No. 13A57

In the

Supreme Court of the United States

EDMUND G. BROWN JR., ET AL.,

Appellants,

v.

MARCIANO PLATA AND RALPH COLEMAN, ET AL.,

Appellees.

On Application to Stay Judgment Pending Appeal

JOINT MEMORANDUM IN OPPOSITION TO APPLICATION FOR STAY

DONALD SPECTER
Counsel of Record
STEVEN FAMA
ALISON HARDY
SARA NORMAN
REBEKAH EVENSON
PRISON LAW OFFICE
1917 Fifth Street
Berkeley, CA 94710
(510) 280-2621
dspecter@prisonlaw.com

Counsel for the *Plata* Appellees

PAUL D. CLEMENT
Counsel of Record
ZACHARY D. TRIPP
MICHAEL H. MCGINLEY
BANCROFT PLLC
1919 M Street NW
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

Counsel for the *Coleman* Appellees

(Additional Counsel Listed on Inside Cover)

July 19, 2013

MICHAEL W. BIEN
JANE E. KAHN
ERNEST GALVAN
LISA ELLS
AARON J. FISCHER
KRISTA STONE-MANISTA
MARGOT MENDELSON
LORI RIFKIN
ROSEN BIEN GALVAN &
GRUNFELD LLP
315 Montgomery Street,
Tenth Floor
San Francisco, CA 94104
(415) 433-6830

Additional Counsel for the *Coleman* Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

The remedy Appellants seek is truly extraordinary. A stay pending appeal is granted "only under extraordinary circumstances, and a district court's conclusion that a stay is unwarranted is entitled to considerable deference." *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1316 (1983) (Blackmun, J., in chambers). The three-judge district court below issued a thorough opinion finding a stay unwarranted. Order Denying Stay at 2 (July 3, 2013) ("Stay Order") (attached as Ex. A). That decision is correct, and this Court should deny the stay.

Only two years ago, this Court affirmed the three-judge court's mandate that Appellants reduce California's prison population to 137.5% of design capacity within two years. *Brown v. Plata*, 131 S. Ct. 1910, 1923 (2011). This injunction gave Appellants "substantial flexibility" to decide how to comply with the 137.5% cap. *Id.* at 1943. Among many other options, they could transfer prisoners to out-of-state facilities, reform sentencing or the parole system, build new facilities, and expand "good-time credits" to give "early release to only those prisoners who pose the least risk of reoffending." *Id.* at 1923, 1943. Appellants complained that this discretion would not be enough, and they warned of needing to release 38,000 to 46,000 prisoners and "jeopardiz[ing] the safety of California residents." Defs.' Br. in *Plata* at 10 (Aug. 27, 2010) ("Defs.' *Plata* Br."). This Court heard those arguments and rejected them. While emphasizing Appellants' flexibility to comply with the cap in ways that maximized state autonomy and minimized the risk to public safety, this Court made clear that compliance with the cap and the Constitution could not be indefinitely deferred and that prisoners may ultimately need to be released. *See*

Plata, 131 S. Ct. at 1947. This Court ordered Appellants to reduce the population "without further delay." *Id*. at 1947.

On remand, Appellants took some initial steps to comply, but all understood those measures would be inadequate. Since then, rather than redoubling their efforts, Appellants have adopted a stance of outright defiance. For example, the three-judge court issued a direct and unambiguous order requiring Appellants to submit a plan for compliance. They instead submitted a "plan for non-compliance" that "at best would achieve essentially only half" of the required reductions. June 20, 2013 Order at 26–27 ("June Order") (Stay App. Ex. A). By disobeying direct court orders, Appellants are frustrating this Court's expectation that state officials would take the lead in resolving California's prison crisis.

Appellants are not merely dragging their feet; they are making the problem worse. In the face of this Court's holding that "serious constitutional violations" have "persisted for years" and "remain uncorrected," *Plata*, 131 S. Ct. at 1922, and lower court findings that violations continue today, California's Governor unilaterally "declar[ed] that the crisis in the prisons was resolved" and "terminated his emergency powers." Stay Order at 7; *see* Governor of the State of California, Edmund G. Brown, Jr., Proclamation (Jan. 8, 2013), http://bit.ly/VOb1jV ("Proclamation"). This proclamation cannot be dismissed as wishful thinking or even mere rhetorical defiance. It terminated the Governor's emergency power to transfer prisoners out of state and threatened to return approximately 9,500 out-of-state prisoners to California. Stay Order at 7.

In the wake of that self-inflicted wound, Appellants ask this Court for a stay. Amazingly, after insisting that compliance is all but impossible, they informed the court below that they *will* "take steps necessary to ensure timely compliance" if they do not get a stay. Defs.' Motion for Stay at 2 (June 28, 2013) (Doc. 2665/4673). In other words, Appellants will not comply unless this Court tells them to not just once but twice. Such open defiance of the federal judiciary, while not unprecedented, has always deserved the same swift response. This Court should deny the application and make clear that one mandate from this Court more than suffices.

Appellants' arguments for a stay are déjà-vu all over again. They argue again that the three-judge court "refused to consider [evidence] regarding significantly changed conditions." Stay Appl. at 1; *see* Defs.' *Plata* Br. at 3, 26, 42 (court "refused to consider current conditions"). They argue again that the three-judge court "d[id] serious violence" to the governing legal standard. Stay Appl. at 26; *see* Defs.' *Plata* Br. at 13 (same). And although Appellants are not required to release a single prisoner, have had four years to build new prisons, and the orders below would at most lead to a smaller and more targeted release of low-risk offenders than this Court contemplated when affirming in 2011, Appellants argue yet again that the orders below threaten public safety by "forc[ing] the early release of thousands of inmates by the end of the year, including violent and serious offenders." Stay Appl. at 1; *see* Defs.' *Plata* Br. at 10, 53–56. This Court rejected these arguments once, deferring to the lower courts' findings of fact. They should fare no better the second time around.

In denying Appellants' motion for a stay, the three-judge court found that they are unlikely to prevail on the merits, will not suffer irreparable harm without a stay, and that the equities weigh heavily against a stay. The three-judge court was correct. At the outset, Appellants are unlikely to succeed on the merits because this Court lacks jurisdiction. This Court has jurisdiction over three-judge court orders "granting or denying" injunctions, not over orders modifying (or refusing to vacate or modify) preexisting injunctions that this Court has already affirmed. *Compare* 28 U.S.C. § 1253, *with* 28 U.S.C. § 1292(a)(1). Even if this Court had jurisdiction, Appellants' arguments are factbound, meritless, and reviewed for clear error or abuse of discretion. In a carefully reasoned 71-page opinion, the three-judge court closely examined the persistently grave situation in California today and found "without a doubt" that the facts had not changed so significantly as to warrant Appellants' request of vacating the injunction entirely. Order Denying Motion to Vacate at 55 (April 11, 2013) ("April Order") (Stay. App. Ex. B). Overcrowding is currently at 149.2%, far above the limit this Court approved and demanded. Stay Order at 19; *Plata*, 131 S. Ct. at 1944–45. Among many other problems, there is still "inadequate treatment space"; "staff shortages are far worse this year than in prior years"; and "suicides are occurring at virtually the same rate and with virtually the same degree of inadequacies in assessment, treatment and intervention." April Order at 43, 45, 51–52; Order Denying Motion to Terminate in *Coleman* at 33–34 (April 5, 2013) (Doc. 4539) ("*Coleman* Order"). Without a significant change in facts, Appellants' request to vacate the injunction is no more

than an effort "to relitigate a thoroughly reasoned decision of the Supreme Court, *Brown v. Plata*, issued two years ago." Stay Order at 2.

The equities also strongly oppose a stay. The three-judge court correctly found that Appellants will not be irreparably injured without a stay. Among other things, Appellants still have the flexibility to comply without releasing a single prisoner and thus without any risk to public safety at all. Yet for decades, thousands of Plaintiff prisoners have been suffering severe constitutional violations at Appellants' hands. A stay would extend those substantial injuries even further. Enough is enough. As this Court held, the 137.5% cap is appropriately tailored to remedy Appellants' constitutional violations without posing an undue risk to public safety. Nothing has changed to make the equities shift in Appellants' favor. To the contrary, granting a stay would reward openly defiant and contumacious conduct, while denying a stay would support the overriding public interest in the orderly administration of justice and promote due respect for court orders.

BACKGROUND

This Court's opinion in *Plata* fully describes the history of this case, and the three-judge court's Stay Order summarizes subsequent events and forcefully articulates the compelling reasons why a stay is inappropriate. That opinion, attached as the first appendix to this memorandum, provides all the background necessary to reject the stay application. Nonetheless, in light of Appellants' one-sided statement of the case, some points merit emphasis.

A. This Court's Decision in *Brown v. Plata*

Two years ago, this Court affirmed the three-judge district court's injunction mandating that California reduce overcrowding to 137.5% of design capacity within two years. Specifically, this Court held, consistent with the requirements of the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626, that (1) overcrowding was the "primary cause" of "the severe and unlawful mistreatment" of Plaintiffs; and (2) the order was "narrowly drawn" and gave "substantial weight" to public safety considerations. 131 S. Ct. at 1923, 1939, 1944–45.

Notably, the injunction "left the choice of how best to comply with its population limit to state prison officials." *Id.* at 1943. Among other options, California could build new facilities, transfer prisoners out of state, reform parole or sentencing, or expand "good-time credits" to give "early release to only those prisoners who pose the least risk of reoffending." *Id.* at 1923, 1943. Appellants also already had "over two years to begin complying." *Id.* at 1946. For that reason, the Court ordered Appellants to "implement the order without further delay." *Id.* at 1947.

The Court explained that, as with any injunction, the three-judge court could exercise its "sound discretion" to consider modifying the decree as appropriate. *Id.* at 1946. "If significant progress is made toward remedying the underlying constitutional violations, that progress may demonstrate that further population reductions are not necessary or are less urgent than previously believed. Were the State to make this showing, the three-judge court in the exercise of its discretion

could consider whether it is appropriate to extend or modify this timeline." *Id.* at 1947. But this Court also expected that the end result could be the release of prisoners. "Even with an extension of time to construct new facilities and implement other reforms, it may become necessary to release prisoners to comply with the court's order." *Id.* Again, this was a question left to the lower court: "The three-judge court, in its discretion, may also consider whether it is appropriate to order the State to begin without delay to develop a system to identify prisoners who are unlikely to reoffend or who might otherwise be candidates for early release." *Id.*

B. Subsequent Proceedings

On remand, Appellants implemented "realignment," a first step that primarily shifted certain inmates to county jails. Stay Order at 5. "It soon became apparent, however, that realignment alone would not be sufficient to meet the 137.5% design capacity benchmark" by the June 2013 deadline. *Id.*

Since then—frustrating this Court's expectation that state officials would take the lead in choosing how best to comply and openly disregarding the three-judge court's orders—Appellants have steadfastly refused even to take steps towards compliance. *See id.* For example, in their January, February, and March 2013 status reports, Appellants forthrightly declared that they "would take no further action to comply with the Order." *Id.* at 7. Making matters worse, Governor Brown "terminated his emergency powers, declaring that the crisis in the prisons was resolved." *Id.* This ended the State's ability "to contract to house approximately 9,500 prisoners in out-of-state prisons," thus threatening "a

scheduled partial return of these prisoners during 2013, and a consequent increase in the prison population." *Id.*

1. In January 2013, Appellants moved in the *Coleman* district court to terminate all injunctive relief, arguing that mental health care now complies with the Eighth Amendment. *Coleman* Order at 2, 26. The district court denied the motion, finding Appellants' evidence "woefully inadequate." *Id.* at 27. "[S]uicides are occurring at virtually the same rate and with virtually the same degree of inadequacies in assessment, treatment and intervention." *Id.* at 33–34. And "[c]hronic understaffing continues to hamper the delivery of constitutionally adequate medical care and is a central part of the ongoing constitutional violation." *Id.* at 62. It thus held that prospective relief remains necessary. *Id.* at 63–67.

Appellants have not even moved in the *Plata* district court to argue that the constitutional violations have been remedied. The Receiver, J. Clark Kelso, recently found "no persuasive evidence" that care had reached the constitutional minimum. *Plata* Receiver's Twenty-Second Tri-Annual Report at 2 (Jan. 25, 2013) (Doc. 2525), http://bit.ly/1brEECM.

2. In January 2013, Appellants also moved in the three-judge district court to "vacate or modify" the population reduction order. Stay Order at 7; April Order at 1–2. But Appellants did not actually ask to raise the cap or extend the deadline; they only asked for "complete vacatur" of the injunction. June Order at 21. Appellants initially argued that they had "remed[ied] the underlying constitutional violations," but they later chose "*not* [to] seek vacatur on [this] basis." April Order

at 30, 33. Instead, they argued that "overcrowding is no longer the primary barrier prohibiting the State from providing constitutionally adequate medical and mental health care." *Id.* at 27 (quotation marks omitted).

On April 11, 2013, the three-judge court issued a thorough 71-page order denying Appellants' motion to vacate. *See id.* at 1. First, the court held that, without evidence of a significant change in facts beyond the mere passage of time, Appellants were simply trying to relitigate the merits of the 137.5% population cap—which they had already litigated and lost in the Supreme Court. *Id.* at 35–36. Subjecting predictive judgments to vacatur "based solely on a contention that some time has passed," the three-judge court explained, would permit "unbounded relitigation." *Id.* at 37.

