

CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf
of Appellants.

DONALD SPECTER, ESQ., Berkeley, California; on behalf of
Appellees.

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1 P R O C E E D I N G S

2 (11:10 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 in Case 09-1233, Schwarzenegger v. Plata, and the
5 related cases.

6 Mr. Phillips.

7 ORAL ARGUMENT OF CARTER G. PHILLIPS

8 ON BEHALF OF THE APPELLANTS

9 MR. PHILLIPS: Thank you, Mr. Chief Justice,
10 and may it please the Court:

11 What this Court has under review today is an
12 extraordinary and unprecedented order issued by a three-
13 judge district court requiring the release of between
14 36,000 and 45,000 inmates, currently incarcerated in the
15 California penal system, within a 2-year period.

16 The order in this particular case is made
17 particularly remarkable because it strikes me that at a
18 minimum it is extraordinarily premature. That -- it may
19 come at some point in this process that an order,
20 probably substantially smaller in scope than this one,
21 may become appropriate. But if this is supposed to be
22 an order or remedy of last resort, and what the district
23 court has done here is leapfrogged a series of steps
24 that should have been taken ahead of going this
25 particular route.

1 JUSTICE GINSBURG: One case, Mr. Phillips,
2 is pending for 20 years; is that not so?

3 MR. PHILLIPS: Yes, that's correct, Justice
4 Ginsburg.

5 JUSTICE GINSBURG: So it seems to me -- and
6 there were something like 70 orders from the district
7 court, the single-judge district court in that case.

8 MR. PHILLIPS: That's absolutely true,
9 Justice Ginsburg.

10 JUSTICE GINSBURG: And no -- no change. So
11 how much longer do we have to wait? Another 20 years?
12 Longer than that?

13 MR. PHILLIPS: No, Justice Ginsburg. I
14 think, obviously, the length of time you have to wait in
15 some ways depends on what the state of the remedial
16 phase is in the particular case. And in this case and
17 in recognition, frankly, of the substantial problems
18 that were inherent in the -- in the penal system as it
19 existed during the 1990s and up until the early 2000s, a
20 receiver was appointed, specifically in the Plata class,
21 but there was also connections between the receiver and
22 the special master even in the Coleman class before the
23 three-judge panel was convened.

24 And under those circumstances and given the
25 extraordinary powers that the receiver had been

1 accorded, what should have -- the most logical course,
2 if this is supposed to be a remedy of last resort, was
3 to allow the receiver an opportunity to implement the
4 extraordinary powers that were conferred upon him, and
5 then see -- because if it turns out that we aren't
6 making progress --

7 JUSTICE SOTOMAYOR: Excuse me. Could you
8 tell me -- from your briefs, I just haven't understood
9 what the alternative steps are. The court below talked
10 about some proposals like construction and said the
11 legislature has struck them down. There's -- the fiscal
12 crisis has gotten worse, so construction is really not
13 an option. I don't see how you wait for an option that
14 doesn't exist. They talked about hiring more staff, but
15 the conclusion was that even if you maximize the staff,
16 you don't have the facilities to add more staff, which
17 is what you need to cure the constitutional violation.

18 So tell me what specific steps outside of
19 this order should have been given time to be
20 implemented, because the receiver has basically said:
21 I've tried, and the small progress we made has been
22 reversed because the population just keeps growing, so
23 we can never get ahead of the problem.

24 MR. PHILLIPS: The -- the --

25 JUSTICE SOTOMAYOR: So slow down from the

1 rhetoric and give me concrete --

2 MR. PHILLIPS: Sure.

3 JUSTICE SOTOMAYOR: -- details about what
4 the least restricted means would have been, other than
5 to say, throw it back to a receiver and special master
6 who are saying we don't have a solution outside
7 of reducing overcrowding.

8 MR. PHILLIPS: I don't think that's a fair
9 characterization of what the receiver said. The
10 receiver said that, at any population, he would in fact
11 get you to the point --

12 JUSTICE SOTOMAYOR: Oh, counsel, that was
13 one statement years ago. If that's all you're relying
14 on --

15 MR. PHILLIPS: No, no. That's not all I'm
16 relying on. All I'm suggesting --

17 JUSTICE SOTOMAYOR: That may be your weakest
18 argument. Tell me -- give me concrete steps that are
19 least -- less restrictive.

20 MR. PHILLIPS: Well, if you -- all you have
21 to do is look at what the receiver has done over the
22 course of the period of time since his appointment, and
23 particularly when the second receiver was put in place.
24 First of all, A.B. 900 has been enacted. There is
25 significant construction. There has been ground broken.

1 There are substantial facilities in place.

2 Second, the receiver has had extraordinary
3 success in the hiring process. They are -- we are at
4 close to 90 percent --

5 JUSTICE GINSBURG: Is there in fact less
6 overcrowding? Because I thought that the -- what this
7 case was all about was the receiver has said, the
8 special master has said, we can't make any progress at
9 all until there are fewer people; we have no place to
10 put clinics.

11 The first step, not the last step, but given
12 the -- given what we're dealing with here, the essential
13 first step is that we have fewer people so there is more
14 room for these health facilities, more room for staff to
15 operate.

16 MR. PHILLIPS: Justice Ginsburg, the
17 fundamental issue in this case seems to me as -- what is
18 the real cause of the constitutional violation here?
19 And the real cause of the constitutional violation here
20 has always been the culture of disregard for the inmate.
21 What the receiver was put in place for, the reason he
22 was appointed, and properly so -- this was with the
23 State's consent; this is not over our objection -- was
24 to change that fundamental culture and to provide, one,
25 construction, to provide increased numbers, to

1 provide --

2 JUSTICE GINSBURG: Yes, but you can't -- you
3 can't provide construction when the State doesn't supply
4 the money for it.

5 MR. PHILLIPS: Except that since the
6 August 8th, 2008, period of time, you know, literally
7 hundreds of millions of dollars have gone to
8 construction specifically and more than \$4 billion have
9 been spent on the provision of health care in this
10 particular system. And a great deal of that is because
11 of the receiver.

12 JUSTICE GINSBURG: Then if you -- then if
13 there -- if there are these great changes in
14 circumstances so that now they -- medical care can be
15 administered in something approaching a decent way, you
16 could go back to the single-judge district court and
17 say: I'm moving under 60(b). Circumstances have
18 changed; it's no longer the case that it's impossible to
19 render decent health care.

20 MR. PHILLIPS: Justice Ginsburg, I don't
21 think we could get that relief from the single-judge
22 district court, unless you're asking me to actually seek
23 to remove the entirety of the claim. I mean, the order
24 that says that we have to get to 137.5 percent of the
25 design, the design capacity, within 2 years is a

1 three-judge district court decision.

2 JUSTICE SOTOMAYOR: So you go back to that
3 panel because it invited you to. It said if
4 circumstances change, come back.

5 MR. PHILLIPS: Right, but that will always
6 be the case, Justice Sotomayor. The fundamental
7 question here is: Congress shifted dramatically the
8 approach that you're supposed to take as a court of
9 equity in this context. This is supposed to be a matter
10 of last resort, which would mean that you would give the
11 receiver a full opportunity to do what the receiver --

12 JUSTICE BREYER: The receiver said the best
13 statement that seemed to me to summarize it. It's in
14 his brief on page 9. He has about two paragraphs. And
15 as you read that two paragraphs, it sounds as if
16 overcrowding is a big, big cause of this problem, which
17 is horrendous, which if you think it's accurately
18 described in the mental case in the first page, two
19 paragraphs -- now, if that's a fair description from the
20 record, it's a horrendous problem.

21 MR. PHILLIPS: Well --

22 JUSTICE BREYER: What the receiver says is
23 overcrowding is a big cause of it. And then he says: I
24 think we've discovered you actually can provide care,
25 and certainly our plan and turnaround plan believes we

1 can provide constitutional levels of care no matter what
2 the population is.

3 So then you look to the care and turnaround
4 plan and it says spend \$8 billion building more
5 buildings. And then the legislature rejected it. Okay?

6 MR. PHILLIPS: And then --

7 JUSTICE BREYER: Now, there we are. More
8 time; what's supposed to happen?

9 MR. PHILLIPS: No, but, Justice Breyer, the
10 legislature also approved a smaller but nevertheless
11 multibillion-dollar construction program.

12 JUSTICE BREYER: Yes, it was 2.31 or
13 something like that.

14 MR. PHILLIPS: Well, I -- I mean, they
15 approved --

16 JUSTICE BREYER: And did they approve the
17 2.3 -- is that in place, 2.35? Did they approve that?

18 MR. PHILLIPS: Yes, they did approve that --

19 JUSTICE BREYER: Okay. So he said: We need
20 8 --

21 MR. PHILLIPS: -- and that money is being
22 spent.

23 JUSTICE BREYER: We need 8, and they
24 approved 2.35.

25 MR. PHILLIPS: Right, and the receiver --

1 JUSTICE BREYER: And is there any evidence
2 here that suggests that 2.35 is sufficient to cure the
3 constitutional violation?

4 MR. PHILLIPS: Well, I don't know whether it
5 will get you there or not.

6 JUSTICE BREYER: So I take it from your
7 answer the answer is no, there is no evidence.

8 MR. PHILLIPS: Well, there is the evidence
9 that the receiver asked for contempt for not getting the
10 8 billion and withdrew that motion. So, obviously,
11 there is some sense in which the receiver is reasonably
12 satisfied with 2.35 billion as an opening gambit.

13 But, again, all of this goes to what is, at
14 least from my perspective, the fundamental question the
15 court should have evaluated in the first instance, which
16 is: Are we ready yet to give up hope at this point?

17 JUSTICE BREYER: Well, what he says -- what
18 the receiver says about the 2.35, that it is a
19 significant step farther. It is certainly better than
20 no construction at all. However, that is not equivalent
21 to a conclusion that that current compromise will result
22 in sustainable constitutional health care at current
23 population density levels.

24 That's what he said about it. So -- so we
25 have his views, and I'm back to my question: What else

1 is supposed to happen?

2 MR. PHILLIPS: Well, there's --

3 JUSTICE BREYER: Which was your question
4 initially.

5 MR. PHILLIPS: Justice Breyer, when the
6 receiver says that -- now remember, he says at current
7 population levels. He doesn't suggest, and his brief is
8 very clear, that it doesn't urge this Court to affirm
9 the particular order in this case.

10 JUSTICE ALITO: Mr. Phillips --

11 MR. PHILLIPS: Can I --

12 JUSTICE ALITO: Yes.

13 MR. PHILLIPS: -- just finish this?

14 And the reality is that the population
15 levels have dropped pretty significantly since August,
16 since the trial in this particular case. And given the
17 actions by the legislature in A.B. 18 and the actions of
18 the legislatures in A.B. 900, there are both a lot of
19 expenditures on the table and substantial reductions in
20 the population size. And so, therefore, even under the
21 receiver's --

22 JUSTICE GINSBURG: What -- do we have
23 information about that substantial reduction? I mean,
24 in this record, it just seems to be that it's -- no
25 matter how many efforts have been made, the population

1 goes up. And now you say that the population has gone
2 down. From what point in time and how much has it gone
3 down?

