No.

IN THE

Supreme Court of the United States

GOVERNOR EDMUND G. BROWN JR., *et al.*,

Applicants-Appellants,

v.

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

Appellees.

Application for a Stay of Injunctive Relief Pending This Court's Final Disposition of Appeals Pursuant to 28 U.S.C. § 1253

APPLICATION TO THE HONORABLE JUSTICE ANTHONY M. KENNEDY AS CIRCUIT JUSTICE

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July 10, 2013

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PARTIES TO THE PROCEEDING

Applicants-Appellants (defendants below) are the following:

Governor Edmund G. Brown Jr.
Jeffrey Beard, Secretary of the California Department of Corrections and Rehabilitation
John Chiang, California State Controller
Ana J. Matosantos, Director of the California Department of Finance
Cliff Allenby, Director of the Department of State Hospitals (Acting)

When this case was last before this Court, Appellees (plaintiffs below) were:

Gilbert Aviles
Steven Bautista
Ralph Coleman
Paul Decasas
Raymond Johns
Joseph Long
Clifford Myelle
Marciano Plata
Leslie Rhoades
Otis Shaw
Ray Stoderd[1]

The California Correctional Peace Officers' Association was an intervenor-plaintiff at an earlier stage of this case, but has not participated in this action since this Court's May 2011 decision in *Brown* v. *Plata*, 131 S. Ct. 1910 (2011).

There were over 140 intervenor-defendants (including state legislators, police chiefs, and other local law enforcement officials) when this action was last before this Court, but none of those intervenor-defendants has since participated in the action. A list of those intervenor-defendants, many of whom surely are no longer in office, appears on pages ii-vi of Appellants' Brief in *Brown* v. *Plata*, No. 09-1233 (filed U.S. Aug. 27, 2010).

Out of an abundance of caution, the undersigned has served this Application on counsel for the intervenor-plaintiff and the intervenor-defendants.

[1] These individuals remain listed as active parties on the district court dockets. Applicants' records show that a number of these inmates have been discharged or are deceased.

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APPLICATION FOR A STAY PENDING FINAL DISPOSITION OF APPEALS

Applicants Governor Edmund G. Brown Jr. et al. respectfully request a stay of the injunctive relief ordered on June 20, 2013 by the three-judge district court presiding over "prisoner release"-related proceedings pursuant to the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626. The three-judge court has now invoked the PLRA to enjoin the enforcement of dozens of statutory and regulatory provisions and, effectively, the California Constitution. See *Coleman* v. *Brown/Plata* v. *Brown*, __ F. Supp. 2d __, Nos. 2:90-cv-520-LKK, C01-1351-TEH, 2013 WL 3326872, at *31 (E.D. Cal./N.D. Cal. June 20, 2013) (hereinafter "June 20 Order") (attached as Ex. A); *id.* at *1 ("All such state and local laws and regulations are hereby waived, effective immediately."). Its order will force the early release of thousands of inmates by the end of the year, including violent and serious offenders. *Id.* at *22-24.

Critically, the three-judge court issued these injunctions after having refused to consider Applicants' showings regarding significantly changed conditions in California's prisons that required vacating or modifying the 137.5% of design capacity cap. The record confirms substantial improvements to the health care California inmates receive. The prison conditions that exist today do not resemble the conditions present in 2008, upon which three-judge court and this Court predicted that the 137.5% cap would be necessary to remedy outstanding Eighth Amendment violations. But the three-judge court refused to give a full or fair examination of how these conditions have changed. Indeed, it failed to comply with

this Court's unequivocal mandate that "[t]he three-judge court must remain open to a showing or demonstration . . . that the injunction should be altered." *Brown* v. *Plata*, 131 S. Ct. 1910, 1946 (2011). This Court specifically instructed that "[a]s the State makes further progress, the three-judge court should evaluate whether its order remains appropriate. *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." *Id.* at 1947 (emphasis added); see also *id.* at 1941-42, 1946-47.

Applicants have, at the very least, made "significant progress toward remedying" the failure in years past to deliver constitutionally adequate medical and mental health care to California's prison inmates. See *infra* at 6-15. California has now diverted tens of thousands of low-risk inmates from state prison to local authorities ("Realignment"), expanded good time credits for certain classes of inmates to further reduce time spent in prison, and eliminated any need to use gymnasiums and day rooms for anything other than their intended purposes. California has also appropriated and spent over a billion dollars on new staff and new facilities to provide mental health and medical care. The positive impact of these and other changes on remedying the underlying constitutional violations is now established. Independent evaluations report high adherence throughout the prison system to standards deemed necessary for constitutionally adequate medical care, and the Receiver's staff has concluded that the care provided is comparable in

critical respects to those of large medical systems that serve non-prison populations. See *infra* at 13-15.

Rather than considering Applicants' "significant progress . . . toward remedying the underlying constitutional violations[,]" the court held that it would be inappropriate to consider *any* changes to the population cap unless Applicants could demonstrate that the Eighth Amendment deficiencies had been *completely* resolved. "[T]he Supreme Court suggested that defendants could seek modification if they had 'remed*[ied]* the underlying constitutional violations.'" *Coleman* v. *Brown/Plata* v. *Brown*, __ F. Supp. 2d __, Nos. 2:90-cv-520-LKK, C01-1351-TEH, 2013 WL 1500989, at *19 (E.D. Cal./N.D. Cal. Apr. 11, 2013) ("April 11 Order") (Ex. B) (quoting *Plata*, 131 S. Ct. at 1947) (emphasis added; alteration by the three-judge court). And, contrary to this Court's mandate, the three-judge court mistakenly held that *res judicata* precluded it from re-examining the need for a population cap of 137.5% of prison design capacity based on circumstances today. See *id.* at *21. Adherence to this Court's mandate in *Plata* requires just the opposite. The mandate requires, rather than bars, a re-examination of the need to reach the 137.5% cap when changed circumstances are presented.

Such a re-examination is now critical because the extensive prisoner releases ordered by the court would undermine the balance Congress struck in the PLRA between respect for State's democratic processes, including their expert analyses of public safety issues, and the need to remedy constitutional violations through prisoner release. After this Court's decision in *Plata*, all impacted stakeholders,

including state legislators, county officials and law enforcement, worked together through the political process to achieve Realignment's historic reforms. As a result of Realignment and other comprehensive criminal justice reforms, California's prison population has fallen by more than 37,000 inmates since the evidentiary record previously before the three-judge court and this Court closed.

While Realignment has reduced the prison population, it has also increased county jail populations and placed increased demands on county probation departments and mental health and drug treatment services. At the same time, as a result of the diversion of low-risk prisoners to the counties, the composition of the California prison population is fundamentally different than it was in 2006-2007 when the expert panel convened by the California Department of Corrections and Rehabilitation (CDCR) made recommendations for reforming California's prisons, or in 2009 when the three-judge court first established the 137.5% cap. See, *e.g.*, *infra* at 9-10, 30-34. Whereas there were once tens of thousands of non-violent, non-serious offenders in the California prisons, that is simply no longer the case. See, *e.g.*, *infra* at 8-10, 30-34. Accordingly, the three-judge court's most recent order requiring the release of thousands of more offenders by the end of the year will thrust serious and violent individuals on the counties, placing even more difficult obligations on them when they are already working to meet the real and substantial challenges presented by Realignment. Moreover, because the California prison population today is fundamentally different than it was before, so too are the potential public safety risks. See *id.*

A stay is critical to permit plenary review of the three-judge court's mistaken interpretation of this Court's mandate, one that avoided consideration of profound changes in favor of rigid insistence on implementing an arbitrary population cap. Absent a stay, California will be compelled to release thousands of inmates, including inmates whose release would directly contradict the judgment of state officials best positioned to evaluate the risk those releases would pose to public safety. See, *e.g.*, *infra* at 30-31.

All relevant considerations support a stay. See *Lucas* v. *Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers); *Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). As detailed below: (1) this Court has jurisdiction pursuant to 28 U.S.C. § 1253 to review the orders on appeal, and there is a "reasonable probability" that it will exercise plenary review given the importance of the issues, the three-judge court's violation of the appellate mandate, and four Justices previously would have reversed the 137.5% cap; (2) there is "a fair prospect" that this Court will reverse or vacate the decisions below because despite this Court's clear instructions, see *Plata*, 131 S. Ct. at 1941, 1946, in the face of markedly changed conditions, the three-judge court treated as set in stone the 137.5% of "design capacity" population cap it predicted would be necessary years ago; (3) irreparable harm exists due to the enjoining of numerous State laws and of altering processes for parole eligibility and credit changes that will result in awards of credit and releases that cannot be revoked even if this Court later reverses the

decisions below; and (4) even if this were a close case, which Applicants do not believe it is, the equities would still decidedly favor a stay.

STATEMENT

This appeal and application for stay involve new injunctive relief issued by the three-judge district court that continues to preside over prisoner release-related proceedings following this Court's decision in *Brown* v. *Plata*, 131 S. Ct. 1910 (2011). Since this case's return to the three-judge court in mid-2011, the prison population has fallen significantly. More significantly, the State has dramatically improved the level of mental health and medical care it provides to its inmates. Because of this progress, Applicants moved to terminate or modify the 137.5% of "design capacity" population cap that the three-judge court ordered in August 2009 and which this Court considered on appeal in *Plata*. The three-judge court refused to consider Applicants' progress and the changed prison conditions and denied Applicants' motion. April 11 Order, 2013 WL 1500989 (Ex. B). It then issued several orders, currently on appeal here, which culminated in an order of June 20, 2013 (Ex. A), imposing additional injunctive relief on Applicants. That order requires the immediate waiver of dozens of state laws and requires that Applicants initiate actions (such as awarding credits and releasing certain inmates) that cannot be undone even if Applicants prevail on appeal.

1. The three-judge court imposed its 137.5% population cap based on a record that closed in August 2008, when the population was at 195.9% of design capacity. See *Coleman* v. *Schwarzenegger*, No. CIV S-90-0520 LKK JFM P/No. C01-1351 TEH, 2009 WL 2430820, at *19, 23 (E.D. Cal./N.D. Cal. Aug. 4, 2009) (156,352

inmates). Circumstances now are radically different. Today, California's prisons house 118,897 inmates, over 37,000 inmates fewer than in August 2008, and operate at 149.2% of design capacity. CDCR, *Weekly Report of Population* (July 1, 2013), http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/WeeklyWed/TPOP1A/TPOP1Ad130626.pdf. Since October 2011 alone, the State has reduced its prison population by 24,000 inmates. See Decl. of Jeffrey Beard, ¶ 8 (May 2, 2013) (*Plata* Doc. 2603[1]); see also Decl. of Jeffrey Beard ¶ 12 (Jan. 7, 2013) (*Coleman* Doc. 4281) ("As of February 23, 2012, CDCR eliminated all nontraditional beds in gymnasiums and dayrooms and reinstated them as program space.").

These reductions in the prison population have been the result of and historic cooperation between the executive and the legislative branches of state government. These combined efforts have reformed the administration of criminal justice in California to reduce time served in prison, improve support for probationers and parolees, and move many inmates out of California prisons to other facilities. See, *e.g.*, Beard Decl. ¶¶ 11-13 (*Plata* Doc. 2603). For instance, in 2009, after the evidentiary record upon which the three-court based its population cap closed, California enacted Senate Bill 18. It increased credit-earning capacity for inmates (*i.e.*, "good time credits"), funded community programs for probationers, expanded drug and mental health reentry courts through which offenders receive highly-structured treatment rather than being returned to prison for violations, and

[1] Record materials are cited by their docket entry number on the district courts' electronic dockets for the *Plata* and *Coleman* cases.

reformed sentencing laws to reduce the number of offenders sent to state prison. See S.B. 18, 2009-2010 Leg., Reg. Sess. (Cal. 2009); *Plata* Doc. No. 2511/*Coleman* Doc. 4284, at 5; see generally Press Release, CDCR, *CDCR Implements Public Safety Reforms to Parole Supervision, Expanded Incentive Credits for Inmates*, CDCR Today (Feb. 26, 2010), *at* http://cdcrtoday.blogspot.com/2010/02/cdcr-implements-public-safety-reforms_26.html.

The largest reduction in prison population came when Governor Brown signed into law Assembly Bill 109 ("Public Safety Realignment" or "Realignment"). See A.B. 109, 2011-2012 Leg., Reg. Sess. (Cal. 2011); see also *Plata* Doc. No. 2511/*Coleman* Doc. 4284, at 4. Realignment, which took effect in October 2011, is a major sentencing reform that diverts lower level offenders and parole violators to local authorities and also dedicates resources for evidence-based community rehabilitative programs. *Id.* The Legislature implemented these changes by reforming the State penal code to shift incarceration and post-release responsibilities for non-serious, non-violent, and non-registerable sex crimes from the State prison system to county jails. *Id.* Realignment, applies to current and future inmates with respect to incarceration, as well as parole supervision and revocation. As the three-judge court has recognized, the "immediate effects [of Realignment] were highly beneficial." June 20 Order, 2013 WL 3326872, at *10. Due to Realignment, California's prison population fell by almost 25,000 inmates in less than a year. Compare *Plata* v. *Brown*/*Coleman* v. *Brown*, Nos. C01-1351 TEH/2:90-cv-520-LKK, slip op. at 16 (N.D. Cal./E.D. Cal. July 3, 2013) (Doc. Nos.

2671/4679) (attached as Ex. C, hereto) (hereinafter "Order Denying Stay") (asserting that Applicants have not made "any effort to comply with the 2011 mandate of the Supreme Court").

