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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEC 11 2007

Rosen, Bien & Galvan

No. _____

IN RE CALIFORNIA STATE REPUBLICAN ASSEMBLYMEMBERS
AND SENATORS; DISTRICT ATTORNEYS FROM TWENTY CALIFORNIA
COUNTIES; AND SIXTY-SEVEN CALIFORNIA STATE SHERIFFS, PROBATION,
CITY POLICE CHIEFS, AND CORRECTIONS OFFICERS

Petitioners,

v.

THREE-JUDGE DISTRICT COURT,
EASTERN AND NORTHERN DISTRICTS OF CALIFORNIA

Respondent,

MARCIANO PLATA ET. AL; RALPH COLEMAN ET. AL;
ARNOLD SCHWARZENEGGER ET. AL,

Real Parties in Interest.

FROM THE THREE-JUDGE UNITED STATES DISTRICT COURT
(EASTERN AND NORTHERN DISTRICTS OF CALIFORNIA)
PRESIDING OVER THE CONSOLIDATED PROCEEDINGS OF
CASE No. C 01-1351 TEH
AND
CASE No. CIV S90-0520 LKK JFM P

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 AND PETITION FOR WRIT
OF MANDAMUS VACATING COURT'S EXCLUSION OF PETITIONERS FROM
PHASE I OF BIFURCATED PROCEEDINGS

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2. Facts Showing The Existence and Nature of Claimed Emergency.

Petitioners are statutory intervenors as of right, pursuant to Federal Rule of Civil Procedure 24(a)(1) and pertinent provision of the Prison Litigation Reform Act (“PLRA”), 18 U.S.C. § 3632(a)(3)(F), who have been excluded from participating in the presently underway crucial first phase of the consolidated *Marciano Plata, et al. v. Arnold Schwarzenegger, et al.*, Case No. C01-1351 TEH (N.D.C.A.), and *Ralph Coleman, et al. v. Arnold Schwarzenegger, et al.*, Case No. S-90-0520 LKK JFM (E.D.C.A.), proceedings relating to the issuance of a prisoner release order. Pursuant to an October 10, 2007 Bifurcation Order and subsequent November 9, 2007 order affirming same, the proceedings have been bifurcated. In Phase I, the Three-Judge Court will hear evidence as to the two questions: (1) whether overcrowding is the primary cause of the violation of prisoners’ rights, and (2) whether any alternative relief other than a prisoner release order may remedy the violation of prisoners’ rights. The Three-Judge Court has barred Petitioners from Phase I. If the Three-Judge Court determines that a release order is warranted, it proceeds to the Phase II. Phase II is a remedial phase in which the Three-Judge Court will determine the scope and form of a prisoner release order, making provision for public safety concerns and community impact.

Petitioners and the populations they serve are suffering irreparable harm because the Three-Judge Court’s Bifurcation Order of October 10, 2007, and its subsequent order of November 9, 2007, affirming the Bifurcation Order, completely preclude them from participating in Phase I, contrary to the clear language and congressional intent behind the PLRA. *See* Exhs. A and B. As California state legislators, district attorneys, and sheriffs, probation officers, police chiefs, and corrections officers, Petitioners have a critical interest in arguing against the issuance

of a prisoner release order, which will drastically affect the people of California, whom Petitioners serve and represent. Barring Petitioners from Phase I of the proceedings irreparably harms Petitioners and prevents them from exercising the rights afforded to them by Congress in the PLRA, which provides Petitioners with a right to intervene in proceedings “relating to” a prisoner release order. *See* 18 U.S.C. § 3632(a)(3)(F). At the conclusion of Phase I, from which Petitioners have been completely excluded, the Three-Judge Court will have arrived at the fundamental decision of whether an order will be issued without any of Petitioners’ input. Limiting Petitioners’ participation to Phase II and only allowing them to comment on the contours of the prisoner release order prevents Petitioners from participating in the heart of the present proceedings.

Petitioners offer essential evidence to the Phase I determination of whether a prisoner release order shall issue. In particular, Petitioners can present vital evidence that addresses the statutory prerequisite to issuance of a prisoner release order—whether alternative means of relief are available. *See* 18 U.S.C. § 3632(a)(3)(E)(ii). If precluded from presenting this evidence and otherwise exercising their statutory right to participate in proceedings relating to a prisoner release order, *see* 18 U.S.C. § 3632(a)(3)(F), Petitioners will suffer irreparable harm.

Petitioners seek emergency relief in light of the December 20, 2007 deadline for the close of discovery, the Joint Pretrial statement, and all motions *in limine*; the Three-Judge Court has excluded Petitioners from participating in any of these matters. Moreover, the Phase I trial is also rapidly approaching, as the pretrial conference is slated for January 16, 2008, and the trial is set to begin on February 6, 2008. The Three-Judge Court has precluded Petitioners from presenting evidence or oral argument during the Phase I trial. *See* Exhs. A and B.

The blanket exclusion of Petitioners from Phase I marginalizes Petitioners' role in these proceedings, and is currently causing Petitioners and their constituents irreparable harm.

Accordingly, Petitioners submit the attached Petition for a Writ of Mandamus seeking an order from this Court vacating the Three-Judge Court's exclusion of Petitioners from Phase I in its October 10, 2007 Order Bifurcating the Proceedings and its affirmance of that exclusion in its denial of Petitioners' Motion for Reconsideration. In the event this Court determines that emergency relief is unnecessary, Petitioners request that the Court stay the lower court proceedings, including discovery-related endeavors, pending this Court's adjudication of this Petition.

3. Notification of Counsel and Service of Stay Motion

Petitioners filed a Notice of Appeal to preserve their appellate rights on December 7, 2007, informing the Three-Judge Court of their intent to file a Petition for a Writ of Mandamus in the Ninth Circuit. *See* Exh. C. This Notice of Appeal was served to each of the three judges presiding over the *Plata/Coleman* proceedings, the Honorable Judge Thelton E. Henderson, the Honorable Lawrence K. Karlton, and the Honorable Stephen Reinhardt. The Notice of Appeal was also served to counsel for all of the involved parties, including all intervenors and real parties in interest.

This emergency motion, Motion for a Stay Pending Appeal, and Petition for Writ of Mandamus have been served on all parties to the proceedings at the time of this filing.

4. District Court Relief

Prior to bringing this petition, Petitioners filed a Motion for Reconsideration of the Three-Judge Court's order excluding them from the first phase of the proceedings. *See* Exh. D.