4 MR. PHILLIPS: Well, it's down to around, as
5 I understand it, about 147,000 from a high of around 165
6 to 170,000, and it has dropped, as we know, because
7 there has been a change in the good time credits. There
8 has been a significant number of transfers. I mean,
9 that was the purpose of the governor's proclamation
10 declaring an emergency.

11 JUSTICE SOTOMAYOR: So it's possible that
12 within the 2-year period, you're going to hit the mark
13 if you -- that's what the lower court's --

14 MR. PHILLIPS: I think it unlikely.

15 JUSTICE SOTOMAYOR: That's what the
16 three-judge panel said, which is: If you implement most
17 of the proposals being made, you are likely to hit the
18 mark. So what you're saying is you're going to do it.
19 And if you don't, they invited you to come back and --
20 you really don't think that if you hit 140 percentage,
21 that the court is going to order an immediate release of
22 the 2.5 percent over the limit it set? It's going to
23 ask you: What have you put into place to reach that
24 level over what additional period of time?

25 MR. PHILLIPS: I mean, there's a core sort

1 of federalism answer and then a basic sort of factual
2 point to be made here. Let me make the second one
3 first, and then I want to come back to the -- what you
4 may regard as rhetorical, but nevertheless I think
5 important, which is that when we made our initial
6 proposal to the three-judge court suggesting what we
7 thought would be a reasonable reduction within a
8 reasonable period of time, it was met with both a motion
9 for contempt and summary rejection out of hand,
10 notwithstanding that there was improvement at the
11 time --

12 JUSTICE SOTOMAYOR: So what are we fighting
13 about? Are we fighting about that the plan was wrong,
14 or are we fighting about that you're angry that you were
15 told to do it in 2 years -- in 22 years, as opposed to
16 do it in 25 years? Is that -- is that what you're
17 objecting to?

18 MR. PHILLIPS: No. I think the -- no, this
19 goes to the federalism point.

20 JUSTICE SOTOMAYOR: Can -- can you do it in
21 5 years?

22 MR. PHILLIPS: I don't know. I -- you know,
23 if -- if balancing all of the policies that the State
24 has to take into account, can it get there and is that
25 in the best interest of the State of California? If it

1 is, yes, then we can get there.

2 JUSTICE SOTOMAYOR: Well, the best interest
3 of the State of California, isn't it to deliver adequate
4 constitutional care to the people that it incarcerates?
5 That's a constitutional obligation.

6 MR. PHILLIPS: Absolutely. And California
7 recognizes that.

8 JUSTICE SOTOMAYOR: So when are you going to
9 get to that? When are you going to avoid the needless
10 deaths that were reported in this record? When are you
11 going to avoid or get around people sitting in their
12 feces for days in a dazed state? When are you going to
13 get to a point where you're going to deliver care that
14 is going to be adequate?

15 JUSTICE SCALIA: But don't be rhetorical.

16 MR. PHILLIPS: I'll do my best. Thank you,
17 Your Honor.

18 (Laughter.)

19 MR. PHILLIPS: I mean, first of all, let's
20 -- you know, if you look at the receiver's 2009 death
21 review which came out in September 2010, it specifically
22 says that there has been a significant downward trend
23 over the past 4 years. The suicides -- the 25 suicides
24 in '09 were 66 percent of the average for the preceding
25 3 years, and the 9 homicides were 60 percent of the

1 average. There have been significant improvements.

2 And the more important point in response to
3 your specific question, Justice Sotomayor, is that the
4 record in this case was cut off in August of 2008, and
5 so what we have are --

6 JUSTICE KENNEDY: Of course, but the problem
7 I have with that, Mr. Phillips, is that at some point
8 the court has to say: You've been given enough time;
9 the constitutional violation still persists, as the
10 State itself acknowledges.

11 MR. PHILLIPS: Well, I'm not sure we've
12 stated that.

13 JUSTICE KENNEDY: Overcrowding is the
14 principal -- overcrowding is the principal cause, as
15 experts have testified, and it's now time for a remedy.

16 The court can't -- has to at some point
17 focus on the remedy, and that's what it did, and that,
18 it seemed to me, was a perfectly reasonable decision.

19 MR. PHILLIPS: Justice Kennedy, I agree with
20 everything you say except -- and I even agree with the
21 last statement, because, you know, you needed a
22 significant remedy. There's no question about it. But
23 you got a significant remedy when the receiver was
24 appointed in 2005 and implemented a program in 2006. I
25 mean, our --

1 JUSTICE KAGAN: How much time do you think
2 the receiver needed? I mean, how much time did --
3 should the court have given the receiver to develop his
4 plan and to try to implement his plan?

5 MR. PHILLIPS: Well, there's no -- Justice
6 Kagan, there's no specific time frame. I mean,
7 obviously, we believe that we are entitled to a
8 reasonable opportunity to comply with the receiver's
9 orders and to bring ourselves ultimately into compliance
10 with the Constitution, and --

11 JUSTICE KENNEDY: Well, at some point the
12 State itself said that if it had, I think, 7 years, it
13 could get down to 137.5 and didn't seem to object to
14 that.

15 MR. PHILLIPS: No, that's --
16 Justice Kennedy, you know, given all of the other
17 constraints, et cetera -- again, there's a fundamental
18 difference between what you do under the hammer of a
19 district court order, which is what we have under these
20 circumstances, and what the State will do. That said,
21 the State is absolutely committed.

22 I mean, the -- again, to go back to what is
23 the root cause of the constitutional violation, it's not
24 overcrowding. I mean, when California violated the
25 constitutional rights of the mentally ill in the 1990s,

1 the prisons weren't crowded. It was because there was a
2 fundamental lack of attentiveness to medical care under
3 those circumstances. And that's unfortunate, to be
4 sure. More than that.

5 But that was the reason. To go back to your
6 point, Justice Kennedy, that's why the receiver, which
7 is an extraordinary remedy. To confer upon a private
8 individual the entire authority to run the California
9 Department of Corrections, not just simply a facility or
10 anything like that, but the entire Department of
11 Corrections' medical and -- medical health provision, is
12 incredible.

13 JUSTICE GINSBURG: But I thought that
14 officer himself said: I can't do this without as a
15 first step reducing the population; nothing else is
16 going to work until we reduce the population to the
17 point where there is room for clinics, room for medical
18 personnel to operate. I mean, that was the view of the
19 district judge, the special master in one case, the
20 receiver in the other case.

21 Everybody -- they all agreed reducing the
22 population is not going to cure it, not going to make
23 everything perfect, but without doing that as a first
24 step, nothing -- there will be no cure.

25 MR. PHILLIPS: Well, Justice Ginsburg, even

1 if you accept that, and I don't think that's precisely
2 how I would interpret what the receiver said under these
3 circumstances anyway, but even if you accept that, the
4 idea of a 137-1/2 percent design cap that has to be
5 implemented within fewer than 2 years is a remedy that's
6 neither necessary nor sufficient. It is not aimed at
7 the specific class. It doesn't remedy the specific
8 Federal rights as required by the Prisoners Litigation
9 Reform Act.

10 JUSTICE GINSBURG: I don't get the class
11 thing, because what -- you can't have a remedy just
12 limited to the class. The class wants to have clinics.
13 They want to have personnel who function someplace
14 outside of a broom closet. So you can't deal with this
15 problem by just dealing with the mentally ill and the
16 people with medical problems. You have to provide space
17 for facilities.

18 MR. PHILLIPS: I think, Justice Ginsburg,
19 the -- the fundamental point here is that it may
20 eventually be that you have to get to that stage, but if
21 you look at the receiver's reports since August 2008,
22 which consistently analyzed this issue, and they say:
23 And we have been able successfully to bring in very
24 qualified personnel, and we have significantly larger
25 numbers; we know there is construction in place; it may

1 not be as substantial as what I originally proposed; it
2 is nevertheless very significant.

3 And -- and Congress was very explicit that
4 the remedy of a prisoner release order should be the
5 remedy of last resort.

6 JUSTICE BREYER: What would I look at to
7 find this? It's a big record. What I did was I -- it
8 refers to on-line evidence, and I went and looked at the
9 pictures, and the pictures are pretty horrendous to me.
10 And I would say page 10 of the religious group's brief,
11 for example, shows you one of them.

12 And what they're saying is, it's -- it's
13 obvious. Just look at it. You cannot have mental
14 health facilities that will stop people from killing
15 themselves and you cannot have medical facilities that
16 will stop staph and tubercular infection in conditions
17 like this. And then you look at them.

18 Now, you've looked at them. I've looked at
19 them. And what is the answer to that? There's nothing
20 in here that -- the special master said \$8 billion is
21 the answer.

22 MR. PHILLIPS: Well --

23 JUSTICE BREYER: And they haven't come
24 close. So how can I -- or you if you were in my
25 position -- what would you say in an opinion that says

1 that these three judges who have 200 pages of
2 findings -- what would you say to -- as an answer to
3 what I just said?

4 MR. PHILLIPS: I would say that the
5 Prisoners Litigation Reform Act has a series of very
6 specific requirements that the Federal court has to
7 comply with, and that in deciding to go to a three-judge
8 district court in the first instance, you have to
9 examine the orders that are in place and whether those
10 orders have had a reasonable time within which to
11 operate. And --

12 JUSTICE KENNEDY: Yes, but the State -- the
13 State did not claim that either order in either case has
14 succeeded in achieving a remedy. You've never claimed
15 that.

16 MR. PHILLIPS: Well, it depends on what you
17 mean by --

18 JUSTICE KENNEDY: And -- and just if I could
19 have your attention for a moment. I have this problem
20 with the case: Overcrowding is, of course, always the
21 cause. If I'm running a hotel -- if I'm looking at a
22 highway system, I need highways, what's the number of
23 cars? If the problem is bad service in a hotel, well,
24 it's the number of employees per -- per guest. I mean,
25 that's fairly simple.

1 Now, I recognize, of course, that Congress
2 has -- had imposed a special duty on us. But I think it
3 means that overcrowding must not be ordered unless that
4 is the only efficacious remedy in -- in a permissible
5 period of time. And it seems to me there is massive
6 expert testimony to support that proposition on the part
7 of -- of the prisoners.

8 MR. PHILLIPS: I -- I mean, it seems to me
9 that, first of all, I'm not sure that's consistent with
10 the language. It's the primary cause of the
11 constitutional violation, not the primary impediment to
12 the implementation of a specific remedy. So I think
13 that's still a difficult and open question as to how to
14 proceed.