Second, the three-judge court held that, although Appellants *could* move to modify based on a significant change in facts, Appellants had not carried their burden of showing that such a change had occurred. They were required to "point to evidence that actually supports invoking this Court's equitable power to modify final judgments." *Id.* The court closely examined the evidence, *id.* at 39–60, but found that Appellants failed to show a significant change of facts that would warrant the sweeping equitable relief Appellants sought. *Id.* at 35, 40.

Among other things, the three-judge court found that Appellants had not shown a change in the barriers to adequate treatment—"inadequate treatment space" and "severe staff shortages"—that were the focus of its order and this Court's analysis in *Plata*. *Id.* at 43; *see also* 131 S. Ct. at 1933–34. Instead, Appellants

could point only to an overall reduction in overcrowding. April Order at 38. But "[n]othing could be more anticipated" than the beginnings of population reduction, as this Court's order mandated it. *Id.* at 39. At bottom, California confused *partial* compliance as a reason to remove any obligation to achieve *full* compliance. *See id.* at 41. The three-judge court thus found, based on current evidence, that overcrowding was still the primary cause of the ongoing violations. *Id.* at 56–60.

The three-judge court warned Appellants that their intransigence risked contempt. "Defendants have thus far engaged in openly contumacious conduct by repeatedly ignoring both this Court's Order and at least three explicit admonitions to take all steps necessary to comply with that Order." *Id.* at 63; *see also id.* at 65 ("[F]or approximately a year, defendants have acted in open defiance of this Court's Order."). "If defendants do not take all steps necessary to comply" with court orders, they will "be subject to findings of contempt, individually and collectively." *Id.* at 71.

Appellants filed a notice of appeal. Rather than moving for a stay or to expedite, they sought and received a 45-day extension of time to file their Jurisdictional Statement. *See Brown v. Plata*, No. 13A5 (U.S.).

3. The three-judge court also issued a separate order on April 11, 2013, directing Appellants "to list, *in their order of preference*, … all possible measures to reduce the prison population" and a plan for compliance. April Order at 69; *see also* Order Requiring List of Proposed Population Reduction Measures at 1–4 (Apr. 11, 2013) (Doc. 2591/4542). Notwithstanding the three-judge court's warning that they

risked contempt, Appellants directly disobeyed the clear order that they provide a plan for compliance with a ranked list of population-reduction measures. Appellants' proposal on its face failed to meet the 137.5% goal and listed measures "in no particular order of preference." *See* June Order at 2, 27; Defs.' Resp. to April 11, 2013 Order at 5 (Doc. 2609/4572). This "plan for non-compliance" exceeded the population cap by 4,170 prisoners, falling 43% short of the needed reduction. June Order at 29.

On June 20, 2013, faced with Appellants' defiance, the three-judge court modified its preexisting injunction. Appellants still must reach the same preexisting goals of 137.5% population by December 27, 2013. But given their inaction, Appellants now must take specific steps to get there: They must adopt their non-compliant plan and also expand "good time" credits both prospectively for certain prisoners (as proposed) as well as retroactively for all prisoners. June Order at 2, 37–41. Nonetheless, the three-judge court still preserved Appellants' flexibility by allowing them to substitute virtually any other measure that would reduce the population as effectively. *Id.* at 2–3, 49–50. And the three-judge court waived the state and local laws that Appellants had themselves identified as barriers to compliance. *Id.* at 2, 43–45. The court also warned again that it would "be within its rights to … institute contempt proceedings immediately," but it deferred any such proceedings. *Id.* at 50–51.

4. Appellants moved for a stay. On July 3, 2013, the three-judge court denied the motion, issuing the opinion in Appendix A, which forcefully exposed the failure of Appellants to satisfy the requirements for a stay.

STANDARD

A stay pending appeal from a three-judge court is an extraordinary remedy, and this Court gives "considerable deference" to a three-judge court's conclusion that a stay is unwarranted. *Ruckelshaus*, 463 U.S. at 1316; *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers). The applicant must show that four Justices will vote to note probable jurisdiction and that there is a fair prospect that five Justices will vote to reverse. *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers). Because the "lower court judgment [was] entered by a tribunal that was closer to the facts than the single Justice, [it] is entitled to a presumption of validity." *Graves*, 405 U.S. at 1203. Given the close correspondence between the three-judge court's decision below and this Court's decision in *Plata*, the presumption of validity should be particularly strong, indeed well-nigh conclusive.

The applicant also must show that, without a stay, it will suffer irreparable harm, that a stay will not substantially injure the other parties, and that the balance of the equities favors a stay. *E.g., Ruckelshaus*, 463 U.S. at 1316; *Graves*, 405 U.S. at 1203; *see also Nken v. Holder*, 556 U.S. 418, 434 (2009) (discussing stay standard). This Court "weigh[s] heavily" a three-judge court's refusal to stay its own order, which indicates that the court closer to the facts "was not sufficiently

persuaded of the existence of potentially irreparable harm as a result of enforcement of its judgment in the interim." *Graves*, 405 U.S. at 1203–04. "Balancing the equities is always a difficult task," and "[w]here there is doubt, it should inure to the benefit of those who oppose grant of the extraordinary relief which a stay represents." *Williams v. Zbaraz*, 442 U.S. 1309, 1315–16 (1979) (Stevens, J., in chambers).[1]

ARGUMENT

This Court should deny Appellants' application for a stay. First, the three-judge court correctly determined that Appellants are unlikely to succeed on the merits. Indeed, this Court lacks jurisdiction over their appeal, and their claims are either foreclosed by *Plata*, or are reviewed on a deferential standard and are factbound and meritless. Second, the three-judge court correctly found that denying a stay will not cause Appellants irreparable harm, and that granting a stay would irreparably harm thousands of prisoners in the Plaintiff classes. Granting a stay would also be inequitable for an even more basic reason: It would reward Appellants' outright disregard for the three-judge court's orders, while denying the stay will bring them into compliance with those orders and this Court's judgment in *Plata*. Accordingly, this Court should deny the extraordinary relief Appellants seek.

[1] There are pending motions to file briefs as amici curiae in support of this application. Neither S. Ct. Rule 22 governing applications nor Rule 37 governing amicus briefs permits such filings. They also violate Rule 37.2(b)'s 10-day notice requirement. The California Sheriffs et al. also improperly attempt to introduce evidence relating to adjudicative facts that they could have presented below (but did not). Stern & Gressman, *Supreme Court Practice & Procedure* 650–51 (8th ed. 2002).

I. This Court Is Unlikely To Note Probable Jurisdiction and There Is Not a Fair Prospect This Court Would Reverse.

A. This Court Lacks Jurisdiction Over This Appeal.

While the three-judge court correctly resolved the issues before it, Appellants face a more basic obstacle in this Court: They are not likely to succeed on the merits because this Court lacks jurisdiction even to reach the merits. *See Munaf v. Geren*, 553 U.S. 674, 690 (2008) (doubt about jurisdiction makes success on the merits "more *unlikely*"). In 28 U.S.C. § 1253, Congress gave this Court appellate jurisdiction to review decisions of three-judge courts "granting or denying" injunctions. This is markedly narrower than Congress's parallel grant of jurisdiction to the courts of appeals: Those courts are empowered to review orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court." 28 U.S.C. § 1292(a)(1). Congress thus knows how to grant jurisdiction over a wider array of orders, including those modifying (or refusing to vacate or modify) a preexisting injunction previously affirmed on appeal. Congress gave this broader jurisdiction to the courts of appeals, but conspicuously withheld it from the Supreme Court. *See Gerstein v. Coe*, 417 U.S. 279, 279 (1974) (per curiam) (three-judge court orders that fall outside § 1253 are "appealable to the Court of Appeals"). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quotation marks and alterations

omitted). The narrow language of § 1253 thus expresses Congress' intent to withhold jurisdiction in precisely these circumstances.

This plain reading of § 1253 also makes practical sense. It avoids the spectacle of an endless loop of relitigation based on an unsuccessful litigant's obstinacy and a three-judge court's understandable disinclination to modify an injunction this Court already approved. And it is further buttressed by the rule that "only a narrow construction" of this statute "is consonant with the overriding policy, historically encouraged by Congress, of minimizing the mandatory docket of this Court in the interests of sound judicial administration." *Gonzalez v. Automatic Emps. Credit Union*, 419 U.S. 90, 98 (1974). This Court wisely guards its appellate jurisdiction. For example, this Court has held that orders only "deny" injunctions, within the meaning of § 1253, if the denial "rests upon resolution of the merits of the constitutional claim presented below." *MTM, Inc. v. Baxley*, 420 U.S. 799, 804 (1975). *See also In re Slagle*, 504 U.S. 952, 952 (1992) (opinion of White, J.); Stern & Gressman, *supra* n.1, at 92. But reading § 1253 loosely—to say the least—to include orders modifying or refusing to vacate or modify injunctions that this Court has already affirmed would create a significant loophole. A party subject to a three-judge court injunction that this Court already affirmed could again obtain mandatory appellate review in this Court any time it wished, simply by filing a new motion to vacate or modify.[2]

[2] Appellants argue that this Court has jurisdiction over any three-judge court order "impos[ing] new obligations." Stay App. 22 (citing *Gunn v. Univ. Comm. to End the War in Viet Nam*, 399 U.S. 383 (1970)). But *Gunn* does not establish this broad rule; it construed § 1253 narrowly to dismiss an

This Court lacks jurisdiction because Appellants seek a stay pending appeal of the April and June Orders, but neither order grants or denies an injunction. First, the April Order denied Appellants' "motion to vacate or modify" the injunction that this Court affirmed in *Plata*. Defs.' Motion to Vacate or Modify at 1 (Jan. 7, 2013) (Doc. 2506/4280) ("Motion to Vacate"); April Order at 1–2. It thus did not grant or deny an injunction; it "refus[ed] to dissolve or modify" a preexisting injunction. § 1292(a)(1). Nor did the three-judge court "grant injunctive relief" by separately requiring Appellants to submit a plan for compliance. Stay Appl. at 21. That separate order was a run-of-the-mill case management order requiring Appellants to identify a plan for complying with the preexisting injunction by the preexisting deadline. *See Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 279 (1988) ("An order … that relates only to the conduct or progress of litigation before that court ordinarily is not considered an injunction…."). This Court thus lacks jurisdiction to review these orders.

Second, the June Order does not "grant" a new injunction; it merely modifies the preexisting injunction that this Court already affirmed. *Cf. Descamps v. United States*, 133 S. Ct. 2276, 2291 (2013) ("'[T]o modify' means to change moderately or in minor fashion." (quotation marks omitted)). In light of Appellants' contumacious refusal to comply (and much less to take the lead in crafting a durable remedy), the June Order refined the preexisting injunction to be more specific about how to reach

---

order that did *not* "grant or deny" an injunction. *Id.* at 389–90. Appellants' view that a minor change to a preexisting injunction "grants" a new one is contrary to ordinary English usage, and it would render superfluous Congress' choice to give the circuit courts jurisdiction over orders "modify[ing]" an injunction—but *not* to give this jurisdiction to the Supreme Court.

the preexisting mandate. June Order at 31–36. Appellants must implement their "plan for non-compliance" and must also expand "good time" credits, both prospectively and retroactively; or they may adopt alternative population reduction measures that are equally effective. *Id.* at 48–50. The three-judge court waived the state laws that Appellants have claimed are barriers to compliance. *Id.* at 2, 43–45. And exercising "its discretion," the three-judge court "order[ed] the State to begin without delay to develop a system to identify prisoners who are unlikely to reoffend or who might otherwise be candidates for early release," just as this Court contemplated. *Id.* at 26; *Plata*, 131 S. Ct. at 1947. This is no more (or less) onerous than the order this Court affirmed; it is simply more specific. The June Order thus does not grant a new injunction. It makes modest changes, consistent with this Court's expectations, to refine the injunction this Court already affirmed. Section 1253 does not allow an appeal of such an order. At a minimum, there are real doubts as to jurisdiction, making Appellants' success on the merits much "more *unlikely*." *Munaf*, 553 U.S. at 690.

B. The Federal Questions Here Are Insubstantial and Properly Left to the Lower Court's Discretion.

Two years ago, this Court affirmed the three-judge court's order mandating that Appellants reduce overcrowding to 137.5% of design capacity within two years and declared that the three-judge court, "in its discretion," could order Appellants to develop a list of offenders to be released early. *Plata*, 131 S. Ct. at 1947. Appellants now argue that this Court is likely to note probable jurisdiction yet again on

strikingly similar—if not identical—issues, but to reach the polar opposite result. Even if this Court had jurisdiction, Appellants would be wrong on both fronts.

1. The Standard of Review Is Highly Deferential.

The courts of appeals review a decision modifying or refusing to vacate or modify an injunction for abuse of discretion. *See, e.g.*, 16 Wright & Miller, *Federal Practice & Procedure* § 3924.2 (2d ed. 2013); *Horne v. Flores*, 557 U.S. 433, 447 (2009). This "narrow scope of appeal" is needed to keep in check "[p]otential abuse" of § 1292(a)(1)'s right to appeal. Wright & Miller § 3924.2. Review is particularly deferential when the original injunction has already been affirmed on appeal: It "should be disturbed only on a compelling showing of changed circumstances not adequately considered by the trial court." *Id.* Otherwise, "[a] dissatisfied litigant who has been enjoined and lost an initial appeal … need only apply for dissolution or modification to produce a new opportunity." *Id.*[3]

Plata itself establishes that the three-judge court's conclusions, even on an initial appeal, are reviewed deferentially. "It is not this Court's place to duplicate the role of the trial court." *Plata*, 131 S. Ct. at 1932. Findings of fact are reviewed for clear error; "review of the … primary cause determination is deferential"; and the lower court has "substantial flexibility" in crafting a remedy. *Id.* at 1932, 1944.

