presents questions of law, see *Walling* v. *A.H. Belo Corp.*, 316 U.S.

624, 631 (1942), and the application of the statute presents mixed questions of law and fact, which should be subjected to de novo review. See *Pullman-Standard* v. *Swint*, 456 U.S. 273, 289 n.19 (1982); see also *Lilly* v. *Virginia*, 527 U.S. 116, 136 (1999) (plurality opinion); *Wright* v. *West*, 505 U.S. 277, 306-07 (1992) (plurality opinion) (Kennedy, J., concurring) (noting "requirement of *de novo* review of mixed questions"). In all events, as detailed below, even the factual findings of the district court are suspect because the court below arbitrarily limited the State's ability to put on a defense to the prisoner release order. See *infra* at 10-13; compare Opp. 26-27 (discussing this Court's usual deference to lower court findings of fact).

Finally, the appellees' effort to dispute the State's showing that the potential harm to community safety establishes a likelihood of review is misleading. See Opp. 26-27. As elsewhere in their opposition, see *id.* at 15, 22 n.3, appellees erroneously assert that because the Governor previously has outlined a plan to relieve overcrowding "without sacrificing public safety," *id.* at 26 (internal quotation marks omitted), this necessarily means that the relief ordered by the federal court would have the same effect. This is wrong. The State's efforts must be understood in the context of the State's plan for comprehensive prison reform, which was based on budget allocations for various proposals and programs that would ensure the safety of California's communities. The three-judge court, by contrast, has imposed a singular requirement—a population cap of 137.5%—that the State must meet irrespective of the budget or other exigent circumstances. These proposals do not, in any way, require a prison population cap. The myopic focus of this federal

injunctive mandate, which lacks comprehensive reform or the State's projections, offers no guarantees of public safety. Indeed, the three-judge court candidly acknowledged that crime was likely to increase without substantial investment in evidence-based programming. *Coleman*/*Plata*, 2009 WL 2430820, at *110-12. In sum, the questions presented by the three-judge order are precisely the type this Court is likely to review in plenary fashion.

B. Appellees' Arguments That The State Has Not Shown A "Fair Prospect" That It Will Prevail Are Misplaced.

The application demonstrated that the appeal will involve a number of legal questions upon which the three-judge court not only lacked guidance from this Court, but had no appellate guidance whatsoever. Particularly in light of the possibility of competing interpretations of the statutory phrase "primary cause," there is a "fair prospect" of reversal. *John Doe Agency* v. *John Doe Corp.*, 488 U.S. 1306, 1309 (U.S. 1989) (Marshall, J., in chambers) (noting "'fair prospect'" that the majority would find error given potentially divergent statutory interpretations); see *California* v. *Am. Stores Co.*, 492 U.S. 1301, 1306 (1989) (O'Connor, J., in chambers) (holding requirement was satisfied where "plausible arguments exist for reversing the decision below"). The three-judge court's novel narrow tailoring analysis and its consideration of previously unexamined procedural questions likewise present serious issues for appellate scrutiny. Indeed, that post-PLRA, a statute that sought to limit the availability and scope of prisoner release orders, the three-judge court issued the most expansive such order in history by itself should provide a

sufficiently fair indication that the decision below is subject to serious challenge. Appellees' arguments do nothing to dim these prospects.

First, although appellees repeatedly disparage (Opp. 3, 25-26) the State for directing this Court's attention to the three-judge court's recognition that the "primary cause" determination is "ultimately a question of law," *e.g.*, Application at 2 (quoting *Coleman/Plata*, 2009 WL 2430820, at *54 n.55 (internal quotation marks omitted)), they do not meaningfully contest the correctness of that point. Instead, appellees assert that there is no dispute among the parties or the lower court about the meaning of the statutory phrase "primary cause." Opp. 27; see *id.* at 27-29. This misses the mark. Appellees and the lower court's interpretations, which completely divorce overcrowding from whether remedying the "crowding" will serve to remedy alleged deprivations in medical and mental health services to specific classes of plaintiffs, are unsustainable. Appellees suggest that their interpretation merely accounts for the situation where "crowding relief is *necessary* but not *sufficient* to remedy the [underlying federal] violation." *Id.* at 29; see *id.* at 28 (arguing that "[n]othing in the statute says that the prisoner release order must be the 'only remedy' for the violation"). They ignore, however, that their interpretation seriously undermines the restrained purpose of the statute. They interpret the terms in a manner that allow a "prisoner release order" to issue without any meaningful inquiry into whether—let alone finding that—the relief aimed at crowding "will remedy the violation of the Federal right," an explicit statutory requirement. 18 U.S.C. § 3626(a)(3)(E)(ii).