15 But it still strikes me that the sequence
16 that Congress envisions and the one that would make the
17 most sense and ultimately the one that hopefully would
18 accommodate both the plaintiffs' interests and the
19 State's interests, and the Department of Corrections'
20 interests, is to allow the receiver to stay on a course
21 that candidly I think will in fact get you there.

22 I mean, again, one of the real flaws in this
23 case, Justice Kennedy, is nobody doubts for a moment
24 that there have been very significant violations of
25 constitutional rights years gone by and, indeed, a

1 failure on the mental health side ultimately to get you
2 -- get to the point where we are in fact providing a
3 significant remedy.

4 The reality is, is that in the course of the
5 last 3 to 4 years under the guidance of the -- of the
6 receiver, who coordinates with the special master on the
7 mental health side and does it with the cooperation of
8 the State of California, there have been significant --
9 there has been significant movement in the right
10 direction.

11 And if the court had not jumped the gun and
12 said, look, we're not going to -- we're not going to let
13 that part play itself out, we are going to leap ahead
14 and go to a three-judge court and go to the prisons --
15 to the prisoner release order, this process would have
16 played itself out and we wouldn't be here --

17 JUSTICE ALITO: All this talk about what the
18 receiver may think can be done seems a little bit
19 perplexing to me, because the receiver did not testify
20 before the three-judge court; isn't that correct?

21 MR. PHILLIPS: That -- that is true, Justice
22 Alito.

23 JUSTICE ALITO: You were not allowed to
24 question him.

25 MR. PHILLIPS: We were not allowed to --

1 JUSTICE ALITO: And now he has submitted
2 what is styled an amicus brief where he doesn't address
3 issues of law. He explains his views about -- he tries
4 to explain prior statements and supplement those prior
5 statements. Is that proper?

6 MR. PHILLIPS: Well, you know, I'm a
7 long-time believer that amicus briefs are pretty much
8 open season in terms of anything you want to present on
9 them. But I mean, obviously, I -- I --

10 JUSTICE ALITO: Well, is that true? Can --

11 MR. PHILLIPS: Clearly a better system is
12 one in which we could --

13 JUSTICE ALITO: Can a witness testify -- can
14 a witness submit an amicus brief that consists of an
15 affidavit?

16 MR. PHILLIPS: No, Your Honor, that's
17 obviously not appropriate, and one of the things we've
18 complained about --

19 JUSTICE GINSBURG: I thought the -- the --
20 that brief was filed because the -- there were -- in
21 your presentations, there were representations about the
22 special master, and he filed that brief to say: You
23 must understand this in context; I was making a speech
24 at the club.

25 So he wanted to put in context what you had

1 used. You had quoted his statements.

2 MR. PHILLIPS: Well, to be sure, although,
3 candidly, we had -- we had referred to some of those
4 same statements even in the jurisdictional statement in
5 this litigation. This has been part of the case for
6 quite some time.

7 So I -- I don't know what motivated the
8 special master to file an out-of-time brief -- or I
9 mean, the receiver to file an out-of-time brief. But I
10 understand -- you know, we didn't object to it so long
11 as the Court was of a mind to hear from the receiver.

12 But I do think the most important part of
13 that, though, to keep in mind in this context is the
14 receiver didn't ask for this Court to affirm. The
15 receiver simply clarified certain statements that had
16 been made and tried to say, as Justice Alito described,
17 put them into some kind of context. And that's -- and
18 that's fine, and we obviously don't have any quarrel
19 with -- with that particular presentation.

20 But I do think to say that the receiver has
21 insisted that he cannot get to a constitutionally
22 permissible result without the order that has been
23 imposed in this particular case is -- is simply not
24 consistent with either the record and certainly not
25 consistent with that amicus brief.

1 JUSTICE KENNEDY: Well, but the experts
2 testified to that effect.

3 MR. PHILLIPS: I mean, experts made the --
4 certainly reached that specific conclusion. But this
5 Court has recognized --

6 JUSTICE KENNEDY: And the strike force and
7 the governor's -- governor's commission reached the
8 same conclusion.

9 MR. PHILLIPS: Well --

10 JUSTICE KENNEDY: The strike team, I think
11 they called them.

12 MR. PHILLIPS: Right. But, again, it seems
13 to me that there is a very, very, very big difference
14 between what do you need to accomplish in order to
15 remedy whatever -- whatever the constitutional violation
16 is, recognizing in the first instance that the biggest
17 element of an Eighth Amendment violation is the
18 deliberate indifference prong, which absolutely seems to
19 me to have been completely eliminated by the conduct of
20 the State over the course of the last 3 to 4 years.
21 There is no evidence to support --

22 JUSTICE BREYER: What specifically will
23 happen? I mean, at the moment, you know, we could go
24 through -- we have all these briefs. I mean, there are
25 all these experts, all the reports. Everybody is saying

1 you need to spend the money. And we have -- if you
2 really want to cure the constitutional violation, we
3 have the legislature rejecting 8 billion but 2, which --
4 2.35, and so -- and nothing, and a void, and give us
5 more time.

6 I mean, I read the newspaper. It doesn't
7 seem to me California has been voting a lot of money for
8 new programs. The -- the -- what is it -- what is it
9 specifically that would happen that would cure this
10 problem were we to say -- I mean, a big human rights
11 problem -- what would we say -- what would happen if we
12 were to say, no, this panel's wrong? What would happen
13 that would cure the problem?

14 MR. PHILLIPS: Well, it depends I suppose on
15 some ways on how you --

16 JUSTICE BREYER: A constitutional problem
17 which the State itself admits --

18 MR. PHILLIPS: Right.

19 JUSTICE BREYER: -- is constitutional, a
20 State with a governor who has said publicly that there's
21 this tremendous safety and health problem in the
22 prisons. What -- what would happen?

23 MR. PHILLIPS: Well, if the Court were to
24 conclude that the three-judge panel shouldn't have been
25 convened, that would be one outcome. If the Court

1 concludes that it was appropriate to convene it, but
2 137-1/2 percent is not narrowly tailored, it would be a
3 different one. Either way, it will go back, obviously,
4 to a court of equity. The receiver is in place. The
5 receiver has a comprehensive plan in place which he is
6 implementing as we speak.

7 I mean, you know, one of the things that --

8 JUSTICE GINSBURG: That's one piece of it.
9 You said something about the 2.35 million. They didn't
10 come up with the 8 million, but they did come up with
11 2.35 billion. And then I'm just looking at this brief
12 for the receiver, and there's a footnote, page 11,
13 footnote 3, that says: No, that money isn't there; it's
14 dependent upon several approvals that have not yet been
15 secured, and such approvals ultimately may not be
16 forthcoming.

17 MR. PHILLIPS: Well, I mean, 400 million of
18 it has already been spent. The rest of it has already
19 been earmarked for this particular purpose, and there is
20 -- and the expectation from the State of California is
21 that money is -- is going forward. Construction is, as
22 we speak, under way. And the one thing we do know is
23 that --

24 JUSTICE GINSBURG: But not the --

25 MR. PHILLIPS: -- every time the receiver

1 asks for a check he gets one.

2 JUSTICE GINSBURG: Not the 2.35 --

3 MR. PHILLIPS: I'm sorry.

4 JUSTICE GINSBURG: I mean, I think you did
5 say earlier that this was a done deal, 2.35 billion.
6 But this is a note telling us it's not so.

7 MR. PHILLIPS: Well, the receiver is saying
8 it's not etched in stone. I understand that. But our
9 assumption and our expectation and our belief is that
10 that money is going to be used for construction. There
11 are projects that are finished, there are projects that
12 are under way, and there are project that are scheduled
13 to begin within the next 6 weeks, all of which will be
14 funded out of that \$2.35 billion.

15 JUSTICE GINSBURG: On one project, the joint
16 legislative budget committee said, no, we're not going
17 to give you money for that.

18 MR. PHILLIPS: They asked for additional
19 information, to be sure. But the expectation, again,
20 from the governor, both this governor and the
21 governor-elect, is that that money will ultimately be
22 approved and that that facility would be built. And
23 we're moving along very rapidly to get that construction
24 under way, because we're talking about enormous
25 facilities under these particular circumstances, Justice

1 Ginsburg.

2 JUSTICE KAGAN: Mr. Phillips, my trouble
3 listening to you is that it seems as though you're
4 asking us to re-find facts. You know, you have these
5 judges who have been involved in these cases since the
6 beginning, for 20 years in the Plata case, who thought:
7 We've done everything we can, the receiver has done
8 everything he can; this just isn't going anywhere and it
9 won't go anywhere until we can address this root cause
10 of the problem.

11 And that was the view of the judges who had
12 been closest to the cases from the beginning and the
13 view of the three-judge court generally. So how can we
14 reach a result essentially without, you know, re-finding
15 the facts that they've been dealing with for 20 years?

16 MR. PHILLIPS: The -- there -- the
17 fundamental problem with the fact-finding in this --
18 well, there are actually two fundamental problems.
19 First of all, remember that the receiver gets appointed,
20 and then 3 months later you get a motion for a
21 three-judge court. The three-judge court convenes
22 itself before the receiver has even finalized the
23 comprehensive plan to bring everybody into compliance in
24 the first instance.

25 So the reality is that's -- that's the

1 fundamental legal error I'm asking this Court to
2 correct. But even if you get beyond that and you're
3 looking at the primary cause analysis, it seems to me
4 that's -- that's at most -- at best, a mixed question of
5 law and fact, and it's the kind of standard that this
6 Court ought to analyze to determine in the first
7 instance and on an independent review whether or not the
8 overcrowding is, quote, "the primary cause of the
9 violation."

10 And what makes that inquiry particularly
11 appropriate for this Court, as opposed to simply
12 slavishly adhering -- deferring to the district court in
13 this circumstance, is that the district court
14 arbitrarily cut off the record in August of '08 and
15 there have been enormous developments since then. And
16 there were enormous developments --

17 JUSTICE GINSBURG: Can you explain me
18 something about that? It was confusing in the briefs,
19 Mr. Phillips. I thought that the State had said: We
20 don't want the plaintiffs to tour these facilities
21 anymore. We don't want to have discovery go beyond --
22 what was it -- some date in 2008.

23 I thought that it was the State that was
24 urging: We don't need any more discovery, we don't want
25 any more inspection tours.

1 So how could -- how could the plaintiffs
2 submit more than they did when the State said it's
3 enough, 2008 should be the cutoff?

4 MR. PHILLIPS: Well, there's a huge
5 difference between not allowing formal tours and all of
6 the rigamarole that goes with that, which is what the
7 State specifically objected to. But what the State
8 wanted to do and what the intervenors on our side in
9 even greater vehemence wanted to do was to bring forward
10 evidence that proved that in the interim period of time
11 there have been, in fact, significant improvements.