Petitioners also applied for a stay of proceedings pending the decision on their Motion for Reconsideration. *See* Exh. E. The Three-Judge Court refused to reconsider their prior order and affirmed their exclusion of Petitioners from the first phase of the proceedings. *See* Exh. B (Order on Motion for Reconsideration and/or Clarification). In the same order, the Three-Judge Court denied as moot Petitioners' motion for a stay. *See id.*

5. Motion for Stay of Proceedings Pending Adjudication of Emergency Motion and Petition for Writ of Mandamus

Petitioners move for a stay of the *Plata/Coleman* proceedings before the Three-Judge Court pending adjudication of this Emergency Motion and Petition for Writ of Mandamus pursuant to Federal Rule of Appellate Procedure 8, to avoid prejudice caused by continuation of Phase I proceedings without Petitioners' participation, as explained in the attached Petition and accompanying exhibits. *See* Declaration of C. Stégeman (attached to exhibits). As noted below, Petitioners will suffer irreparable harm without immediate stay of the proceedings, as Phase I is well-underway, and discovery closes on December 20, 2007. Absent a stay pending this Emergency Motion and Petition, the Petitioners will continue to suffer irreparable harm arising from their exclusion from the Phase I.

Prior to bringing this motion and petition, Petitioners moved for reconsideration and stay of proceedings pending reconsideration before the Three-Judge Court. The motion for reconsideration and stay were both denied. *See* Exh. B (order by the Three-Judge Court denying as moot Petitioners' motion for a stay of proceedings pending reconsideration). Thus, a motion to stay the proceedings before the Three-Judge Court would be futile.

Corporate Disclosure Statement/Certificate of Interested Parties
[F.R.A.P. 26.11; Circuit Rule 28-2.1]

None of the Petitioners are corporations.

Petition for Writ of Mandamus

I. INTRODUCTION

Petitioners, the Legislator Intervenors,¹ District Attorney Intervenors,² and Sheriff, Probation, Police Chief, and Corrections Intervenors³ (collectively, the “Statutory Intervenors”),

¹ The California Senator and Assembly Intervenors (collectively the “Legislator Intervenors”), include the following California State Senators: Senators Samuel Aanestad, Dick Ackerman, Roy Ashburn, James F. Battin, Jr., Dave Cogdill, Dave Cox, Jeff Denham, Robert Dutton, Dennis Hollingsworth, Abel Maldonado, Bob Margett, George Runner and Mark Wyland; and the following California Assemblymembers: Todd Spitzer, Chairman, Assembly Select Committee on Prison Construction and Operations, Michael N. Villines, Assembly Republican Leader Anthony Adams, Greg Aghazarian, Joes Anderson, John J. Benoit, Tom Berryhill, Sam Blakeslee, Paul Cook, Chuck DeVore, Michael D. Duvall, Bill Emmerson, Jean Fuller, Ted Gaines, Martin Garrick, Shirley Horton, Guy S. Houston, Bob Huff, Kevin Jeffries, Rick Keene, Doug La Malfa, Bill Maze, Alan Nakanishi, Roger Niello, George A. Plescia, Sharon Runner, Jim Silva, Cameron Smyth, Audra Strickland, Van Tran, and Mimi Walters. In its November 9, 2007 order, the Three-Judge Court consolidated the Assembly Member Intervenors and Republican Senator Intervenors into one party. See Exh. B.

² The District Attorney intervenors include: Rod Pacheco, District Attorney County of Riverside, Bonnie M. Dumanis, District Attorney County of San Diego, Tony Rackauckas, District Attorney County of Orange, Jan Scully, District Attorney County of Sacramento, Christie Stanley, District Attorney County of Santa Barbara, Michael A. Ramos, District Attorney County of San Bernardino, Robert J. Kochly, District Attorney County of Contra Costa, David W. Paulson, District Attorney County of Solano, Gregg Cohen, District Attorney County of Tehama, Todd Riebe, District Attorney County of Amador, Bradford R. Fenocchio, District Attorney County of Placer, John R. Poyner, District Attorney County of Colusa, Michael Ramsey, District Attorney County of Butte, Gerald T. Shea, District Attorney County San Luis Obispo, Edward R. Jagels, District Attorney County of Kern, Gregory Totten, District Attorney County of Ventura, Vern Pierson, District Attorney County of El Dorado, Clifford Newell, District Attorney County of Nevada, Ronald L. Calhoun, District Attorney County of Kings, and Donald Segerstrom, District Attorney County of Tuolumne.

³ The Sheriff, Probation, Police Chief, and Corrections Intervenors include the following: San Diego County Sheriff William B. Kolender, Orange County Sheriff-Coroner Michael S. Carona, Placer County Sheriff Edward N. Bonner, Butte County Sheriff-Coroner Perry L. Reniff, Calaveras County Sheriff Dennis Downum, Los Angeles County Sheriff Lee Baca, Santa Clara County Sheriff Laurie Smith, San Benito County Sheriff Curtis Hill, Stanislaus County Sheriff Adam Christianson, Mendocino County Sheriff Tom Allman, Tehama County Sheriff Clay Parker, Lassen County Sheriff Steve Warren, Yolo County Sheriff Ed Prieto, Santa Barbara County Sheriff Bill Brown, Kern County Sheriff Donny Youngblood, San Mateo County Sheriff Greg Munks, Yuba County Sheriff Steve Durfor, Contra Costa County Sheriff Warren Rupf, Shasta County Sheriff Tom Bosenko, Riverside County Sheriff Stanley Sniff Jr., Ventura County Sheriff Bob Brooks, Solano County Sheriff Gary R. Stanton, San Luis Obispo County Sheriff Pat Hedges, Sutter County Sheriff Jim Denney, Lake County Sheriff Rod Mitchell, Glenn County Sheriff Larry Jones, Tuolumne County Sheriff Jim Mele, Fresno County Sheriff Margaret Mims, Monterey County Sheriff Mike Kanalakakis, Mono County Sheriff Richard Scholl, Humboldt County Sheriff Gary Philp, El Dorado County Sheriff Jeff Neves, Merced County Sheriff Mark Pazin, Del Norte County Sheriff Dean Wilson, San Joaquin County Sheriff Steve Moore, Amador County Sheriff Martin Ryan, Inyo County Sheriff William Lutze, Stanislaus County Chief Probation Officer Jerry Powers, Ventura County Chief Probation Officer Karen Staples, Solano County Chief Probation Officer Isabelle Voit, Santa Barbara County Chief Probation Officer Patricia Stewart, Butte County Chief Probation Officer John Wardell, San Luis Obispo County Chief Probation Officer Kim Barrett, Contra Costa County Chief Probation Officer Lionel Chatman, Inyo County Chief Probation Officer Jim Moffett, Shasta County Chief Probation Officer Brian Richart, Yolo County Chief Probation Officer Don Meyer, Fresno County Chief Probation Officer Linda Penner, Mariposa County Chief Probation Officer Gail Neal, City Of Whittier Police

have a statutory right to participate in *all* proceedings relating to the issuance of a prisoner release order, whether the Three-Judge Court⁴ presiding over the consolidated cases of *Marciano Plata, et al. v. Arnold Schwarzenegger, et al.*, Case No. C01-1351 TEH (N.D.C.A.), and *Ralph Coleman, et al. v. Arnold Schwarzenegger, et al.*, Case No. S-90-0520 LKK JFM (E.D.C.A.), bifurcates the issues to be addressed or otherwise endeavors to streamline the proceedings. The Three-Judge Court has bifurcated the proceedings relating to the issuance of a prisoner release order and excluded the Statutory Intervenor from participating in “Phase I,” in which the Three-Judge Court will determine as a preliminary matter whether it is able to issue a prisoner release order. *See* Exh. A (Order Bifurcating Proceedings and Setting Deadlines for Phase I, dated October 10, 2007, hereinafter, “Bifurcation Order”). Accordingly, the Statutory Intervenor seeks a writ of mandamus vacating the Three-Judge Court’s order to the extent it excludes them from participating in the presently underway Phase I proceedings.⁵ The exclusion of the Statutory Intervenor stands in contravention of their acknowledged statutory right to intervene, which flows from the clear and unambiguous language of the Prison Litigation Reform Act (18 U.S.C.