Second, appellees claim that there is no prospect for reversal due to a failure to narrowly tailor the prisoner release order to the underlying violations. Their contention that the three-judge court justifiably concluded that the 137.5% figure is narrowly tailored to the violations at issue is severely flawed. The argument that the State, not plaintiffs, had the burden of showing that the relief was sufficiently narrow finds no support in the statute or in case law. See Opp. 30-31; cf., *e.g.*, *Guarjardo* v. *Tex. Dep't of Crim. Justice*, 363 F.3d 392, 395 (5th Cir. 2004) (per curiam) (recognizing that in the PLRA termination context, plaintiffs have the burden "to demonstrate ongoing violations and that the relief is narrowly drawn"). The appellees' remaining efforts to support the figure are no more than circular and conclusory. See Opp. 31 (stating "[t]he three judge district court exercised its authority under the PLRA to determine an appropriate population level" without citing support for the level selected); *id.* ("the 137.5% cap is firmly grounded in evidence from the State's own reports and deliberations"). This eventually is made evident by appellees' own quotation of the district court's order: "'Rather than adopting the 130% limit requested by plaintiffs, we will *out of caution* require a reduction in the population . . . to only 137.5% of their combined design capacity.'" *Id.* at 32 (quoting *Coleman*/*Plata*, 2009 WL 2430820, at *83) (appellees' emphasis). Similarly, as the State noted in its application, the three-judge court admitted that it selected the figure not based on the evidence presented, but because: "137.5% of their combined design capacity-[is] a population reduction 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*." *Coleman/Plata*, *supra*, at *83 (emphasis added). Although drawing such rough lines might constitute a rational decision by a legislator or regulator, a court that does so has not engaged in narrow tailoring, particularly, as here, when it admits that the lines drawn do not take into account the underlying alleged federal violations it is seeking to remedy. See *id.*; see also *id.* at *77 (admitting that the relief ordered "extends further than the identified constitutional violations"). There is at least a fair prospect that this Court will conclude that a remedy as sweeping as the district court proposes can only be justified by clearer findings of a nexus between the harm and the remedy than the court below articulated.

Third, appellees dispute the notion that a "fair prospect" for reversal exists because the State was precluded from presenting evidence about the alleged continuing constitutional violations. They argue that the State was allowed to present some evidence about current conditions. Opp. 32-33. This is at best misleading. As shown, the court below explicitly stated: "Because this proceeding deals only with the plaintiffs' requested remedy, we did not permit the introduction of evidence relevant only to determining whether the constitutional violations found by the *Plata* and *Coleman* courts were 'current and ongoing.'" *Coleman/Plata*, 2009 WL 2430820, at *31 n.42.

Throughout the proceedings, the three-judge court prohibited the State from trying to gather and introduce such evidence that crowding is—in the present tense as the PLRA requires—the primary cause of the violation of a federal right. See 18

U.S.C. § 3626(a)(3)(E)(i). It did so with respect to evidence that the State tried to obtain from both the *Plata* Receiver and the *Coleman* Special Master, each of whom the State argued were well-positioned to support the State's defenses. *Coleman*/*Plata*, Nos. CIV S-90-0520 LKK JFM P, C01-1351 TEH (E.D. Cal./N.D. Cal. Nov. 29, 2007) (*Plata* Docket No. 988); *Coleman*/*Plata*, Nos. CIV S-90-0520 LKK JFM P, C01-1351 TEH (E.D. Cal./N.D. Cal. June 5, 2008) (*Plata* Docket No. 1226). The *Plata* court refused the State's request for evidence from the Receiver before trial, *Coleman*/*Plata*, Nos. CIV S-90-0520 LKK JFM P, C01-1351 TEH, slip op. at 3 (E.D. Cal./N.D. Cal. Sept. 5, 2008) (*Plata* Docket No. 1450), which the State sought because, *inter alia*, the Receiver was the only entity with knowledge about the current conditions of the medical care system. Defs.' Request for Evidence from the Cal. Prison Health Care Receivership Corp., *Coleman*/*Plata*, Nos. CIV S-90-0520 LKK JFM P, C01-1351 TEH (E.D. Cal./N.D. Cal. Aug. 29, 2008) (*Plata* Docket No. 1436). While admitting that "evidence of such progress may be relevant to the issues to be presented at trial," the court denied the State's request as moot and instead permitted the introduction of a quarterly report from the Receiver that was due after the August 30, 2008 close of evidence. *Coleman*/*Plata*, slip op. at 3 (*Plata* Docket No. 1450). Similarly, during trial, the court repeatedly ruled that evidence would not be allowed to prove current constitutional conditions. See, *e.g.*, Pre-Trial Hr'g Tr. at 28:16-29:2 (E.D. Cal./N.D. Cal. Nov. 10, 2008) (*Plata* Docket No. 1786) (denying the State's request to introduce evidence of constitutional compliance); Trial Tr. at 6:24-7:9 (E.D. Cal./N.D. Cal. Nov. 18, 2008) (*Plata* Docket No. 1829)