12 As I sit here today, Justice Kennedy, you
13 said it's conceded that we're -- that we're in
14 constitutional violation. It is conceded that we have
15 been in constitutional violation. I don't know whether
16 today we are in violation.

17 JUSTICE GINSBURG: But then don't you have
18 the burden? If -- if you have -- you concede that you
19 have been in constitutional violation, then it seems to
20 me you have the burden of showing that's no longer the
21 case. That's generally so in -- in --

22 JUSTICE SOTOMAYOR: Counsel, did you --

23 CHIEF JUSTICE ROBERTS: I'm sorry. Could
24 you answer Justice Ginsburg's question first?

25 MR. PHILLIPS: Yes. Justice Ginsburg, I

1 understand what the ordinary rule would be in a -- of a
2 court of equity dealing with a constitutional violation.
3 But we're talking about an order entered under the
4 Prisoners Litigation Reform Act, and it's quite clear,
5 the statute couldn't be any plainer, that it shifts the
6 burden significantly onto the plaintiff when you are
7 going to go for a remedy as extreme as insisting that
8 somewhere between potentially 36,000 and 45,000 inmates
9 be released within a -- within a 2-year period of time.

10 Again, if you go back, you know, the
11 receiver has not -- at the time that all of this took
12 place, the receiver had been appointed. The receiver
13 had devised a plan. The receiver is currently spending
14 an enormous amount of money, \$4 billion on health care,
15 to get -- to get the system moving in the right
16 direction, with the right attitude, in order to bring
17 ourselves without question into constitutional
18 compliance. The truth is we haven't really had an
19 assessment of where we are in the constitutional
20 compliance spectrum.

21 JUSTICE GINSBURG: Well, maybe -- you're
22 talking about one of the cases, but the other one -- and
23 it's the newer one, instituted in 2001. But what about
24 the one that started out in 1990?

25 MR. PHILLIPS: Coleman is obviously a

1 much -- a much more serious problem. I don't doubt
2 that. But it seems -- and if the Court were to conclude
3 ultimately that Coleman ought to go back for another
4 analysis based on the problems there, I could understand
5 that. And it would be a very different prisoner release
6 order under those circumstances because then you'd have
7 to take out all of the evidence with respect to Plata
8 and let that play out.

9 But even that, it seems to me, would be a
10 mistake under these circumstances where the special
11 master and the receiver have been in a sense joined at
12 the hip in a variety of ways. And it only makes sense,
13 because the -- the receiver is controlling the provision
14 of medical care in the CDCR and the special master is
15 taking care of or trying to promote a very small slice
16 of that.

17 So in the scheme of things, as you might
18 expect, the receiver consistently gets the ultimate
19 authority to make the decisions to help provide the kind
20 of resources, both in quality and quantity and staff and
21 construction and access to health care.

22 JUSTICE SOTOMAYOR: Counsel, this issue
23 about evidence -- did you proffer to the judge anywhere
24 in this record what the additional evidence it was that
25 you wanted to show? I know that the decrease in

1 suicides happened post-trial, so you couldn't have
2 proffered that pretrial.

3 MR. PHILLIPS: Right.

4 JUSTICE SOTOMAYOR: But you run the prisons.
5 I presume that you could have yourself without discovery
6 set forth a proffer for the court that says: We had a
7 wait time between diagnosis and treatment that was
8 60 days, 90 days, 120 days in the past, and we've
9 reduced that down now to 2 weeks or whatever the reality
10 is.

11 MR. PHILLIPS: Right.

12 JUSTICE SOTOMAYOR: Why don't you -- you
13 keep saying we were blocked.

14 MR. PHILLIPS: Because the district court --
15 because the district court could not have been plainer.
16 And when the intervenor's counsel stood up in the
17 opening statement and said, I want to start talking
18 about the beneficial changes and where the status is
19 today as opposed to where it was way back when, the
20 three-judge court, or at least one member of the
21 three-judge court said: We have been as clear as we can
22 be that we are not entertaining any evidence on that
23 point.

24 So the notion of coming forward with a
25 proffer, while technically it might have been -- is

1 clearly a futile act, and we had already annoyed the
2 judges on our side by even making reference to it. So I
3 don't think it's an appropriate response to say that we
4 should have put forward more, because the truth is we
5 would have --

6 JUSTICE SOTOMAYOR: Except that the district
7 court invited you to proffer that evidence that went to
8 the appropriateness of the remedy. So you didn't have
9 to proffer it -- it viewed you as saying, we're no
10 longer violating, constitutionally violating the Eighth
11 Amendment. Instead, it said: We'll take whatever you
12 have to proffer to show that the remedy is
13 inappropriate.

14 MR. PHILLIPS: All right. But Justice
15 Sotomayor, there is, to my mind at least, a complete
16 disconnect by saying, I'm not going to tell you exactly
17 where the constitutional violation is today, we're not
18 going to get into that, we're just going to assume
19 there's a constitutional violation; now prove to me that
20 the remedy -- you know, what remedy will or will not
21 work under those circumstances. It seems to me the
22 exact opposite is the way to do it. You determine where
23 the constitutional violation is --

24 JUSTICE SOTOMAYOR: When does -- well, we'll
25 get back to Justice Kennedy's --

1 CHIEF JUSTICE ROBERTS: Counsel, I see your
2 time is about to expire.

3 MR. PHILLIPS: Thank you, Mr. Chief Justice.

4 CHIEF JUSTICE ROBERTS: Mr. Specter.

5 ORAL ARGUMENT OF DONALD SPECTER

6 ON BEHALF OF THE APPELLEES

7 MR. SPECTER: Thank you. Mr. Chief Justice,
8 and may it please the Court:

9 For 20 years, the overcrowding crisis has
10 caused prisoners suffering from psychosis and
11 life-threatening illnesses to languish in their cells
12 because treatment facilities have no room for them.
13 Prisoners are committing suicide at a rate twice the
14 national average, and more than two-thirds of those
15 suicides are preventable. The absence of --

16 JUSTICE SOTOMAYOR: Are you talking about
17 current figures or past? Tell us the date of the
18 figures.

19 MR. SPECTER: Sure. That's from the trial
20 court's opinion, Your Honor. That's from the record.

21 JUSTICE SOTOMAYOR: That's what I thought.
22 How do you address your adversary's point --

23 MR. SPECTER: Yes, ma'am.

24 JUSTICE SOTOMAYOR: -- that the adequacy of
25 a remedy can't be measured unless you measure the state

1 of the situation at the time the remedy is imposed?

2 MR. SPECTER: Well, I think, Your Honor,
3 there was massive amounts of evidence about the
4 constitutional violations that existed at the time that
5 the remedy was imposed. And if we -- I can point to the
6 jurisdictional statement 1 appendix, page 30a, the court
7 said: "Nonetheless, as we describe below, fundamental
8 unconstitutional deficiencies caused primarily by
9 overcrowding continue to exist and" --

10 JUSTICE SCALIA: They didn't take any
11 evidence on the point, I thought.

12 MR. SPECTER: No, Your Honor. I'm sorry,
13 that's not correct, with all respect. They took massive
14 amounts of evidence up to the day of trial about all the
15 conditions as they relate to the remedy. And those
16 conditions were --

17 JUSTICE SOTOMAYOR: Could you give us the
18 record --

19 JUSTICE SCALIA: Current conditions?

20 MR. SPECTER: -- current -- current as of
21 the time of the trial.

22 JUSTICE SCALIA: What was -- what was your
23 friend talking about when he said that they rejected any
24 effort to show the current situation?

25 MR. SPECTER: Well, my friend and I have a

1 disagreement, but I think Justice Sotomayor accurately
2 captured it. What the three-judge panel said is: Look,
3 we're not going to -- you can't -- this isn't the place
4 for you to come in and say everything's fine, it's --
5 everything's constitutional.

6 What the three-judge court did say is: We
7 will consider -- and they did, in fact, consider -- all
8 the evidence from the State. They had experts from the
9 State, two of the prisons, in August of 2008. Those
10 experts wrote reports, they testified, and they've
11 testified about the conditions current. And one of
12 them from the mental health side said --

13 JUSTICE SCALIA: This was in 2008.

14 MR. SPECTER: And that was the time of the
15 trial, Your Honor. There were -- the discovery --

16 JUSTICE KENNEDY: They had a -- they had a
17 cutoff date of some 2 months before the trial --

18 MR. SPECTER: In August, and the trial
19 started in November.

20 JUSTICE KENNEDY: And that was a -- and --
21 but before that point, the experts that were -- had
22 testified were aware of the conditions that existed.

23 MR. SPECTER: Exactly, Your Honor. And --

24 JUSTICE SCALIA: And when was the remedy
25 imposed?

1 MR. SPECTER: The remedy -- well, the final
2 order came -- well, the close of evidence was in
3 December of 2008.

4 JUSTICE SCALIA: That was in the -- in the
5 one-judge court, in the district court, wasn't it?

6 MR. SPECTER: No, no. In the three-judge
7 court -- the three-judge court closed evidence in
8 December of 2008. We then argued the case after the
9 post-trial briefing in February of 2009. Then the court
10 came out with the tentative decision about 20 days
11 later, and then in August of 2009, it issued the
12 183-page opinion and the order that's at issue here.

13 CHIEF JUSTICE ROBERTS: Did -- I'm sorry.
14 Let me just keep track here.

15 The evidence was cut off when in 2008?

16 MR. SPECTER: The trial closed in December
17 of 2008, after all the parties had submitted all their
18 evidence.

19 CHIEF JUSTICE ROBERTS: All right. So --

20 MR. SPECTER: Then there was post-trial
21 briefing for a month. Then we had argument in
22 February of that year. And then a few weeks later, they
23 issued a brief summary of their conclusions in an
24 attempt to get the State and the parties to settle the
25 case.

1 CHIEF JUSTICE ROBERTS: You -- you don't
2 dispute the statement I have -- it's in the response of
3 the intervenors -- that between October 2006 and October
4 2010, the population of the adult facilities declined by
5 14,832 inmates?

6 MR. SPECTER: Well, I -- I agree with my
7 friend Mr. Phillips that the population has declined by
8 about 10,000 prisoners. Most of that decline has been
9 due to a transfer to out-of-State prisons, and, true,
10 there's some -- some amount of it has been as a result
11 of the marginal increase in good time credits, which the
12 State elected to pursue on its own.

13 JUSTICE KENNEDY: What about the argument
14 that there was evidence that should have been admitted
15 but that was not, with reference to new construction?