[3] We are unaware of any Supreme Court case setting a standard of review of a three-judge court decision modifying (or refusing to vacate or modify) an injunction this Court previously affirmed. This, of course, is because this Court does not have and has never exercised jurisdiction over such an appeal. If this Court had such jurisdiction, however, it would presumably apply the well-established standard that the circuit courts apply, if not a standard even less inviting to relitigation efforts.

"Once invoked, the scope of a district court's equitable powers is broad, for breadth and flexibility are inherent in equitable remedies." *Id*. at 1944.

Plata also emphasized the three-judge court's discretion to consider potential modifications. *Id.* at 1946–47. If the state shows "significant progress made toward remedying the underlying constitutional violations," the court "in the exercise of its discretion could consider whether it is appropriate to extend or modify [the] timeline." *Id*. at 1947. But "[e]ven with an extension of time to construct new facilities and implement other reforms, it may become necessary to release prisoners to comply with the court's order." *Id*. Accordingly, the three-judge court, "in its discretion," could choose to require Appellants "to identify prisoners who are unlikely to reoffend or who might otherwise be candidates for early release." *Id*.

2. Appellants Have Waived Any Claim That They Have Remedied The Constitutional Violations.

Appellants appear not to argue that they have remedied the constitutional violations here. To the extent they raise this issue, this Court would not likely review it or reverse. First, the three-judge court correctly found that Appellants had waived this argument. Stay Order at 17–18. Appellants "initially posed this question" to the three-judge court, but then expressly "modified the[ir] motion by removing any constitutional question from the purview of [that] Court." *Id*. at 18. This Court is unlikely to note probable jurisdiction and reverse to undo Appellants' waiver. *Cf. Patrick v. Burget*, 486 U.S. 94, 99 n.5 (1988).

Furthermore, Appellants' claims are factbound and meritless. This Court held in 2011 that "serious constitutional violations" have "persisted for years" and

"remain uncorrected." *Plata*, 131 S. Ct. at 1922. In January 2013, Appellants moved to terminate in the *Coleman* court, arguing that they had remedied these violations. But that court—intimately familiar with the current facts on the ground—held that "ongoing constitutional violations remain." *Coleman* Order at 67. If Appellants disagree, their recourse is in the Ninth Circuit. Remarkably, Appellants have not even challenged the *Plata* court's finding that constitutional violations are ongoing. Stay Order at 18. This Court is not likely to note probable jurisdiction to conduct a fact-intensive inquiry in the first instance on an issue that is not even appropriately before this Court, much less to reverse. *Cf. Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view….").

3. The Three-Judge Court Did Not Abuse Its Discretion In Denying Appellants' Rule 60(b)(5) Motion In Light of Current Evidence.

Appellants primarily argue that this Court will note probable jurisdiction and reverse on the grounds that the 137.5% cap is no longer necessary. This argument has not been waived, but it is factbound, insubstantial, and meritless. Two years ago, this Court held that the 137.5% cap *is* necessary to remedy ongoing and severe constitutional violations. *Plata*, 131 S. Ct. at 1945. Eighteen months later, Appellants moved to "vacate or modify" that order, but the caption is misleading. Appellants did not ask to raise the cap or "extend or modify [the] timeline" because the need was "less urgent than previously believed." *Id.* at 1947. Instead, they swung for the fences and asked only for complete relief: "[T]his Court must vacate

the 137.5% population cap order." Motion to Vacate at 2, 21; *see also id.* at 20 ("the Court must discontinue prospective enforcement of the population reduction order").

The three-judge court did not abuse its discretion in denying that motion. First, the three-judge court correctly stated the legal standard. Appellants "may not … challenge the legal conclusions" undergirding the prior judgment, but instead bear the burden of showing "a significant change in facts" warranting the relief they seek. April Order at 29 (quoting *Horne*, 557 U.S. at 447; *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 393 (1992)). While courts adopt a "flexible approach" in institutional reform litigation to ensure that an injunction remains "equitable," relief will not be granted simply because the defendant finds compliance "is no longer convenient." *Id.* at 30.

Appellants take a single word from the April Order out of context and argue that the three-judge court believed it could not grant any relief until the violations have been completely "remed[ied]," while this Court stated that modification may be appropriate in light of "significant progress towards remedying" them. Stay Appl. 26 ("the three-judge court re-wrote a key passage of this Court's mandate," doing "serious violence to this Court's command"); *see* April Order at 33. Appellants are grasping at straws. The sentence they attack addresses waiver, not the Rule 60(b) standard, and states that Appellants no longer argued that they had "remed[ied] the underlying constitutional violations." April Order at 33; *see also id.* ("That contention … is no longer the basis for defendants' Three-Judge Motion…."). Directly above this sentence, the court correctly quoted the relevant passage from

Plata—and emphasized the language Appellants contend it overlooked. *Id.* And if the three-judge court actually believed that it could not modify the injunction without a complete remedy, its opinion would have stopped at page 34 after finding that Appellants waived the argument that they had remedied the violations. The opinion instead continues until *page 60*, closely examining Appellants' progress—or lack thereof—*towards remedying* the violations.

The three-judge court also properly exercised its discretion in applying this standard, consistent with this Court's expectations. The three-judge court concluded that Appellants could not seek to modify the injunction on the grounds that (1) the 137.5% figure was erroneous; and (2) "the passage of time constitutes a 'changed circumstance' sufficient to justify a Rule 60(b)(5) motion." *Id.* at 36. To the extent Appellants seek to relitigate the 137.5% number based solely on the passage of time, that request is barred by *res judicata* and law of the case principles. *See id.* at 35–36. "Defendants are, in effect, challenging a legal conclusion, which is not a permissible basis for modification" under Rule 60(b)(5), particularly where this Court has already affirmed that legal conclusion. *Id.* at 38. Appellants "already lost this argument," and "should not be allowed to litigate it once again." *Id.*

The three-judge court explained that Appellants *could* move to modify by "point[ing] to evidence that actually supports invoking [that] Court's equitable power to modify final judgments." *Id.* at 37. But the three-judge court correctly found that Appellants had "fallen far short" of carrying their burden. *Id.* at 40.

Appellants claim, as they did in *Plata*, that the court below failed to look at current conditions. *Plata*, 131 S. Ct. at 1935. Here again, "[t]his suggestion lacks a factual basis." *Id.* More than 20 pages of the April Order—pages 39 to 60—are devoted to assessing the current state of affairs. The three-judge court found, among other things, that the population reductions thus far, although laudable, were not a "significant change," they were evidence of *partial* compliance with an effective order. "Nothing could be more 'anticipated' than the consequent decline in crowding to which defendants point." *Id.* at 38. "[T]he effectiveness of the Order thus far is not an argument for vacating it, but rather an argument for keeping it in effect and continuing to make progress toward reaching its ultimate goal." *Id.* at 41. The current evidence also shows California has a long way to go. Overcrowding is currently at 149.2%, far above the limit this Court affirmed. Stay Order at 19; *see Plata*, 131 S. Ct. at 1945 (discussing evidence that even 145% is too high).

Appellants also failed to identify a "significant change *in the barriers* that prison crowding raised and that prevented the provision of constitutionally adequate medical and mental health care." April Order at 42–43. These barriers include "inadequate treatment space and severe staff shortages." *Id.* "With regard to staffing, defendants' [motion] is conspicuously silent." *Id.* at 43. Indeed, "staff shortages are far worse this year than in prior years." *Id.*; *see Coleman* Special Master's Twenty-Fifth Round Monitoring Report at 44 (Doc. 4298). Lack of treatment space is still a major problem. The three-judge court found that, "[f]or mentally ill patients, defendants lack sufficient bed space" and "the conditions

described" in *Plata* "continue to persist." April Order at 43–44. And California officials have recently admitted that there is "inadequate treatment space" that "hinder[s] the department's ability to deliver care." CDCR, *The Future of California Corrections* at 35 (2012), http://bit.ly/ImbE08. California's application does not even mention these findings.[4]

Current evidence regarding mental health care shows that "[s]ystemic failures persist in the form of inadequate suicide prevention measures, excessive administrative segregation of the mentally ill, lack of timely access to adequate care, insufficient treatment space and access to beds, and unmet staffing needs." *Coleman* Order 64–65. "[I]nmate suicides are occurring at virtually the same rate and with virtually the same degree of inadequacies in assessment, treatment and intervention." *Id.* at 33–34. The mental health staffing vacancy rate is 29%, "nearly as high as it was at the time of the trial." April Order at 43–45. Overcrowding forces clinicians to "treat" patients in metal cages that are clustered together like open-air confessionals and lack any semblance of confidentiality. *See* Ex. B-3. And remarkably, Appellants still use the same "telephone-booth sized cages without toilets" to hold suicidal inmates for extended periods of time because of a shortage of crisis beds. *Plata*, 131 S. Ct. at 1924 & App. C (photograph of cages); *see* April Order at 44. Indeed, they are still using these cages in the very

[4] Appellants make much of Office of the Inspector General (OIG) reviews and scores. Stay Appl. 14–15. The three-judge court found that these scores are "not a reliable basis for drawing any conclusions regarding the relationship between prison crowding and constitutional care." April Order at 48. They relate only to *Plata*, and have no bearing on *Coleman*. The OIG scores do not measure constitutional conditions, and are based on sample sizes too small to be reliable. *Id.* at 47–49.

same room pictured in *Plata*, with the only apparent "improvement" being a fresh coat of paint. *See* Ex. B-2.[5]

Current evidence similarly shows that health care remains dire. In May 2013, the Receiver found that "overcrowding continues to interfere with the ability to deliver constitutionally acceptable medical and mental health care." *Plata* Receiver's Twenty-Third Tri-Annual Report at 30 (Doc. 2636), http://bit.ly/11ZS0Dd ("Receiver's 23rd Report"). Notwithstanding the population reductions, the number of high-risk patients has increased. *Id.* at 32. Overcrowding also exacerbates thousands of prisoners' risk of death from Valley Fever, a fungal disease endemic to the Central Valley that disproportionately harms certain groups, including African-Americans. Order re: Valley Fever at Pleasant Valley and Avenal State Prisons in *Plata* at 3 (June 24, 2013) (Doc. 2661) ("Valley Fever Order"). Despite knowing for years that Valley Fever is "a public health emergency" in two prisons, the State did not remove all at-risk inmates from these prisons in part because there was no place to put them. *Id.* at 11, 20. As a result, inmates have "suffer[ed] unnecessary and unreasonable harm," showing again that "Defendants lack the will, capacity, and leadership to maintain a system of providing constitutionally adequate medical

[5] In 2013, prisoners with serious mental illness were still housed in overcrowded dorms and doubled up in cells that are too small, even under American Correctional Association standards, for a single prisoner. *See* Ex. B-1 (dorm with mentally ill inmates mixed with general population); Ex. B-4 (small double-bunked cell with one inmate sleeping on floor). The *Coleman* court also recently found "significant and troubling evidence" of failures in inpatient care, including policies that "may in fact cause additional harm," and the "denial of basic necessities including clean underwear…." *Coleman* July 11, 2013 Order at 10–11 (Doc. 4688) ("July 11 *Coleman* Order").

health care services to class members." *Id.* at 24.[6] In painting a rosy picture of care, Appellants "have simply divorced themselves from reality." July 11 *Coleman* Order at 2 n.2.

In sum, this Court is unlikely to note probable jurisdiction, and much less likely to reverse. Section 1253 does not give this Court appellate jurisdiction over orders, like those below, modifying (or refusing to vacate or modify) three-judge court orders this Court has previously affirmed. And even if this Court had jurisdiction, Appellants largely seek to relitigate *Plata* and otherwise raise factbound questions reviewed only for clear error or abuse of discretion. The three-judge court thoroughly assessed the current evidence and its holdings are correct.

II. Appellants Will Not Be Irreparably Harmed Without a Stay.

1. The three-judge court also correctly found that Appellants "will not be irreparably injured absent a stay." Stay Order at 20. At the outset, Appellants' failure to move expeditiously belies their claim of irreparable harm. The three-judge court denied their motion to vacate on April 11, 2013. They waited more than a month to appeal in this Court—and never moved for a stay or to expedite. They instead obtained a *45-day extension of time* to file. Following the June Order, Appellants waited over a week before seeking a stay from the three-judge court, and another week before seeking a stay from this Court. This "failure to act with

[6] Appellants' failure to respond to Valley Fever is only the tip of the iceberg. Indeed, a recent review at one prison found that overcrowding and lack of space leads to patients being examined in open hallways, visible to other prisoners, with no sinks, lights, or fixed equipment. R.J. Donovan Correctional Facility Health Care Evaluation in *Plata* at 14–15 (March 18, 2013) (Doc. 2572). These unconstitutional conditions contribute to systematically unsound treatment and "result in preventable morbidity and mortality." *Id.* at 25–26, 48.

greater dispatch tends to blunt [Appellants'] claim of urgency and counsels against the grant of a stay." *Ruckelshaus*, 463 U.S. at 1318; *see also Beame v. Friends of the Earth*, 434 U.S. 1310, 1313 (1977) (self-inflicted delay "vitiates much of the force of … allegations of irreparable harm"). Appellants' claim to irreparable harm is also undercut by their assurance that they will comply if and when this Court denies a stay. This is not irreparable harm, it is footdragging combined with a lawless insistence that they will comply only if this Court affirms not just once but twice.