Chief Dave Singer, City Of Roseville Police Chief Joel Neves, City Of Pasadena Police Chief Barney Melekian, City Of Alhambra Police Chief Jim Hudson, City Of Fremont Police Chief Craig Steckler, City Of Grover Beach Police Chief Jim Copsey, City Of Santa Clara Police Chief Steve Lodge, City Of Vacaville Police Chief Rich Word, City Of Woodland Police Chief Carey Sullivan, City Of Sonoma Police Chief Mace McIntosh, City Of Paso Robles Police Chief Lisa Solomon, City Of San Bernardino Police Chief Michael Billdt, City Of Atwater Police Chief Richard Hawthorne, National City Police Chief Adolfo Gonzales, City Of Delano Police Chief Mark Derosia, City Of Modesto Police Chief Roy Wasden, City Of Fresno Police Chief Jerry Dyer, And City Of Delano Chief Of Corrections George Galaza.

⁴ The respective judges presiding over the *Plata* and *Coleman* proceedings have convened a three-judge court to consider issuing a prisoner release order pursuant to the Prison Litigation Reform Act (“PLRA”). *See* 18 U.S.C. § 3626(a)(3)(A). The three-judge panel consists of the Honorable Thelton E. Henderson of the U.S. District Court for the Northern District of California, the Honorable Lawrence K. Karlton of the U.S. District Court for the Eastern District of California, and the Honorable Stephen Reinhardt of the Ninth Circuit Court of Appeals (hereinafter, “Three-Judge Court”).

⁵ Petitioners bring this petition before the Ninth Circuit Court of Appeals, rather than the Supreme Court, as they are seeking mandamus relief due to their exclusion from Phase I, rather than appealing the grant or denial of an injunction. *See* 28 U.S.C. § 1253 (2006) (the Supreme Court has jurisdiction over direct appeals arising from a three-judge court’s grant or denial of interlocutory or permanent injunctions).

§ 3626 *et seq.*, hereinafter, “PLRA”). Moreover, the bifurcation and exclusion of the Statutory Intervenor runs contrary to Congress’s intention that each predicate relating to the issuance of this extraordinary remedy be met and carefully considered with the participation of the people most affected by the Three-Judge Court’s decision.

As demonstrated below, Petitioners’ circumstances satisfy the requirements for mandamus relief enumerated under *Bauman v. U.S. Dist. Court*, 557 F.2d 650 (9th Cir. 1977). First, Petitioners cannot appeal the order and have exhausted all other avenues of relief by filing a motion for reconsideration of the order, which order the Three-Judge Court subsequently affirmed. *See* Exh. D (Motion for Reconsideration/Clarification, Oct. 23, 2007); *see also* Exh. B (order affirming the Bifurcation Order, November 9, 2007). Second, Petitioners will suffer irreparable harm unless the Ninth Circuit grants mandamus relief, because they cannot participate as parties until the Three-Judge Court has already decided whether the predicates to issuance of a prisoner release order have been met. Petitioners have a statutory right to participate as parties, so they should be allowed to test the Plaintiffs’ evidence and present evidence of their own. Third, the Bifurcation Order and the Three-Judge Court’s affirmation of the order ignores the clear language of the statute, which explicitly provides that statutory intervenors such as the Petitioners have the right to participate in any proceedings “relating to [a prisoner release order].” 18 U.S.C. § 3632(a)(3)(E). Moreover, the Three-Judge Court also ignored the legislative intent behind the PLRA and its subsequent amendments to include the community representatives and corrections decision-makers in the adjudication of all issues relating to a prisoner release order. Finally, the exclusion of the Statutory Intervenor from Phase I presents an issue of first impression to this Court, and indeed, an issue that has not been

decided by any court applying the PLRA. Thus, the Three-Judge Court's exclusion of the Statutory Intervenors from the heart of the proceedings relating to the prisoner release order may have drastic repercussions on the rights of future PLRA intervenors. It is vital that this Court address these important issues and prevent irreparable harm to the Statutory Intervenors by allowing them to exercise their statutory right to participate in the proceedings below.

A rapid resolution of these proceedings is in the best interests of all parties. Recognizing the urgency and gravity of the issues at hand, the Statutory Intervenors bring this Petition in the belief that their full participation at this point of the proceedings will ultimately expedite the proceedings by shortening the overall discovery period and avoiding potential appellate issues at a later date. Accordingly, the Statutory Intervenors respectfully request that this Court modify the Three-Judge Court's Bifurcation Order to allow the Statutory Intervenors to participate fully in both phases of the proceedings.

II. STATEMENT OF FACTS

A. Procedural History Preceding the October 10, 2007 Bifurcation Order

The Plaintiffs in the *Plata* and *Coleman* lawsuits moved to convene a three-judge court to consider the issuance of a prisoner release order pursuant to the PLRA. 18 U.S.C. §§ 3632(a)(3)(A), (B). Judges Henderson and Karlton granted the respective Plaintiffs' motions on July 23, 2007. *See* Exhs. F, G (*Plata* and *Coleman* Orders Granting Plaintiffs' Motions to Convene a Three-Judge Court). In granting the *Plata* Plaintiffs' motion, Judge Henderson noted that issuance of a prisoner release order would be a "radical step," and such a step may not be necessary if parties reached an agreement, or if "[Assembly Bill] 900 or any other subsequent action by the State" adequately remedied the effects of overcrowding on inmate medical care.

See Exh. F at 11. (*Plata* Order convening three-judge court). Then Chief Judge Mary M. Schroeder of the United States Courts for the Ninth Circuit appointed Judge Stephen Reinhardt, Judge Karlton, and Judge Henderson to the panel. See Exh. H (July 26, 2007 order).

Shortly after the appointment of the Three-Judge Court, the Statutory Intervenor moved to intervene in the proceedings. See Exhs. I, J, K, L, M, N, and O (Motions to Intervene, by Legislator, District Attorney, and Sheriff, Probation, Police Chief, and Corrections Intervenor). The Three-Judge Court granted these motions to intervene, and recognized that the Statutory Intervenor “meet [the] statutory criteria for intervention as of right,” citing section 3626(a)(3)(F) of Title 18 and Rule 24(a)(1). See Exhs. P, Q (Order Re: Motions to Intervene, dated August 17, 2007, and Order Granting Motions to Intervene, dated September 19, 2007); see also Fed. R. Civ. P. 24(a)(1).