16 MR. SPECTER: Well, I don't -- there was no
17 evidence that wasn't -- that was offered that wasn't
18 considered by the three-judge panel, Your Honor. They
19 considered all the evidence. Their 183-page opinion is
20 scrupulous in considering all the evidence, both that
21 supported the order and they distinguished the evidence
22 and, in fact, made credibility determinations based on
23 the evidence that -- that was contrary. But --

24 JUSTICE SOTOMAYOR: Counsel --

25 MR. SPECTER: Yes. I'm sorry.

1 JUSTICE ALITO: Can you explain what the
2 connection is between the 137.5 percent figure and the
3 constitutional violations relating to the provision of
4 medical care in general and treatment for -- for mental
5 illness?

6 My understanding of the 137.5 percent figure
7 is that that has to do with the total number of
8 prisoners in the -- in the system in relation to design
9 capacity; isn't that right?

10 MR. SPECTER: That's correct, Your Honor.

11 JUSTICE ALITO: Now, what does the ruling --
12 that doesn't speak to the number of personnel who are
13 available in the system to attend to medical needs or
14 mental illness. It doesn't speak to the extent of the
15 facilities that are available for those purposes. It
16 seems to be -- there seems to be a disconnect between
17 those two. Could you explain why that is narrowly
18 tailored?

19 MR. SPECTER: Yes, Your Honor. There was --
20 the court made findings that 137.5 percent was the
21 maximum number of prisoners that -- of the capacity, of
22 the design capacity of the prison, that the prison could
23 have that would enable the State to provide -- to have
24 all those things that you just mentioned -- staffing,
25 facilities, medication management -- be effective and

1 reach the actual prisoners who are ill, seriously ill.

2 JUSTICE ALITO: See, that's what I don't
3 understand. You can have a -- could you not have a
4 prison where the cells are somewhat crowded -- and 137.5
5 percent of design capacity is not --

6 MR. SPECTER: Right.

7 JUSTICE ALITO: -- is not unconstitutional
8 in itself, is it?

9 MR. SPECTER: No, it remedies --

10 JUSTICE ALITO: You could have --

11 MR. SPECTER: It's a remedy, Your Honor.

12 JUSTICE ALITO: Or you could have a prison
13 where the -- the cells themselves are crowded, and yet
14 there are other facilities available for medical care
15 and plenty of staff to attend to those things. So
16 what's the connection?

17 MR. SPECTER: Well, that's -- that's -- and
18 you're right. If there were -- if the cells were
19 crowded but the prison had all the other facilities
20 available, then there might not be a problem. You have
21 to -- well, I hope you can understand that in this case,
22 the prisons were built to double-cell the prisoners, but
23 they weren't built to provide 200 percent of health care
24 needs. So as soon as they started to double-cell these
25 prisoners, they could meet their literal housing needs

1 in the space of the cell, but they couldn't meet the
2 needs of their health care.

3 And that's why, Your Honor, the
4 137.5 percent figure is reasonable, because the Court
5 went almost a third overcrowding above what all the
6 experts recommended.

7 JUSTICE ALITO: But why order the release of
8 around 40,000 prisoners, many of whom, perhaps the great
9 majority of whom, are not going to be within a class in
10 either of these lawsuits? Why order the release of all
11 those people, rather than ordering the provision of the
12 construction of facilities for medical care, facilities
13 to treat mental illness, hiring of staff to treat mental
14 illness? Why not go directly to the problem rather than
15 address what seems to be a different issue altogether?

16 MR. SPECTER: Well, I have two responses to
17 that, and they're both a little separate.

18 The first point: It's important to
19 understand that this is not a release order. It's a
20 population-crowding reduction order. The court is not
21 ordering the State to throw open the gates of its doors
22 and release people. They can reduce crowding through
23 more transfers to out of State. To your construction
24 point, if the State so chooses, it can construct new
25 facilities to increase the capacity. And the

1 three-judge panel said if you increase the capacity, you
2 can increase the population.

3 The point about --

4 JUSTICE ALITO: If all they do is to build
5 more cells, they're not going to address the problem.
6 So I --

7 MR. SPECTER: Exactly. So that goes to the
8 second part of your question, which is: Why don't they
9 try other things, like ordering the prisons to hire more
10 doctors, ordering better medication management, all of
11 those kinds of things? And the answer to that is in the
12 appendix to the Appellee's Coleman brief, which lists 70
13 discrete orders which the Coleman court, single-judge
14 Coleman court, tried over a period of 15 years, which
15 have proven singularly to be ineffective. And that's
16 why the court analyzed all those things; the trial court
17 analyzed all these things, and it made a finding of fact
18 that based on the statements by the special master, by
19 the receiver's reports, and by the general state of the
20 horrendous conditions which we have in these prisons,
21 that those discrete orders would not solve the problem.
22 And given the level of harm --

23 JUSTICE ALITO: I -- I still don't get it.
24 You're saying that they were ordered to do a variety of
25 things that directly address the problem and they didn't

1 comply. So as a --

2 MR. SPECTER: No.

3 JUSTICE ALITO: In order to -- in order to
4 provide some kind of a remedy, we're going to order
5 something else that doesn't address the problem --

6 MR. SPECTER: No, that --

7 JUSTICE ALITO: -- that these lawsuits aim
8 at addressing.

9 MR. SPECTER: No, Your Honor. To the
10 contrary, Justice Alito, we -- I think the court
11 believes based on the facts that it found that this
12 would be an effective remedy. All of the testimony that
13 they heard from experts from Texas, from Pennsylvania,
14 from Washington State -- all of whom had suffered, had
15 dealt with crowding in their prison systems, have said
16 that when you reduce the crowding, that's the critical
17 thing that you have to do now, because unless you reduce
18 the crowding, nothing else is going to work. And the
19 court found that that was exactly true.

20 Nothing else over 20 years in one case and
21 over 8 years in another case has worked. And -- and
22 all -- as Justice Kennedy said, massive amounts of
23 evidence show that the primary reason it hasn't worked
24 is one singular word, overcrowding; and when you reduce
25 overcrowding, the prison will be able to operate and

1 will be able to provide those services that it can't
2 provide now, so the doctors will have room to be able to
3 work, which they don't have now.

4 There will be less prisoners, so officers
5 will be able to take them from one place to another to
6 get treatment. There won't be so many lockdowns, which
7 inhibit care.

8 JUSTICE SOTOMAYOR: Counsel --

9 JUSTICE ALITO: That's a very indirect way
10 of addressing the problem, and it has collateral
11 consequences. If -- if I were a citizen of California,
12 I would be concerned about the release of 40,000
13 prisoners. And I don't care what you term it, a prison
14 release order or whatever the --

15 MR. SPECTER: Crowding --

16 JUSTICE ALITO: -- terminology you used was.
17 If 40,000 prisoners are going to be released, do you
18 really believe that if you were to come back here 2
19 years after that, you would be able to say they
20 haven't -- they haven't contributed to an increase in
21 crime --

22 MR. SPECTER: Well --

23 JUSTICE ALITO: -- in the State of
24 California? In the -- in the amicus brief that was
25 submitted by a number of States, there is an extended

1 discussion of the effect of one prisoner release order
2 with which I am familiar, and that was in Philadelphia;
3 and after a period of time they tallied up what the cost
4 of that was, the number of murders, the number of rapes,
5 the number of armed robberies, the number of assaults.
6 You don't -- that's not going to happen in California?

7 MR. SPECTER: Your Honor, this trial court
8 found, based on 50 pages of its opinion, based on expert
9 testimony not only from our experts but from the State's
10 experts, from the intervenors' experts, they all came to
11 the unanimous conclusion that there are methods that --
12 by which you can reduce crowding which will not increase
13 crime and that are safe.

14 The Secretary of the Department of
15 Corrections who was the secretary at the time of trial
16 so testified that he was in favor, for example, of
17 increasing prisoners' good time credits. That's one way
18 to reduce crowding.

19 And, moreover, there was statistical
20 evidence saying -- looking at all the other States that
21 had reduced their prison population over a period of
22 about 15 years, and they all came to the same
23 conclusion, all of those studies came to the same
24 conclusion, which is there's no -- there is no increase
25 in the crime rate. In --

1 CHIEF JUSTICE ROBERTS: But that's not what
2 -- that is not what the three-judge district court
3 determined. The Prisoner Litigation Reform Act requires
4 that court to give substantial weight to adverse impact
5 on public safety.

6 MR. SPECTER: Yes. Yes, Your Honor.

7 CHIEF JUSTICE ROBERTS: And when -- and then
8 it said to the State, look, you come up with a plan that
9 gets you to 137.5 in 2 years.

10 MR. SPECTER: Yes, Your Honor.

11 CHIEF JUSTICE ROBERTS: The State did --

12 MR. SPECTER: Yes, Your Honor.

13 CHIEF JUSTICE ROBERTS: -- and the State did
14 not say -- emphatically did not say this is not going to
15 have an adverse impact on public safety.

16 MR. SPECTER: Right, but the --

17 CHIEF JUSTICE ROBERTS: If you follow the
18 double negative there. But -- and what the district
19 court said -- it didn't examine that. It said, well,
20 we're sure the State's not going to do anything that has
21 an adverse impact on public safety. I'm looking at page
22 4a of the jurisdictional statement.

23 MR. SPECTER: Right. I know it.

24 CHIEF JUSTICE ROBERTS: It said -- and so it
25 did not make those determinations, but the PLRA requires

1 it to determine that what it's ordering -- or at least
2 give substantial weight to the public safety issue. So
3 isn't that a basis for overturning the remedy that's
4 imposed here?

5 MR. SPECTER: I would respectfully disagree
6 with that, and I'll tell you why --

7 CHIEF JUSTICE ROBERTS: I thought you would.
8 (Laughter.)

9 MR. SPECTER: At least it's respectful.
10 (Laughter.)

11 MR. SPECTER: I'll tell you why I think
12 that. The court examined all of the methods that are
13 commonly used and that the governor himself has proposed
14 to reduce crowding. The governor himself wanted to
15 reduce the prison population by 37,000. That was in one
16 of his legislative enactments, and the secretary of
17 corrections testified that those proposals were safe.

18 CHIEF JUSTICE ROBERTS: Did he want to do it
19 within the 2-year period the district court ordered?

20 MR. SPECTER: Yes, Your Honor, he did. He
21 submitted legislation to the legislature for that, and
22 the legislature wouldn't -- wouldn't take it. And the
23 governor actually said, reacting to that, after a riot
24 at Chino which was partly -- at one of the -- Chino is a
25 prison in California -- a riot; he said, and the quote:

1 "And the politicians in Sacramento have swept the
2 problem under the rug."

3 CHIEF JUSTICE ROBERTS: Right. Right. No,
4 my -- my question is specifically with respect --

5 MR. SPECTER: And I'll get to that.

6 CHIEF JUSTICE ROBERTS: -- to the 2-year
7 plan --

8 CHIEF JUSTICE ROBERTS: -- and I'd like an
9 answer to that --

10 MR. SPECTER: Yes.

11 CHIEF JUSTICE ROBERTS: -- because I look at
12 this record; I don't see that the district court did
13 what was required by the Act with respect to the plan
14 that it's ordering.