2. In any event, this Court should defer to the three-judge court's finding that Appellants would not suffer irreparable harm. In seeking a stay below, Appellants primarily argued that expanding "good time" credits would be an irreparable harm because it would threaten public safety and could not be undone consistent with the Ex Post Facto clause. Defs' Motion for Stay at 6–7. The three-judge court correctly disagreed. First, Appellants' public safety argument runs headlong into this Court's decision, which affirmed the finding that expanding "good time" credits would "have little or no impact on public safety." 131 S. Ct. at 1943; *see* Stay Order at 20. Appellants' "new evidence" to the contrary (a law review article untested through cross-examination) was "not sufficient to rebut the extensive testimony [the three-judge] Court considered after fourteen days of trial in 2009." Stay Order at 20–21.

Second, expanding "good time" credits would not be irrevocable, and Appellants conspicuously fail to provide legal analysis showing that it would be. *See* Stay. Appl. 36. "The Ex Post Facto Clause, by its own terms, does not apply to courts." *Rogers v. Tennessee*, 532 U.S. 451, 460 (2001). Even statutes increasing

credits for existing prisoners could be revoked without ex post facto concerns, because revocation would not "rais[e] the penalty from whatever the law provided when [a defendant] acted." *Johnson v. United States*, 529 U.S. 694, 699 (2000); *cf. Lynce v. Mathis*, 519 U.S. 433, 441 (1997) (clause prohibits laws "increas[ing] punishment beyond what was prescribed when the crime was consummated"). And however implemented, there would be "fair warning" that credits granted pursuant to the three-judge court's orders could be revoked if those orders were reversed on appeal. *See Peugh v. United States*, 133 S. Ct. 2072, 2085 (2013); *Lynce*, 519 U.S. at 441 (a "central concer[n]" is "the lack of fair notice and governmental restraint"); *see also, e.g.*, *In re Borlik*, 194 Cal. App. 4th 30 (Ct. App. 2011) (California released prisoner after court granted additional credits; he was returned to prison when the decision was reversed on direct appeal).

More fundamentally, Appellants do not have to release *any* prisoners; they have wide latitude to substitute other methods for reducing overcrowding. "[A]lthough [the three-judge] Court believes the expanded good time credits measure is the simplest and best way for defendants to comply," it did not "requir[e] defendants to implement this measure." Stay Order at 21; *see* June Order at 49–50. For example, Appellants could "reassign prisoners to leased jail space," without any impact on public safety whatsoever. June Order at 50.

Indeed, in response to the three-judge court's recent decisions, the Governor has finally gotten creative and relied on his residual emergency powers (which he revoked but were still operative) to enter into a contract to lease beds—reportedly

more than 8,000—in privately-run prisons. Paige St. John, *Jerry Brown Extends Private Prison Deal—Without Funds Budgeted*, L.A. Times, July 10, 2013. This action completely belies Appellants' claim to irreparable harm. Appellants *can* comply without any threat, real or imagined, to public safety. But without ongoing pressure from the courts, they will do nothing.

3. Appellants also argue that waiving state-law barriers to compliance is *per se* an irreparable harm. Stay Appl. 34–36. But unlike the cases Appellants rely upon, the court below did not invalidate a state law on its face pursuant to an as-yet unreviewed finding of a constitutional violation. *See Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers); *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). This Court has already held that Appellants have been violating Plaintiffs' constitutional rights for years. Consistent with the Supremacy Clause, the PLRA allows a three-judge court to empower state officials to "exceed [their] authority under State or local law" in order to comply with the U.S. Constitution. 18 U.S.C. § 3626(a)(1)(B).

Eliminating state-law barriers to complying with this Court's mandate cannot be the basis for awarding Appellants extraordinary injunctive relief from that very mandate. In affirming, this Court "c[ould] not ignore" that "California's Legislature has not been willing or able to allocate the resources necessary to meet this crisis absent a reduction in overcrowding." 131 S. Ct. at 1939; *id.* at 1936 ("a lack of political will in favor of reform" contributed to the crisis). "The State first had notice that it would be required to reduce its prison population in February

2009," *id*. at 1946, and the two-year deadline was stayed during this Court's review, effectively extending it to June 27, 2013. The three-judge court further extended the deadline to December 27, 2013, giving Appellants nearly five years total to comply. *See* Stay Order 15.

In this time, Appellants could have enacted laws implementing any number of options to reduce overcrowding, including with zero impact on public safety. For example, they could have expanded prison capacity or at least taken substantial steps towards doing so. Appellants have squandered this opportunity. They chose to implement "realignment"—and nothing more—knowing it would be insufficient, and have since "fr[ozen] and ossif[ied] improvement efforts in the field" or actively made matters worse. Receiver's 23rd Report at 35. Appellants thus cannot complain about the "harms" of setting aside state-law barriers to compliance. The fact that state laws still impede compliance underscores that Appellants have disobeyed this Court's command to comply "without further delay." 131 S. Ct. at 1947.

III. Granting a Stay Would Substantially Harm Plaintiffs.

The three-judge court also correctly held that a stay "will substantially injure plaintiffs." Stay Order at 22. This Court "weigh[s] heavily" the judgment of the court closest to the facts. *Graves*, 405 U.S. at 1203. And the lower court's judgment should not be surprising or open to serious debate, since this Court already affirmed the necessity of reducing overcrowding to remedy persistent constitutional violations of the highest order. If this Court denies the stay, Appellants have stated

that they will finally obey court orders and comply with the 137.5% cap. Defs.' Motion for Stay at 2. But if this Court grants the stay, they will not comply, further protracting the already-protracted violations in California's prison system.

The harm here is grave indeed. As set forth in the three-judge court's orders and above, unconstitutional conditions brought on primarily by the overcrowding endemic in California's prisons cause ongoing suffering and death. "[I]nmate suicides are occurring at virtually the same rate and with virtually the same degree of inadequacies in assessment, treatment and intervention" today as when this Court affirmed. *Coleman* Order at 33–34. The *Plata* district court similarly found, less than a month ago, that California has "clearly demonstrated [its] unwillingness to respond adequately to the health care needs of California's inmate population." Valley Fever Order at 23–24. "[O]vercrowding continues to interfere with the ability to deliver constitutionally acceptable medical and mental health care." Receiver's 23rd Report at 30. In short, a stay would "creat[e] a certain and unacceptable risk of continuing violations of the rights of sick and mentally ill prisoners, with the result that many more will die or needlessly suffer. The Constitution does not permit this wrong." *Plata*, 131 S. Ct. at 1941.

IV. The Equities Weigh Heavily Against a Stay.

This Court has already affirmed the three-judge court's determination that the ongoing violation of thousands of prisoners' constitutional rights outweighs the uncertain and low risk to public safety that compliance requires. "[P]rison populations [have] been lowered without adversely affecting public safety in a

number of jurisdictions," and "various available methods of reducing overcrowding"—including the methods the June Order identifies—"would have little or no impact on public safety." *Plata*, 131 S. Ct. at 1942, 1943. "Some evidence indicate[s] that reducing overcrowding in California's prisons could even improve public safety." *Id.* at 1942. Indeed, compliance poses an obviously lower risk to public safety today than when this Court affirmed in 2011. At most, Appellants would release a subset of the tens of thousands of prisoners that could have been released when this Court affirmed. *See id.* at 1923.

Because compliance is unlikely to pose a serious safety risk, the paramount public concern is eliminating the established harm that Plaintiffs have suffered for decades. "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." Stay Order at 22 (quotation marks omitted). And "[c]ourts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration." *Plata*, 131 S. Ct. at 1928–29.

Appellants' intransigence also informs the balance of the equities and provides another overriding reason to deny their stay application. "It is beyond question that obedience to judicial orders is an important public policy." *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766 (1983). Parties cannot "by-pass orderly judicial review of [an] injunction before disobeying it." *Walker v. City of Birmingham*, 388 U.S. 307, 320 (1967); *see also United States v. United Mine Workers of America*, 330 U.S. 258, 293 (1947) ("[A]n order issued by a court with

jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings."). Furthermore, granting a stay is ultimately an act of equity, and the doors of equity are closed "to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief…." *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945).

"[F]or approximately a year, defendants have acted in open defiance" of the mandate to remedy ongoing constitutional violations, essentially taking no steps at all while knowing that the result is non-compliance. April Order at 65; *see also id.* at 63 (Appellants have "engaged in openly contumacious conduct by repeatedly ignoring" court orders). "The most recent, and perhaps clearest," example of their willful disobedience is their "failure to follow the clear terms of [the] April 11, 2013 order, requiring them to submit a Plan for compliance." June Order at 50. Instead, Appellants submitted "a Plan for non-compliance" that "does not come close to meeting" the required reduction, falling "43% short." *Id.* at 29, 50.

Most egregiously, Governor Brown unilaterally declared that the prison crisis is over, threatening to make the crisis significantly worse. Every court to consider the issue—this Court, the three-judge court, the *Coleman* court, and the *Plata* court—has found ongoing, grave violations. Governor Brown nonetheless proclaimed that the emergency "no longer exist[s]." Proclamation. As a direct result of that self-denial of emergency authority, Appellants lost the power "to contract to house approximately 9,500 prisoners in out-of-state prisons," triggering "a scheduled partial return of these prisoners during 2013, and a consequent

increase in the prison population." Stay Order at 7. Any consideration of Appellants' invocation of public safety concerns has to account for the fact that the Governor personally exacerbated the problem the three-judge court was forced to solve.

Granting a stay thus would undermine the compelling interest in the orderly administration of justice and due regard for court orders. It would also be manifestly inequitable, as it would reward Appellants' contumacious conduct and further perpetuate their "severe and unlawful mistreatment" of Plaintiffs. *Plata*, 131 S. Ct. at 1923.

CONCLUSION

This Court should deny the application for a stay.

Respectfully submitted,

DONALD SPECTER
Counsel of Record
STEVEN FAMA
ALISON HARDY
SARA NORMAN
REBEKAH EVENSON
PRISON LAW OFFICE
1917 Fifth Street
Berkeley, CA 94710
(510) 280-2621
dspecter@prisonlaw.com

Counsel for the *Plata* Appellees

PAUL D. CLEMENT
Counsel of Record
ZACHARY D. TRIPP
MICHAEL H. MCGINLEY
BANCROFT PLLC
1919 M Street NW
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

MICHAEL W. BIEN
JANE E. KAHN
ERNEST GALVAN
LISA ELLS
AARON J. FISCHER
KRISTA STONE-MANISTA
MARGOT MENDELSON
LORI RIFKIN
ROSEN BIEN GALVAN &
GRUNFELD LLP
315 Montgomery Street
Tenth Floor
San Francisco, CA 94104
(415) 433-6830

Counsel for the *Coleman* Appellees

July 19, 2013

No. 13A57

In the
Supreme Court of the United States

EDMUND G. BROWN JR., ET AL.,
Appellants,
v.
MARCIANO PLATA AND RALPH COLEMAN, ET AL.
Appellees.

CERTIFICATE OF SERVICE

I, Paul D. Clement, a member of the Supreme Court Bar, hereby certify that three copies of the attached Joint Memorandum in Opposition to Application for Stay were served on:

KAMALA HARRIS
Attorney General of California
JONATHAN L. WOLFF
Senior Assistant Attorney General
JAY C. RUSSELL
Supervising Deputy Attorney
DEBBIE VOROUS
PATRICK R. MCKINNEY
Deputy Attorneys General
455 Golden Gate Avenue
Suite 1100
San Francisco, CA 94102
(415) 703-5500

CARTER G. PHILLIPS
Counsel of Record
MARK E. HADDAD
EAMON P. JOYCE
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, DC 20005
(202) 736-8000
cphillips@sidley.com

JERROLD C. SCHAEFER
PAUL B. MELLO
HANSON BRIDGETT LLP
425 Market Street, 26th Floor
San Francisco, CA 94105

Service was made by first-class mail on July 19, 2013.

PAUL D. CLEMENT
Counsel of Record
BANCROFT PLLC
1919 M Street NW, Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

EXHIBIT A

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

RALPH COLEMAN, et al., Plaintiffs, v. EDMUND G. BROWN JR., et al., Defendants.	NO. 2:90-cv-0520 LKK JFM P **THREE-JUDGE COURT**
MARCIANO PLATA, et al., Plaintiffs, v. EDMUND G. BROWN JR., et al., Defendants.	NO. C01-1351 TEH **THREE-JUDGE COURT** ORDER DENYING DEFENDANTS' MOTION TO STAY JUNE 20, 2013 ORDER

On June 20, 2013, this Court issued an Opinion and Order once again directing defendants to comply with our August 2009 Population Reduction Order by reducing the prison population to 137.5% design capacity by December 31, 2013. June 20, 2013 Op. & Order (ECF No. 2659/4662).[1] The Population Reduction Order, although almost four years old, has still not been complied with by defendants. On June 28, 2013, defendants requested a stay of the June 20 Order pending appeal to the United States Supreme Court. Defs.' Mot.

[1] All filings in this Three-Judge Court are included in the individual docket sheets of both *Plata v. Brown*, No. C01-1351 TEH (N.D. Cal.), and *Coleman v. Brown*, No. 90-cv-520-LKK (E.D. Cal.). In this Order, when we cite to these filings, we list the docket number in *Plata* first, then *Coleman*. When we cite to filings in the individual cases, we include the docket number and specify whether the filing is from *Plata* or *Coleman*.

to Stay (ECF No. 2665/4673). For the reasons set forth below, we DENY defendants' motion for a stay.