In granting these motions to intervene, the Three-Judge Court acknowledged that the PLRA provided the Statutory Intervenor grounds to intervene as of right pursuant to Rule 24(a)(1), which provides: “Intervention of Right. Upon timely application [a party] shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene.” See Exhs. P, Q ; see also Fed. R. Civ. P. 24(a)(1); *Brotherhood of Railroad Trainmen v. Baltimore & O.R. Co., et al.*, 331 U.S. 519, 531 (1947) (holding that a statutory intervenor under Rule 24(a)(1) has a right of intervention that is “absolute and unconditional”). The pertinent subsection of the PLRA provides:

Any state or local official including a legislator or unit of government whose jurisdiction or function includes the appropriation of funds for the construction, operation, or maintenance of prison facilities, or the prosecution or custody of persons who may be released from, or not admitted to, a prison as a result of a prisoner release order ... shall have the right to intervene in any proceeding relating to [a prisoner release order].

18 U.S.C. § 3626(a)(3)(F). As statutory intervenors of right, Petitioners have the right to fully participate in the proceedings as if they were an original party. *See League of United Latin American Citizens v. Wilson*, 131 F. 3d 1297 (9th Cir. 1997).

In its order setting the initial hearing, the Three-Judge Court instructed that it would hear from parties regarding scheduling and procedural issues, and further specified that “parties and intervenors shall be prepared to advise the Court at this initial hearing of their respective positions regarding the intervenors’ roles in these proceedings.” *See* Exh. R (Order Setting Initial Hearing, dated August 29, 2007); *see also* Exh. P (referred to in August 29, 2007 order). Nowhere in the orders discussing the initial hearing on September 24, 2007, did the Three-Judge Court indicate that it was considering bifurcation or exclusion of intervenors from the proceedings, nor did the Three-Judge Court advise the Statutory Intervenors to be prepared to argue against such extreme measures. *See id.*

The Three-Judge Court first alluded to potential bifurcation during the September 24, 2007 hearing. *See* Exh. S at 58:01-60:10. The Three-Judge Court considered breaking the proceedings into a stage determining whether a prisoner release order could issue, and a remedial phase determining the form of the prisoner release order as well as public safety considerations. *See id.* The first stage would specifically address whether overcrowding was the cause of the constitutional violations at issue, and whether any alternative forms of relief other than a prisoner release order were available. Petitioners strenuously asserted their right to participate in the evaluation of whether alternatives other than a prison release order would remedy the violation of prisoners’ rights. *See* Exh. S at 27:17-25, 28:1; at 29:16-25; 30; 31:8-14 (in which the Petitioners assert their expectation of contributing to the determination of not just the remedial

phase of the proceedings, but the initial determination of whether other forms of relief would address the situation); *see also* 18 U.S.C. § 3632(a)(3)(E)(ii). During the hearing, the Petitioners asserted their interest in presenting evidence as to alternatives including Assembly Bill 900 (Exh. S at 31:4-7, 23-25; 32:1-2) and probation reforms (*id.* at 29:16-21; 30:18-25). This evidence would be properly addressed in Phase I, and could potentially resolve the proceedings before they even reach Phase II. Even Judge Karlton cast doubt on the efficacy of the bifurcation, as he noted his belief that discovery on certain issues in Phase I and Phase II could not be bifurcated, because of the intertwined considerations in the proceedings' primary and remedial phases. *See id.* at 59:5-9 ("It seems to me that these questions [of (i) whether a prisoner release order should issue, and (ii) how the Three-Judge Court should address attendant public safety issues] are so...intimately intertwined that it would be very difficult to develop a discovery order which segregated the questions that could be asked in Part 1 and Part 2").

B. The October 10, 2007 Bifurcation Order and Subsequent Developments

On October 10, 2007, the Three-Judge Court issued an order that bifurcated the proceedings into two phases and excluded all statutory intervenors (but not plaintiff nonstatutory intervenors), including Petitioners, from participation in Phase I of the proceedings ("Bifurcation Order"). *See* Exh. A. Phase I involves consideration of two predicate elements to issuance of a prisoner release order: (i) whether overcrowding is the primary cause of the violation of federal rights, and (ii) whether any alternative forms of relief, other than a prisoner release order, would remedy the violation. *See id.* at 5; *see also* 18 U.S.C. § 3632(a)(3)(E)(i) and (ii).

During Phase I, Petitioners may "be present during depositions, participate as amici during the proceedings, and sit at counsel table." *See* Exh. A at 5. However, Petitioners cannot

engage in discovery or presentation of experts, and they have no allotted time for oral argument in Phase I. *See id.* If Plaintiffs successfully establish the Phase I criteria, then the proceedings progress to Phase II, in which the Three-Judge Court will hear evidence as to the “effects of such an order on public safety, as well as whether such an order is narrowly drawn, extends no further than necessary, and is the least intrusive means necessary to correct the violation of the Federal right.” *See id.* at 4; *see also* 18 U.S.C. § 3632(a)(1). Petitioners can participate in Phase II. *See id.*

In excluding Petitioners from Phase I, the Three-Judge Court stated that the Petitioners’ interest in Phase I issues would be “adequately represented by the defendants.” *See* Exh. A at 3. However, the Petitioners have a statutory right to act as a party. Moreover, the interests of the Petitioners are distinct from the interests of the Defendants, the State of California. Petitioners have a unique stake and ability to present evidence of local and legislative alternatives to a prisoner release order. Further, Defendants have only three days to present their evidence during the Phase I trial, and accordingly, cannot be expected to allot any of that limited time to Petitioners. *See* Exh. A at 5. In fact, Defendants have indicated to Petitioners that they will be unable to present any of Petitioners’ evidence at the Phase I trial. *See* Exh. T (Declaration of Riverside County District Attorney Elise Farrell).

The Bifurcation Order added to the urgency and stress of the circumstances by setting onerous and rapid-paced discovery cutoffs and a projected trial date. *See* Exh. A at 5-7. Pursuant to the Bifurcation Order, the parties disclosed their experts and served expert reports on November 9, 2007, with discovery closing on December 20, 2007. *See id.* at 5-6. The Three-Judge Court also set due dates for filing the joint pretrial conference statement (December 20,

2007), motions *in limine* (same), responses to motions *in limine* (January 2, 2008), the pretrial conference (January 16, 2008), and the Phase I trial (February 6, 2008). *See id.*

Further minimizing the Petitioners' ability to participate in the proceedings, the Three-Judge Court in its Bifurcation Order effectively rejected Petitioners' objections to *ex parte* communications between the Three-Judge Court and the parties, by simply excluding the Petitioners from participation. At the September 24, 2007 hearing, the Three-Judge Court inquired whether the parties would agree to a continuing practice of *ex parte* communications between the Court and the parties. *See* Exh. S at 11:9-12:2. All but three of the Petitioners⁶ filed objections to the *ex parte* communications, specifically requesting they be allowed to participate in all conferences with the Three-Judge Court. *See* Exhs. U, V, and W (Petitioners' objections to *ex parte* communications, filed after September 24, 2007 hearing). The Three-Judge Court never addressed the Petitioners' objections. Instead, it resolved the issue through the Bifurcation Order's wholesale exclusion of Petitioners from Phase I of the proceedings. *See* Exh. A.