15 MR. SPECTER: Right.

16 CHIEF JUSTICE ROBERTS: It just simply said,
17 oh, we're sure -- I'm sure the State wouldn't do
18 anything to hurt public safety -- after telling the
19 State you've got to give me a plan in 2 years that gets
20 to 137.5.

21 MR. SPECTER: Right. Well, I think all of
22 the -- it didn't -- it didn't analyze the plan, because
23 the court was trying -- well, there was no plan.

24 The court, what they -- what the court did
25 was it said, we want to give the State the maximum

1 flexibility, for comity reasons, to determine how best
2 to remedy the constitutional violations.

3 Now, on cert, then they said -- they also
4 said that we're sure the State can do it in a safe way,
5 but it's not our job --

6 CHIEF JUSTICE ROBERTS: Well, they said
7 we're sure, because -- but --

8 MR. SPECTER: Because there are methods --

9 CHIEF JUSTICE ROBERTS: -- because we
10 trust -- I'm just quoting from 4a --

11 MR. SPECTER: Yes.

12 CHIEF JUSTICE ROBERTS: "We trust that the
13 State will comply with its duty to ensure public safety
14 as it implements the constitutionally required
15 reduction."

16 The State is saying it cannot meet the 137.5
17 in 2 years without an adverse impact on public safety.

18 MR. SPECTER: Right. And the -- that's the
19 State's position --

20 CHIEF JUSTICE ROBERTS: Right.

21 MR. SPECTER: -- and had been the State's
22 position all along. The court's findings that a
23 population reduction of this magnitude were clear, and
24 they're not shown to be clearly erroneous here. They --
25 the court said point blank that we're -- we're -- we --

1 it's our finding that the State can reduce the
2 population to its current levels -- from its current
3 levels to 137.5 safely. They made that finding --

4 JUSTICE SOTOMAYOR: Counsel, didn't
5 the court --

6 MR. SPECTER: -- and it has not been shown
7 to be clearly erroneous. So they didn't have to look at
8 particulars. In an effort to give the State the maximum
9 flexibility, they wanted to allow the State to choose
10 the methods that it wanted. If the State -- if the
11 court had ordered --

12 JUSTICE SOTOMAYOR: Counsel --

13 JUSTICE SCALIA: Well, what do you mean they
14 can do it?

15 MR. SPECTER: I'm sorry.

16 JUSTICE SCALIA: Of course, they could do it
17 safely if they built, you know, umpteen new prisons, but
18 that --

19 MR. SPECTER: But they can also do it
20 safely --

21 JUSTICE SCALIA: But that's -- you know,
22 that's pie in the sky. That's not going to happen.

23 MR. SPECTER: No, it isn't, Your Honor,
24 because they can also do it safely by good time credits.
25 They can do it safely --

1 JUSTICE SCALIA: What -- doesn't good time
2 credits let -- let people out who would not otherwise be
3 out?

4 MR. SPECTER: Just a -- you know, the -- the
5 evidence was at trial, and the court's finding about
6 that evidence was, and the State officials so testified,
7 that giving prisoners good time credits is not a threat
8 to public safety.

9 JUSTICE SCALIA: But --

10 JUSTICE SOTOMAYOR: Counsel, didn't --

11 JUSTICE KAGAN: Why wouldn't it have been
12 the better course, for the State -- excuse me -- for the
13 court to say, you know, the State said it can do this in
14 5 years --

15 MR. SPECTER: Right.

16 JUSTICE KAGAN: -- without any public safety
17 problem? So why don't we let them take those 5 years?

18 MR. SPECTER: Because, Your Honor, as
19 Justice Ginsburg and others have been saying before, the
20 constitutional violations have been ongoing for
21 20 years. We're dealing here with cases of life and
22 death and serious injury. And after all these years, in
23 -- when they -- when they heard the evidence that said
24 that population could be -- and they made the findings
25 which the State doesn't argue are clearly erroneous --

1 when they made those findings, that it could be reduced
2 safely, they had an obligation to provide a remedy that
3 would provide constitutionally adequate care in the
4 safest manner possible -- in the quickest manner
5 possible.

6 CHIEF JUSTICE ROBERTS: I think --

7 JUSTICE SOTOMAYOR: Counsel --

8 CHIEF JUSTICE ROBERTS: I think Justice
9 Sotomayor has been patient.

10 JUSTICE SOTOMAYOR: I have several
11 questions, but I'm -- I'm not sure why you have not been
12 responding to Justice -- to the Chief Justice. Didn't
13 the district court discuss different safe ways --

14 MR. SPECTER: Yes.

15 JUSTICE SOTOMAYOR: -- of reducing the
16 population --

17 MR. SPECTER: Yes.

18 JUSTICE SOTOMAYOR: -- and said we're not
19 imposing them because we want the State to do -- to
20 choose among them?

21 MR. SPECTER: Yes, Your Honor.

22 JUSTICE SOTOMAYOR: As I've looked at the
23 State's final plan, I thought that they had in fact not
24 only accepted all of the recommendations, but they added
25 a couple of additional remedies that the court had not

1 suggested.

2 MR. SPECTER: Yes, Your Honor.

3 JUSTICE SOTOMAYOR: Is it a fair statement
4 that the district -- that the three-judge panel was
5 saying, if you do these things -- that's their
6 finding -- you can do it without affecting public
7 safety? Wasn't that what they were saying?

8 MR. SPECTER: Yes, Your Honor. If I didn't
9 make that clear, I meant to.

10 CHIEF JUSTICE ROBERTS: Well, but I thought
11 the --

12 JUSTICE SOTOMAYOR: The second and more
13 important question is going back to something that
14 Justice Scalia asked you, which was: You made the
15 statement that no one was stopped from proffering
16 evidence about prison conditions --

17 MR. SPECTER: Yes, Your Honor.

18 JUSTICE SOTOMAYOR: -- up till 2 months
19 before the trial. So what evidence was excluded?

20 MR. SPECTER: Nothing. Nothing.

21 JUSTICE SOTOMAYOR: What point is the other
22 side making that they were excluded from making?

23 MR. SPECTER: Well, as we said in our
24 briefs, Your Honor, there was no evidence that was
25 excluded, and, in fact, the State's witnesses testified

1 about conditions, some of the conditions current as of
2 the day of the -- of the testimony. So it was very
3 current, and nothing was excluded. That way, even if
4 the court made a ruling which was error, which we don't
5 believe it was, there was absolutely no prejudice.

6 JUSTICE BREYER: What is -- what is the
7 number? I mean, I -- I was puzzled by the same thing
8 that Justice Sotomayor was. I read, on page 253 of the
9 appendix, a conclusion where the district court said it
10 is our conclusion that they can reduce this by how many
11 people? What is it -- 30,000? It's a lot.

12 MR. SPECTER: Thirty-five thousand.

13 JUSTICE BREYER: Thirty-five thousand. That
14 this could be done safely.

15 MR. SPECTER: Yes.

16 JUSTICE BREYER: Preceding page, whatever
17 that was -- I have it -- it was 253.

18 MR. SPECTER: Right.

19 JUSTICE BREYER: There are about six pages
20 where they summarize evidence from all kinds of
21 criminologists that say, for example, there are 17,000
22 technical parole violators that are being sent to prison
23 who haven't committed additional crimes, and they could
24 perhaps be released from some of the time that they're
25 spending in prison. Then they go on to this good time,

1 which would, I guess, lead to people who are 50 years
2 old or 60 years old who have been in prison for 40 years
3 would be released at age 55 instead of age 75. I guess
4 there's some category there.

5 MR. SPECTER: Yes, Your Honor.

6 JUSTICE BREYER: Then they had several other
7 things. Okay. Now, what are some facts about that?

8 MR. SPECTER: There was also -- and there
9 was also testimony that the Department of Corrections
10 was using a risk assessment instrument to identify the
11 low-risk prisoners. So --

12 JUSTICE ALITO: Isn't it true that one of
13 the main programs that they were -- that was cited as
14 providing a safeguard is evidence-based rehabilitation
15 programs?

16 MR. SPECTER: Yes, Your Honor. All the --
17 all the witnesses from the State, the intervenors, the
18 local witnesses, our experts -- they all found that
19 those would help reduce crime and that they would be
20 most effective if used in the community, but they would
21 be effective also if they were implemented --

22 JUSTICE ALITO: What's the general record of
23 the success of rehabilitation efforts?

24 MR. SPECTER: Well, different -- you can't
25 say generally because different programs have different

1 records. But do we --

2 JUSTICE ALITO: What did Congress think when
3 it enacted the -- the Sentencing Reform Act?

4 MR. SPECTER: I don't know, Your Honor.

5 JUSTICE KENNEDY: I have this question, and
6 this goes just to remedy.

7 MR. SPECTER: Yes, Your Honor.

8 JUSTICE KENNEDY: I recognize the district
9 court has to be given considerable discretion.

10 It shows the 137.5 figure because it's
11 halfway between 145 and 130.

12 MR. SPECTER: Yes, Your Honor.

13 JUSTICE KENNEDY: I think that certainly the
14 Prison Litigation Reform Act means that you have to, if
15 you -- if there's going to be a release order, it must
16 be releasing the minimum amount --

17 MR. SPECTER: Yes, Your Honor.

18 JUSTICE KENNEDY: -- that will effect the
19 purposes of the remedy order. There was substantial
20 expert opinion that 145 -- 145 percent would be
21 sufficient. Isn't -- doesn't the evidence indicate to
22 you that at least 145 ought to be the beginning point,
23 not 137.5?

24 MR. SPECTER: Well, I -- I --

25 JUSTICE KENNEDY: That there was no -- and I

1 understand --

2 MR. SPECTER: May I make this --

3 JUSTICE KENNEDY: There were more -- correct
4 me if I'm wrong -- there were more experts that
5 testified that 145 would work than there were that 130
6 was necessary.

7 MR. SPECTER: No, I -- I respectfully
8 disagree with the record, Your Honor. The 145 figure
9 came from a report by the former governor, Deukmejian,
10 and a group that he organized, and they said that they
11 could operate a crowded system at 145 percent of
12 capacity. And that figure was high, the district court
13 found, because it didn't take into account health care
14 needs.

15 JUSTICE KENNEDY: And --

16 MR. SPECTER: It didn't take into account
17 health care needs, which is the issue here. And our
18 experts testified that, because it didn't take into
19 account health care needs, 130 percent was the -- was
20 the better number. It's the number that the strike team
21 had thought of, the -- the administration's own strike
22 team. It is the number that these professional experts
23 believed would be sufficient to remedy the population.