Through SB 18 and Realignment, the State substantially adopted the population reduction and criminal justice measures recommended by the CDCR expert panel in 2007—a panel upon which the three-judge court repeatedly has relied in ordering strict adherence to the 137.5% cap. See, *e.g.*, *Coleman*, 2009 WL 2430820, at *20, 25; April 11 Order, 2013 WL 1500989, at *3, 40; June 20 Order, 2013 WL 3326872, at *22-24. Specifically, that expert panel recommended (1) awarding earned credits to offenders after completion of rehabilitation programs, (2) replacing work incentive program (WIP) credits with statutorily-based day for day good time credits for those offenders eligible to receive them (excluding violent offenders), (3) releasing not any offender, but "low-risk, non-violent, non-sex registrants from prison without placing them on parole," and (4) restricting the use of total confinement for parole violations to specified violations. CDCR, Expert Panel on Adult Offender & Recidivism Reduction Programming, *Report to the California State Legislature, A Roadmap for Effective Offender Programming in California* 95 tbl.E-6 (2007), *available at* http://www.cdcr.ca.gov/News/Press_Release_Archive/2007_Press_Releases/docs/ExpertPanelRpt.pdf ("CDCR Expert Panel Report"). SB 18 addressed the first recommendation by establishing credits for non-serious and non-violent offenders completing rehabilitation programs, and it accomplished the second by establishing statutorily-

based good time credits. The third recommendation was accomplished by both SB 18, which created non-revocable parole, and Realignment. See Cal. Penal Code § 3000.08(b).[2] And Realignment accomplished the expert panel's fourth recommendation by requiring all serious, violent, or high risk sex offenders who served a term of incarceration to be placed on parole at the time of release, and permitting only those with life sentences to be returned to prison for parole violations (again, this went further than the panel's recommendation). See *id.* § 3000.08(f)-(h).

As a result of Realignment as well as the other criminal justice reforms described above, the State has staunched prison population growth, substantially improving upon projections made in Spring 2008 that the State would have 167,535 people in custody on June 30, 2013, when, in fact, the State had 34,871 fewer men and women in custody at that time.[3]

2. At the same time, the State has continued to make and maintain the significant improvements to the quality of medical and mental health care that already were underway when this case was before this Court in 2010.[4] The State has continued to complete and embark on significant construction projects at its facilities, to increase its staffing and the quality of its staff, and to implement the

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[2] Indeed, Realignment went further than recommended insofar as it discharged from CDCR jurisdiction "non-high risk" offenders, a broader category than merely "low risk" offenders.

[3] *See* CDCR, *Spring 2008 Adult Population Projections 2008-2013*, at 11 tbl.B (2008); CDCR, *Weekly Report of Population* (July 1, 2013) (132,664 total in-custody). Unlike CDCR's weekly population reports, CDCR's population projections do not distinguish between individuals held in state prisons versus those at camps, instate and out-of-state contract facilities, and state hospitals.

[4] *See* Appellants' Br. at 27-29, *Brown* v. *Plata*, No. 09-1233 (U.S. filed Aug. 27, 2010) (discussing changes in conditions since trial before the three-judge court); Appellants' Consolidated Reply Br. at 23-25, 26-27 & n.13, 34-35 & n.16, *Plata*, No. 09-1233 (U.S. filed Nov. 19, 2010) (same).

Turnaround Plan of Action of the Receiver, whom the *Plata* district court appointed to run CDCR's health care system. See generally *Plata*, 131 S. Ct. at 1931; Defs.' Modification Motion & Termination Motion Briefing (*Coleman* Docs. 4275-4282, 4345-4346, 4429-4434, 4436-4444, 4446-4491, 4507-4508, 4529, & 4534).

For example, the State has recently spent well over $1 billion on the construction of new and expanded health care facilities that will meet the present and future needs of its inmates. See, *e.g.*, Decl. of Chris Meyer, CDCR Director of the Facility Planning, Construction & Management Division (*Coleman* Doc. 4278), ¶¶ 3-15; see also Beard Decl. ¶¶ 21-22 (*Coleman* Doc. 4281) (discussing nearly $1 billion in additional expenditures recently secured in the budget for health care facility improvements, and inmate medical services). Moreover, each of the six core objectives of the Receiver's Turn Around Plan of Action is substantially complete, with most items completed more than a year ago. *Plata* Docs. 2415-1, 2476; see *Plata* Doc. 1229, letter at ii (recognizing that the *Plata* single-judge court approved the Turnaround Plan in 2008 to "correct constitutional deficiencies in California's prison health care system"); *Plata* Doc. 1245, at 1 (same).

Recognizing the dramatically changing conditions in the prisons, in January 2012, the *Plata* court stated "it is clear that many of the goals of the Receivership have been accomplished" and that "the end of the Receivership appears to be in sight." *Plata* v. *Brown*, No. C01-1351 TEH, slip op. at 1-2 (N.D. Cal. Jan. 17, 2012) (Doc. 2417); see also *Plata* Doc. 2476-1, at 5, 13, 17, 21 (showing that the outstanding items largely consist of state-of-the-art advances, such as mobile

imaging/radiology units and the implementation of a "revolutionary approach" for reviewing adverse health care events).[5] Similarly, in mid-2012, the *Coleman* court commended the Applicants "for the remarkable accomplishments to date in addressing the problems in access to inpatient mental health care," *Coleman* v. *Brown*, No. 2:90-cv-0520 LKK, slip op. at 1 (E.D. Cal. July 13, 2012) (Doc. 4214). The Special Master similarly recognized that the Applicants' ability to eliminate wait lists for mental health care constituted "a dramatic improvement that is unprecedented in the history of the *Coleman* remedial effort," *Coleman* Doc. 4205, at 9. Thus, he advocated a "shift . . . toward streamlining monitoring by the special master, as CDCR institutions begin to take on an increasing role in self-monitoring and begin their move toward assuming responsibility for all of it." *Id.* at 60.

On the critical question of whether classmembers are "needless[ly] suffering and d[ying]" as a result of medical care in the prisons, *Plata*, 131 S. Ct. at 1923, the data show that they are not. Cf. *id.* at 1927 (crediting trial court's 2005 findings that unconstitutional care leads to a needless death "'every six to seven days'"); *id.* at 1941. For example, a recent report by the Bureau of Justice indicates that California had a mortality rate of 247 deaths per 100,000 prisoners in 2010. M. Noonan, U.S. Dep't of Justice, Bureau of Prison Statistics, *Mortality in Local Jails*

[5] After a series of extremely positive reports in which the Receiver commended the State's progress in improving medical care and reducing crowding, *see, e.g.*, *Plata* Doc. 2476-1, at 26 & 29 (stating "[t]here are no particularly significant problems to highlight for this reporting period"), Applicants moved to vacate or modify the population cap, and then noticed an appeal from the injunctions the three-judge court issued in conjunction with the denial of that motion. Shortly thereafter, the Receiver identified crowding as an impediment to needed reforms. *See Plata* Doc. 2636, at 30 ("overcrowding continues to interfere with the ability to deliver constitutionally acceptable medical and mental health care"). In doing so, however, the Receiver did not identify specific instances of crowding-related complications in the delivery of medical care, or report any substantial risks of serious harms to the *Plata* class.

and State Prisons, 2000-2010-Statistical Tables 18 tbl.20 (Dec. 2012). This is on par with the national average of 245. *Id.* at 1 & fig.2. During 2011, the most recent period examined by the court-appointed Receiver's staff, the death rate fell to 240 inmates per 100,000. K. Imai, M.D., *Analysis of 2011 Inmate Death Reviews in the California Prison Healthcare System* 18 tbl.8 (May 12, 2012).

Moreover, the Receiver's staff found that of 388 deaths in the California prison system in 2011, only *two* were "likely preventable" had there not been lapses in care, and just 41 were "possibly preventable." *Id.* at 8-9 tbl.4, 11 tbl.5, 15 tbl.6. One of the two "likely preventable" deaths occurred at an outside hospital not controlled by the Receiver or state officials, *id.* at 16, and 10 of the "possibly preventable" deaths resulted from such outside care, *id.* at 16-17. Furthermore, the number of preventable lapses in care fell to the lowest levels in the history of the Receivership. See *id.* at 23-24 tbl.14 & fig.6. The Receiver's staff stated that the number of serious lapses in care "represents a very significant reduction from the average . . . identified from 2007-2010," and concluded "the overall decline in identified lapses is *a result of the work done to systematically improve quality* in the [California Correctional Health Care System]." *Id.* at 24 (emphasis added). Indeed, the Receiver's staff acknowledged both that "lapses in care occur commonly in medical practice" regardless of the setting, *id.* at 22, and that the lapses that the Receiver's staff had observed in the California prisons are now "similar to those found in other large integrated health systems." Letter from R. Steven Tharratt, M.D., Statewide Chief Medical Executive to J. Clark Kelso Receiver (June 7, 2012).

Other independent evaluations confirm significant progress. The reports of the Office of the Inspector General (OIG)—on which plaintiffs repeatedly relied on at earlier stages of this litigation to identify alleged Eighth Amendment inadequacies and which the *Plata* district court has held are a benchmark for assessing constitutional adequacy[6]—demonstrate that the quality of care has improved by leaps and bounds since this case was last before this Court. The California prisons now have an *average* overall score on OIG evaluations of 86.9%, which reflects "High Adherence" to the medical policies and procedures the Receivership instituted to achieve constitutional compliance. Ex. 1 to Decl. of Jeffrey Beard, *Plata* Doc. 2603-1 (updated May 2, 2013). By contrast, when OIG completed its first cycle of medical inspections of the state's 33 prisons in June 2010, just nine prisons had an overall score of at least 75 percent and the overall CDCR average was 72%. OIG, *Medical Inspection Results: Summary and Analysis of the First Cycle*, *supra*, at 12, 14; *id.* at 12 (highest average score for any

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[6] In 2007, OIG was charged with assessing the State's compliance with the metrics that the Receiver developed with *plaintiffs'* counsel's extensive input to assist in determining when the system for providing care and quality of care comply with the Eighth Amendment. *See, e.g.*, Decl. of Robert A. Barton, Inspector General for the State of California, ¶¶ 5-6, 8 (Jan. 7, 2013) (*Coleman* Doc. 4282); OIG, *Medical Inspection Results: Comparative Summary and Analysis of the First Cycle of Medical Inspections of California's 33 Adult Prisons* 5-6 (May 2011), *available at* http://www.oig.ca.gov/media/reports/MIU/Medical%20Inspection%20Results%20Summary%20and%20Analysis%20of%20the%20First%20Cycle%20of%20Medical%20Inspection%20ofCalifornias%2033%20Adult%20Prisons.pdf; *see also id.* at 8 (explaining that scores above 85% constitute high adherence to the medical policies and procedures, scores between 75-85 percent reflect moderate adherence, and those below 75 percent reflect low adherence). Indeed, Judge Henderson, who presides over the *Plata* litigation, has held that "an institution shall be deemed to be in substantial compliance, and therefore *constitutionally adequate*, if it receives an overall OIG score of at least 75%," as well as receives at least two of three court-appointed expert evaluations that it "is providing adequate care." *Plata*, slip op. at 9, ¶ 3 (N.D. Cal. Sept. 5, 2012) (emphasis added) (Doc. 2470). *See also, e.g.*, Br. for Plata Appellees at 14, No. 09-1233 (U.S. filed Oct. 25, 2010) (relying on OIG's findings of "deficiencies" that allegedly "cut to the core of the medical system"); *Coleman*, 2009 WL 2430820, at *34 (relying on OIG audit reports addressing crowding's effects on care in the CDCR system).

institution was 83 percent). Today, every institution's score exceeds 75%, all but seven have scores of 85% or higher, and all but three exceed 80%. *Plata* Doc. 2603-1 (lowest score at any institution is 77.6%); OIG, *SOL Medical Inspection Results Cycle 3 & CIM Medical Inspection Results Cycle 3* (2003), http://www.oig.ca.gov/pages/reports.php. The Inspector General testified in January 2013 that, due to improvements throughout the prisons' medical care system, "[o]vercrowding is no longer a factor affecting the CDCR's ability to provide effective medical care in the prisons," Barton Decl. ¶ 15 (*Coleman* Doc. 4282), and that "it is abundantly clear that the system provides timely and effective medical care," *id.* ¶ 16. Particularly relevant to the question of whether conditions warrant vacating or modifying the population cap, of the institutions with an overall score of at least 85%, 20 have a population that exceeds 137.5% of design capacity. See *id.* ¶¶ 14-15; *Plata* Doc. 2603-1; OIG, *CDCR Cycle 3 Reports*; *Plata* Doc. 2672-1 (reporting facility-by-facility populations as of June 26, 2013).[7]

3. In light of these substantial improvements in the quality of care in the California prisons and the prisons' ability to deliver (and to continue delivering) such care at current population levels, in May 2012, Applicants advised the three-judge court that they intended to seek a modification of the 137.5% of design capacity population cap. See April 11 Order, 2013 WL 1500989 at *7. The court then required briefing concerning the basis for the "anticipated motion to modify"

[7] Although the Receiver himself has criticized (albeit, unjustifiably) the State's inability, to date, to reach 137.5% of design capacity, the Receiver has noted the State's "steady improvement" in OIG quality scores and its commitment to bringing new facilities online according to an "aggressive" construction schedule. *Plata* Doc. 2636, at 1.

and Applicants responded that changed conditions provided the basis for the anticipated filing. See *id.* at *8. Thereafter, the court stated in a September 2012 order that because Eighth Amendment compliance had "'already been litigated and decided by this Court and affirmed by the Supreme Court, this Court is not inclined to permit relitigation of the proper population cap at this time.'" *Id.* at *9 (quoting Sept. 7, 2012 Order, at 2-3). The court treated the cap as immovable even though the factual record that the cap was based on had closed in *2008*, and is starkly different from the current conditions in California prisons. See, *e.g.*, *Plata*, 131 S. Ct. at 1925 n.4, 1938; *id.* at 1961 (Alito, J. dissenting).

Nonetheless, after further proceedings related to extending the time to meet the 137.5% cap, see April 11 Order, 2013 WL 1500989, at *7-12, Applicants moved to vacate or modify the cap in January 2013. See *id.* at *12.[8] Applicants presented evidence that the original predictive judgment, based on the 2008 record, that constitutionally adequate medical and mental health care could be provided only by reducing the number of inmates to 137.5% of design capacity was no longer sound.