On October 23, Petitioners filed a motion for reconsideration of the Bifurcation Order, seeking, *inter alia*, the right to participate in both Phase I and Phase II of the proceedings. *See* Exh. D (Motion for Reconsideration, filed October 23, 2007). Although not required to do so, Petitioners offered examples of some of the evidence they wanted to present in Phase I, and even suggested an alternate bifurcation structure. *See id.* at 14-23. Petitioners outlined several alternatives that were relevant to Phase I: AB 900, the recently enacted bill appropriating \$7.8 billion for the California Department of Corrections and Rehabilitation's efforts in adding beds and improving medical, dental, and mental health facilities in the prisons; Senate Bill 618, a pilot

⁶ Three of the sixty-seven sheriffs, county probation officers, city chief of corrections and city police chiefs consented to the *ex parte* contacts, all other Petitioners objected to such communications.

program implemented in San Diego County that provides for an integrated, multi-agency effort to reduce recidivism through the cooperation of the district attorney's office and police, corrections, and probation departments; Sheriff Intervenor's plans for community re-entry facilities, developed in conjunction with CDCR; and the Probation Department's new recidivism programs targeted toward offenders between 18 and 25 years of age. *See id.* Petitioners also applied for a stay of the proceedings pending a ruling on their motion for reconsideration. *See* Exh. E (Application for Stay Pending Order on Motion for Reconsideration, filed November 2, 2007).

On November 9, the Three-Judge Court reaffirmed its decision to exclude the Petitioners from Phase I of the proceedings. *See* Exh. B. The Three-Judge Court stated that in excluding intervenors, it is nonetheless granting them "the right of intervention afforded by the [PLRA]." *See id.* at 2. The Three-Judge Court drew attention to the Statutory Intervenor's suggested alternatives and concluded that they were irrelevant to Phase I determinations, because they have the "purpose or effect of reducing or limiting the prison population," and therefore constitute prisoner release orders themselves. *See id.* at 4; *see also* 18 U.S.C. § 3632(g)(4). However, the Three-Judge did not reconcile the plain meaning of the PLRA with its decision to exclude Petitioners, nor did it address Petitioners' role in testing the Plaintiffs' evidence. Petitioners do not contest that courts may limit discovery and the presentation of certain evidence, but the Three-Judge Court goes beyond streamlining the proceedings by preventing Petitioners from defending their position against the Plaintiffs.

During the period in which the Three-Judge Court reviewed Petitioners' Motion for Reconsideration, it appointed a Settlement Referee, Elwood Lui, who until October 25, 2007

served as co-counsel for Plaintiffs, and the Honorable Peter Siggins, as consultant and advisor to the settlement referee, who had previously served as legal counsel to the Defendants in the *Plata* case during his service with the Attorney General's Office. *See* Exh. X (Order Appointing Settlement Referee and Consultant, November 1, 2007). Petitioners objected on a number of grounds, including the prior affiliations of the Settlement Referee and his Consultant, as well as the fact that the order required participation in settlement discussions, despite Petitioners' inability to conduct discovery and Plaintiffs' refusal to state the actual relief they seek. *See* Exh. Y (Objections to Order Appointing Settlement Referee and Consultant, November 6, 2007). In response to Petitioners' objections, the Three-Judge Court, without actually addressing the objections, reacted to the objections, stating that "no intervenor shall be required to participate in any settlement discussions." *See* Exh. Z (Order Setting Conditions on Intervenors' Participation in Settlement Discussions, Nov. 8, 2007). Without waiving their objections, each of the Petitioners indicated their desire to participate in the settlement discussions.

III. STATEMENT OF RELIEF SOUGHT

Petitioners seek an emergency order directing the Three-Judge Court to vacate its Bifurcation Order to the extent it precludes Petitioners from participating fully in both phases of the *Plata/Coleman* proceedings as intervenors. *See* Exh. A. Petitioners also seek an order directing the Three-Judge Court to vacate its November 9, 2007 order, to the extent that it reaffirms the Bifurcation Order. *See* Exh. B. Additionally, Petitioners respectfully request the Court direct the Three-Judge Court to adjust the discovery schedule and other due dates associated with trial to allow Petitioners' meaningful participation in Phase I. Finally,

Petitioners request an order staying the *Plata/Coleman* proceedings pending adjudication of this Petition.

IV. ARGUMENT

The Bifurcation Order bars Petitioners from exercising their statutory right to intervene in proceedings relating to a prisoner release order in contravention of the clear language of the PLRA and the congressional intent behind it. This exclusion will result in irreparable harm to Petitioners and their constituents. *See* 18 U.S.C. § 3632(a)(3)(F).

The Ninth Circuit evaluates five factors, commonly known as the “*Bauman* factors,” in determining whether mandamus is an appropriate remedy. *Bauman*, 557 F.2d 650. These factors are weighed cumulatively, and a petitioner need not satisfy all five factors to obtain mandamus relief. *Id.* at 655 (“[t]he considerations are cumulative and proper disposition will often require a balancing of conflicting indicators”). The five factors are:

1. Does the petitioner have other adequate means, such as direct appeal, to attain the relief desired?
2. Will the petitioner be damaged or prejudiced in a way not correctable on appeal?
3. Is the court’s order clearly erroneous as a matter of law?
4. Does the court’s order manifest an oft-repeated error or a persistent disregard of federal rules? and
5. Does the court’s order raise new or important problems or issues of law of first impression?

Id. at 654-55. Consideration of the five factors weighs in favor of granting mandamus relief.

A. Petitioners Have Exhausted Their Alternatives for Relief.

The Three-Judge Court’s initial grant of intervention, followed by its explicit exclusion of Petitioners from the crucial first stage of the proceedings, is not an immediately appealable

decision. The Bifurcation Order is neither a final decision nor an appealable interlocutory decision. *See* 28 U.S.C. §§ 1291, 1292; *see also* *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) (the limited collateral order exception applies only to orders that (i) “conclusively determine the disputed question”; (ii) “resolve an important issue completely separate from the merits of the action”; and (iii) are “effectively unreviewable on appeal from final judgment”). Petitioners remain a party to the action, although only as Phase II intervenors, and therefore cannot immediately appeal the Three-Judge Court’s order. *See Churchill County v. Babbitt*, 150 F.3d 1072, 1081 (9th Cir. 1998) (holding that courts should apply the collateral order doctrine narrowly; thus, an intervenor of right does not have the right to appeal an interlocutory order limiting its participation to the remedial phase of the trial) (citing *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370 (1987)); *see also* *Stringfellow*, 480 U.S. at 379, n.6 (in holding that an order denying intervention of right was not immediately appealable because the party remained a permissive intervenor, the Supreme Court further noted that “the possibility that the District Court order is legally flawed has no bearing on [its] decision”).