24 And back to my answer to Justice Alito's
25 question is the health care facilities themselves were

1 built to provide services to only 100 percent of --
2 health care services to only 100 percent of the
3 prisoners. So --

4 JUSTICE KENNEDY: But the experts --

5 MR. SPECTER: -- 137 --

6 JUSTICE KENNEDY: The experts that -- who
7 were testifying were quite aware of the fact that
8 overcrowding related to the constitutional violations.
9 That was their whole theory.

10 MR. SPECTER: Yes.

11 JUSTICE KENNEDY: And any number of them
12 suggested that 145 would be sufficient.

13 MR. SPECTER: I think there might have been
14 only one; one expert suggested 145. Most of -- I think
15 most -- the majority of the experts suggested 130. The
16 court found -- and it has not been challenged here as
17 clearly erroneous -- that the weight of the evidence
18 went to 130. They wanted to do what you're saying,
19 which was minimize the intrusion, maximize the
20 population. So to -- even though they -- the court had
21 ample basis to issue an order saying it should be 130,
22 they said in an abundance of caution and to give -- to
23 give the State the benefit of the doubt and to make
24 sure, we're going to bump it up an extra 7.5 percent.

25 JUSTICE KENNEDY: I see no evidence in the

1 record that the State -- that the -- pardon me -- that
2 your clients said that 145 wouldn't work.

3 MR. SPECTER: I think --

4 CHIEF JUSTICE ROBERTS: Maybe you can
5 answer.

6 JUSTICE SOTOMAYOR: Did the expert who
7 gave --

8 CHIEF JUSTICE ROBERTS: Maybe you can
9 answer, counsel, please.

10 MR. SPECTER: Thank you. My recollection of
11 the testimony was that our experts said it had to be --
12 get down to 130 in order for the other remedies to be
13 effective, Your Honor.

14 JUSTICE SOTOMAYOR: The expert who gave the
15 145?

16 MR. SPECTER: Pardon me.

17 JUSTICE SOTOMAYOR: The expert who gave the
18 145 --

19 MR. SPECTER: There was no expert -- well,
20 there was one expert who said maybe in the best of
21 circumstances it could get to 145. All the others
22 talked about 130 percent.

23 JUSTICE SOTOMAYOR: Let's go to the one who
24 has used the 145 figure.

25 MR. SPECTER: He was a psychologist, Your

1 Honor.

2 JUSTICE SOTOMAYOR: He was a what?

3 MR. SPECTER: He was -- he was a
4 psychologist who has expertise in prison health care.

5 JUSTICE SOTOMAYOR: And did he say that at
6 145 you could deliver health care safely?

7 MR. SPECTER: He was equivocal on that
8 point. He thought -- he said that at the outer reaches
9 it might be true.

10 But I want to emphasize that the district
11 court has allowed the State to come back in at any time
12 to modify its order and to modify this percentage point
13 if the circumstances changed. So, since the --

14 JUSTICE GINSBURG: Mr. Specter, there --
15 there has been at least two significant changes. One is
16 the good time credit. The California legislature did
17 pass the law that upped the good time credits and also
18 addressing the probationers and the parolees --

19 MR. SPECTER: Yes, Your Honor.

20 JUSTICE GINSBURG: -- and the technical
21 violators to divert them from the system. Do you have
22 any information about what effect that legislation that
23 was passed January?

24 MR. SPECTER: It was passed, I think, last
25 year. I think it went into effect in July of last year,

1 I believe, if that's what -- what you're referring to.

2 JUSTICE GINSBURG: So, do we -- do we know
3 at all what effect it has had?

4 MR. SPECTER: It has had a marginal effect
5 on reducing the population. There have been no reports
6 that it has led to an increase in crime.

7 But to get back to my earlier point and your
8 point, Justice Kennedy, about the -- the remedy and that
9 it should be the least intrusive possible. This order
10 is set to take effect over a 2-year period, and during
11 that 2-year period, if Mr. Phillips is correct that the
12 conditions are constitutional and that they can deliver
13 services at 145 percent, then the State is free to come
14 in and make a motion to -- to bring those changed
15 circumstances to the court. And, if anything, this
16 court has been incredibly sensitive to the -- to the
17 needs and desires of the State, and it -- it was
18 extremely reluctant to enter this order in the first
19 place, and it would -- and it would bend over backwards
20 to give the State discretion while attempting to --

21 JUSTICE KENNEDY: I -- I don't see a finding
22 by the three-judge court that 145, is it, would not be
23 an efficacious remedy. I know that it --

24 MR. SPECTER: Yes.

25 JUSTICE KENNEDY: I know that it would for

1 137.

2 MR. SPECTER: Yes, Your Honor. I don't
3 think -- I don't think it's explicitly said 145, but I
4 think it discussed the 145 figure in the context of the
5 -- of the fact that it didn't provide for health care
6 services. So it discounted that a little bit and went
7 down about 7 percent. But it came close to that figure,
8 I believe.

9 CHIEF JUSTICE ROBERTS: Can I ask you a
10 hypothetical question that I know is not your case? But
11 let's say you had the district court entering an order
12 saying you have to bring it down to 137.5 in 2 years.
13 That will, as a practical matter, result in the release
14 of 40,000 prisoners. The State comes back and makes a
15 showing supported by experts saying, look, if you give
16 us 4 years, we can reach the figure without releasing
17 any prisoners.

18 Do you think it would violate the Prison
19 Litigation Reform Act for the district court to say:
20 No, I want this done in 2 years, not 4 years, and we'll
21 just have to deal with the fact there are going to be
22 40,000 prisoners out on the streets.

23 MR. SPECTER: Well, the Prison Litigation
24 Reform Act requires the court to give substantial weight
25 to --

1 CHIEF JUSTICE ROBERTS: Right.

2 MR. SPECTER: -- the public safety
3 implications of its decision. So, under those
4 circumstances, it's -- under those hypothetical
5 circumstances, there's always the possibility that, in
6 those cases, the degree of public safety problems might
7 outweigh the harm.

8 That -- as you said, that's not this case.
9 They found that we could do it. And they -- the
10 three-judge panel found that the State could reduce the
11 population safely. And there was no suggestion in -- in
12 the record that this 2- or 4-year period would make that
13 much of a difference.

14 You have to put the 40,000 or 35,000 figure
15 in context. California releases 120,000 prisoners every
16 year on parole. That's a lot of prisoners. And the
17 findings of the district courts are, even when
18 California increases the number of parolees in the
19 communities, that doesn't increase the crime rate.

20 JUSTICE ALITO: What's the recidivism --
21 what is the recidivism rate for those parolees?

22 MR. SPECTER: Well, it depends on the risk
23 of the parolees. The high-risk ones --

24 JUSTICE ALITO: In general, what is the
25 recidivism rate?

1 MR. SPECTER: Well, overall, the risk is
2 around 70 percent, but if you -- for low-risk prisoners,
3 the risk is 17 percent who re-violate, and --

4 CHIEF JUSTICE ROBERTS: I'm sorry. I
5 couldn't -- what was the first --

6 MR. SPECTER: The first number, when you
7 take all parolees, all together, it's 70 percent.

8 CHIEF JUSTICE ROBERTS: Seven-zero?

9 MR. SPECTER: Seven-zero, because -- within
10 3 years. That's what -- the situation we have now, and
11 that's the situation that the governor, the secretary,
12 the court described as a failure. With parole reform,
13 you could reduce that number in many ways, and the court
14 described how you could do that. But for the low-risk
15 prisoners --

16 JUSTICE ALITO: But for the -- for the
17 low-risk prisoners, it's 17 percent?

18 MR. SPECTER: Seventeen percent, and
19 California has a risk-assessment instrument which the
20 court found could be used to make sure that what
21 happened in Philadelphia doesn't happen again. If I
22 understand it --

23 JUSTICE ALITO: Well, I understood that of
24 the low-risk -- if only the low-risk people are
25 released, around 3,000 of them are going to commit

1 another crime.

2 MR. SPECTER: They -- but they don't have to
3 be released. First, I want to make sure I emphasize the
4 point that this is a crowding-reduction measure. You
5 don't have to release 35,000 prisoners.

6 JUSTICE ALITO: They -- they don't have to
7 be released if you can build enough cells --

8 MR. SPECTER: Or you can divert, or you can
9 improve the parole system so that parole violators don't
10 commit so many crimes, if you offer rehabilitation
11 alternatives, if you provide a number of -- diversion
12 into the community. There are a number of other options
13 short of releasing prisoners.

14 And the 70 percent figure includes the --

15 JUSTICE ALITO: The 17 percent figure -- and
16 the 17 percent figure goes to exactly my concern. This
17 is going to have -- it seems likely this is going to
18 have an effect on public safety. And the experts can
19 testify to whatever they want, but you know what? If
20 this order goes into effect, we will see.

21 MR. SPECTER: But the --

22 JUSTICE ALITO: We will see, and the people
23 of California will see: Are there more crimes or are
24 there not?

25 MR. SPECTER: Well, based on the experience

1 in other jurisdictions, the court found we wouldn't.

2 And I want to just -- I want to clarify one
3 point, Your Honor: The 70 percent figure includes --
4 doesn't always include crimes. It includes lots of
5 technical parole violators, people who have missed their
6 appointments, for example. So it's not as grave as some
7 of the figures that are -- been thrown by the -- by the
8 other side.

9 JUSTICE BREYER: Is there any likelihood --

10 JUSTICE GINSBURG: Is -- is there any other
11 case where the prison reduction has been done under the
12 PLRA, or is this the first -- the first one?

13 MR. SPECTER: It's the first one to reach
14 this Court, obviously. There have been a few others
15 that have been resolved by consent, as I understand it,
16 or not appealed, but just a few.

17 JUSTICE BREYER: Is there any evidence on --
18 I -- I see their suggestions that the technical parole
19 violators go elsewhere --

20 MR. SPECTER: Yes, Your Honor.

21 JUSTICE BREYER: -- that the elderly and
22 infirm prisoners --

23 MR. SPECTER: Yes, Your Honor.

24 JUSTICE BREYER: -- some of them be
25 released.

1 MR. SPECTER: Right.

2 JUSTICE BREYER: The good time credits for
3 older people would have effect, be increased, and also,
4 halfway houses and other kinds of prison facilities
5 which used to be called less -- less physically
6 restrictive punishments, or taking the money you save
7 and building new prisons. Okay, that seems to be the
8 gamut.

9 Is there any evidence, statistically or
10 otherwise -- because it used to be that States did rely
11 on halfway houses, that relied upon -- they relied upon
12 certain camps -- prison camps --

13 MR. SPECTER: Yes, Your Honor.

14 JUSTICE BREYER: -- for example, and some of
15 them were pretty tough. And there were a whole range of
16 what used to be called intermediate punishments.