In the April 11 Order, the three-judge district court denied Defendants' motion to vacate or modify. The court concurrently issued an order imposing

[8] In response to an order of the three-judge district court, Applicants also submitted a plan that explained how they would achieve the required 137.5% of design capacity cap by June 27, 2013 and, alternatively, by December 27, 2013. See *Plata* Doc. No. 2511/*Coleman* Doc. 4284. Applicants' plan explained that, given the limits of executive power, the further population reductions would have to be court-ordered, approved by voter initiative, or enacted by a supermajority of the Legislature. *Id.* at 1. On the same day, the State moved in the Eastern District of California to terminate all injunctive relief in the *Coleman* case because the mental health care no longer created a substantial risk of serious harm to the class, and because Applicants, in all events, were not deliberately indifferent. *See* Mot. Terminate & Vacate Judgment (*Coleman* Doc. 4275). Judge Karlton denied that motion in April. *See Coleman* v. *Brown*, No. CIV. S-90-520 LKK/JFM, 2013 WL 1397335, at *12-24 (E.D. Cal. Apr. 5, 2013).

additional injunctive relief. See 2013 WL 1500989, at *42-45. Among other things, that order compelled Applicants to:

(i) submit a List of all possible population reduction measures and a Plan to reach the 137.5% cap by identifying measures from the List that Applicants proposed to implement, *id.* at *42-43;

(ii) submit a list of specific constitutional provisions, statutes, and regulations that must be modified or waived to allow Applicants to implement certain measures, *id.* at *42 (¶ 1.b);

(iii) "immediately commence taking the steps necessary to implement the measure[s]" in the Plan that Applicants had the authority to implement, and to "attempt in good faith to obtain the necessary authorization, approval, or waivers from the Legislature or any relevant administrative body or agency" with respect to any measures that Applicants were without authority to implement, *id.* at *44 (¶ 3) (ordering "All defendants, including the Governor, [to] use their best efforts to implement the Plan"), and;

(iv) "develop a system to identify prisoners who are unlikely to reoffend or who might otherwise be candidates for early release," *id.* at *44 (¶ 5) (ordering Applicants to report within 100 days regarding actions taken with respect to the system).

Applicants noticed an appeal from the order, and, without seeking a stay, began complying with each of those injunctive orders. Applicants timely submitted a List and Plan, identified state law impediments to population reductions, began working with the Legislature, and worked on developing a prisoner identification system. See *Plata* Doc. 2609/*Coleman* Doc. 4572. In the court-compelled List/Plan submission, Applicants again explained that the three-judge court had erred in denying the request to vacate or modify based on its failure to evaluate the changed circumstances in the California prisons. *Id.* at 2-3 ("It is imperative that the State's motions be decided based on a full examination of the *current* state of the prison

health care system.").[9] Notwithstanding Applicants' view that no further population reduction measures were necessary in light of the evidence presented to the three-judge court, Applicants complied with the court's order by submitting both a List and a Plan that, if implemented by the Legislature, would bring the total prison population to within 2,570 inmates (*i.e.*, 2.2%) of satisfying the 137.5% cap by the December 2013 deadline, and would fully satisfy the cap in June 2014 and June 2015. *Id.* at 39. Applicants also began preparing draft legislation that, if passed by the Legislature, would implement the Plan. See *id.* At the same time, however, Applicants explained that if the court compelled any additional population reduction measures under present circumstances, the State's program of population reduction might be undone. *Id.* at 3. Applicants explained that the enormous population reductions the State already had achieved were possible only because of collaboration with numerous stake-holders, including the Legislature, community leaders, and county officials, whose responsibility extends beyond the health and safety of California's inmate population to that of the public at large. *Id.* Based on this experience and the political realities currently operating in California, Applicants submitted that population reduction measures were not only

[9] Contrary to the three-judge court's assertion that Applicants "abandoned" any claim that current conditions were relevant to the motion to vacate or modify the cap, April 11 Order, 2013 WL 1500989, at *18, Applicants did no such thing. Applicants represented that the single judge courts—not the three-judge court—had to make the ultimate determination of whether the Eighth Amendment *minima* had been satisfied. *See Plata* Doc. 2529, at 4. However, Applicants stressed that the "evidence establishing that there are no ongoing system wide constitutional violations in medical and mental health care" was relevant to whether the cap remained lawful. *Id.*; *see id.* at 5 ("the greatly reduced current population levels do not prevent the State from providing constitutionally adequate medical and mental health care"); *id.* (arguing in the context of "modifying the population cap" that "the State has presented clear evidence that inmates have access to medical care that comports with the constitution"); *id.* at 6 ("further population reductions are 'unnecessary'" given the improvements to "prison medical and mental health care").

unnecessary to remedy a constitutional violation but could be counterproductive, either by turning the Legislature and the counties against Realignment (thus increasing the State's prison population) and/or prompting the counties to reduce the number of inmates in their jails due to their own capacity constraints by releasing offenders who pose a risk to public safety. *Id.* at 3-4.

Appellees responded by seeking further injunctive relief, including outright releases of inmates, and requested that the three-judge court institute contempt proceedings. *Coleman* Doc. 4611. The court's June 20 Order deferred ruling on the request for contempt, see 2013 WL 3326872, at *30, and imposed additional injunctive relief. The court compelled Applicants to implement all aspects of the Plan, as well as to "implement an additional measure," namely "the expansion of good time credits" sufficient to ensure the release of an additional 4,170 inmates by December 31, 2013. *Id.* at *22.[10] To facilitate the relief ordered, the court waived or preempted numerous provisions of state and local law. *Id.* at *1, *16, *25-26.[11] Furthermore, the court required that if any of the measures compelled were insufficient to reduce the prison population to the 137.5% cap by December 2013, "defendants shall release the necessary number of prisoners to reach that goal" by using the list of "low-risk prisoners" that the three-judge court compelled Applicants

[10] Although Applicants calculated that the shortfall between the Plan proposed and the 137.5% cap would be 2,570 inmates in December 2013, the three-judge court refused to credit a 1,600 inmate reduction included in the Plan and the court therefore considers the shortfall to be 4,170 inmates. June 20 Order, 2013 WL 3326872, at *17-18.

[11] Pursuant to the three-judge court's invitation, Applicants filed with it today a list of additional state provisions, including multiple sections of the California Constitution and a section of the California Budget Act, that the three-judge court would need to preempt to allow Applicants to effectuate the relief ordered. See, *e.g.*, *Plata* Doc. 2674/*Coleman* Doc. 4686, at 2.

to begin formulating in its April 11 order (*supra* at 17). June 20 Order, 2013 WL 3326872 at *2; see *id.* at *24-25.

On June 24, 2013, Applicants noticed their appeal from the June 20, 2013 Order. *Plata* Doc. 2660/*Coleman* Doc. 4665. On June 28, 2013, consistent with this Court's Rule 23.3, Applicants filed a motion for a stay in the three-judge district court. On July 3, 2013, the court denied the motion.

REASONS FOR GRANTING A STAY PENDING APPEAL

A stay should issue here because: (1) there is a "reasonable probability" that this Court will note probable jurisdiction; (2) a "fair prospect" exists that this Court will conclude that the decision below was erroneous; (3) California will suffer irreparable harm without a stay; and (4) the relative harm to California and the interests of the public at large outweigh any harm to the plaintiff-classmembers that a stay pending review might cause. See, *e.g.*, *Lucas*, 486 U.S. at 1304 (Kennedy, J., in chambers); *Rostker*, 448 U.S. at 1308 (1980) (Brennan, J., in chambers).

I. THERE IS A "REASONABLE PROBABILITY" THAT THIS COURT WILL NOTE PROBABLE JURISDICTION.

This Court has jurisdiction over these appeals under 28 U.S.C. § 1253, and there is a "'reasonable probability'" that this Court again will note jurisdiction and exercise plenary review in this important case. *Rostker*, 448 U.S. at 1308; see *Lucas*, 486 U.S. at 1305.

Section 1253 provides for direct appeal to this Court from any order that (1) is entered in a suit "required by any Act of Congress to be heard and determined by

a district court of three judges," and (2) grants or denies injunctive relief. 28 U.S.C. § 1253. Both elements of § 1253 are plainly satisfied here.

First, this Court has already exercised appellate jurisdiction over this case under § 1253. See *Plata*, 131 S. Ct. at 1929-30 (recognizing that this suit was required to be heard by the three-judge district court under the PLRA, and thus subject to this Court's appellate jurisdiction under § 1253). Second, the orders on appeal are within the scope of § 1253 because they plainly grant injunctive relief. On April 11, the court required Applicants to take several specific steps. See *supra* at 17.

Following Applicants' court-compelled List/Plan submission, the three-judge court went even further, imposing additional new obligations on Applicants in its June 20 Order. The court specifically ordered Applicants "to implement an additional measure along with its Plan," namely the expansion of good time credits, both prospectively and retroactively. June 20 Order, 2013 WL 3326872, at *1, 16, *21-23. The court also ordered Applicants to implement both the Plan and the good time credits expansion immediately, "notwithstanding any state or local laws or regulations to the contrary," and preempted all state and local laws and regulations that would impede immediate implementation. *Id.* at *26. In addition to the Plan measures and good time credits expansion, the court ordered the State to begin releasing prisoners—according to the "system" the State had been ordered to develop for identifying specific prisoners for release—as needed to reduce the prison population to the 137.5% cap by December 31, 2013. *Id.* at *29-30.

Plainly these orders impose new obligations on Applicants, and thus grant injunctive relief that is reviewable by this Court under 28 U.S.C. § 1253. *Cf. Gunn* v. *Univ. Comm. to End War in Viet Nam*, 399 U.S. 383, 387-88 (1970) (§ 1253 requires that the order on appeal be sufficiently specific in requiring or prohibiting conduct that it is possible to know "with ... certainty" what the three-judge district court has ordered, and that the order is amenable to enforcement through the court's contempt power). The court listed multiple concrete actions that Applicants must take by a date certain. And the court expressly waived state and local laws to permit Applicants to comply with the new federal obligations the April and June Orders imposed. That the court found it necessary to newly preempt state and local laws confirms that those Orders create new obligations on the State.

Additionally, the three-judge district court took pains to note that the injunctive relief granted in the April and June Orders was subject to enforcement through the court's contempt power. June 20 Order, 2013 WL 3326872, at *30. The court stated its view that Applicants had "fail[ed] to follow the clear terms of [the three-judge district court's] April 11, 2013 order," and that the court "would therefore be within its rights to issue an order to show cause and institute contempt proceedings immediately," though it declined to do so. *Id.* It further emphasized that failure on Applicants' part to "comply with this order [the June 20 Order], including the filing of bi-weekly reports" would "constitute an act of contempt." *Id.* The three-judge court left no doubt that the April and June Orders required Applicants to take particular measures, and that failure to comply with the specific

mandates of the April and June Orders would constitute contempt. The orders were therefore well within the scope of § 1253.

It is, at a minimum, "reasonably probable" that this Court will note probable jurisdiction here because doing so is necessary to permit this Court to compel adherence to its appellate mandate. Four members of this Court already would have rejected the prison capacity cap based on the record that existed when this case was before the Court in 2011. Moreover, the majority in *Plata* admonished that the three-judge district court's previously entered injunction "must remain open to appropriate modification," and that that court must give "serious consideration" to any showing by the State that such modification is warranted. 131 S. Ct. at 1947. Instead of heeding this Court's instruction, the three-judge district court treated its population cap as immutable, disregarded Applicants' evidence that modification was warranted, and instead expanded its prior order by imposing new, additional burdens on the State. See § II, *infra*. It is well within this Court's authority to correct that error before the State is subjected to irreparable harm. *E.g.*, *Minn. State Bd. for Cmty. Colls.* v. *Knight*, 465 U.S. 271, 279 (1984); *White* v. *Regester*, 412 U.S. 755, 761 (1973).

Plenary review of the three-judge district court's orders also is called for in light of the importance and complexity of the issues presented here. The court's decision not only orders Applicants to take specific measures, but expressly displaces numerous duly enacted laws of the sovereign State of California. Moreover, the court's implicit waiver of state constitutional provisions effectively

collapses the separation between the legislative and executive branches of state government. See *supra* at 19 n.11. It does so in areas—prisons, spending, and the penal code—that are typically the sole province of the political branches, and for reasons that appear grounded now more in policy preferences that ought to remain the province of those branches rather than in a faithful application of the appellate mandate. See, *e.g.*, *infra* at 37-38, 38 n.22. This case continues to present highly difficult questions of national significance fully comparable to those that previously warranted review. At a minimum there is a "reasonable probability" that the Court will note probable jurisdiction over these appeals.

II. THERE IS A "FAIR PROSPECT" THAT APPLICANTS WILL PREVAIL.

There is "fair prospect" that this Court will reverse or vacate the decisions below because the three-judge court failed to heed this Court's mandate in *Plata*, 131 S. Ct. at 1941-42, 1946-47, and did not faithfully analyze changed conditions in determining whether the "predictive judgments" about what is necessary to satisfy the PLRA's requirements are still valid, *id.* at 1942.[12]

In affirming the three-judge district court's issuance of a prisoner release order with a 137.5% of design capacity population cap, this Court recognized that

[12] *See generally* 18 U.S.C. § 3626(a)(1)(A) (requiring that any prospective relief "shall extend no further than necessary to correct the violation of the Federal right" and be "narrowly drawn, extend[] no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right," and that "substantial weight" be given "to any adverse impact on public safety or the operation of a criminal justice system" in making such determinations); *id.* § 3626(a)(3)(E) (imposing further requirements on issuance of prisoner release orders by requiring that crowding be "the primary cause of the violation" and that "no other relief will remedy the violation"); *Plata*, 131 S. Ct. at 1945 ("The PLRA's narrow tailoring requirement is satisfied so long as these equitable, remedial judgments are made with the objective of releasing *the fewest possible prisoners* consistent with an efficacious remedy.") (emphasis added).

such injunctive relief "involve[d] difficult predictive judgments regarding the likely effects of court orders," 131 S. Ct. at 1942, and that during implementation of the order "time and experience may reveal targeted and effective remedies that will end the constitutional violations even without a significant decrease in the general prison population," *id.* at 1941. Therefore, it instructed the three-judge court that it had "the responsibility[] to make further amendments to the existing order" as may be warranted. *Id.* at 1946 ("the three-judge court must remain open to a showing or demonstration . . . that the injunction should be altered"). This Court mandated that the court below "give due deference to informed opinions as to what public safety requires," and it recognized that "changing political, economic, and other circumstances" were relevant to the analysis of whether continuing injunctive relief remains warranted. *Id.* To underscore the importance of continued judicial sensitivity to changing circumstances, this Court recognized that "[t]he State has already made significant progress toward reducing its prison population," and that:

> As the State makes further progress, the three-judge court should evaluate whether its order remains appropriate. 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.