In reliance on the above analysis, and to exhaust all avenues of relief before applying for this writ, the Petitioners filed a motion for reconsideration, which was denied. *See* Exhs. D and B. No further procedures exist whereby Petitioners may seek relief from the Three-Judge Court’s clearly erroneous order.

For the reasons stated above, mandamus relief is the only remaining relief available to petitioners, so the first *Bauman* factor weighs in favor of granting mandamus. *See Stringfellow*, 480 U.S. 370 at 381-85 (Justice Brennan’s concurrence, noting that appellants could also

potentially seek relief from “extraordinarily prejudicial interlocutory orders” by petitioning for a writ of mandamus, in addition to, or in lieu of appealing the final judgment).

B. Petitioners and Their Constituents Will Suffer Irreparable Harm Because the Bifurcation Order Ultimately Prolongs the Proceedings, and Prevents Petitioners from Exercising Their Statutory Right of Intervention in Phase I’s Fast-Paced Discovery and Trial Schedule.

The Three-Judge Court has barred Petitioners from participating in the critical first phase of the proceedings. Without mandamus relief, Petitioners, and correspondingly, their constituents, will suffer harm that is not remediable later on appeal. *See Bauman*, 557 F.2d at 656. Therefore, the second *Bauman* factor, which is closely related to the first, also weighs in favor of granting mandamus. *See id.* at 654, 656.

1. Petitioners and Their Constituents Will Suffer Irreparable Harm Because the Bifurcation Order Precludes Them From Exercising Their Statutory Right of Intervention.

By excluding Petitioners from Phase I, the Three-Judge Court has struck out at the heart of the PLRA. As noted below, Congress meant for the community to be involved in proceedings relating to prisoner release orders. The value of the harm associated with this preclusion is difficult to quantify, but nonetheless involves real consequences. Indeed, the offices to which these Petitioners have been elected, and the positions to which the Petitioners have been entrusted will suffer if not afforded the status granted to them by Congress, as these Petitioners are held responsible by their constituencies for matters of great public concern. Notably, the Three-Judge Court has taken a number of irregular measures to minimize the Statutory Intervenors’ participation in the proceedings, such as permitting *ex parte* communications between the Three-Judge Court and the parties over the Statutory Intervenors’ objections,

responding to the Statutory Intervenor's objections to peculiar settlement procedures by making their participation optional, and insisting that the Defendants can adequately represent the Statutory Intervenor's interests, despite the unique perspectives and evidence each Statutory Intervenor offers, and clear indications from the Attorney General's office that they will not share the scarce allotted time for argument and witness examination with the Statutory Intervenor. *See* Exh. T (Farrell Declaration).

At the end of Phase I, the Three-Judge Court will have decided whether it may issue a prisoner release order. *See* Exh. A at 4 (Bifurcation Order). This core decision was the primary motive behind convening a three-judge court in the first place. *See* Exh. F at 10 (*Plata* Order Convening Three-Judge Court); Exh. G at 13 (*Coleman* Order). Once Phase II has begun, Petitioners will only be able to provide input regarding the form of a prisoner release order. The Three-Judge Court will not revisit predicate elements of whether the order could issue in the first place. Absent immediate relief, Petitioners will not be able to participate at all in Phase I. The discovery and trial schedule the Three-Judge Court has set for Phase I is moving forward at an extremely rapid pace, and Petitioners have yet to be allowed meaningful participation. Thus, so long as Phase I is permitted to continue without Petitioners' involvement, Petitioners are prejudiced by being unable to exercise their statutory right of intervention.

Furthermore, Petitioners and their constituents will suffer irreparable harm if the Three-Judge Court decides to issue a prisoner release order without allowing Petitioners to test the Plaintiffs' evidence and to present evidence regarding alternative forms of relief. Petitioners have also offered evidence as to alternatives involving collaborative efforts between legislators, district attorneys, and probation, police, and corrections officers that address prison

overpopulation without resorting to court-ordered relief. *See* Exh. D 17-22 (Motion for Reconsideration). These alternatives and others may provide the basis for relief other than a prisoner release order. The fact that Petitioners cannot offer any evidence or challenge evidence that Plaintiffs present constitutes the very real harm.

2. Exclusion from Phase I of the Proceedings Harms Petitioners and Their Constituents.

Petitioners participate in these proceedings as representatives elected by the people of California and officials who serve Californians at the local level. Thus, excluding Petitioners from the vital first phase not only harms the immediate interests of the participating legislators, district attorneys, and law enforcement personnel, it also harms the interests of their constituents. The public, including that segment of the population that is currently incarcerated and may include Plaintiff class members, have a vested interest in seeing these proceedings conclude swiftly and judiciously. In light of the gravity of the rights violations at issue, a speedy result is in the best interest of all parties. Bifurcating the case into two separate discovery periods will ultimately prolong the proceedings. Much of this discovery overlaps. Judge Karlton even alluded to the difficulty of bifurcating discovery between the initial and remedial phases. *See* Exh. S (Trans. at 59:5-9). Thus, permitting Petitioners to engage in current discovery efforts will streamline and expedite Phase II discovery efforts. Furthermore, Petitioners' exclusion from the proceedings merits mandamus relief to avoid prolonging the proceedings through a later reversal and new trial based on the exclusion.

This Court has recognized that mandamus relief is necessary when the highly time-sensitive nature of the relief sought would make later appellate relief ineffective. *See San Jose Mercury News v. U.S. District Court*, 187 F.3d 1096, 1098 (9th Cir. 1999) (granting mandamus

relief, even though direct appeal was available, because of the risk of immediate harm). In the present case, the nature of the injury Petitioners face is immediate, and the relief sought is highly time-sensitive. Mandamus relief is even more appropriate because Petitioners do not have the option of direct appeal that was available in *San Jose Mercury News*. *See id.* In *San Jose Mercury News*, the time-sensitive nature of the decay of newsworthiness merited mandamus relief. *See id.* Thus, the Three-Judge Court should take all measures that speed up their resolution, while respecting Petitioners' statutorily-mandated right to participate. Though the participation of Petitioners may initially prolong the proceedings, the Three-Judge Court can minimize this delay by limiting the presentation of duplicative evidence, restricting the amount of discovery and prescribing time limitations to the presentation of evidence. Such measures would allow Petitioners to exercise their statutory right to intervene while observing time pressures, and would ultimately expedite the proceedings as a whole.

C. The Three-Judge Court's Order Is Clearly Erroneous as a Matter of Law, in Light of the Plain Language of the PLRA and the Congressional Intent Behind the PLRA.