It is worth stating at the outset that by its underlying appeal defendants (sometimes referred to as "the State") seek to relitigate a thoroughly reasoned decision of the Supreme Court, *Brown v. Plata*, issued two years ago. That decision holds that within two years the State must reduce its prison population to 137.5% of design capacity because, when a higher number of prisoners is confined in the prisons, the prison conditions result in medical and mental health care that violates the Eighth Amendment. 131 S. Ct. 1910 (2011). Because of the State's resistance to complying with that decision, and in order to avoid the necessity of contempt proceedings against the Governor and other state officials, this Three-Judge Court has repeatedly declined to initiate such proceedings and has even sua sponte extended the time for defendants to comply with the Population Reduction Order issued in conformity with *Brown v. Plata*. This Court has repeatedly directed defendants to adopt specific plans that will serve to reduce the prison population to the designated figure by the specified date. Until now, the State has insisted that it is unable (read unwilling) to comply with the Population Reduction Order. In the present motion, however, it has finally acknowledged that it will comply if the Supreme Court denies the stay it will request from that Court. Defs.' Mot. to Stay at 2 (ECF No. 2665/4673). Accordingly, with anticipation that the Supreme Court's denial of the stay will finally bring defendants into compliance with the Population Reduction Order and the Eighth Amendment (subject to the durability of its compliance), we further explain our reasons for denying defendants' motion.

I. PROCEDURAL HISTORY

The history of this litigation is of defendants' repeated failure to take the necessary steps to remedy the constitutional violations in its prison system, violations that have still not been remedied after 23 years. The litigation began with two separate class actions. The first, *Coleman v. Brown*, began in 1990 and concerns California's failure to provide constitutionally adequate mental health care to its prison population. The second, *Plata v.*

Brown, began in 2001 and concerns California's failure to provide constitutionally adequate medical care to its prison population. The district courts in both cases found constitutional violations and ordered injunctive relief. In 1995, in *Coleman*, the district court found that defendants were violating the Eighth Amendment rights of mentally ill prisoners. *Coleman v. Wilson*, 912 F. Supp. 1282 (E.D. Cal. 1995). The court appointed a Special Master to supervise defendants' efforts to remedy the constitutional violations. *Id.* at 1323-24. In 2005, in *Plata*, after a stipulated injunction failed to remedy the Eighth Amendment violations, the district court placed defendants' prison medical care system in a receivership. Oct. 3, 2005 FF&CL, 2005 WL 2932253, at *31. Now, 23 years later in one case and 12 years later in the other, despite the extensive efforts we have made to bring about compliance with our Population Reduction Order, which has been approved by the Supreme Court, defendants remain delinquent.

"After years of litigation, it became apparent that a remedy for the constitutional violations would not be effective absent a reduction in the prison system population." *Plata*, 131 S. Ct. at 1922. In 2006, the *Coleman* and *Plata* plaintiffs independently filed motions to convene a three-judge court capable of issuing a population reduction order under the PLRA. Both motions were granted, and on July 26, 2007, the cases were assigned to the same Three-Judge Court, made up of the district judges overseeing *Plata* and *Coleman* and one circuit judge appointed in conformance with Court Rules by the Chief Judge of the Circuit. After a fourteen-day trial, this Three-Judge Court issued a 184-page opinion ordering defendants to reduce the institutional prison population to 137.5% design capacity within two years. Aug. 4, 2009 Op. & Order (ECF No. 2197/3641) ("Population Reduction Order").

In issuing the Population Reduction Order, this Court found that "no relief other than a prisoner release order is capable of remedying the constitutional deficiencies at the heart of these two cases," *id.* at 119, and that "there was overwhelming agreement among experts for plaintiffs, defendants, and defendant-intervenors that it is 'absolutely' possible to reduce the prison population in California safely and effectively," *id.* at 137. We did not instruct defendants *how* to reduce the prison population. We left this question to defendants but

ordered them to submit a plan for compliance within 45 days of our Population Reduction Order. *Id.* at 183. Defendants did not comply; they submitted a plan for reducing the population to 137.5% within five years, not two. Defs.' Population Reduction Plan (ECF No. 2237/3678). This Court ordered defendants to comply by providing a two-year plan. Oct. 21, 2009 Order Rejecting Defs.' Proposed Population Plan (ECF No. 2269/3711). Defendants responded with a plan for compliance by which they would reduce the prison population to 167%, 155%, 147%, and 137.5% at six-month benchmarks. Defs.' Response to Three-Judge Court's Oct. 21, 2009 Order (ECF No. 2274/3726). On January 12, 2010, this Court issued an order accepting defendants' two-year timeline, but stayed the date of the order while defendants appealed to the Supreme Court. Jan. 12, 2010 Order to Reduce Prison Population (ECF No. 2287/3767).

In June 2011, the Supreme Court affirmed this Court's Population Reduction Order, holding that "the court-mandated population limit is necessary to remedy the violation of prisoners' constitutional rights." *Plata*, 131 S. Ct. at 1923. Although the Population Reduction Order, the Supreme Court stated, was "of unprecedented sweep and extent," and the release of prisoners a matter of "undoubted, grave concern," so too "is the continuing injury and harm resulting from these serious constitutional violations." *Id.* The Supreme Court rejected defendants' argument that a population reduction order was not required because the overcrowding could be eliminated through construction and other efforts. The Supreme Court called such options "chimerical," *id.* at 1938-39, and noted that defendants' troubled history in this litigation belied placing trust in them. The Supreme Court said:

> Attempts to remedy the violations in *Plata* have been ongoing for 9 years. In *Coleman*, remedial efforts have been ongoing for 16. At one time, it may have been possible to hope that these violations would be cured without a reduction in overcrowding. A long history of failed remedial orders, together with substantial evidence of overcrowding's deleterious effects on the provision of care, compels a different conclusion today.

Id. at 1939. The Supreme Court also rejected defendants' argument that population reduction would adversely affect public safety, citing this Court's extensive factual findings to the contrary. *Id.* at 1942-43. The Supreme Court specifically endorsed expanding good time

credits, stating that "[e]xpansion of good time credits would allow the State to give early release to only those prisoners who pose the least risk of reoffending," *id.* at 1943, and cited positive evidence from other jurisdictions that had successfully implemented good time credits, *id.* at 1942-43. The Supreme Court concluded that "[t]he relief ordered by the three-judge court is required by the Constitution and was authorized by Congress in the PLRA," and ordered defendants to "implement the order without further delay." *Id.* at 1947.

Following the Supreme Court's decision, this Court mandated a two-year schedule for defendants to reduce the prison population to 137.5% design capacity: 167% design capacity by December 27, 2011; 155% design capacity by June 27, 2012; 147% design capacity by December 27, 2012; and 137.5% design capacity by June 27, 2013. June 30, 2011 Order Requiring Interim Reports at 1-2 (ECF No. 2375/4032). Defendants responded by informing this Court that they would reach these benchmarks primarily through "Realignment," a measure authorized by Assembly Bill 109 that shifted criminals who had committed "non-serious, non-violent, and non-registerable sex crimes" from state prisons to county jails. Defs.' Resp. to Jan. 12, 2010 Court Order (ECF No. 2365/4016). Realignment went into effect in October 2011 and enabled defendants to comply with the first benchmark shortly after the December 27, 2011 deadline. Defs.' Jan. 6, 2012 Status Report (ECF No. 2411/4141).

It soon became apparent, however, that Realignment alone would not be sufficient to meet the 137.5% design capacity benchmark by June 2013. In February 2012, plaintiffs filed a motion asking defendants to show cause as to how they would reach this benchmark. They insisted that based on the California Department of Corrections and Rehabilitation's ("CDCR's") own Fall 2011 population projections, defendants would not meet the benchmark. Pls.' Mot. for an Order Requiring Defs. to Demonstrate How They Will Achieve the Required Population Reduction by June 2013 at 2-3 (ECF No. 2420/4152). Defendants responded that the CDCR's Fall 2011 population projections were not reliable and that the forthcoming Spring 2012 population projections would be more accurate. Defs.' Opp'n to Pls.' Mot. for Increased Reporting in Excess of the Court's June 30, 2011 Order at

2-4 (ECF No. 2423/4162). This Court accepted defendants' argument and denied plaintiffs' motion without prejudice. Mar. 22, 2012 Order Denying Pls.' Feb. 7, 2012 Mot. (ECF No. 2428/4162). Two months later, plaintiffs renewed their motion, correctly observing that the Spring 2012 population projections were not significantly different from the Fall's. Pls.' Renewed Mot. for an Order Requiring Defs. to Demonstrate How They Will Achieve the Required Population Reduction by June 2013 (ECF No. 2435/4180). Plaintiffs also informed this Court of a new public report, "The Future of California Corrections" ("The Blueprint"), in which defendants stated that they would not meet the 137.5% June 2013 benchmark and would seek modification of this Court's Population Reduction Order. *See* CDCR, *The Future of California Corrections: A Blueprint to Save Billions of Dollars, End Federal Oversight, and Improve the Prison System*, Apr. 2012, *available at* http://www.cdcr.ca.gov/2012plan/docs/plan/complete.pdf. Plaintiffs asked that defendants be held in contempt. Defendants responded, informing us that they intended to seek modification of our Population Reduction Order to increase the final benchmark from 137.5% to 145% design capacity. Defs.' Opp'n to Pls.' Renewed Mot. for an Order Requiring Defs. to Demonstrate How They Will Achieve the Required Population Reduction by June 2013 at 2 (ECF No. 2442/4192).

This Court ordered two rounds of supplemental briefing regarding defendants' anticipated motion to modify the Population Reduction Order. June 7, 2012 Order Requiring Further Briefing (ECF No. 2445/4193); Aug. 3, 2012 2d Order Requiring Further Briefing (ECF No. 2460/4220). In response, defendants retreated, stating that they believed it would be premature to begin modification proceedings before the prison population reached 145% design capacity, which they predicted would happen in February or March of 2013. Defs.' Resp. to Aug. 3, 2012 2d Order Requiring Further Briefing at 9-10 (ECF No. 2463/4226). In September 2012, we again denied without prejudice plaintiffs' request that defendants be held in contempt. We also asked defendants to answer questions they had failed to respond to in their supplemental briefing, namely how long it would take them to develop a system for identifying low-risk offenders for early release ("Low-Risk List," a list recommended by

the Supreme Court in *Plata*, 131 S. Ct. at 1947), and whether they could comply with our Population Reduction Order by June 2013, and if not, when the earliest time they could comply by would be. Sept. 7, 2012 Order Granting in Part & Denying in Part Pls.' May 9 and Aug. 22, 2012 Mots. (ECF No. 2473/4235). Defendants responded that they needed six months to develop the Low-Risk List and that they could comply with our Population Reduction Order with a six-month extension, largely by maintaining the out-of-state program. Defs.' Resp. to Sept. 7, 2012 Order at 5-6 (ECF No. 2479/4243). Believing that resolution was close, this Court ordered both parties to meet and develop plans to reduce the prison population to 137.5% design capacity by (a) June 27, 2013, and (b) December 27, 2013. Oct. 11, 2012 Order to Develop Plans to Achieve Required Prison Population Reduction at 1 (ECF No. 2485/4251).

On January 7, 2013, both parties filed plans to meet the 137.5% design capacity benchmark. Defendants stated that they could comply by December 2013 without the release of prisoners. Defs.' Resp. to Oct. 11, 2012 Order (ECF No. 2511/4284). But, despite this promising report, not long after this filing defendants refused to take further action to comply with our Population Reduction Order. First, in their January, February, and March status reports, defendants stated that they would take no further action to comply with the Order. *See* Defs.' Jan. 2013 Status Report at 1 (ECF No. 2518/4292); Defs.' Feb. 2013 Status Report at 1 (ECF No. 2538/4342); Defs.' March 2013 Status Report at 1 (ECF No. 2569/4402). Second, the Governor terminated his emergency powers, declaring that the crisis in the prisons was resolved. Gov. Edmund G. Brown Jr., *A Proclamation by the Governor of the State of California*, Jan. 8, 2013, *available at* http://gov.ca.gov/news.php?id=17885. As a result, defendants were no longer able to contract to house approximately 9,500 prisoners in out-of-state prisons, forcing a scheduled partial return of these prisoners during 2013, and a consequent increase in the prison population. Third, defendants filed a motion in the *Coleman* court to terminate all injunctive relief in that case. Mot. to Terminate & to Vacate J. & Orders (*Coleman* ECF No. 4275). Fourth, defendants filed a motion to vacate or modify our Population Reduction Order.

Defs.' Mot. to Vacate or Modify Population Reduction Order (ECF No. 2506/4280) ("Three-Judge Motion"). This motion did not await the prison population's reaching a design capacity of 145%, as defendants had said they would, *see supra* p. 6. In fact, the prison population has still not reached that figure.

This Court stayed consideration of defendants' Three-Judge Motion on January 29, 2013. At the same time, we granted defendants a six-month extension to comply with our Population Reduction Order, extending the final 137.5% design capacity benchmark to December 31, 2013. Jan. 29, 2013 Order at 2-3 (ECF No. 2572/4317). On April 11, 2013, this Court denied defendants' Three-Judge Motion, as modified,[2] and ordered that they take all steps to comply with the Population Reduction Order. Apr. 11, 2013 Op. & Order at 2 (ECF No. 2590/4541). We gave three reasons for denying defendants' Three-Judge Motion. First, it was barred by res judicata as an improper attempt to relitigate the 137.5% figure that we had determined in 2009 and that the Supreme Court had explicitly affirmed. *Id.* at 36-37. Second, defendants did not meet their burden under Federal Rule of Civil Procedure 60(b)(5) to prove a "significant and unanticipated change in factual conditions warranting modification." *Id.* at 40 (citing *United States v. Asarco Inc.*, 430 F.3d 972, 979 (9th Cir. 2005) (summarizing *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 384-86 (1999))).