Id. at 1947 (emphasis added).

The three-judge court's failure to abide by these commands creates a fair prospect that Appellants will succeed on appeal. The court failed to recognize that it was to remain open to vacating or modifying the relief it had ordered—relief that was (at best) a predictive judgment based on now five-year-old evidence about the population reductions necessary to facilitate other remedies that ultimately would

satisfy the Eighth Amendment. Instead, the court below was openly hostile to the idea of modification. In essence, the three-judge court is now requiring that Applicants demonstrate to each of the single-judge district courts in *Plata* and *Coleman* that there are no remaining Eighth Amendment violations before the three-judge court will consider any modification of the cap. This is irreconcilable with this Court's mandate, the PLRA, and basic principles of equity, and therefore creates a fair prospect of reversal.

First, the three-judge court re-wrote a key passage of this Court's mandate. Such rewriting alone demonstrates the three-judge court's infidelity to this Court's carefully crafted mandate. Specifically, as quoted above, this Court expressly stated that "significant progress . . . toward remedying" the Eighth Amendment violations alone may be sufficient to obviate any obligation to further reduce the population. Yet, in refusing to vacate or modify the population cap, the three-judge court reasoned that Applicants could not satisfy the threshold for such relief because "the Supreme Court suggested that defendants could seek modification if they had 'remed*[ied]* the underlying constitutional violations.'" April 11 Order, 2013 WL 1500989, at *19 (emphasis added; alteration by the three-judge court) (quoting *Plata*, 131 S. Ct. at 1947).[13] This does serious violence to this Court's command. By definition, demonstrated *progress* in "remedying" violations is distinct from having

[13] *See also* April 11 Order, 2013 WL 1500989, at *17 (mistakenly claiming that unless the State were asking the three-judge court to determine "that prison conditions are no longer unconstitutional," there was no basis for vacatur or modification); Order Denying Stay at 8 n.2 (repeating claim that unless the State asked the three-judge court to determine whether constitutional compliance had been achieved, the quality of medical care was irrelevant); *id.* at 17-18 (similar).

remedied and hence ended the constitutional violations.[14] An evaluation of such progress therefore was critical to determining whether vacating or modifying the population cap was necessary to satisfy the PLRA.

Instead, the three-judge court wrongly surmised that the standards set forth in *Horne* v. *Flores*, 557 U.S. 433 (2009), were irrelevant unless Applicants could show that they had fully "remedied the underlying constitutional violation." April 11 Order, 2013 WL 1500989, at *18-19. The standards articulated in *Horne* are directly relevant to determining whether a particular type of injunctive relief (*e.g.*, a prisoner release order) and scope of such relief (*e.g.*, a 137.5% of design capacity cap) now fail to satisfy the PLRA, even if other forms of injunctive relief (*e.g.*, the appointment of a Special Master and a Receivership that controls all medical care) still satisfied the PLRA given underlying Eighth Amendment violations. See *Horne*, 557 U.S. at 449 (discussing "overbr[eadth]"); see also *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc.* v. *Westchester Cnty.*, 712 F.3d 761, 775 (2d Cir. 2013) (recognizing that *Horne* requires courts to "carefully consider the validity *and scope* of consent decrees") (emphasis added).

Second, consistent with the errors in its reasoning just discussed, the three-judge court erred by repeatedly holding that it is foreclosed from re-visiting the 137.5% population cap in light of changed circumstances. See April 11 Order, 2013 WL 1500989, at *20-21; June 20 Order, 2013 WL 3326872 at *14. Notwithstanding

[14] If Applicants successfully remedy the Eighth Amendment violations (as opposed to making progress toward doing so), not only would population reductions be inappropriate—as opposed to "less urgent," *Plata*, 131 S. Ct. at 1947—but so too would any other injunctive relief, and federal supervision of the prisons' provision of medical care would terminate.

this Court's guidance that subsequent progress toward remedying the Eighth Amendment violations and other subsequent events or developments might show that the 137.5% cap no longer satisfied the PLRA's narrow tailoring and other requirements, see *supra* at 24-25 (discussing *Plata*, 131 S. Ct. at 1941-42, 1946-47); 18 U.S.C. § 3626(a), the three-judge court categorically rejected Applicants' attempts to premise vacating or modifying the cap on changed conditions. See, *e.g.*, Mot. Vacate or Modify at 7-12, *Plata* Doc. 2506/*Coleman* Doc. 4280 (E.D. Cal./N.D. Cal. filed Jan. 7, 2013) (discussing increased capacity and decreased population); *id.* at 15-19 (discussing improvements in care). The three-judge court held that vacating or modifying the population cap was prohibited by "fundamental principles of res judicata." April 11 Order, 2013 WL 1500989, at *21.[15]

The three-judge court's reliance on *res judicata* was erroneous as a matter of law and, in the context of managing complex injunctive relief over one of the nation's largest state-run institutions, defies common sense. This Court has held that federal courts sitting in equity have "the right . . . to apply modified measures to changed circumstances." *Sys. Fed'n No. 91, Ry. Employees' Dep't* v. *Wright*, 364 U.S. 642, 647-48 (1961). It has specifically advised courts that "policies of *res judicata*" yield where, as here, "the circumstances, whether of law or of fact, obtaining at the time of [an injunction's] issuance have changed, or when new ones

[15] *Accord* June 20 Order, 2013 WL 3326872, at *14 ("First, [Applicants' motion for vacatur or modification of the population cap] was barred by res judicata principles as an improper attempt to relitigate the 137.5% figure, a predictive judgment that this Court had made and that the Supreme Court had specifically affirmed."); *see also supra* at 15-16, 27-28 (noting that, in May 2012, when the State raised the possibility of moving for modification, the three-judge court also claimed that this Court's decision barred it from re-visiting the 137.5% of design capacity cap); Order Denying Stay at 8 n.2 ("[w]e did not consider this evidence [that the State's prisoner health care now exceeds constitutional standards]").

have since arisen." *Id.* (holding that lower court erred in refusing to modify consent decree); see also *Horne*, 557 U.S. at 450 (requiring that courts take a "'flexible approach'" to requests to modify consent decrees).[16] This is especially true in this case, given that the population cap was admittedly a prediction—made nearly four years ago—about what population reductions might be necessary to allow the State to provide Eighth Amendment compliant care. Accordingly, it makes little sense to adhere to such a prediction out of slavish devotion to the doctrine of *res judicata*. On the contrary, the court below should have assessed based on "time and experience," *Plata*, 131 S. Ct. at 1941, *inter alia*:

(i) the level of medical care being provided today to determine whether the already substantial population reductions and the many other forms of injunctive relief have themselves brought about progress and now lead to the conclusion that Eighth Amendment *minima* will be satisfied without further (or with fewer) population reductions;

(ii) the nature of the prison population today, which has changed dramatically since this case was before this Court, particularly given new data on the State's recent experiences with recidivism; and

(iii) how political circumstances bear on further court-imposed population reductions, including the possibility that ordering reductions beyond those suggested by Applicants could cause the entire program of population reduction to unravel.

Compare *Horne*, 557 U.S. at 450, 454, with April 11 Order, 2013 WL 1500989, at *21 (claiming that only if there were a "change in background assumptions on which this Court relied in making its 137.5% determination" could the injunction be

[16] Curiously, the three-judge panel quoted *System Federation No. 91* for the proposition that "'[f]irmness and stability must no doubt be attributed to continuing injunctive relief based on adjudicated facts and law, and neither the plaintiff nor the court should be subjected to the unnecessary burden of re-establishing what has once been decided,'" April 11 Order, 2013 WL 1500989, at *21 (quoting 364 U.S. at 647), while ignoring the language on changed circumstances directly applicable here.

modified) (emphasis omitted). There is a reasonable prospect of reversal based on the decision of the court below to elevate principles of *res judicata* above the present circumstances through which the proprietary and scope of further injunctive relief must be judged.

Finally, the district court's refusal to re-evaluate the accuracy of its prediction about the necessity of a 137.5% cap in light of the changed circumstances that exist today is deeply prejudicial to core state interests that the PLRA protects. Had the quality of care in 2008 been as good as it is today—*e.g.*, had California's prisons received scores from the Inspector General that reflected "High Adherence" to the policies deemed necessary to satisfy metrics devised by the Receiver, in consultation with Appellees, for constitutional care—it is inconceivable that this Court would have upheld such a cap as the least restrictive means of ensuring that Eighth Amendment care is provided to the plaintiff-classes. See 18 U.S.C. § 3626(a)(1)(A) (requiring any prospective relief be "narrowly drawn, extend[] no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right"). Because of the drastically changed record that drove Applicants' request for modification or vacatur, there is likewise no basis for retaining such a cap today.

This is particularly so given the changed composition of the California prison population today and the public safety issues that these further, court-ordered prisoner releases would implicate. See *id.* (requiring "substantial weight" be given "to any adverse impact on public safety or the operation of a criminal justice

system"); *Plata*, 131 S. Ct. at 1946 (instructing three-judge court to weigh "changing political, economic, and other circumstances"). Given the tremendous reductions in population that have occurred since the time the three-judge court imposed its predictive 137.5% cap, today's prison population simply no longer contains four-thousand-plus inmates—which essentially amounts to an entire prison's worth of offenders—who could be released without a significant impact on public safety. See, *e.g.*, Feb. 19, 2013 Beard Decl. ¶ 7 (*Coleman* Doc. 4346); May 2, 2013 Beard Decl. ¶ 15 (*Plata* Doc. 2603). Indeed, Dr. Jeffrey Beard—who is now the head of CDCR, and whose testimony the three-judge court relied upon when he was *plaintiffs'* expert in this litigation—testified that given the prison population today, "[t]he further reductions needed to reach the 137.5% level cannot be achieved without the early release of inmates convicted of serious or violent felonies." *Coleman* Doc. 4281, ¶ 25; *accord* Beard Decl. ¶ 15 (May 2, 2013) (*Plata* Doc. 2603); see also *Coleman*, 2009 WL 2430820, at *83, 88, 90, 92, 95, 110-11 (three-judge panel's reliance on Dr. Beard's opinions about public safety); *id.* at *55, 59-60 (relying on Dr. Beard's opinions on other subjects). Moreover, the CDCR Expert Panel, upon which Dr. Beard previously served, did not recommend that day for day good time credits be awarded to serious or violent offenders. The three-judge court, insistent on the achievement of its 137.5% goal, misstated this critical point.[17]

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[17] The three-judge court claimed that the "CDCR Expert Panel, on which we relied heavily, specifically recommended expanding good time credits for all prisoners, 'including all sentenced felons regardless of their offense or strike levels.'" June 20 Order, 2013 WL 3326872, at *24 (quoting CDCR Expert Panel Report at 92). That is wrong on its face. The passage quoted refers to the expansion of *rehabilitation program credits* to all offenders. *See* CDCR Expert Report at 92 ("Award earned credits to offenders who complete any rehabilitation program in prison and on parole.") (emphasis omitted). The CDCR Expert Panel did not recommend a similar expansion of good time

This post-Realignment population presents far different considerations with respect to recidivism and public safety than what the three-judge court assumed would exist when it analyzed those issues, and upon which basis this Court affirmed the 137.5% population cap two years ago. See *Plata*, 131 S. Ct. at 1943 (suggesting that the prison population could be released with "little or no impact on public safety" because the State could "lower the prison population without releasing violent convicts"); *id.* at 1923 (similar). For instance, Dr. Petersilia—upon whose work the three-judge court previously extensively relied, *see, e.g.*, *Coleman*, 2009 WL 2430820, at *20, 85, 92, 97-98, 110, and who co-chaired the CDCR expert panel that the three-judge court relied upon in deeming certain population reductions feasible, see *id.* at *114—has recognized that even those inmates categorized as "low risk" by CDCR recidivate such that 41% are returned to California prison within three years, and that 11% of such "low risk" offenders have been "rearrested for a violent felony within 3 years of release." J. Petersilia & J. Greenlick Snyder, *Looking Past the Hype: 10 Questions Everyone Should Ask About California's Prison Realignment*, 5(2) Cal. J. Pol. Pol'y 266, 295 (2013) (concluding "regardless of how one slices the data, California counties are dealing with a risky

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credits. *See id.* at 93, 12. On the contrary, it recommended allowing only "statutorily eligible" inmates to receive those day for day good time credits, *id.* at 93, and explained that "most offenders *(with the exception of those serving 3- and 2-Strike sentences, life sentences, and those convicted of violent crimes)* are eligible," *id.* at 12 (emphasis added). The State achieved the Panel's recommended expansion of good time credits through SB18. Furthermore, even as to the expansion of rehabilitation program credits to which the Expert Panel was referring in the passage incorrectly cited by the three-judge court, the State expanded such credits through SB 18 to offenders other than those convicted of serious and violent offenses.

offender population").[18] Not only was the three-judge court unduly dismissive of these findings, see *supra* note 18, but its treatment of public safety issues related to potential population reductions also is facially erroneous, see *supra* at 31-32 n.17, and otherwise unsound.[19]

The requirement that courts give serious consideration to public safety under the PLRA cannot be squared with the fact that the three-judge court is willing to gamble on incurring those additional risks for the sake of achieving a 137.5% benchmark by December 31, 2013. Moreover, the court's willingness to brush past these issues signals inadequate concern for the role of the political branches generally, and the States in particular. Indeed, to the extent that reducing or even

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[18] By contrast, in 2009, in finding that the population cap it imposed would not pose substantial risks to public safety, the three-judge court claimed, based on then-existing data, that "low-risk inmates have an average recidivism rate of just 17%." *Coleman*, 2009 WL 2430820, at *101 (citing Rep. Tr. at 1750:1-6). The testimony the three-judge court cited, however, made clear that the opinion on "low risk" recidivism was pertinent to only "property, drug and non-violent offenders." Tr. 1750:1-6 (*Plata* Doc. 1920). Today, such inmates largely are incarcerated at the county, not state level, thus the testimony about recidivism upon which the three-judge court's conclusions hinged is no longer apt. *But cf.* Order Denying Stay at 20 (dismissing Dr. Petersilia's findings—notwithstanding that they rest on CDCR data—as a "sole law journal article" by "two Stanford Law Professors"); *id.* at 20-21 (claiming the data was "not sufficient to rebut the extensive testimony this Court considered after fourteen days of trial in 2009" without addressing the fact that such testimony, as shown, was based on a definition of "low risk inmate" that is inapposite today).