17 MR. SPECTER: Yes, Your Honor.

18 JUSTICE BREYER: All right. Is there any
19 statistical evidence on the part -- on the point that is
20 -- that Justice Alito raised --

21 MR. SPECTER: Yes, Your Honor, there's --

22 JUSTICE BREYER: -- as to whether these did
23 or did not result in higher crime rates?

24 MR. SPECTER: Well, the evidence was, and
25 the court found -- and, again, it's not clear error --

1 that these programs were not -- were more effective than
2 prison in reducing recidivism, and they were less
3 expensive. And -- and that's part of the reason why the
4 three-judge panel concluded that a reduction in the
5 prison population wouldn't increase crime.

6 CHIEF JUSTICE ROBERTS: Counsel, one of the
7 thing that concerns me about this type of institutional
8 reform litigation --

9 MR. SPECTER: Yes, Your Honor.

10 CHIEF JUSTICE ROBERTS: -- is that the State
11 is responsible for a lot of different things.

12 MR. SPECTER: Yes, Your Honor.

13 CHIEF JUSTICE ROBERTS: And what happens
14 when you have this case, another district court ordering
15 the State to take action with respect to environmental
16 damage, another court saying, well, you've got to spend
17 this much more on education for disabled, another court
18 saying you've got to spend this much more on something
19 else? How does the State sort out its obligations?
20 Does it say --

21 MR. SPECTER: We would prefer --

22 CHIEF JUSTICE ROBERTS: -- well, I'll spend
23 more money to build prisons, but I'll violate this other
24 district court order saying I have to spend more money
25 to build water treatment plants?

1 MR. SPECTER: Well, Your Honor, in this
2 particular case --

3 CHIEF JUSTICE ROBERTS: I know you like your
4 particular case --

5 (Laughter.)

6 CHIEF JUSTICE ROBERTS: -- and you want the
7 State to say this is where I'm going to put my money.

8 MR. SPECTER: No, we're not --

9 CHIEF JUSTICE ROBERTS: But the point is
10 it's a budget prioritization that the State has to go
11 through --

12 MR. SPECTER: Right.

13 CHIEF JUSTICE ROBERTS: -- every day, and
14 now it's being transferred from the State legislature to
15 Federal district courts throughout the State.

16 MR. SPECTER: Well, I believe the Federal
17 courts have an obligation to enforce the Constitution
18 and the laws of the United States.

19 CHIEF JUSTICE ROBERTS: No, no. I believe
20 that as well, counsel.

21 (Laughter.)

22 CHIEF JUSTICE ROBERTS: What I'm saying is
23 that you have conflicting orders from different district
24 courts telling them you've got to comply with the
25 Constitution by spending 8 billion here; and another

1 court saying, I've got another constitutional problem of
2 my own, and you've got to spend 8 billion over there.
3 What is the State supposed to do in that situation?

4 MR. SPECTER: Well, my simple answer to your
5 question, Your Honor -- and I don't mean to be
6 flippant -- but they're -- they have an obligation to
7 follow the Federal law, constitutional law and other
8 laws. And if they're not, then the Federal court has an
9 obligation to impose a remedy.

10 In this particular case, the State has a
11 choice. It can either incarcerate 140,000 prisoners in
12 a system built for 80,000, or it can incarcerate a -- a
13 lesser number. If it chooses to incarcerate 148,000
14 prisoners in a space built for 80, it's going to incur
15 certain obligations. And we believe, as I said in
16 answer to Justice Breyer's question, the State could
17 choose to use less restrictive punishments, alternative
18 punishments, get a better bang for their buck, have more
19 public safety.

20 But that's -- if we -- if the court imposed
21 that kind of a rule, then the State would be here saying
22 it's -- it's violating comity provisions and making
23 policy choices for the State which it shouldn't. I
24 believe in this case, the court gave the State the
25 maximum degree of flexibility to make all the policy

1 choices surrounding -- surrounding the incarceration of
2 these prisoners. You just -- the Constitution prevents
3 the State from incarcerating somebody and then not
4 providing them the basic medical care they need to
5 escape from the prison and not die before their sentence
6 is out. And that's what we have here.

7 Thank you.

8 JUSTICE KENNEDY: If you take the State's
9 concession that it can meet a goal in 5 years and the
10 Federal court order is 2 years, we're talking about 3
11 years. Is there any indication of how fast the State's
12 remedy would click in? Are we talking maybe about a
13 5 percent differential for the last 3 years, or --

14 MR. SPECTER: Well, there are a lot of
15 things the State can do quickly. For instance, it can
16 reform its parole system; it cannot re-incarcerate
17 technical parole violators. It can --

18 JUSTICE KENNEDY: No, no. I'm saying,
19 assuming --

20 MR. SPECTER: Yes.

21 JUSTICE KENNEDY: Compare what the State
22 concedes that it will do with what the court has ordered
23 it to do.

24 MR. SPECTER: The State -- well, I just want
25 to remind you that the governor proposed to the

1 legislature that he reduce the prison population; he
2 said it could be done safely by the same amount, roughly
3 37,000 prisoners, in 2 years. So what the court found
4 was basically what the governor had believed was safe.

5 The 5-year -- the 5-year period is longer,
6 and the 5-year period is longer because it takes time to
7 construct the facilities that the -- that the State
8 wants to construct. I believe that's the major
9 difference between the two remedies. But the other
10 methods -- the good time credits, parole reform,
11 diversion -- those can be implemented very quickly, and
12 those substantial reductions can be accomplished safely
13 in that amount of time.

14 JUSTICE SOTOMAYOR: So should the court have
15 said 2 years for everything but construction? Wouldn't
16 that have been a more narrowly tailored remedy?

17 MR. SPECTER: Well, the State --

18 JUSTICE SOTOMAYOR: Except that they --

19 MR. SPECTER: Well, I was --

20 JUSTICE SOTOMAYOR: -- there was going to be
21 no construction adequate, because there was no money.

22 MR. SPECTER: Right. And the State has --
23 has not really put up the money to construct those new
24 prisons. This case has been ongoing since 2006, and
25 they've hardly constructed anything. Even if it was a

1 more narrow remedy, the court found that construction
2 wouldn't be a viable alternative.

3 My time is up.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 Mr. Phillips, you have 3 minutes left.

6 REBUTTAL ARGUMENT OF CARTER G. PHILLIPS

7 ON BEHALF OF THE APPELLANTS

8 MR. PHILLIPS: Thank you, Mr. Chief Justice.

9 Just a few points. First of all, with
10 respect to the state of the record and what was
11 proffered and what was not proffered, if you look at the
12 joint appendix at 2085, there's a specific proffer that
13 is made by the intervenors in that context -- or I
14 mean -- I'm sorry. There's a specific proffer made by
15 the State of the --

16 JUSTICE SOTOMAYOR: I'm sorry. What page
17 was that?

18 MR. PHILLIPS: 2085. That's volume 6 of the
19 -- and it is at that point where the plaintiffs, the
20 intervening plaintiffs say we'd like to put on evidence
21 of constitutional violations. And Judge Karlton says:
22 Twice this court has said we will not receive that
23 evidence. You've made a clear -- as clear a record as
24 you can; please don't waste our time.

25 And then later, at 2338, which is again in

1 volume 6, where we enter Mr. Dezember, who is the
2 assistant secretary of CDCR in charge of health care, he
3 specifically said -- I've read the -- I've read the
4 Dezember declaration, and it will not be received to the
5 extent that it says the State is in compliance.

6 So we've made our efforts --

7 JUSTICE SOTOMAYOR: I'm sorry --

8 MR. PHILLIPS: -- and we were rebuffed.

9 JUSTICE SOTOMAYOR: I don't know what the
10 declaration said. Is the actual declaration in the
11 record somewhere?

12 MR. PHILLIPS: Yes, I believe the actual
13 declaration is in the record, Justice Sotomayor.

14 JUSTICE SOTOMAYOR: All right.

15 JUSTICE KAGAN: Mr. Phillips, sorry, but on
16 a -- on a different subject. Does the State stand by
17 its representation that it can do this without any
18 public safety impact in 5 years?

19 MR. PHILLIPS: Yes. I mean, we made that
20 submission to the court, and we -- we believe that we
21 could comply with it. That said --

22 JUSTICE KAGAN: That remains true --

23 MR. PHILLIPS: We --

24 JUSTICE KAGAN: -- notwithstanding budget --

25 MR. PHILLIPS: Well, it's --

1 JUSTICE KAGAN: -- economic differences,
2 budget differences?

3 MR. PHILLIPS: Look, I mean, the plaintiffs'
4 counsel talks about all of the things that you can do,
5 and if you -- if you look at 70a of the -- the
6 jurisdictional statement appendix, it specifically says
7 there's a line; above the line we can implement, and
8 that will get you about 16,000 inmates, and below the
9 line you need legislation in order to implement these
10 things. But the reality is that anytime you say you're
11 going to release 30,000 inmates in a very compressed
12 period of time, I guarantee you that there's going to be
13 more crime and people are going to die on the streets of
14 California. I mean that -- there's no way out of that
15 particular box.

16 JUSTICE KAGAN: But if there were 5 years,
17 you think you could do it without any public safety
18 impact in the way that you told the court you could?

19 MR. PHILLIPS: I think so, but I'm still
20 concerned, because the district court in this specific
21 says -- said: We have not evaluated the -- the safety
22 impact of each of the State's -- of the elements of the
23 State's proposed plan.

24 And it seems to me they had an obligation to
25 do that.

1 The other point I want to make with respect
2 to Justice Kennedy's question is that there is not a
3 shred of evidence that 137.5 makes any sense whatsoever.
4 That is a pulled-out-of-the-air number. Theirs was
5 aspirational. None of that is based on what is the
6 constitutional violation that exists at the time you
7 adopt that particular percentage.

8 And it seems to me that's the entire problem
9 with this -- this exercise, which is to say we're going
10 to fix this across the board, rather than what would
11 make much more sense, which is to evaluate these matters
12 facility by facility, to evaluate these matters on the
13 basis of the various elements discrete elements of how
14 you can reduce the prison population, and to do it in --
15 in conjunction with a receiver who is in place who can
16 help to implement this in a very systemic way and that
17 will get us to where we want to get to.

18 JUSTICE SOTOMAYOR: So why didn't you give
19 the court that as your plan? The court gave you
20 absolute discretion to implement the plan that you
21 wanted; it said we don't want to do facility by
22 facility, because we want you to figure out where you
23 need to implement.

24 So, your plan didn't do that; why? Either
25 in your 5-year plan or in your 2-year plan.

1 MR. PHILLIPS: Because the district court's
2 order said you're going to have to reach 137.5 percent
3 in 2 years, period. That's the categorical rule. And
4 the first time we went in to suggest something above
5 137.5, Judge Henderson said: I'm not hearing that.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.
7 Mr. Phillips, Mr. Specter.

8 The case is submitted.

9 (Whereupon, at 12:31 p.m., the case in the
10 above-entitled matter was submitted.)

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