(denying the State's pre-trial request for reconsideration of the pre-trial oral ruling); Trial Tr. at 57:11-58:13 (prohibiting intervenor counsel's opening statement from continuing when he attempted to address the issue of current constitutionality).

Notwithstanding these prohibitions, the three-judge court based its findings, in part, on cherry-picked (and often times contradictory) statements in reports issued by the *Plata* Receiver, and disregarded statements made by and the *Coleman* Special Master. Compare *Coleman*/*Plata*, 2009 WL 2430820, at *69 ("The *Plata* Receiver has determined that adequate care cannot be provided for the current number of inmates at existing prisons . . . ."), with Receiver Report re: Overcrowding, *Plata* v. *Schwarzenegger*, No. C01-1351 TEH, slip op. at 42-43 (N.D. Cal. May 15, 2007) (*Plata* Docket No. 673) ("those . . . who think that population controls will solve California's prison health care problems, are simply wrong" and "the cure to existing health care problems will be difficult and costly to implement, regardless of population control efforts"); compare also *Coleman*/*Plata, supra*, at *70 (acknowledging the Special Master's finding that even "'the release of 100,000 inmates would likely leave the defendants with a largely unmitigated need to provide intensive mental health services to program populations' . . . and that the release of 50,000 inmates 'would probably not raise staffing resources into equilibrium with the mental health caseload'"), with *id.* ("[w]e find the Special Master's statement about 100,000 inmates somewhat hyperbolic"). In having been denied discovery and latitude to explore these subjects at trial with the Receiver and Special Master, the State was precluded from evaluating, challenging, or

amplifying the statements. This meant that the State could not question the bases for or propriety of the *Plata* Receiver's and *Coleman* Special Master's statements that were relied upon by the court. This constitutes prejudice and places doubt on the district court's findings and even more doubt on the propriety of the relief selected as a remedy to any current violations.

Fourth, the appellees express incredulity at the notion that there is a "fair prospect" that this Court will find a prerequisite to convening a three-judge court is that the single-judge district courts previously issued orders should involve overcrowding. Opp. 33-34. Their position is dubious because, as the application showed, this is precisely what happened in a previous proceeding under the PLRA, see Application at 24 (discussing *Roberts* v. *County of Mahoning*, 495 F. Supp. 2d 694, 696-98 (N.D. Ohio 2006)), and even the three-judge court here acknowledged that lesser alternatives theoretically exist to address crowding (though it rejected them here), see *Coleman*/*Plata*, 2009 WL 2430820, at *64-72.

Finally, plaintiffs argue that the Receiver's testimony and evidence dispels any likelihood of reversal on the basis that the State did not receive a reasonable amount of time to comply with relief previously ordered in *Plata*. This argument, however, suffers from the same deficiency noted above, *viz.*, the State had no opportunity to create a record on the Receiver's view of the "crowding" and "primary cause" issues central here.

C. Appellees Do Not Dispel The Likelihood Of Irreparable Harm To The State.

The application showed that irreparable harm to the State was likely to result in the near term as the State sought to formulate a plan for meeting the 137.5% population cap by September 18, 2009, as well in the period thereafter as the State attempts to achieve the population reductions pursuant to any plan.

To support the former showing, the State pointed to a series of cases in which this Court has granted stays to avoid disruptions to government functions. See Application at 26, 28 (citing *Legalization Assistance Project*, *Barnes*, and *Nat'l Ass'n of Letter Carriers*). Appellees do not mention, never mind distinguish, a single one of those cases. They fail to do so even though the degree of interference would be far greater here if the order takes force. The PLRA's implications for federalism are well-established. See, *e.g.*, Application at 14 (collecting cases); *Coleman*/*Plata*, 2009 WL 2430820, at *3; *Benjamin* v. *Jacobson*, 172 F.3d 144, 165 (2d Cir. 1999) (en banc). There would be no way to reverse the damage done to the structure of our constitutional scheme were this order to go into effect only to be held unlawful on appeal. See generally *Missouri* v. *Jenkins*, 515 U.S. 70, 88 (1995) ("'[F]ederal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution.'"); cf. *INS* v. *Legalization Assistance Project*, 510 U.S. 1301, 1306 (1993) (O'Connor, J., in chambers) (granting stay application due, in part, to risk of "improper intrusion by a federal court into the workings of a coordinate branch of the Government").