[19] Notwithstanding the three-judge court's repeated suggestions that a large number of "lifer" inmates (i.e., those serving sentences of life with the possibility of parole) could be released without any impact on public safety, *see* Order Denying Stay at 13-14, Applicants showed that this claim rested on a significant and gross logical error. Specifically, the recidivism rates for lifers upon which the district court and plaintiffs relied are for those inmates whom the Board of Parole Hearings already has found "'no longer pose an unreasonable risk to public safety.'" Decl. of Jennifer Shaffer, Executive Officer of the Board of Parole Hearings ¶ 4 (May 2, 2013) (*Plata* Doc. 2602). It is a fallacy of the worst magnitude to extrapolate those rates of recidivism to the opposite category of "lifers," namely those whom the Board of Parole Hearings has *denied* parole (and perhaps repeatedly done so) because they "*continue to pose a current* unreasonable risk to public safety." *Id.* (emphasis added) Logic dictates that those inmates whom correctional experts have concluded still pose unreasonable risks to the public would have *higher* recidivism rates than those whom the Board has determined no longer pose such risks. Of course, it is necessarily the case that no specific data exist on the recidivism of inmates whom the Board deems unfit for release because California does not release such inmates. But what the three-judge court has now ordered and refused to stay necessarily displaces the judgments of the Board as to which inmates today may safely be released.

maintaining current population levels is necessary to achieving Eighth Amendment *minima*, the three-judge court acted recklessly in refusing to acknowledge (let alone address) Applicants' showings (*supra* at 18-19) that compelling further population reductions may well upset the delicate political balance between the executive branch and the legislature and California's counties. It was cooperation between the branches and among State, county, and community actors that brought about Realignment and other recent, successful criminal justice reforms. Should California's Legislature reverse course, or the counties begin releasing inmates or scale back on their rehabilitation programs, the State could find itself with an increasing prison population and fewer effective alternatives to address it.

There is simply no basis, either in this Court's mandate or in the record, for treating, as the three-judge court has, the 137.5% cap as etched in stone. Accordingly, there is a fair prospect that this Court will enforce its mandate and order the three-judge court to review the current circumstances before deciding whether to compel the State to comply with that cap no matter the consequences.

III. IRREPARABLE HARM TO THE STATE EXISTS AND WILL CONTINUE IF THE ORDER IS NOT STAYED.

Irreparable harm not only is likely to result from the denial of a stay, see, *e.g.*, *Lucas*, 486 U.S. at 1304, it already has occurred and will be compounded as long as the three-judge court's order remains in effect.

First and foremost, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. of Cal.* v. *Orrin W. Fox Co.*, 434 U.S. 1345, 1351

(1977) (Rehnquist, J., in chambers) (staying district court order enjoining enforcement of California Automobile Franchise Act); *accord Maryland* v. *King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Board*, granting stay, and holding that Maryland suffered irreparable harm where it could "not employ a duly enacted statute"). That form of irreparable injury undisputedly exists here.

In response to the executive branch's repeated showings that no further population reductions are possible without action of the legislative branch,[20] the three-judge court granted plaintiffs-appellees' request to have the court nullify provisions of California law: "All such state and local laws and regulations [that prevent the prison population from being 137.5% of design capacity by December 31, 2013] are hereby waived, *effective immediately*." June 20 Order, 2013 WL 3326872 at *29 (emphasis added); see also, *e.g.*, *id.* at *1, 26, 29 (discussing waivers of state law). The three-judge court's order "immediately" prevents the State from enforcing at least 26 separate statutory and regulatory provisions which otherwise prohibit the measures ordered by the court. See *id.* at *31 ("not exclusive" list of laws and regulations preempted by the court). It effectively does the same with respect to the California Constitution. *Supra* at 19 n.11. Like the laws at issue in *New Motor Vehicle Board* and *King*, such laws were duly "'enacted by representatives of [the] people'" of the State, and their non-enforcement creates

[20] *Plata* Doc. 2640, at 4-5; *Coleman* Doc. 4572, at 6-7. *See also Coleman* Doc. 4572, at 1-2 (noting "Governor Brown has also ended the practice of governors routinely rejecting the Board of Parole Hearings' decisions granting parole to 'lifer inmates,' and discussing the use of parole during this Administration).

irreparable harm. *King*, 133 S. Ct. at 3; *cf. Karcher v. Daggett*, 455 U.S. 1303, 1306-07 (1982) (Brennan, J., in chambers) (granting stay and noting that a federal court causes irreparable harm when it orders a State to "adopt an alternative" plan or "face the prospect that the District Court will implement its own" plan in a field where "plans created by the legislature are . . . preferred to judicially constructed plans"). Moreover, the laws nullified involve "areas of core state responsibility" where "[f]ederalism concerns are heightened." *Horne*, 557 U.S. at 448.

Second, in addition to the irreparable harm created by the waivers of state law, Applicants will be irreparably harmed because implementing some of these measures cannot be undone. For example, the court requires the retroactive award of additional "good time" credits, which would lead to the release of thousands of inmates, including violent offenders. See June 20 Order, 2013 WL 3326872, at *22-24. Once credits are awarded, it is unlikely that the credits could be rescinded, even if the three-judge court's order is reversed or modified by this Court. See U.S. Const. art. I, § 9, cl. 3 (prohibiting *ex post facto* laws); *Lindsey* v. *Washington*, 301 U.S. 397, 401 (1937) (holding that statute violated the *ex post facto* clause because "the measure of punishment prescribed by the later statute is more severe than that of the earlier"). And surely once prisoners' sentences are terminated and they are released, those actions could not be unwound.

The three-judge court asserts that because Applicants have flexibility to choose remedies other than awarding good time credits, irreparable harm does not exist. Order Denying Stay at 21; see also *id.* at 12, 14. That is baseless. The State

will be unable to enforce numerous state laws regardless of what remedy it chooses. Moreover, any remedy that reduces prisoners' sentences or requires their release will implicate *ex post facto* problems. The notion that Applicants have meaningful flexibility here is belied by the fact that the court preemptively and categorically held that "[n]o other prisoners housed out of state will be considered as part of any substitute measure [for meeting the cap]." *Id.* at 13 n.5; compare *Plata* Doc. 2609/*Coleman* Doc. 4572, at 33 (proposals for housing inmates out-of-state). That restriction, together with the strict deadline for meeting the cap, means that—absent a stay from this Court—releases of prisoners who have committed serious and violent felonies will occur by December 31, 2013.

Third, and related to the first two considerations noted above, in "bear[ing] the administrative costs of changing its [criminal justice] system to comply with the [lower court's] order," the State will be irreparably harmed. *Ledbetter v. Baldwin*, 479 U.S. 1309, 1310 (1986) (Powell, J., in chambers). This harm is irreparable because "[e]ven if this Court reverses the judgment of the [lower court], it is unlikely that the State would be able to recover these costs." *Id.* (staying order striking down state welfare regulations); see also *INS* v. *Legalization Assistance Project*, 510 U.S. 1301, 1305-06 (1993) (O'Connor, J., in chambers) (granting stay because order "would impose a considerable administrative burden").[21]

[21] Moreover, contrary to the three-judge court's suggestions, the Applicants lack the ability to appropriate funds—whether to carry out remedies ordered by the court or to improve the likelihood that public safety could be protected after significant releases. *See, e.g.*, Order Denying Stay at 21. The California Legislature is not a party to this proceeding, and the executive branch has acted up to the limits of its authority. *See supra* at 16 n.8.

Finally, in light of significant changes to California's prison population since the evidence closed in 2008, including new evidence regarding recidivism, the three-judge court's most recent orders may create even more dire irreparable harm in the form of threats to public safety. See, *e.g.*, Beard Decl. (*Plata* Doc. 2603) ¶ 15; *supra* at 30-34. Since realignment, the California prisons no longer house the non-violent class of offenders and parole violators that—at the time of trial—the expert panel predicted would comprise the bulk of inmates affected by any release. See *supra* at 7-10, 27 n.14, 28 n.15, 31, 33. Moreover, even for the categories of offenders that CDCR has defined as "low risk" under a risk assessment model that it developed and implemented post-trial, recidivism is significant—far higher than the three-judge court or this Court conceived based on review of the now-outdated evidence that previously existed. See *supra* at 32-33. Because the court's latest orders will require the release of inmates—including those previously convicted of violent offenses and who thus pose a substantial risk of committing new and violent crimes—Applicants and California's public are exposed to an additional form of irreparable harm. See, *e.g.*, *supra* at 30-34.[22]

Accordingly, irreparable harm to the State exists and warrants a stay.

IV. THE EQUITIES FAVOR A STAY.

If this is deemed a "close case"—which it is not—the equities also counsel in favor of a stay. Both the "relative harms" to the parties and "the interests of the

[22] The three-judge court claims that this is not a form of irreparable harm because whether prisoners are released earlier or later will not necessarily have a different deterrent effect, and that so-called "low risk" prisoners released early may be less likely to recidivate than those released later. The court's order reflects overt judicial policy-making; by the three-judge court's logic, these "low risk" prisoners—contrary to the political branches' decisions—simply should not be incarcerated at all.

public at large" favor Applicants. *Rostker*, 448 U.S. at 1308. As shown above, there is no question that the State will sustain irreparable harm as a result of the injunctions imposed, and given the nature of the credits to be awarded, the composition of the prison population now available to receive them, and the early releases they necessarily must trigger, the repercussions may be more severe and widespread. In sum, the interests of California's public strongly favors a stay. By contrast, absent a stay pending review, any direct harm to the plaintiff-classes is uncertain and limited. The June 20 Order itself does not require that *any* inmate actually be released today. Although extraordinary and irrevocable state action is needed to ensure compliance with the Order, the inmates need not be released until December 31, 2013. Applicants have not sought a stay of the Court's directive that they develop a system for assessing so-called "low risk" offenders who could be released if this Court does not ultimately grant relief on the merits. Nor have Applicants sought a stay or modification of any of the myriad forms of injunctive relief that have been imposed over the years, continue today, and—as described above—contribute to health outcomes that are on par with those in prisons nationwide. In short, there are numerous protections that remain in place to protect any individual inmate from a substantial risk of serious harm, and a stay would not diminish those protections.

Moreover, this Court could treat this stay request as a jurisdictional statement and grant plenary review immediately, see E. Gressman et al., *Supreme Court Practice* § 17.9, at 864 (9th ed. 2007), and thus allow Applicants to brief the

merits on an expedited basis to permit the Court to hear arguments before the end of the year.

CONCLUSION

For the foregoing reasons, the three-judge court's June 20 Order imposing additional injunctive relief should be stayed pending final disposition of these appeals.

Dated: July 10, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

Governor Edmund G. Brown Jr., et al.,

Appellants,

v.

Marciano Plata and Ralph Coleman, et al.,

Appellees.

I, Carter G. Phillips, do hereby certify that, on this 10th day of July 2013, I caused one copy of the Appellants' Application For A Stay Of Injunctive Relief Pending This Court's Final Disposition Of Appeals Pursuant To 28 U.S.C. § 1253 in the foregoing case to be served by first class mail, postage prepaid, and by email on the following parties:

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Exhibit A

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Ralph COLEMAN, et al., Plaintiffs,
v.
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Marciano Plata, et al., Plaintiffs,
v.
Edmund G. Brown Jr., et al., Defendants.

Nos. 2:90–cv–0520 LKK JFM P,
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Opinion

OPINION AND ORDER REQUIRING DEFENDANTS TO IMPLEMENT AMENDED PLAN

STEPHEN REINHARDT, Circuit Judge, LAWRENCE K. KARLTON, Senior District Judge, THELTON E. HENDERSON, Senior District Judge.

***1** On April 11, 2013, this Court issued an opinion and order denying defendants' motion to vacate or modify our population reduction order. Apr. 11, 2013 Op. & Order Denying Defs.' Mot. to Vacate or Modify Population Reduction Order (ECF No. 2590/4541). [1] In that opinion and order, defendants were required to take all steps necessary to comply with our population reduction order issued on June 30, 2011, in compliance with the Supreme Court's decision of May 23, 2011, which (as amended) requires defendants to reduce the overall prison population to 137.5% design capacity by December 31, 2013 (sometimes referred to as "Order"). To ensure that they did so, this Court ordered defendants to submit a list of all prison population reduction measures identified in this litigation ("List") and a plan for compliance with our Order ("Plan"). Apr. 11, 2013 Order Requiring List of Proposed Population Reduction Measures (ECF No. 2591/4542). On May 2, 2013, defendants submitted this List and their Plan, although their Plan does not comply with our Order. Defs.' Resp. to Apr. 11, 2013 Order (ECF No. 2609/4572) ("Defs.' Resp"). On May 15, 2013, plaintiffs submitted a responsive filing, in which they requested this Court to issue an order to show cause why defendants should not be held in contempt. Pls.' Resp. & Req. for Order to Show Cause Regarding Defs.' Resp. to Apr. 11, 2013 Order (ECF No. 2626/4611). On May 29, defendants submitted a reply. Defs.' Resp. to Pls.' Resp. & Req. for Order to Show Cause Regarding Defs.' Resp. to Apr. 11, 2013 Order (ECF No. 2640/4365). On June 17, defendants submitted their monthly status report. Defs.' June 2013 Status Report (ECF No. 2651/4653).

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 Opinion, when we cite to such filings, we include 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.*

Because defendants' Plan does not comply with our Order, this Court hereby orders defendants to implement an additional measure along with its Plan that will bring defendants into compliance: the expansion of good time credits, as set forth in Item 4 of defendants' List submitted on May 2, 2013. This measure, expanded good time credits, in conjunction with the measures included in the Plan submitted by defendants, will constitute an amended Plan ("Amended Plan")—a plan that will, unlike defendants' Plan, reduce the overall prison population to 137.5% design capacity by December 31, 2013. Defendants are ordered to take all steps necessary to implement all measures in the Amended Plan, commencing forthwith, notwithstanding any state or local laws or regulations to the contrary. 18 U.S.C. § 3626(a)(1)(B). All such state and local laws and regulations are hereby waived, effective immediately.