---

[2] Contrary to defendants' representation in their motion to stay this Court's June 20, 2013 Order, defendants' Three-Judge Motion was not based on "evidence showing that underlying Eighth Amendment deficiencies in medical and mental health care had been remedied." Defs.' Mot. to Stay at 3 (ECF No. 2665/4673). Although defendants initially asked this Court to decide this constitutional question, they later modified their motion by withdrawing this request. Defs'. Resp. to Jan 29, 2013 Order at 4 (ECF No. 2529/4332) ("The issue to be decided by this Court is not constitutional compliance."); Defs.' Reply Br. in Supp. of Three-Judge Mot. at 11 (ECF No. 2543/4345) ("Defendants' motion did not seek a determination of constitutionality."). With this request withdrawn, the only argument that defendants made for vacatur was that crowding was no longer the primary cause for any underlying constitutional violations. *Id.*

Defendants made a similar misrepresentation in their notice of appeal to the Supreme Court of our April 11, 2013 Order. In that notice, they stated that they would appeal in part because we "did not fully or fairly consider the evidence showing that the State's prisoner health care now exceeds constitutional standards." Defs.' Notice of Appeal to the Supreme Court at 3 (ECF No. 2621/4605). We did not consider this evidence because, as stated above, defendants explicitly modified their motion so as to withdraw any constitutional questions from this Court's consideration.

Third, defendants failed to demonstrate a "durable" solution that would justify this Court's vacating a prior order. *Id.* at 54-55.

To ensure compliance with our Population Reduction Order, this Court asked defendants to submit a list of all population reduction measures discussed as possible remedies during the course of the Three-Judge Court proceedings ("List") and, from that List, suggest a plan for compliance with the Population Reduction Order ("Plan"), without regard to whether defendants had the authority to implement the measures designated. We further ordered defendants to use their best efforts to implement the Plan, and to inform us of their progress in their monthly reports. Finally, we ordered defendants to develop a "Low-Risk List" that they might use, if necessary, to comply with the Population Reduction Order by releasing low-risk offenders. Apr. 11, 2013 Order (ECF No. 2491/4542).

On May 2, 2013, defendants submitted their List and Plan. Defs.' Resp. to April 11, 2013 Order (ECF No. 2609/4572). Defendants' response did not comply with our April 11 Order, as they did not provide a Plan that would reach the 137.5% population benchmark by December 31, 2013. Defendants conceded as much, *id.* at 5 n.3, 37 (acknowledging that their latest Plan will not achieve the 137.5% figure by December 31, 2013), although they underestimated the scope of their noncompliance. They estimated that their Plan would result in a prison population of 140.7% design capacity by December 31, 2013; in fact, their Plan might at best achieve a prison population of 142.6% design capacity by December 31, 2013 – 4,170 prisoners short of the 137.5% benchmark. *See* June 20, 2013 Op. & Order at 28-31(ECF No. 2659/4662) (explaining this discrepancy). Thus, well into the third decade of litigation, it was clear that defendants remained unwilling to implement a plan that would comply with the Population Reduction Order and the Supreme Court's 2011 decision.

//

//

//

//

//

II. JUNE 20, 2013 OPINION & ORDER

On June 20, 2013, in response to defendants' proposed Plan that would not in any event achieve compliance, and facing a "long and unhappy history of litigation," this Court entered a "comprehensive order to insure against the risk of inadequate compliance." June 20, 2013 Op. & Order at 36 (ECF No. 2659/4662) (quoting *Hutto v. Finney*, 437 U.S. 678, 687 (1978)). We ordered defendants to implement an "Amended Plan" consisting of the measures in their proposed Plan plus an additional measure consisting of the expansion of good time credits, prospective and retroactive, to all prisoners, as set forth in defendants' List, but not in their Plan. This additional measure would provide the 4,170 prisoners needed to bring defendants' Plan into compliance, assuming that the compliance would be durable. We carefully explained our reason for choosing this particular measure. First, extensive testimony at the 2009 trial revealed that good time credits were the most promising measure for reducing overcrowding. *Id.* at 38. The measure would in many cases reduce the prison population by allowing prisoners to shorten their lengths of stay in prison by as little as a few months. At trial, plaintiffs' experts – Doctors Austin and Krisberg, and Secretaries Woodford, Lehman, and Beard – were unanimous in their agreement that "such moderate reductions in prison sentences do not adversely affect either recidivism rates or the deterrence value of imprisonment." Aug. 4, 2009 Op. & Order at 140 (ECF No. 2197/3641). Defendants' one expert in opposition, Dr. Marquart, did not in fact oppose good time credits. *Id.* at 139-40. His only criticism – that good time credits expansion might reduce the opportunity for prisoners to complete rehabilitative programming – was, in our final determination, "a note about the factors that should be considered in designing an effective expanded good time credits system. It is entitled to little, if any, weight as an observation about the possible negative effect on public safety of such a system." *Id.* at 141. Based on this and other testimony, we concluded following trial that early release through good time credits does not increase the crime rate but rather "affects only the timing and circumstances of the crime, if any, committed by a released inmate." *Id.* at 143. We further "credit[ed] the opinions of the numerous correctional experts that the expansion of good time credits would

not adversely affect but rather would benefit the public safety and the operation of the criminal justice system." *Id.* at 145.

Second, we rejected defendants' arguments against expanding the good time credits measure by applying it retroactively and to all offenders. June 20, 2013 Op. & Order at 39-40 (ECF No. 2659/4662). Defendants first argued that, although prospective application of good time credits for prisoners convicted of non-violent offenses is safe, retroactive application of these credits to these same prisoners is not safe. Defendants provided no support for this proposition. Moreover, both the *Plata* Receiver and the State's own CDCR Expert Panel had recommended making the good time credits changes retroactive. *See* Receiver's 23rd Report at 33 (ECF No. 2636/4628); CDCR Expert Panel, *A Roadmap for Effective Offender Programming in California: A Report to the California Legislature*, June 2007, at 95.[3] Defendants further argued that good time credits should not be afforded to prisoners convicted of violent offenses. Yet not a single expert at trial distinguished between inmates convicted of violent and non-violent crimes for the purposes of good time credits, and the CDCR Expert Panel specifically recommended expanding good time credits for all prisoners, "including all sentenced felons regardless of their offense or strike levels." *Id.* at 92. Based on these observations, we concluded that defendants' arguments against expanding the good time credit measure were without merit.

Third, we noted the success other jurisdictions experienced in safely expanding their good time credits programs. June 20, 2013 Op. & Order at 9-10, 41 & n.26 (ECF No. 2659/4662). California has instituted good time credit programs in 21 counties between 1996 and 2006, resulting in approximately 1.7 million inmates having been released by court order without an increase in the crime rate. *Id.* at 9 (citing testimony by Dr. Krisberg, Aug. 4, 2009 Op. & Order at 144 (ECF No. 2197/3641)). Washington expanded its good time credits program and Secretary Lehman, the former head of corrections for Washington,

[3] The members of the CDCR Expert Panel included various leading experts in crime and incarceration, such as Doctors Petersilia, Krisberg, and Austin; current CDCR Secretary Jeffrey Beard; and many other senior officials of correctional programs throughout the country.

testified at trial that "these measures did not have any 'deleterious effect on crime' or public safety." *Id.* (citing Aug. 4, 2009 Op. & Order at 147 (ECF No. 2197/3641)). Illinois, Nevada, Maryland, Indiana, and New York all successfully implemented good time credits expansion without adversely affecting public safety. *Id.* In New York, the prison population decreased due in part to the expansion of programs awarding good time credits, and the crime rate *declined* substantially. *Id.*

Finally, we pointed out that the Supreme Court had expressly endorsed the good time credits measure: "Expansion of good-time credits would allow the State to give early release to only those prisoners who pose the least risk of reoffending." *Plata*, 131 S. Ct. at 1943. The Supreme Court also approvingly discussed the empirical and statistical evidence from other jurisdictions that had successfully implemented good time credits. *Id*. at 1942-43 (listing the experience in certain California counties, Washington, etc.). In endorsing the good time credits measure, the Supreme Court stated that this Court's factual findings on public safety were to be credited over the contrary views of defendants. *Id*. at 1942. The Supreme Court was in clear agreement with this Court that defendants could reduce the prison population to 137.5% design capacity without adversely affecting public safety, specifically through the expansion of good time credits. For these reasons, we ordered defendants to implement an "Amended Plan" consisting of their Plan and the expanded good time credits measure.

Although this Court ordered defendants to implement the Amended Plan, including good time credits, we emphasized that we desired to "continue to afford a reasonable measure of flexibility to defendants, notwithstanding their failure to cooperate with this Court or to comply with our orders during the course of these proceedings." June 20, 2013 Op. & Order at 51 (ECF No. 2659/4662). To this end, this Court offered defendants three methods of making substitutions to the measures in the Amended Plan. First, defendants may, if they prefer, revise the good time credit measure currently proposed such that it does not result in the release of violent offenders, so long as the revision results in the release of at

least the same number of prisoners as would the current good time credit measure.[4] This may be accomplished in part by adjusting the credits to levels awarded by other states or counties. Second, defendants may substitute for any group of prisoners who are eligible for release under the Amended Plan a different group of prisoners consisting of no less than the same number of prisoners selected pursuant to the Low-Risk List, with the substitution being in the order in which the prisoners are listed, individually or by category on that list. Third, defendants may substitute any group of prisoners from the List of all population reduction measures identified in this litigation, submitted by defendants on May 2, 2013, for any groups contained in a measure listed in the Amended Plan, should defendants conclude by objective standards that they are no greater risk than the prisoners for whom they are to be substituted. *Id.* We provided examples of such substitutions: "Lifers," who, due to age or infirmity, are adjudged to be "low risk" by CDCR's risk instrument; prisoners who have nine months or less to serve of their sentence who could serve the duration of their sentences in county jails rather than in state prisons; or prisoners who could be reassigned from state prisons to leased jail space. *Id.* at 51-52.[5] By "Lifers," we refer to the category of prisoners who are serving sentences of a fixed number of years to life and are eligible for parole. As of 2011, there were 32,000 Lifers in California state prisons. Lifers made up 20% of the California prison population, an increase from 8% in 1990. A 2011 study by the Stanford Criminal Justice Center reported that "the incidence of commission of serious crimes by the recently released lifers has been minuscule." Robert Weisberg, Debbie A. Mukamal &

---

[4] These modifications to the proposed good time credit program would not affect the inclusion of retroactivity. They would only affect aspects such as the amount of good time credit to be received by various categories of offenders, all non-violent, and the amount of credit to be received for the various activities for which good time credit is rewarded. For example, defendants could extend 2-for-1credit earning to prisoners other than those held in fire camps and minimum custody facilities (their current proposal), increase the credit earning limit for milestone completion credits, or increase the credit earning capacity of non-violent offenders above 34 percent. Other states have taken similar measures to expand their good time credit programs for non-violent offenders without a subsequent increase in recidivism. June 20, 2013 Op. & Order at 40 & n.26 (ECF No. 2659/4662).

[5] The prisoners now housed out of state who were due to be returned this year are already accounted for in the Plan. No other prisoners housed out of state will be considered as part of any substitute measure.

Jordan D. Segall, *Life in Limbo: An Examination of Parole Release for Prisoners Serving Life Sentences with the Possibility of Parole in California* at 3-4 (Stanford Criminal Justice Center, Sept. 2011).

Our June 20, 2013 Order was not the first time we have given defendants a broad choice in determining how to comply with our Population Reduction Order. Over the past four years, this Court has done everything possible to ensure that defendants have flexibility in adopting measures that will attain compliance. We have never ordered defendants to select any particular measures; rather, we have consistently offered defendants the choice as to how they will reach the 137.5% design capacity benchmark. Our Population Reduction Order merely asked for a plan for compliance. Aug. 4, 2009 Op. & Order at 183 (ECF No. 2197/3641). Our January 2010 Order accepted defendants' two-year timeline for compliance without ordering them to implement any specific measures. Jan. 12, 2010 Order to Reduce Prison Population at 4 (ECF No. 2287/3767). Our April 11, 2013 Order deferred to defendants for a Plan for reaching the 137.5% design capacity benchmark that *they* found most acceptable. Finally, and as described in detail above, although our most recent order, issued on June 20, 2013, makes suggestions as to how defendants could reduce the prison population to 137.5% by December 31, 2013, it leaves defendants significant flexibility in deciding how to reach this cap. *See* June 20, 2013 Op. & Order at 33 (ECF No. 2659/4662) ("We are willing to defer to [defendants'] choice for *how* to comply with our Order, not *whether* to comply with it.").

Further, this Court has twice extended deadlines for compliance for defendants, even without their formally requesting that we do so. In January 2010, when this Court ordered defendants to reduce the prison population to certain benchmarks every six months, we sua sponte stayed this order pending appeal to the Supreme Court. Jan. 12, 2010 Order to Reduce Prison Population at 6 (ECF No. 2287/3767). Because the Supreme Court's decision was not issued until June 2011, defendants gained an additional two years with which to comply with this Court's Population Reduction Order – an additional two years that the Supreme Court recognized in endorsing our two-year timeline. *Plata*, 131 S. Ct. at 1946

(noting that "defendants will have already had over two years to begin complying with the order of the three-judge court"). Then, on January 29, 2013, again without any formal request by defendants, this Court once more extended the deadline, giving defendants six additional months to comply with our Population Reduction Order. Jan. 29, 2013 Order at 2-3 (ECF No. 2527/4317). As a result, defendants will have had well over four years to comply with our Population Reduction Order – more than twice the amount of time contemplated in that Order.