Nonetheless, parroting the three-judge court's order denying the State's motion for a stay, appellees continue to downplay the immediate burdens that the injunction imposes on the State. See Opp. 20-22 (claiming that the State is "merely require[d] . . . to develop a . . . *plan*"); compare Application at 26-30. The requirement that the State immediately formulate such a plan is a gross interference with the State's prerogatives. Because no such plan can be developed unilaterally by any single government entity, *contra* Opp. 19 (suggesting that the State could comply by doing little more than implementing the State's prior proposals),[2] the order effectively commandeers the executive and its agencies, and legislature to serve the federal court's objectives and disregard other priorities of the State. The federalism implications of permitting this degree of federal court interference with such a wide range of essential government functions are staggering. Coordinating so many arms of the government necessarily is difficult even without federal intrusion. Yet, the inevitable result is compromised State autonomy when, as here, all of the government actors must fixate on one federally selected objective—meeting a 137.5% cap—at the expense of the other prison reform goals to which the State government had been dedicated. Cf. *Davis ex rel. LaShonda D.* v. *Monroe County Bd. of Educ.*, 526 U.S. 629, 686 (1999) (Kennedy, J., dissenting) (observing affront to state sovereignty that exists where "[e]nforcement

[2] Without explanation, appellees jettison their contentions below in their motion to compel that the State had a tremendous amount of work to accomplish before it could submit any plan, *see* Application at 29-30, in favor of an argument that the State's "work is mostly complete." Opp. 19.

of the federal right . . . means that federal influence will permeate everything" in a particular area of state concern).[3]

Finally, to support its showing that irreparable harm would result as the population cap was set in motion over the next two years, the State demonstrated the likely irreparable harms to the safety of its communities. See Application at 30-32. In response, appellees rely on what is no more than an ill-conceived game of "gotcha." They suggest that because the Governor previously represented that his plans would not impair public safety, those implemented under duress of the three-judge court's order would provide the same assurances. As noted above, however, it should be patently obvious that a government plan that (i) rests on a comprehensive reform of the correctional system, (ii) depends on assumptions about the budget available for its implementation, and (iii) is to be rolled-out on a time frame of the government's own choosing is not remotely akin to what has been ordered here. The goal the State has been ordered to meet is inflexible, the time frame for doing so is rigid, and the funds available to implement any population reduction are uncertain. There is no inconsistency between the Governor's previous statements and the State's representations to this Court; instead, there is simply no parallel between what the Governor sought to achieve, which is fully consistent with Our Federalism, and with what the district court has commanded, which does serious violence to the State's legitimate interest in ordering its own affairs.

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[3] Appellees' suggestion (Opp. 38) that the circumstances and harms the State faces are not exigent is belied by the fact that the State is presently laboring under an obligation to implement the population cap and must submit materials to the three-judge court in less than 10 days.

D. The Balance Of The Equities Continues To Favor The State.

Appellees again ignore that where the likelihood of irreparable harm exists, particularly where that harm is to the machinery of government, this Court has found that the equities favor a stay. See Application at 32-33; see also *Tate* v. *Rose*, 466 U.S. 1301, 1303-04 (1984) (O'Connor, J., in chambers) (holding that the balance of equities favored staying writ of habeas corpus because doing so "should not cause a significant incremental burden to respondent, who has been incarcerated for several years, but doing so will relieve the State of Ohio of the burden of releasing respondent or retrying him"). Appellees' assertions to the contrary (Opp. 36-38) fail to account for the single-judge district courts' powers to act to prevent any immediate deprivations to life or health alluded to by appellees, and that the State remains committed to a course of comprehensive correctional reforms that are intended to benefit the plaintiff classes as well as the prison population as a whole.

CONCLUSION

For the foregoing reasons and those stated in the Application, the three-judge court's injunctive order should be stayed pending final disposition of this appeal.

Respectfully submitted,

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Appellees.

I, Carter G. Phillips, do hereby certify that, on this tenth day of September, 2009, I caused two copies of the Appellants' Reply In Support Of Application For A Stay in the foregoing case to be served by first class mail, postage prepaid, on the following parties:

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