This Court desires to continue to afford a reasonable measure of flexibility to defendants, notwithstanding their continued failure to cooperate with this Court. To this end, this Court offers defendants three ways in which they can amend the Amended Plan. First, defendants may, if they prefer, revise

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the expanded good time credit program, so long as defendants' revision results in the release of at least the same number of prisoners as does the expanded measure. This Court will not specify the changes defendants must make in order to meet this requirement. Defendants must inform this Court in a timely manner, however, of their decision to make such changes.

*2 Second, defendants may at their discretion substitute for prisoners covered by any measure or measures in the Amended Plan an equivalent number of prisoners by using the "system to identify prisoners who are unlikely to reoffend or who might otherwise be candidates for early release" (the "Low Risk List"). *Brown v. Plata,* 131 S.Ct. 1910, 1947 (2011). Although defendants need not obtain prior approval for this substitution, they must inform this Court that they intend to make such substitution.

Third, defendants may, with the prior approval of this Court, substitute any measure or measures on the List for any measure or measures in the Amended Plan, as long as the number of prisoners to be substituted equals or exceeds the number of prisoners to be substituted for and defendants provide this court with incontestable evidence that the substitution of prisoners to be released will be completed by December 31, 2013. The filing or pendency of any such request, or of any appeal from any order of this Court, shall not relieve defendants of their continuing obligation to take forthwith all steps ordered herein or necessary for the purpose of achieving compliance with this Order and the Amended Plan.

If for any reason the measures in the Amended Plan will not reach the 137.5% population ceiling by December 31, 2013, defendants shall release the necessary number of prisoners to reach that goal by using the aforementioned Low Risk List, a list that we have previously ordered them to develop, and that they have advised us they can develop in sufficient time to allow its use for purposes of compliance with the Order.

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. It is defendants' unwillingness to comply with this Court's orders that requires us to order additional relief today and to reiterate the lengthy history of this case, notwithstanding the fact that we set forth much of this history in our April 11, 2013 Opinion & Order.

A. *The Plata and Coleman cases*

We begin where the Supreme Court began in its June 2011 decision: "This case arises from serious constitutional violations in California's prison system. The violations have persisted *for years.* They *remain* uncorrected." *Plata,* 131 S.Ct. at 1922 (emphasis added). The constitutional violations at issue concern the Eighth Amendment's ban on cruel and unusual punishment and are the subject of 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 mentally ill prison population. The second, *Plata v. Brown,* began in 2001 and concerns California's failure to provide constitutionally adequate medical health care to its prison population. In both cases, the district courts found constitutional violations and ordered injunctive relief. [2]

2 We provide here only a brief review of the extensive (and unsuccessful) remedial efforts in both the *Plata* and *Coleman* cases. For those interested in a detailed summary of these efforts, see our August 4, 2009 Opinion & Order at 10–36 (ECF No. 2197/3641).

*3 In *Coleman,* defendants proved unable to remedy the constitutional violations despite over a decade of remedial efforts. The case was initiated in 1990, and—following a trial overseen by Magistrate Judge John Moulds—the *Coleman* court found in 1995 that defendants were violating the Eighth Amendment rights of mentally ill prisoners. *Coleman v. Wilson,* 912 F.Supp. 1282 (E .D.Cal.1995). Defendants were ordered to remedy the constitutional violations under the supervision of a Special Master. *Id.* at 1323–24. One decade later in 2006, however, the Special Master's reports stated that defendants had wholly failed to remedy the constitutional violations. Worse yet, there was a backward slide in progress, attributable largely to the growing overcrowding problem in the California prison system.

In *Plata,* defendants' inability to make progress in remedying the constitutional violations resulted in the imposition of a drastic remedy: placing the prison medical care system in a receivership. The case was initiated in 2001, and defendants agreed to a stipulated injunction in 2002. Three years passed, however, during which defendants made virtually no progress in implementing the necessary injunctive relief to remedy the underlying constitutional violations. As the *Plata* court wrote in 2005:

> The prison medical delivery system is in such a blatant state of crisis that in recent days defendants have publicly conceded their inability to find and implement on their own solutions that will meet constitutional standards. The State's failure has created a vacuum of leadership, and utter disarray in the management, supervision, and delivery of care in the Department of Corrections' medical system.

May 10, 2005 OSC, 2005 WL 2932243, at *1–2. After an extensive fact-finding process, the *Plata* court established the Receivership, concluding that there was "nowhere else to turn." Oct. 3, 2005 FF & CL, 2005 WL 2932253, at *31. The Receiver was able to implement substantial changes in the prison healthcare system but, ultimately, was unable to remedy the constitutional errors in light of the severe overcrowding in the California prison system. [3]

3 The current Special Master in the *Coleman* case is Matthew A. Lopes, Jr. The current Receiver in the *Plata* case is J. Clark Kelso.

"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. Congress, however, had restricted the ability of federal courts to enter a population reduction order in the Prison Litigation Reform Act of 1996 ("PLRA"), Pub.L. No. 104–134, 110 Stat. 1321 (codified in relevant parts at 18 U.S.C. § 3626); Aug. 4, 2009 Op. & Order at 50–51 (ECF No. 2197/3641) (explaining why a population reduction order is a "prisoner release order," as defined by the PLRA, 18 U.S.C. § 3626(g)(4)). Under the PLRA, a population reduction order can be issued only by a specially convened three-judge court which has made specific findings described in the statute. 18 U.S.C. § 3626(a).

***4** In 2006, the plaintiffs in *Coleman* and *Plata* independently filed motions to convene a three-judge court capable of issuing a population reduction order. Both district courts granted plaintiffs' motions and recommended that the cases be assigned to the same three-judge court "[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; *see also Plata,* 131 S.Ct. at 1922 ("Because the two cases are interrelated, their limited consolidation for this purpose has a certain utility in avoiding conflicting decrees and aiding judicial consideration and enforcement."). The Chief Judge of the United States Court of Appeals for the Ninth Circuit agreed and, on July 26, 2007, convened the instant three-judge district court pursuant to 28 U.S.C. § 2284. The court was composed of the two district judges who had many years of experience with the *Coleman* and *Plata* cases and one circuit judge appointed by the Chief Judge of the Circuit, in accordance with the circuit's regular procedure for the assignment of circuit court judges to special matters (the next judge on the list for such assignments who is available to serve).

B. *This Court's August 2009 Opinion*

In August 2009, after a fourteen-day trial, this Court issued an Opinion & Order designed to remedy the ongoing constitutional violations with respect to both medical and mental health care in the California prison system. The order directed defendants, including the Governor, then Arnold Schwarzenegger, [4] and the Secretary of the California Department of Rehabilitation and Corrections ("CDCR"), then Matthew Cate, [5] to reduce the institutional prison population to 137.5% design capacity within two years. This Court made extensive findings, as set forth in our 184–page opinion. We repeat here only those findings that are necessary or relevant to the determination of the issues before us.

4 Edmund G. Brown Jr. was elected Governor to succeed Arnold Schwarzenegger on November 2, 2010.

5 Jeffrey Beard was appointed successor to Matthew Cate on December 27, 2012.

Because the PLRA makes the entry of a prisoner release order the "remedy of last resort," H.R.Rep. No. 104–21, at 25 (1995) (report of the House Committee on the Judiciary on the Violent Criminal Incarceration Act of 1995), we were required to find that "no other relief will remedy the violation of the Federal right." 18 U.S.C. § 3626(a)(3)(E)(ii). Defendants contended that a prisoner release order was unnecessary because defendants *could* construct new prisons, construct re-entry facilities at existing prisons, or expand medical facilities at existing prisons. Aug. 4, 2009 Op. & Order at 101–08 (ECF No. 2197/3641). We recognized the theoretical possibility of such measures but found them entirely unrealistic. California had thus far failed to fund prison expansion and, in light of its ongoing fiscal crisis, the prospect of any additional funding for

prison expansion was "chimerical." *Id.* at 106. We further concluded on the basis of expert testimony that all other remedies suggested by defendants or defendant-intervenors were either insufficient or required some level of prisoner release. *Id.* at 112–118. Accordingly, we concluded 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. In short, we would not delay remedying the constitutional violations in the prison system simply because defendants made unrealistic and unfounded assertions regarding alternative remedies to the problem of overcrowding.

***5** This Court gave "substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." 18 U.S.C. § 3626(a)(1)(A). In fact, we devoted 10 days out of the 14–day trial to the issue of public safety; we also devoted approximately 25% of our Opinion & Order—49 out of 184 pages—to it. We heard from the country's leading experts in the field of incarceration and crime, who based their opinions on the experience of various jurisdictions that had successfully reduced prison population without adversely affecting public safety or the operation of the criminal justice system. On the basis of this testimony and many state-commissioned reports that proposed various measures for safely reducing the overcrowding in California's prison system, we identified a variety of measures to reduce prison population without a significant adverse effect on public safety or the criminal justice system's operation: (1) early release through the expansion of good time credits; (2) diversion of technical parole violators; (3) diversion of low-risk offenders with short sentences; (4) expansion of evidence-based rehabilitative programming in prisons or communities; and (5) sentencing reform and other potential population reduction measures. Aug. 4, 2009 Op. & Order at 137–57 (ECF No. 2197/3641). We did not, however, select specific measures for defendants to implement. Instead, defendants were ordered to submit a plan for reducing California's prison population to 137.5% design capacity within two years, and we stated that "[a]ny or all of these measures may be included in the state's plan. Whichever solutions it ultimately chooses, the evidence is clear that the state can comply with our order in a manner that will not adversely affect public safety." *Id.* at 132. Indeed, "[t]here 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. The question of *how* to do it was left to defendants.

The most promising measure, it was generally agreed, was early release through the expansion of good time credits. This measure would in some cases reduce the prison population by allowing prisoners to shorten their lengths of stay in prison by a few months. Plaintiffs' experts-Doctors Austin and Krisberg; 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." *Id.* at 140. According to Dr. Austin (who continues to provide expert testimony on behalf of plaintiffs in the present proceedings), criminologists have known "for many, many, many years" that generally "there is no difference in recidivism rates by length of stay" in prison, so reducing the length of stay by a "very moderate period of time"—four to six months—would have no effect on recidivism rates. Tr. at 1387:1–11. We considered extensive testimony on the question of whether early release through good time credits increases the crime rate, concluding that it does not and that it "affects only the timing and circumstances of the crime, if any, committed by a released inmate." *Id.* at 143. Defendants presented only one expert in opposition, Dr. Marquart, but his opposition (if it can be called that) was feeble. Marquart testified that, while he criticized generic early release, he did not in fact oppose good time credit measures. *Id.* at 139–40. Further, he agreed that there was no statistically significant relationship between an individual's length of stay in prison and his recidivism rate. *Id.* at 140–41. His only criticism—that good time credits expansion might reduce the opportunity for prisoners to complete rehabilitation 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. Thus, there was essentially agreement among all experts—for plaintiffs and for defendants—that the expansion of good time credits was consistent with public safety. We concluded as follows: "We credit 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.

***6** This conclusion was supported by the experience in many jurisdictions that had successfully and safely implemented early release through good time credits. California was one such jurisdiction. "Dr. Krisberg reviewed data provided by California and the FBI and concluded that such programs,

which were instituted in twenty-one California counties between 1996[and] 2006, resulted in approximately 1.7 million inmates released by court order but did not result in a higher crime rate." *Id.* at 144. Washington expanded its good time credits program and Secretary Lehman, the former head of corrections for Washington, testified that "these measures did not have any 'deleterious effect on crime' or public safety." *Id.* at 174. Dr. Austin—who has thirty years of experience in correctional planning and research and has personally worked with correctional systems in eight states to reduce their prisoner populations—testified that Illinois, Nevada, Maryland, Indiana, and New York all successfully implemented good time credits expansion without adversely affecting public safety. *Id.* at 175. In New York, in particular, "the prison population decreased due in part to the expansion of programs awarding good time credits, and not only did the crime rate not increase, it 'declined substantially .' " *Id.* Dr. Marquart attempted to point to Texas as an example of a jurisdiction that unsuccessfully implemented good time credits expansion, but he ultimately presented such equivocal testimony that it was of little use to this Court. *Id.* at 176–77. We concluded that "the CDCR should implement population reduction measures mirroring those of the jurisdictions that have successfully and safely reduced their inmate populations." *Id.* at 177.

Not only did this Court find the expansion of good time credits to be safe, but we found that it had the potential for significant reduction in the prison population. The state-sponsored CDCR Expert Panel on Adult Offender Recidivism Reduction Programming ("CDCR Expert Panel"),[6] on which we relied heavily, recommended that expansion of good time credits could result in the release of 32,000 prisoners. *Id.* at 177–81. Such estimates, in conjunction with our findings regarding other safe and effective population reduction measures, led us to conclude that "the state has available methods by which it could readily reduce the prison population to 137.5% design capacity or less without an adverse impact on public safety or the operation of the criminal justice system." *Id.* at 181.

6 CDCR Expert Panel, *A Roadmap for Effective Offender Programming in California: A Report to the California Legislature,* June 2007. The report is available at http://sentencing.nj.gov/dow nloads/pdf/articles/2007/July2007/document03.pdf

Defendants were thus ordered to submit a plan for compliance within 45 days of our order. *Id.* at 183. They failed to do so, however; instead, they submitted a plan for achieving the 137.5% reduction within five years, not two. Defs.' Population Reduction Plan (ECF No. 2237/3678). This Court ordered defendants to comply with the terms of the August 2009 Order by providing a plan for the reduction of the prison population to 137.5% capacity within two years. Oct. 21, 2009 Order Rejecting Defs.' Proposed Population Plan (ECF No. 2269/3711). Defendants responded by submitting a plan for compliance within two years in which defendants 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 for compliance. That is, rather than ordering defendants to implement any specific population reduction measures, we ordered defendants to reduce prison population to 167%, 155%, 147%, and 137.5% at six-month benchmarks. Jan. 12, 2010 Order to Reduce Prison Population at 4 (ECF No. 2287/3767). This Court stayed the effective date of our order while defendants appealed to the Supreme Court. *Id.* at 6.