The Petitioners seek mandamus because the Bifurcation Order is clearly erroneous as a matter of law. *See Executive Software N. Am., Inc. v. U.S. Dist. Court*, 24 F.3d 1545, 1551 (9th Cir. 1994) (among the five *Bauman* factors, "[t]he existence of clear error as a matter of law is dispositive"); *see also Varsic v. U.S. Dist. Court for Cent. Dist. of Calif.*, 607 F.2d 245 (9th Cir. 1979) (holding that mandamus was appropriate where the district court order was erroneous because it failed to liberally construe ERISA venue provisions and thereby frustrated congressional intent). The Three-Judge Court accurately noted that the PLRA gives statutory intervenors standing "to intervene only in 'proceedings relating to' a prisoner release order." *See*

Exh. A at 3 (Bifurcation Order). However, the Three-Judge Court stated that it saw no reason to go “beyond the scope of intervention contemplated by the statute,” by allowing the statutory intervenors to participate in Phase I. *See id.* at 3-4. The plain language of the PLRA, its legislative history and related caselaw demonstrate that Phase I proceedings are related to the issuance of a prisoner release order and participation in Phase I is at the heart of the “scope of intervention contemplated by the [PLRA].” *See id.*

1. The Plain Language of the PLRA Clearly Provides for Petitioners’ Right to Participate in Proceedings “Relating to” Prisoner Release Orders.

The plain language of the relevant subsection of the PLRA (“PLRA Intervention Provision”) indicates that certain public officials have the right to intervene in “any proceeding relating to [issuance of a prisoner release order].” 18 U.S.C. § 3626(a)(3)(F) (which falls under subsection (a)(3), entitled, “Prisoner Release Order”); *see also Bowers v. City of Philadelphia*, No. 06-CV-3220, 2006 WL 2601604 at *6 (E.D. Pa. Sept. 8, 2006) (“Clearly, given the context of the [intervenor’s] standing provision in the section on prisoner release order, the ‘relief’ referenced in the final sentence is a ‘prisoner release order’”). In light of the plain language of the statute, Petitioners have an unconditional right to intervene in the proceedings, pursuant to Rule 24(a)(1). *See* 18 U.S.C. § 3626(a)(3)(F); *see also* Fed. R. Civ. P. 24(a)(1). Since the plain language of the statute clearly means that statutory intervenors such as Petitioners have the right to intervene in “any proceeding” relating to prisoner release orders, no further inquiry is necessary. *See generally, In re Silicon Graphics Inc. Securities Litigation*, 183 F.3d 970 (9th Cir. 1999) (“If language of statute is plain and its meaning clear, that is end of statutory inquiry”).

The Intervention Provision falls squarely within the section on the PLRA articulating the criteria for a prisoner release order. *See* 18 U.S.C. § 3632(a)(3)(F). These criteria constitute the

entirety of Phase I. *See* Exh. A at 5 (Bifurcation Order). Thus, exclusion of the Petitioners from Phase I contravenes the structure of the statute, which exists for the purpose of providing Petitioners standing to participate in Phase I considerations. *See* 18 U.S.C. § 3632(a)(3)(F); *see generally*, *U.S. Nat. Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439 (1993) (“Statutory construction ‘is a holistic endeavor’ ... and, at a minimum, must account for a statute’s full text, language, as well as punctuation, structure, and subject matter”) (internal citations omitted); *see also* *U.S. v. Flores-Garcia*, 198 F.3d 1119 (9th Cir. 2000) (“Court ascertains statute’s plain meaning by examining the statute’s language and its internal structure as well as its object and policy”). The Phase I considerations “relate to” issuance of a prisoner release order; indeed, the justification for convening the Three-Judge Court relies solely on whether or not a prisoner release order should issue. 18 U.S.C. § 3626(a)(3)(F).

2. The Legislative History of the PLRA Demonstrates the Congressional Intent to Protect Petitioners’ Statutory Right to Intervene in a Wide-Range of Proceedings “Relating to” Prisoner Release Orders.

Beyond the plain language of the statute, the legislative history of the PLRA demonstrates a conscious decision by Congress to enable Petitioners to participate fully in a wide-range of proceedings relating to prisoner release orders.

Congress enacted the PLRA Intervention Provision to ensure that courts grant certain officials their right to intervene under Rule 24(a)(1), as a direct response to federal court decisions denying intervention under Rule 24(a)(2). *See Bowers*, 2006 WL 2601604 at *6 (referring to enactment of Section 3626(a)(3)(F) in response to two Third Circuit decisions denying a district attorney the right to intervene under Rule 24(a)(2)); *see also* H.R. Rep. No. 104-21, at 27 (1995), 1995 WL 56410 (the PLRA grants a “explicit right to intervene” under

Rule 24(a)(1)).]; *see also* Pub. L. 104-134, § 802, 1996 H.R. 3019 (April 26, 1996) (granting intervention to government officials whose function includes appropriation of funds for construction of prison facilities, or prosecution or custody of persons affected by prisoner release orders).

In drafting the Intervention Provision, Congress wanted to ensure that courts liberally construed its language. *See* H.R. Rep. No. 104-21, at 27 (1995), 1995 WL 56410 (“the provisions of [the PLRA] should be construed liberally so as to grant standing” to the statutory intervenors). Following Congress’s lead, the court in *Bowers* liberally construed the phrase “any proceeding relating to” a prisoner release order to include proceedings in the very early stages of litigation, before a prisoner release order was even explicitly considered. *See Bowers*, 2006 WL 2601604 at *6, 7 (“The legislative history [of the Intervention Provision] suggests that Congress intended this subsection to be liberally interpreted”). The present litigation has progressed far beyond the initial stages addressed in *Bowers*, and these proceedings involve the imminent possibility that a prisoner release order will issue. *See Bowers*, 2006 WL 2601604 at *6.⁷ Therefore, protecting the Petitioners’ right to intervene is all the more critical, and the Three-Judge Court’s suggestion that Petitioners’ participation as intervenors is outside the scope of participation contemplated by the statute runs counter to legislative intent, and is clearly erroneous.⁸ Thus, the third *Bauman* factor weighs in favor of granting mandamus relief to

⁷ In its November 9, 2007 order, the Three Judge court noted that the *Bowers* court based its decision on two factors: (1) its “prudential determination” that the district attorney “may well play a very active role” in the proceedings, and (2) “the relevant provisions of 18 U.S.C. § 3626.” *See* Exh. B at 2, n.1. The Three-Judge Court nevertheless concluded that the reasoning in *Bowers* did not require a reconsideration of its bifurcation order, although it did not explain why. Petitioners will “play a very active role” in these proceedings, and the relevant provisions of 18 U.S.C. § 3626 also provide for their participation. *See id.*

⁸ The legislative history of the PLRA demonstrates congressional intent to facilitate the intervention of legislators in particular. The 1997 amendment to the PLRA’s Intervention Provision added the words “including a legislator,” to clarify that even individual legislators have standing to intervene in proceedings relating to a prisoner release order.

enable Petitioners to participate as full parties in all proceedings in this action. *See Bauman*, 557 F.2d at 654-55.

D. Although the Three-Judge Court's Order Is Not an Oft-Repeated Error or a Manifestation of Persistent Disregard for the Federal Rules, Mandamus Should Be Granted Because This Is a Question of First Impression, and This Error Could Be Perpetuated in Other PLRA Proceedings.