Despite our repeated efforts to assist defendants to comply with our Population Reduction Order, they have consistently engaged in conduct designed to frustrate those efforts. They have continually sought to delay implementation of the Order. At the time of the Population Reduction Order, defendants asked this Court to wait for "chimerical" possibilities. *Plata*, 131 S. Ct. at 1938. As the Order was appealed to the Supreme Court, defendants insisted that this Court had been convened prematurely and that alternative remedies to a prisoner release order existed. The Supreme Court rejected these arguments, ordering defendants to "implement the order without further delay." *Id.* at 1947. Defendants have done no such thing. They have refused to follow the Supreme Court's order. They took one action, Realignment, and when it became apparent that this action would be insufficient to comply with the Population Reduction Order, defendants refused to take any further steps to reduce the prison population to 137.5% design capacity. Instead, they moved to terminate all prospective relief granted by the *Coleman* court under the PLRA's termination provision, moved to vacate the Population Reduction Order issued by this Court under Federal Rule of Civil Procedure 60(b)(5), voluntarily terminated their own emergency powers to house prisoners out of state, and reported in their monthly status reports that they would no longer take actions to comply with the Population Reduction Order. Governor Brown declared, notwithstanding the orders of this Court, that the crisis in the prisons was resolved. *See* Gov. Edmund G. Brown Jr., *A Proclamation by the Governor of the State of California*, Jan. 8, 2013, http://gov.ca.gov/news.php?id=17885. Finally, when asked to submit a Plan for

compliance, defendants submitted, instead, a Plan for noncompliance – a Plan that fell far short of the required figures.

In defense of their actions, defendants equivocate regarding the facts and the law. For example, defendants have repeatedly asserted that they have reduced the prison population by "more than 42,000 inmates since 2006." Defs.' Resp. to Pls.' Resp. & Req. for Order to Show Cause Regarding Defs.' Resp. to Apr. 11, 2013 Order at 3 (ECF No. 2640/4365); *see also* Defs.' Resp. to Apr. 11, 2013 Order at 39 (ECF No. 2609/4572) (same). This statistic is misleading, as it includes reductions made between 2006 and 2009, before we issued our Population Reduction Order. Similarly, in defense of their May 2013 Plan for noncompliance, defendants stated that they have "taken all actions in [their] power" to reach the December 2013 population cap, arguing that they are either without authority to take further measures or that such measures would threaten public safety. Defs.' Resp. to Pls.' Resp. & Req. for Order to Show Cause Regarding Defs.' Resp. to Apr. 11, 2013 Order at 1 (ECF No. 2640/4365). In making this statement, defendants failed to recognize that they could have met the 137.5% cap by increasing capacity, a measure that would have reduced overcrowding without releasing any prisoners; asked the legislature to modify the restrictions to which they adverted in submitting an insufficient Plan; requested changes to sentencing policies that would have reduced the prison population substantially; or retained, instead of surrendering, emergency authority regarding housing prisoners out of state. Given defendants' history of noncompliance, it comes as no surprise that they have requested a last-minute stay of our June 20, 2013 Order, rather than making any effort to comply with the 2011 mandate of the Supreme Court. Of crucial importance, however, defendants now state that absent a stay by this Court and the Supreme Court, they will comply with the Population Reduction Order. Defs.' Mot. to Stay at 2 (ECF No. 2665/4673). Such compliance, if durable, will bring the California prison population into conformity with the Eighth Amendment.

As to the timeliness of defendants' request for a stay, as plaintiffs point out in their thorough and thoroughly reasoned response, *see* Pls.' Am. Resp. to Defs.' Mot. to Stay (ECF

No. 2669/4677), defendants' sense of urgency appears to be as newly developed as their sense of urgency regarding the appeal of the Population Reduction Order, which is now over four years old. This Court's April 11, 2013 Order, the order immediately prior to the one at issue here, and one of a number of orders directing defendants to comply with the Population Reduction Order, was appealed by defendants to the Supreme Court on May 13, 2013, yet no stay was requested following that appeal. Defs.' Notice of Appeal to the Supreme Court at 3 (ECF No. 2621/4605). Moreover, despite the familiarity defendants' counsel undoubtedly have with this case after at least four years of uninterrupted litigation, they felt compelled to obtain a 45-day extension of time in which to file a jurisdictional statement before the Supreme Court, thus belying the need for urgency in resolving the appeal. *See Brown v. Plata*, Sup. Ct. Docket No. 13A5, *available at* http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/13a5.htm (noting that, on July 1, 2013, Justice Kennedy granted defendants' June 25, 2013 application to extend the time to file a jurisdictional statement on appeal from July 12, 2013, to August 26, 2013).

III. DISCUSSION

In considering an application for a stay, this Court considers: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Nken v. Holder*, 556 U.S. 418, 434 (2009); *Humane Soc. of U.S. v. Gutierrez*, 558 F.3d 896, 896 (9th Cir. 2009). Applying these factors to this case, this Court has no difficulty in denying defendants' request for a stay.

First, defendants have not made a strong showing that they are likely to succeed on the merits. Defendants appear to make two arguments regarding this factor in their application for a stay: (1) there are no longer any underlying constitutional violations; and (2) even if constitutional violations remain, additional population reductions are not necessary to remedy these violations. Defs.' Mot. to Stay at 8-9 (ECF No. 2665/4673). The

first argument is not raised before this Three-Judge Court. As explained *supra* p.8 & n.2, although defendants initially posed this question in their January 7, 2013 Three-Judge Motion to Vacate the Population Reduction Order, they later modified the motion by removing any constitutional question from the purview of this Court. Defendants have also never made this argument before the *Plata* court. That is, they have not asked the *Plata* court or this Court to determine that defendants are no longer failing to provide constitutionally adequate medical health care to its prison population or to vacate injunctive relief on that ground. They have, in fact, made this argument only once. They did so before the *Coleman* court, on January 7, 2013. They asked that court to terminate all injunctive relief in *Coleman* on the ground that California's mental health care system for prisoners no longer violates the Eighth Amendment. *See* Mot. to Terminate & Vacate J. & Orders at 28 (*Coleman* ECF No. 4275). The *Coleman* court denied defendants' motion to terminate on the ground that "ongoing constitutional violations remain" "in the delivery of adequate mental health care." Apr. 5, 2013 Order Denying Defs.' Mot. to Terminate at 67 (*Coleman* ECF No. 4539). Moreover, we have made clear that our Population Reduction Order relied on each of the two cases individually and collectively, and that if the constitutional violations exist in either case, they exist for the purposes of this Three-Judge Court.[6] Thus, even if plaintiffs were to file a motion to dismiss in the *Plata* case on the ground that the medical health care system in California prisons no longer violates the Eighth Amendment, and even if they were to

[6] *See* Aug. 4, 2009 Op. & Order at 58-60 (ECF No. 2197/3641) (discussing how crowding causes "general problems in the delivery of medical and mental health care"); *id.* at 61-63 (discussing how overcrowded reception centers result in insufficient medical care); *id.* at 63-65 (discussing the especially grave consequences of overcrowded reception centers for individuals with mental illness); *id.* at 65-68 (discussing the effect of insufficient treatment space and the inability to properly classify inmates on both medical and mental health care); *id.* at 68-70 (discussing lack of space for mental health beds); *id.* at 70-72 (discussing how conditions of confinement result in the spread of diseases); *id.* at 72-73 (discussing how conditions of confinement exacerbate mental illness); *id.* at 74-76 (discussing shortages in medical health care staff); *id.* at 76-77 (discussing shortages in mental health care staff); *id.* at 79-80 (discussing medication management issues in both *Plata* and *Coleman*); *id.* at 82 (discussing the effect of lockdowns on the provision of medical health care); *id.* at 83 (discussing the effect of lockdowns on the provision of mental health care); *id.* at 83-85 (discussing the need for medical records in medical and mental health care); *id.* at 85-86 (discussing the increasing acuity of mental illness); *id.* at 87-88 (discussing suicides); *id.* at 87-88 (discussing preventable deaths).

succeed on that motion, which appears to be highly unlikely, our Population Reduction Order would still be necessary to remedy the constitutional violations that remain in *Coleman*.[7]

Defendants' second argument, that even if constitutional violations remain, additional population reductions are not necessary to remedy these violations, has been raised properly, *see* Three-Judge Mot. (ECF No. 2506/4280), but is without merit. In 2011, the Supreme Court affirmed in full this Court's finding that the only way to remedy the ongoing constitutional violations in California prisons is to reduce the prison population to 137.5% of design capacity. *Plata*, 131 S. Ct. at 1945 ("There are also no scientific tools available to determine the precise population reduction necessary to remedy a constitutional violation of this sort. The three-judge court made the most precise determination it could in light of the record before it."). In fact, describing the evidence before the Three-Judge Court, the Supreme Court said that the evidence supported "an even more drastic remedy," i.e., a population cap lower than 137.5% design capacity. *Id.* at 1945. Defendants have not met the 137.5% design capacity benchmark. The current California prison population is at 149.2% design capacity. CDCR, *Weekly Rpt. of Population*, July 1, 2013, *available at* http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Weekly Wed/TPOP1A/TPOP1Ad130626.pdf.

When defendants first made this argument before this Court in January 2013, we rejected it on the ground that they had not provided evidence of any significant and unanticipated change in circumstances to rebut the Supreme Court's determination that only a population reduction to 137.5% design capacity would remedy the underlying constitutional violations. Apr. 11, 2013 Op. & Order Denying Defs.' Mot. to Vacate or Modify Population Reduction Order at 55-56 (ECF No. 2590/4541). Defendants provide no

[7] One three-judge court was convened, instead of two, for practical reasons only. The individual district courts recommended consolidation "[f]or purposes of judicial economy and avoiding the risk of inconsistent judgments." July 23, 2007 Order in *Plata*, 2007 WL 2122657, at *6; July 23, 2007 Order in *Coleman*, 2007 WL 2122636, at *8. The Supreme Court agreed, stating that there was a "certain utility in avoiding conflicting decrees and aiding judicial consideration and enforcement." *Plata*, 131 S. Ct. at 1922. It was a "limited consolidation" only and, most important, "[t]he order of the three-judge District Court is applicable to both cases." *Id.*

further support for such a contention, and therefore are unlikely to succeed on the merits. Defs.' Mot. to Stay at 9 (ECF No. 2665/4673) (stating only that "additional population reductions are unnecessary to prevent death or needless suffering or to ensure that the quality of medical and mental health care does not pose a substantial risk of serious harm to the two certified classes of inmates").

Second, defendants will not be irreparably injured absent a stay. The Amended Plan that we have ordered defendants to implement consists largely of measures in their proposed Plan. *See* Defs.' Resp. to Apr. 11, 2013 Order at 28-33 (ECF No. 2609/4572). Further, we have already determined that the one additional measure we have suggested they implement, the full expansion of good time credits, will not cause irreparable injury. As explained in detail *supra* pp. 10-12, this Court carefully considered the question of whether the expansion of good time credits was consistent with public safety in our August 2009 Opinion & Order. We heard extensive testimony from the leading experts in the country, all of whom – including the now Secretary of CDCR Dr. Beard – testified that the expansion of good time credits could be implemented safely. The Supreme Court affirmed this conclusion, crediting our factual findings, *Plata*, 131 S. Ct. at 1942, and endorsing our determination that expansion of good time credits would reduce overcrowding "with little or no impact on public safety" by allowing the State "to give early release to only those prisoners who pose the least risk of reoffending," *id.* at 1943.

Defendants' "new evidence" in their request for a stay is not to the contrary. Defendants cite an article by two Stanford Law School professors for the proposition that "even inmates that CDCR has considered 'low risk' recidivate such that 41% are returned to California prisons within three years, and that 11% of such 'low risk' offenders have been 'rearrested for a violent felony within 3 years of release.'" Defs.' Mot. to Stay at 6-7 (ECF No. 2665/4673) (citing Joan Petersilia & Jessica Greenlick Snyder, *Looking Past the Hype: 10 Questions Everyone Should Ask About California's Prison Realignment*, 5(2) Cal. J. Politics Policy 266, 295 (2013)). This sole law journal article, not subject to cross-examination, of course, is not sufficient to rebut the extensive testimony this Court

considered after fourteen days of trial in 2009. This aside, the professors' statistics, even if correct, are irrelevant to the question of whether releasing prisoners *early* will have a different effect on their behavior than releasing them *later*. The statistics that defendants cite indicate the percentage of prisoners who are likely to recidivate, but they do not suggest that there is a difference in the percentage of low-risk prisoners who recidivate when they are released early compared to when they are released at the time originally scheduled. At trial, after considering extensive testimony on the question of whether early release through good time credits increases the crime rate, the evidence showed overwhelmingly that it does not, and that it "affects only the timing and circumstances of the crime, if any, committed by a released inmate." Aug. 4, 2009 Op. & Order at 143 (ECF No. 2197/3641). In fact, an argument can be made that the early release of prisoners may even *decrease* the crime rate. The State could well use the funds it saves by caring for fewer prisoners to fund reentry programs such as drug rehabilitation, job training, housing assistance, education, and other programs that reduce recidivism. The absence of such reentry assistance is far more likely to increase recidivism than release on a date earlier than initially scheduled.