C. *The Supreme Court's June 2011 Opinion*

*7 In June 2011, the Supreme Court affirmed this Court's order in full. Again, we repeat here only those portions of the Supreme Court opinion that are relevant to the motions pending before us.

The Supreme Court framed the central question before it as whether resolving the ongoing constitutional violations necessitated the entry of a prisoner release order. The Court fully recognized that the order was "of unprecedented sweep and extent" and that the possible release of 37,000 prisoners was a matter of "undoubted, grave concern." *Plata,* 131 S.Ct. at 1923. The Court continued:

> Yet so too is the continuing injury and harm resulting from these serious constitutional violations. For years the medical and mental health care provided by California's prisons has fallen short of minimum constitutional requirements and has failed to meet prisoners' basic health needs. Needless suffering and death have been the well-documented result. Over the whole course of years during which this litigation has been pending, no other remedies have been found to be sufficient. Efforts to remedy the

> violation have been frustrated by severe overcrowding in California's prison system. Short term gains in the provision of care have been eroded by the long-term effects of severe and pervasive overcrowding.

Id. The Court thus recognized that, at some point when a state actor has proven unwilling or incapable of remedying a constitutional violation, the deprivation of constitutional liberties demands a more forceful solution. Here, as "overcrowding is the 'primary cause of the violation of a Federal right,' 18 U.S.C. § 3626(a)(3)(E)(i), specifically the severe and unlawful mistreatment of prisoners through grossly inadequate provision of medical and mental health care," that solution was a population reduction order. *Id.* The Supreme Court affirmed our order in full, holding "that the court-mandated population limit is necessary to remedy the violation of prisoners' constitutional rights." *Id.*

One of defendants' principal arguments before the Supreme Court was that the Three–Judge Court was prematurely convened, as defendants had been afforded insufficient time to achieve a solution on their own to the problem of prison overcrowding. The Supreme Court rejected this argument, stating that defendants had been given "ample time to succeed" in resolving the constitutional violations. *Id.* at 1930. At the time that the Three–Judge Court was convened, twelve years had passed since the appointment of the Special Master in *Coleman,* and five years had passed since the stipulated injunction in *Plata.* The Supreme Court stated that, given defendants' continuing inability to remedy the overcrowding problem during that time, "the District Courts were not required to wait to see whether their more recent efforts would yield equal disappointment." *Id.* at 1931. In short, decades of failure by defendants justified the convening of this Three–Judge Court.

***8** Defendants also repeated their challenge that a population reduction order was not required, as the overcrowding problem could be resolved through construction and other efforts. The Supreme Court flatly rejected each option presented by defendants, affirming our determination that these options were "chimerical," ineffective, or demanded some level of prisoner release. *Id.* at 1938–39. When defendants attempted to assert, without evidence, that they could resolve the problem through some combination of these options, the Supreme Court explained why defendants' troubled history in this litigation belied placing any trust in them:

> The State claims that, even if each of these measures were unlikely to remedy the violation, they would succeed in doing so if combined together. Aside from asserting this proposition, the State offers no reason to believe it is so. 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. Again, decades of failure justified rejecting defendants' reassurances that, with more time, they could resolve the problem.

Defendants also insisted that achieving a prison population of 137.5% design capacity would adversely affect public safety. The Supreme Court recognized that defendants maintained this belief but found it unpersuasive in light of this Court's explicit factual findings to the contrary:

> This inquiry necessarily involves difficult predictive judgments regarding the likely effects of court orders. Although these judgments are normally made by state officials, they necessarily must be made by courts when those courts fashion injunctive relief to remedy serious constitutional violations in the prisons. These questions are difficult and sensitive, but they are factual questions and should be treated as such. Courts can, and should, rely on relevant and informed expert testimony when making factual findings. It was proper for the three-judge court to rely on the testimony of prison officials from California and other States. Those experts testified on the basis

> of empirical evidence and extensive experience in the field of prison administration.

Id. at 1942. In other words, defendants' beliefs about public safety are not to be credited over the contrary findings of this Court, which were supported by extensive expert testimony and which the Supreme Court affirmed. In so doing, the Supreme Court specifically endorsed the good time credits expansion measure:

> The court found that various available methods of reducing overcrowding would have little or no impact on public safety. Expansion of good-time credits would allow the State to give early release to only those prisoners who pose the least risk of reoffending.

***9** *Id.* 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.). 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.

In its final section, the Supreme Court addressed the issue of timing. Defendants objected to the fact that our Order required them to achieve the prison population cap within two years. The Supreme Court held that there was nothing problematic about our two-year time frame, especially as defendants had not raised an objection to the two-year deadline at trial; nor had they formally requested an extension from the Supreme Court. *Id.* at 1946. The Court further observed that, because our Order was stayed during the pendency of the Supreme Court proceedings, defendants "will have already had over two years to begin complying with the order of the three-judge court." *Id.* The Supreme Court stated that, to the extent that additional time was necessary, defendants could seek modification, a request which this Court "must remain open to." *Id.* (We have, in fact, done so, granting defendants a six-month extension, the most that they even suggested might be necessary.) Just as the Supreme Court advised this Court to be open to accommodating defendants' possible need for additional time, it also reminded us of the "the need for a timely and efficacious remedy for the ongoing violation of prisoners' constitutional rights." *Id.* at 1946–47. To the extent that this Court granted defendants an extension, it should be "provided that the State satisfies necessary and appropriate preconditions designed to ensure that measures are taken to implement the plan without undue delay," including "the State's ability to meet interim benchmarks for improvement in provision of medical and mental health care." *Id.* at 1947. The Supreme Court then stated that, while it approved of the fact that our order "left the choice of how best to comply with its population limit to state prison officials," *id* at 1943, circumstances may call for further relief:

> 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. 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. To do so safely, the State should devise systems to select those prisoners least likely to jeopardize public safety. An extension of time may provide the State a greater opportunity to refine and elaborate those systems.

***10** *Id.* at 1947. The Supreme Court concluded its opinion by recognizing that, while modification was certainly permissible, the serious constitutional deprivations in the California prison system must be resolved in a timely fashion:

> The medical and mental health care provided by California's prisons falls below the standard of decency that inheres in the Eighth Amendment. This extensive and ongoing constitutional violation requires a remedy, and a remedy will not be achieved without a reduction in overcrowding. The relief ordered by the three-judge court is required by the Constitution and was authorized by Congress in the PLRA.

Id. The final words of the Supreme Court's opinion leave no room for ambiguity: "The State shall implement the order without further delay." *Id.*

D. *Three–Judge Court Proceedings since June 2011*

Having been affirmed, our Court issued an order setting the following schedule by which defendants were required to reduce the prison population to 137.5% design capacity within two years after the Supreme Court's decision:

> Defendants must reduce the population of California's thirty-three adult prisons as follows:
>
> a. To no more than 167% of design capacity by December 27, 2011.
>
> b. To no more than 155% of design capacity by June 27, 2012.
>
> c. To no more than 147% of design capacity by December 27, 2012.
>
> d. To no more than 137.5% of design capacity by June 27, 2013.

June 30, 2011 Order Requiring Interim Reports at 1–2 (ECF No. 2374/4032). Defendants informed this Court that they would accomplish the population reduction primarily through Assembly Bill 109, often referred to as "Realignment." Defs.' Resp. to Jan. 12, 2010 Court Order (ECF No. 2365/4016). [7] Realignment would shift responsibility for criminals who commit "non-serious, non-violent, and non-registerable sex crimes" from the state prison system to county jails. This would apply both to incarceration and parole supervision and revocation, and to current and future prisoners convicted of those crimes. Defs.' Resp. to June 30, 2011 Court Order (ECF No. 2387/4043). Realignment became effective in October 2011, and its immediate effects were highly beneficial, as thousands of prisoners either serving prison terms or parole revocation terms for "non-serious, non-violent, and non-registerable sex crimes" were shifted to county jails. Defendants were thus able to comply with the first benchmark, albeit shortly after the deadline. Defs.' Jan. 6, 2012 Status Report (ECF No. 2411/4141). It also appeared that Defendants would easily meet the second benchmark and would likely meet the third. *Id.*

7 California had also enacted Senate Bill 18, which made various minor reforms to its good-time credits, parole policy, community rehabilitation programs, and sentences. Defs.' Resp. to Jan. 12, 2010 Court Order at 4–5 (ECF No. 2365/4016).

It soon became apparent, however, that Realignment was not sufficient in itself to achieve the 137.5% benchmark by June 2013 or to meet the ultimate population cap at any time thereafter, in the absence of additional actions. In February 2012, plaintiffs filed a motion requesting this Court to order defendants to demonstrate how they intended to meet the 137.5% figure by June 2013. Pls.' Mot. for an Order Requiring Defs. to Demonstrate How They Will Achieve the Required Population Reduction by June 2013 (ECF No. 2420/4152). Plaintiffs argued that, based on CDCR's own population projections (as of Fall 2011), it was evident that defendants would not achieve a prison population of 137.5% by June 2013. *Id.* at 2–3. Defendants responded that, because their Fall 2011 projections predated the implementation of Realignment, they were not reliable. Defs.' Opp'n to Pls.' Mot. for Increased Reporting in Excess of the Court's June 30, 2011 Order at 2–3 (ECF No. 2423/4162). They stated that the forthcoming Spring 2012 population projections would give a more accurate indication of whether defendants would meet the 137.5% figure by June 2013. *Id.* at 4. This Court accepted defendants' representations and denied plaintiffs' motion without prejudice to the filing of a new motion after CDCR published the Spring 2012 population projections. Mar. 22, 2012 Order Denying Pls.' Feb. 7, 2012 Mot. (ECF No. 2428/4169).

***11** In May 2012, plaintiffs renewed their motion. 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 correctly observed that, despite defendants' assurances that the Fall 2011 projections were outdated and unreliable, the Spring 2012 population projections were not significantly different. *Id.* at 3–4. Plaintiffs also pointed to a new public report issued in the intervening months, titled "The Future of California Corrections" (known as "The Blueprint"), in which defendants stated that they would not meet the 137.5% figure by June 2013 and announced their intention to seek modification of this Court's Order. *See* CDCR, *The Future of California Corrections: A Blueprint to Save Billions of Dollars, End Federal Court Oversight, and Improve the Prison System,* Apr. 2012 ("CDCR Blueprint"). [8] In fact, the Blueprint called for a substantial increase in the California prison population. Based on this evidence, plaintiffs repeated their request that this Court order defendants to demonstrate how they would comply with this Court's June 30, 2011

Order. Pls.' Renewed Mot. for an Order Requiring Defs. to Demonstrate How They Will Achieve the Required Population Reduction by June 2013 at 5–6 (ECF No. 2435/4180). They further contended that defendants' delaying tactics and "failure to take reasonable steps to avert a violation of this Court's Order would amount to contempt of court." *Id.* at 6. Defendants' responsive filing, dated May 2012, confirmed their intent not to comply with the Order but instead to seek its modification from 137.5% design capacity 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. 2442/4191).

8 The Blueprint represents defendants' current plan for the California prison system. It, however, makes no attempt to reduce prison crowding further than Realignment. To the contrary, it calls for the elimination of California's program that houses approximately 9,500 prisoners in out-of-state prisons, which—as explained *infra*—will have the result of increasing prison crowding substantially. The Blueprint is therefore in all ways relevant, as it is in effect the updated version of the Realignment, and we use the terms Realignment and Blueprint interchangeably. The Blueprint can be found at ht tp:// www.cdcr.ca.gov/2012plan/docs/plan/complete.pdf

This Court, being of the opinion that it could not grant plaintiffs' request to order defendants to demonstrate how they would meet the 137.5% goal if defendants actually had a legitimate basis for seeking modification, ordered two rounds of supplemental briefing regarding the basis for defendants' anticipated (but unfiled) motion to modify. June 7, 2012 Order Requiring Further Briefing (ECF No. 2445/4193); Aug. 3, 2012 2d Order Requiring Further Briefing (ECF No. 2460/4220).[9] Additionally, because defendants[10] had suggested that they were not currently on track to reduce prison population to 137.5% design capacity, this Court asked the following:

9 Defendants' initial responsive briefing was unclear and did not satisfactorily respond to this Court's question as to what the basis for the motion to modify would be. Additionally, their answer raised further factual questions. For example, defendants assured this Court that they would not use modification as a delaying tactic because they would seek modification promptly after the prison population fell to 145%, which they projected would happen in December 2012. Defs.' Resp. to June 7, 2012 Order Requiring Further Briefing at 1, 2 (ECF No. 2447/4203). Their projection, however, appeared to be outdated or simply erroneous. The then-current prison population was higher than defendants estimated, and the rate of prison population decline was already slowing considerably. If defendants failed to take additional measures until after they filed a motion to modify and would not file the motion until the prison population fell to 145%, it was unclear when, if ever, a motion would be filed. Accordingly, this Court ordered a second round of briefing.