The fourth *Bauman* factor, whether the disputed action represents an oft-repeated error or a persistent disregard for the federal rules, and the fifth *Bauman* factor, whether the disputed action is a question of first impression, are “two sides of the same coin”; where one factor is present, the other likely is not. *See Calderon v. U.S. Dist. Court for Central Dist. of Cal.*, 163 F.3d 530, 534 (9th Cir. 1998) (citing *Admiral Ins. Co. v. U.S. Dist. Court for Dist. of Ariz.*, 881 F.2d 1486, 1491 (9th Cir. 1988) (granting mandamus where the fourth factor was absent, but the fifth was present); *see also McClatchy Newspapers, Inc. v. U.S. Dist. Ct. for Eastern Dist. Of Calif.*, 288 F.3d 369, 375 (9th Cir. 2002) (granting mandamus where all factors but the fourth were satisfied).

Petitioners acknowledge that their exclusion from Phase I of the proceedings is not an oft-repeated error by the Three-Judge Court. The fourth *Bauman* factor gives appellate courts the opportunity to remedy “oft-repeated errors,” or actions manifesting “persistent disregard of

See Pub. L. 105-119, § 123(a)(1)(B)(ii)(I), 111 Stat. 2470 (Nov. 26, 1997); *see also U.S. v. Monroe*, 943 F.2d 1007 (9th Cir. 1991) (“Subsequent amendment to statute, which serves to clarify, rather than to change, existing law, is entitled to substantial weight in construing earlier law”). The unambiguous language of the statute now reads:

“Any State or local official *including a legislator* or unit of government whose jurisdiction or function includes the appropriation of funds for the construction, operation, or maintenance of prison facilities, or the prosecution or custody of persons who may be released from, or not admitted to, a prison as a result of a prisoner release order shall have standing to oppose the imposition or continuation in effect of such relief and to seek termination of such relief, and shall have the right to intervene in any proceeding relating to such relief.”

18 U.S.C. § 3626(3)(F) (1997) (emphasis added to show language added by amendment). *See also Ruiz v. Estelle*, 161 F.3d 814 (5th Cir. 1998) (recognizing Congress’s intent to afford legislators in particular the right to participate in PLRA proceedings).

the federal rules,” by the courts below them through mandamus relief. *See Bauman*, 557 F.2d at 660-61. Given the uncommon nature of PLRA cases and cases before three-judge panels, it is not a surprise that the exclusion issue has not been raised before. Few PLRA cases have addressed the issue of statutory intervention, and among those that have, all of been resolved in favor of granting, rather than denying or limiting intervention. *See, e.g., Ruiz v. Estelle*, 161 F.3d 814, and *Bowers v. City of Philadelphia*, 2006 WL 2601604 at *6; *see also Roberts v. Mahoning County*, 495 F. Supp.2d 713 (N.D. Ohio, 2006) (granting City of Youngstown’s right to intervene in the “remedial phase” of the proceedings involving the determination of the criteria in 18 U.S.C. § 3626(a)(3)(E))(i) and (ii), which are the contents of Phase I in the present case).

While the fourth *Bauman* factor is absent here, the fifth factor weighs toward grant of mandamus; Petitioners bring before the Court an issue of first impression that raises new and important problems that demand this Court’s attention. *See Bauman*, 557 F. 2d at 661 (reviewing the petition on the basis of whether it was an issue of first impression that was “sufficiently new and important to warrant mandamus review”). The Three-Judge Court’s decision to exclude Petitioners from Phase I of the proceedings effectively nullifies their participation in the core decision of whether a release order shall issue, and if carried out, this decision will drastically affect the rights afforded to statutory intervenors in this Circuit and others. The precedent set here could severely curtail the rights of not only Petitioners, but all other statutory intervenors in future PLRA proceedings.

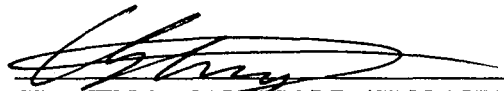
V. CONCLUSION

The *Bauman* factors weigh heavily in favor of granting mandamus relief: Petitioners have no alternative forms of relief; Petitioners will suffer irreparable harm; the Three-Judge Court’s

exclusion of Petitioners is clearly erroneous, and the issue of exclusion of statutory intervenors from PLRA proceedings is one of first impression for this Court. As legislators, district attorneys, and law enforcement officials, Petitioners can make an invaluable contribution to all of the proceedings relating to a prisoner release order. Accordingly, and because the Three-Judge Court has erred in stripping Petitioners of their statutory right to intervene in proceedings relating to prisoner release orders, Petitioners respectfully submit this petition for a writ of mandamus to overturn the Three-Judge Court's exclusion of Petitioners from Phase I of these proceedings.

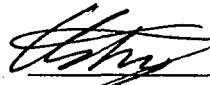
Because of the impending discovery deadlines and trial date, Petitioners respectfully request that its petition be considered at the Court's earliest convenience.

Dated: December 10, 2007


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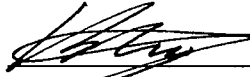
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Statement of Related Cases

Circuit Rule 28-2.6

Defendants in the *Plata/Coleman* proceedings filed two appeals in this Court, Ninth Circuit Case No. 07-16361 and Case No. 07-16383, to contest the *Plata* and *Coleman* orders convening the Three-Judge Court. These appeals were denied on the grounds that the orders could be effectively reviewed following the entry of a final order by the three-judge district court.

Petitioners filed a Notice of Appeal for the matters at issue herein to preserve their appellate rights; a case number has not yet been assigned to this appeal. Petitioners filed the Notice on December 7, 2007.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is: 580 California Street, Suite 1500. On December 10, 2007, I served the foregoing document(s) described as:

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 AND PETITION FOR WRIT OF
MANDAMUS VACATING COURT'S EXCLUSION OF PETITIONERS FROM PHASE I OF
BIFURCATED PROCEEDINGS

DECLARATION OF CHAD A. STEGEMAN RE PETITIONER'S EXHIBIT IN SUPPORT OF
EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 AND PETITION FOR WRIT OF
MANDAMUS VOL 1 & 2

DECLARATION OF ELISE J. FARRELL

on the interested party(ies) below, using the following means:

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20	Matthew A. Lopes, Jr. Esq. Deputy Special Master Pannone Lopes & Devereaux LLC 1800 Financial Plaza Providence, RI 02903 (For Special Master)	Richard Goff Heller, Ehrman White & McAuliffe 701 Fifth Avenue Seattle, WA 98104
23		<u>Via Overnight Delivery</u> Honorable Lawrence K. Karlton Robert T. Matsui United States Courthouse 501 I Street Sacramento, CA 95814

Via Overnight Delivery

Honorable Thelton E. Henderson
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San Francisco, CA 94102

Via Overnight Delivery

Honorable Stephen Reinhardt
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312 North Spring Street, Suite 1747
Los Angeles, CA 90012

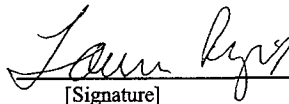
☒ BY UNITED STATES MAIL I enclosed the documents in a sealed envelope or package addressed to the respective address(es) of the party(ies) stated above and placed the envelope(s) for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid at San Francisco, California.

☒ (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on December 10, 2007 at San Francisco, California.

Laura Rojas

[Print Name of Person Executing Proof]



[Signature]