Moreover, although this Court believes the expanded good time credits measure is the simplest and best way for defendants to comply with our Population Reduction Order, we have not *required* defendants to implement this measure. Rather, we have afforded them flexibility, allowing them to modify the good time credits measure by, for example, increasing the amount of such credits that can be awarded to particular sets of individuals and limiting the number of prisoners who will be eligible to receive them. We have also allowed defendants to substitute for measures on the Amended Plan (including the good time credits measure) other measures from their List, or to substitute prisoners from the Low-Risk List. For example, defendants might reassign prisoners to leased jail space – one of the measures included on their List. June 20, 2013 Op. & Order at 50 (ECF No. 2659/4662). We also suggested that defendants consider substituting, for prisoners who fall within the Amended Plan, "Lifers" who, due to age or infirmity, are adjudged to be "low risk" by CDCR's risk assessment and a number of whom may be physically and mentally unable to commit future

crimes. *Id.* Our only requirement is that the substituted measures result in defendants' reaching the 137.5% design capacity benchmark by December 31, 2013.

Third, issuance of a stay of our June 20, 2013 Order will substantially injure plaintiffs. The *Plata* and *Coleman* courts have both determined that mental and medical health care conditions in the California state prisons violate plaintiffs' constitutional rights, and this Court and the Supreme Court have held that the only way to remedy these constitutional violations is to reduce prison overcrowding to 137.5% design capacity. Recent reports by the Receiver in *Plata*, Clark Kelso, confirm this finding. Kelso recently reported that "we do not have appropriate and adequate healthcare space at the current population levels. We need population levels to reduce to 137.5% of design capacity as ordered by the Three Judge Panel." Receiver's 23rd Report at 31 (ECF No. 2636/4628). Granting a stay would result in continuing injury to plaintiffs by maintaining the prison population at the current level of 149.2%, far above the constitutional level determined by this Court and affirmed by the Supreme Court in 2011 to be necessary to the safety and welfare of those in the custody of the State.[8]

Fourth, the public interest lies in denying defendants' request for a stay. "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (internal quotation marks and citation omitted). Here, the public interest lies in obviating the ongoing constitutional violations in the mental and medical health care systems in California's prisons – violations that this Court and the Supreme Court have determined will be eliminated only when defendants reduce the prison population from its current state of 149.2% design capacity to 137.5% design capacity. Finally, the public interest lies in denying the stay because defendants have informed this Court that, absent a stay, they will comply with the Population

[8] In their motion for a stay, defendants state that "population reduction is just one of many existing remedies directed at the alleged Eighth Amendment violations at issue; the other remedies will remain in place irrespective of any stay here." Defs.' Mot. to Stay at 7 (ECF No. 2665/4673). This does not change our finding, affirmed by the Supreme Court, that the only way to completely alleviate the ongoing constitutional violations is to reduce the prison population to 137.5% design capacity.

Reduction Order. Defs.' Mot. to Stay at 2 (ECF No. 2665/4673). Conformity with the Order, if durable, will satisfy the requirements of the Eighth Amendment.[9]

IV. CONCLUSION

Granting defendants a stay of our June 20, 2013 Order would serve to resolve this litigation in defendants' favor. The stay, which would last through the Supreme Court's determination whether its previous 2011 decision was warranted, would last well past December 31, 2013, the date by which defendants have been ordered to reduce the prison population to 137.5% design capacity. Put differently, granting the stay would mean that at the end of the period by which defendants have been ordered to comply, defendants will have been excused from meeting the requirements of this Court's Population Reduction Order. Only denial of the stay by this Court and the Supreme Court will, defendants concede, cause them to comply with the Population Reduction Order issued in August 2009 and approved by the Supreme Court in June 2011. Specifically, only denial of the stay will cause defendants to implement the Plan it has selected along with an additional measure, whether the additional measure be the expansion of good time credits, a measure recommended by numerous experts at trial, which other states have had success in safely implementing, and which the Supreme Court endorsed in *Brown v. Plata*; use of the Low-Risk List; or any of a number of other measures of defendants' choice.

Coleman was initiated 23 years ago, and *Plata* 12 years ago. The district court in *Coleman* has issued over 100 substantive orders in an attempt to bring defendants into compliance with the Eighth Amendment of the Constitution. Apr. 5, 2013 Order Denying Defs.' Mot. to Terminate at 31 (*Coleman* ECF No. 4539). The district court in *Plata* has

---

[9] It is not enough simply to meet a specific target number of prisoners on a specific date. Durability is necessary to ensure compliance with both the Order and the Constitution, and can be determined only after a period of time in which this Court can examine whether the ratio of prisoners to design capacity is stable. Changes in penological policies and procedures, as well as other matters, may have a significant effect on the prisoner to design capacity ratio. We maintain jurisdiction over the question for a reasonable period of time in order to resolve that issue.

issued over 50 such orders, *see* Docket Sheet, *Plata v. Brown*, No. C01-1351 TEH (N.D. Cal.), and undoubtedly would have issued many more had a Receiver not been appointed in 2006. After this long history of defendants' noncompliance, this Court cannot in good conscience grant a stay that would allow defendants to both not satisfy the Population Reduction Order and relitigate the Supreme Court's emphatic decision in the very case before us. A denial of the stay by this Court and the Supreme Court will, however, at least result in the State's obeying the orders of the federal judiciary and bringing the prison system into compliance with the Eighth Amendment, should the measures it selects prove durable.

For the above reasons, defendants' motion to stay this Court's June 20, 2013 Order is DENIED.

IT IS SO ORDERED.

Dated: 07/03/13

STEPHEN REINHARDT
UNITED STATES CIRCUIT JUDGE
NINTH CIRCUIT COURT OF APPEALS

Dated: 07/03/13

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

Dated: 07/03/13

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

EXHIBIT B

Exhibit B-1

California Institution for Men
Dorm unit housing mental health patients and general population
February 12, 2013 (*Coleman* Doc. 4378, Photo Ex. W)

http://rbgg.com/wp-content/uploads/Coleman-CIM-A-Yard-Angeles-Dorm-which-houses-EOP-CCCMS-and-general-population-taken-Feb.-12-CIM-37-2.pdf

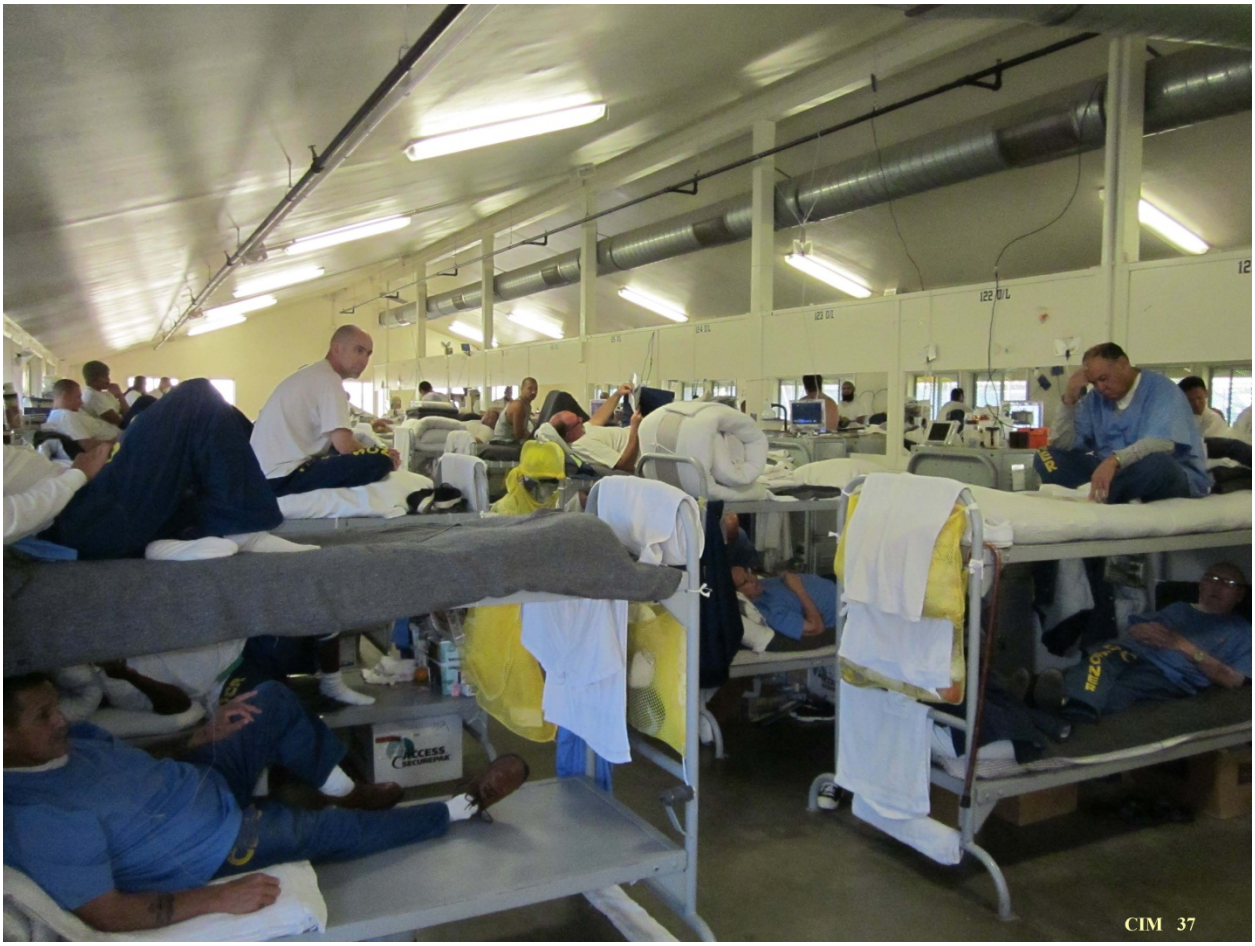

Exhibit B-2

Salinas Valley State Prison
Standing cages used to hold suicidal prisoners, in the same room photographed in *Brown v. Plata*, Appendix C
January 28, 2013 (*Coleman* Doc. 4381, Appendix K)

http://rbgg.com/news/coleman-termination-motion-photos/
("Stewart Declaration Photo 11")

Exhibit B-3

Mule Creek State Prison
Treatment cages for individual mental health clinical contacts
February 7, 2013 (detail from *Coleman* Doc. 4378, Photo Ex. E)

http://rbgg.com/news/coleman-termination-motion-photos/
("Haney Declaration Photo 5")

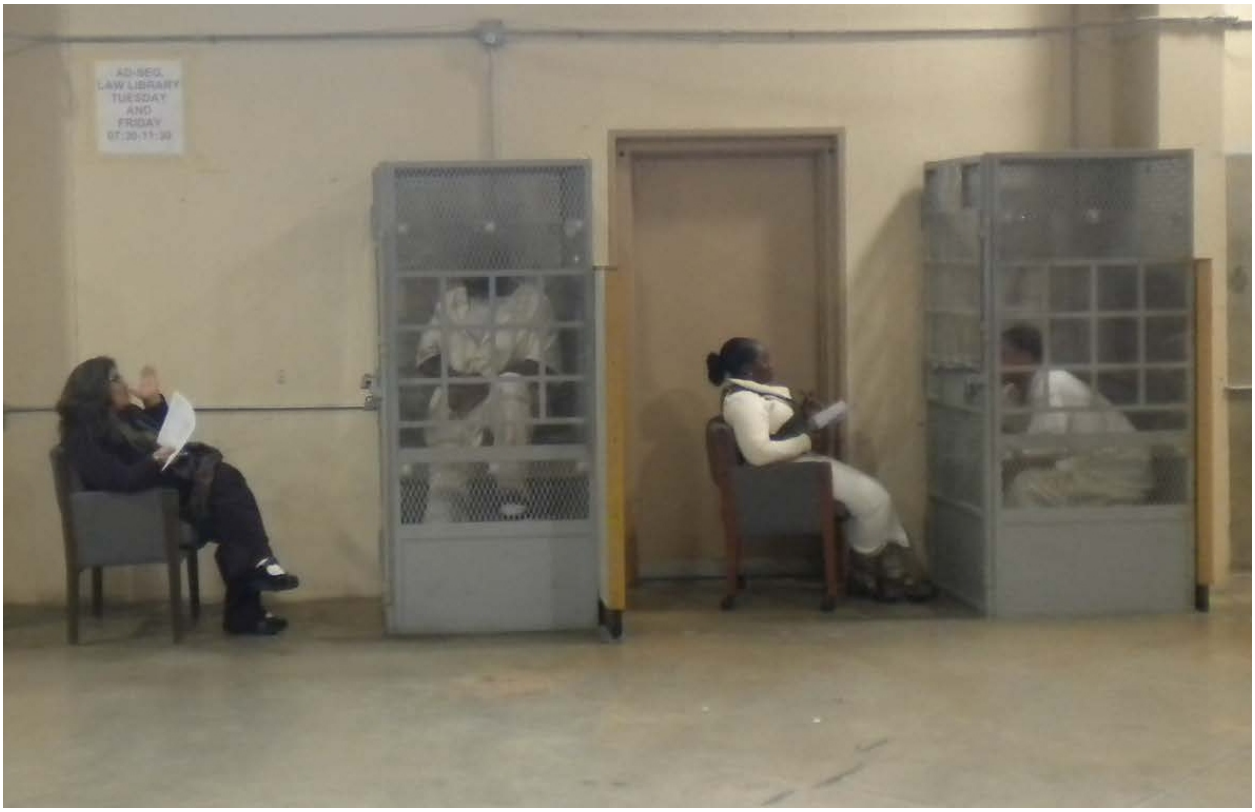

Exhibit B-4

California Institution for Men
Double-bunked cell for mental health patients
(one of whom slept on the floor)
February 12, 2013 (*Coleman* Doc. 4378, Photo Ex. U)

http://rbgg.com/wp-content/uploads/CIM-24-CIM-Reception-Center-housing-for-2-EOP-patients-one-of-whom-slept-on-floor-taken-Feb.-13-2013..pdf