10 Our order was directed at both parties, but the answers we sought were from defendants only.

> [I]f the Court ordered defendants "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," *Plata,* 131 S.Ct. at 1947, by what date would they be able to do so and, if implemented, how long would it take before the prison population could be reduced to 137.5%? By what other means could the prison population be reduced to 137.5% by June 27, 2013? Alternatively, what is the earliest time after that date that defendants contend they could comply with that deadline?
>
> ***12** *Id.* at 4. This Court further stated that, until such time as we declare otherwise, "defendants shall take all steps necessary to comply with the Court's June 30, 2011 order, including the requirement that the prison population be reduced to 137.5% by June 27, 2013." *Id.*

In their response, defendants stated that they would seek to prove that Eighth Amendment compliance could be achieved with a prison population higher than 137.5% design capacity. Defs.' Resp. to Aug. 3, 2012 2d Order Requiring Further Briefing at 6 (ECF No. 2463/4226). Defendants defiantly refused, however, to answer the set of questions quoted above. Defendants stated, somewhat astonishingly, that our suggestion that we *might* order defendants to develop a system to identify low-risk prisoners, a system that the Supreme Court had suggested we might consider ordering defendants to develop "without delay," "is a prisoner release order that vastly exceeds the scope of any of the Court's prior orders." *Id.* at 11. In tortured logic, defendants suggested that the Supreme Court's statement ("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.") "did not authorize the early release of prisoners," or even the consideration of that question. *Id.* More to the point, our questions were about the timing of the development of such a system, not the actual

imposition of it. Defendants, nevertheless, refused to answer our questions. [11]

11 Defendants did appear to state, however, that, if the motion to modify were to be denied, they could comply with our Order with a six-month extension. *Id.* at 12 ("If the Court for some reason disagrees and insists that the final benchmark cannot be modified, Defendants' only method of achieving the 137.5% target, without the early release of prisoners or further legislative action to shorten prison time, would be to maintain the out-of-state program. If the Court were to order that the current out-of-state capacity be maintained and waived the associated state laws, the prison population should reach 137.5% by December 31, 2013."). Defendants offered no explanation, however, why they could not release low-risk prisoners early or obtain any necessary legislative action for other measures identified in our August 2009 Opinion & Order. As to the out-of-state prisoner program, which had been authorized under an Emergency Proclamation issued by Governor Schwarzenegger but still remained in effect, Governor Brown without prior notice subsequently terminated the Emergency Proclamation while announcing that the overcrowding problem had been solved.

We had asked other factual questions, which defendants did answer. In response to this Court's question whether modification proceedings could commence before the prison population reached 145%, defendants replied that they believed it would be premature to begin modification proceedings before the prison population reached 145%. Defs.' Resp. to Aug. 3, 2012 2d Order Requiring Further Briefing at 9–10 (ECF No. 2463/4226). In response to the question whether their population projections were flawed, defendants conceded that point and stated that they believed the prison population would reach 145% design capacity by February or March 2013, at which point they would seek modification. *Id.* at 10–11. As of the date of this order, the prison population is at 149.8% design capacity. CDCR, *Weekly Rpt. of Population,* June 12, 2013, *available at* http://www.cdcr.ca.gov/reports_research/offender_ information_service s_branch/WeeklyWed/TPOP1A/TPOP1Ad130612.pdf. Plaintiffs again asked this Court to find defendants in contempt, asserting that "[d]efendants have all but stated that they have no intention of complying with this part of the Court's Orders." Pls.' Request for Disc. & Order to Show Cause Re: Contempt at 1 (ECF No. 2467/4230).

In September 2012, this Court ruled on plaintiffs' pending motions, including their request that defendants be held in contempt, which we denied without prejudice. Sept. 7, 2012 Order Granting in Part & Denying in Part Pls.' May 9 and Aug. 22, 2012 Mots. (ECF No. 2473/4235). In the course of ruling on those motions, we commented that the question whether constitutional compliance could be achieved with a prison population higher than 137.5% design capacity "has already been litigated and decided by this Court and affirmed by the Supreme Court, and this Court is not inclined to permit relitigation of the proper population cap at this time." *Id.* at 2–3. Accordingly, this Court stated that we were "not inclined to entertain a motion to modify the 137.5% population cap based on the factual circumstances identified by defendants." *Id.* at 2. This Court further stated that it would, "however, entertain a motion to extend the deadline for compliance with the June 30, 2011 order." *Id.* at 3. We also ordered defendants to answer the questions to which they had failed to respond. *Id.*

***13** Defendants filed a response in which they answered our questions. Specifically, they stated that they would need six months to develop a system for identifying low-risk offenders for early release. Defs .' Resp. to Sept. 7, 2012 Order at 5 (ECF No. 2479/4243). Furthermore, defendants advised us that they could comply with our Order with a six-month extension, largely by maintaining the out-of-state program. *Id.* at 6. It appeared, from the parties' filings, that resolution was not far off: Even defendants acknowledged that they could comply by December 2013. The parties disagreed, but perhaps not irreconcilably, over whether defendants could comply by the original date for compliance, June 2013. Accordingly, in October 2012, this Court ordered both parties to meet and confer, to develop, and to submit (preferably jointly) "plans to achieve the required population reduction 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). The plans were due on January 7, 2013.

On January 7, 2013, both parties filed plans to meet the 137.5% population cap. Defendants suggested in their plan that, although compliance by June 2013 would require the outright release of thousands of prisoners "without a structured program," compliance by December 2013 would require virtually no such release of prisoners. Defs.' Resp. to Oct. 11, 2012 Order (ECF No. 2511/4284). Three other more significant events occurred, however, on or around that date, all indicating a troubling change in position on

the part of defendants. First, in their monthly status report, defendants stated that despite not being in compliance with this Court's order, they would take no further action to comply with it.[12] Defs.' Jan. 2013 Status Report at 1 (ECF No. 2518/4292) ("Based on the evidence submitted in support of the State's motions, further population reductions are not needed...."). Second, defendants filed a *motion to vacate or modify* this Court's Order. Defs.' Mot. to Vacate or Modify Population Reduction Order (ECF No. 2506/4280) ("Three–Judge Motion"). This motion did not await the defendants' reaching a 145% population cap, as they had said they would, *see supra* at n.9, or renew defendants' request to extend the deadline by six months. Rather, defendants requested complete vacatur of this Court's Order. *Id.* at 3. On the same day, defendants filed, in the *Coleman* court, a motion to terminate all injunctive relief in that case. Mot. to Terminate & to Vacate J. & Orders *(Coleman* ECF No. 4275). Notably, defendants did not file a similar motion in the *Plata* court. The *Coleman* court denied defendants' motion to terminate. Apr. 5, 2013 Order Denying Defs.' Mot. to Terminate *(Coleman* ECF No. 4539). Third, the Governor terminated his emergency powers, while arrogating unto himself the authority to declare, notwithstanding the orders of this Court, 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 ("[P]rison crowding no longer poses safety risks to prison staff or inmates, nor does it inhibit the delivery of timely and effective health care services to inmates.") .[13] This termination eliminated the legal authorization that permitted defendants to form contracts to house approximately 9,500 California prisoners in out-of-state prisons.[14] As the existing contracts expire, they will not be reauthorized. Consequently, the state prison population will increase by approximately 9,500 prisoners over the next several years. The Governor's declaration that the constitutional crisis in the prisons had ended and that overcrowding no longer posed health risks to prisoners or safety risks to prisoners or staff was contrary to fact and served no legal purpose other than, by terminating his own authority with regard to out-of-state prisoner housing, to make it more difficult for defendants to comply with this Court's orders while publicly proclaiming "Victory," or "Mission Accomplished."

12 In defendants' two subsequent status reports, they repeated verbatim the statement from their January report that they would not make any further attempts to comply with the Order. Defs.' Feb. 2013 Status Report at 1 (ECF No. 2538/4342) ("Based on the evidence submitted in support of the State's motions, further population reductions are not needed."); Defs.' March 2013 Status Report at 1 (ECF No. 2569/4402) (same).

13 Available at http://gov.ca.gov/news.php?id=17885.

14 The appropriations for housing California prisoners in out-of-state prisons had already been terminated by the Blueprint.

***14** On January 29, 2013, this Court stayed its consideration of the Three–Judge Motion. Jan. 29, 2013 Order at 2 (ECF No. 2527/4317). However, we granted defendants a six-month extension, even though no formal request had been made to this Court. *Id.* at 2–3. Finally, we once again ordered defendants to comply with our Order. *Id.* at 2 (ECF No. 2527/4317) ("Neither defendants' filings of the papers filed thus far nor any motions, declarations, affidavits, or other papers filed subsequently shall serve as a justification for their failure to file and report or take any other actions required by this Court's Order.").

E. *This Court's April 11, 2013 Opinion & Order Denying Defendants' Three–Judge Motion and April 11, 2013 Order Requiring List of Population Reduction Measures*

On April 11, 2013, this Court denied defendants' Three–Judge Motion and ordered them to "immediately take all steps necessary" to comply with our Order. Apr. 11, 2013 Op. & Order at 2 (ECF No. 2590/4541). This Court explained its rationale for rejecting defendants' modification request in a lengthy 71–page opinion. We briefly repeat our rationale here, noting one instance in which evidence available subsequent to the filing of our April 11, 2013 Opinion & Order confirms our conclusions.

We denied the Three–Judge Motion (as modified[15]) for three reasons. First, it was barred by res judicata principles as an improper attempt to relitigate the 137.5% figure, a predictive judgment that this Court had made and that the Supreme Court had specifically affirmed.[16] Second, defendants presented insufficient evidence to meet their burden under a Rule 60(b)(5) motion, which is to prove a "significant and unanticipated change in factual conditions warranting modification." *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 (1992)). The Receiver's 23rd Report, which was filed on May 23, 2013, subsequent to our April 11, 2013 Opinion & Order, further supports our conclusion that defendants failed to demonstrate that their various renovation projects, although adding some

treatment space, have added *adequate* treatment space to conclude that the overcrowding was no longer the primary cause of the ongoing constitutional violations:

15 Defendants' Three–Judge Motion presented two arguments for vacatur: that there are no longer ongoing constitutional violations regarding the failure to provide the requisite level of medical and mental health care and, even if there are, crowding is no longer the primary cause of those constitutional violations. Defendants later modified the Three–Judge Motion by withdrawing their request for this Court to decide either constitutional question and asked us to answer only the overcrowding question. 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.").

16 To the extent that defendants continue to insist that 137.5% design capacity is too low a figure, we note that the Receiver's 23rd Report calls for the opposite conclusion. He states that Realignment has transferred a disproportionately younger and thus healthier prison population to county jails. Receiver's 23rd Report at 32 (ECF No. 2636/4628). This proposition supports the conclusion that, if anything, the population cap should be lower, as the remaining prison population is less healthy than this Court assumed when it adopted the 137.5% figure in August 2009.

Sufficient additional space for healthcare has been added by the Receiver only at San Quentin and Avenal, and some additional space and beds for mental healthcare have been added pursuant to court orders in *Coleman.* As reported below, however, the State has not completed promised improvements and upgrades to healthcare space at the remainder of the prisons, and even though a plan to complete such construction was completed and agreed to four years ago, not a single upgrade project has broken ground and not even a single contract for design services has been entered into. The completion dates for these projects stretch into 2016 and 2017, far enough into the future that there is no reliable guarantee the projects will ever be undertaken.

***15** Simply put, 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, and we need the State to complete its promised construction.

Receiver's 23rd Report at 31 (ECF No. 2636/4628). [17] Third, in light of defendants' stated intention to increase the state prison population by 9,500 prisoners by eliminating the out-of-state prison program, defendants failed to demonstrate a "durable" solution that would justify this Court exercising its equity power to vacate a prior order. We denied the Three–Judge Motion and ordered defendants to comply with our Order and reduce the overall prison population to 137.5% design capacity by December 31, 2013.

17 We have received and reviewed Defendants' Response to the Receiver's 23rd Tri–Annual Report (ECF No. 2647/4650).

To ensure that defendants complied, this Court entered a separate order consisting of five parts. Apr. 11, 2013 Order (ECF No. 2591/4542). First, we ordered defendants to "submit a list ('List') of all prison population reduction measures identified or discussed as possible remedies in this Court's August 2009 Opinion & Order, in the concurrently filed Opinion & Order, or by plaintiffs or defendants in the course of these proceedings (except for out-of-state prisoner housing ...). Defendants shall also include on the List any additional measures that they may presently be considering." *Id.* at 1–2. Defendants were to list these measures "in the order that defendants would prefer to implement them, without regard to whether in defendants' view they possess the requisite authority to do so," and to provide various additional information for each measure on the List. *Id.* at 2. For example, we asked for "[d]efendants' best estimate as to the extent to which the measure would, in itself, assist defendants in reducing the prison population to 137.5% design capacity by December 31, 2013, including defendants' best estimate as to the number of prisoners who would be 'released,' *see* 18 U.S.C. § 3626(g)(4), as a result of the measure." *Id.* These estimates were to include both prospective and retroactive implementation of the measure, where applicable. *Id.*

Second, we ordered defendants to submit "a plan ("Plan") for compliance with the Order: [18] The Plan was to identify measures from the List that defendants propose to implement, without regard to whether in defendants' view they possess the requisite authority to do so." *Id.* at 3. Defendants were specifically ordered to explain:

18 "Order" was defined in the April 11, 2013 order the same way as "Order" is defined in this Opinion & Order. It refers to defendants' obligation to reduce the prison population to 137.5% design capacity by December 31, 2013.

For the measures included in the List but not in the Plan: defendants' reasons, excluding lack of authority, why they do not propose to implement these measures. Other reasons that shall be excluded are all reasons that were previously offered at the trial leading to this Court's August 2009 Opinion & Order and rejected in that Opinion & Order. *Id.* at 3. If defendants included a measure to slow the return of out-of-state prisoners, they were required to "include an estimate regarding the extent to which this measure would assist defendants in reducing the prison population to 137.5% design capacity by December 31, 2013" and to explain whether any such measure would provide a durable solution. *Id.* at 4.

***16** Third, we ordered defendants to "use their best efforts to implement the Plan." *Id.* at 4. For measures for which they possessed the requisite authority, this meant "[d]efendants shall immediately commence taking the steps necessary to implement the measure." *Id.* For measures for which they lacked such authority, this meant "[d]efendants shall forthwith attempt in good faith to obtain the necessary authorization, approval, or waivers from the Legislature or any relevant administrative body or agency." *Id.*

Fourth, we ordered defendants to update us on their progress towards implementing the Plan in their monthly reports. *Id.* For measures for which they possess the requisite authority, defendants were to commence taking all necessary steps immediately and, if they failed to do so, explain who is responsible and why. For measures for which they lacked such authority, we asked for information regarding their progress in acquiring legislative and administrative authorization.

Fifth, we ordered defendants "to develop a system to identify prisoners who are unlikely to reoffend or who might otherwise be candidates for early release, to the extent that they have not already done so." *Id.* at 5. "If defendants fail to reduce the prison population to 137.5% design capacity in a timely manner, this system will permit defendants to nevertheless comply with the Order through the release of low-risk prisoners." *Id.* Defendants were ordered to submit the List and Plan within 21 days of our April 11, 2013 order.

II. DISCUSSION

Defendants timely submitted the List and a Plan, although —as will be explained in detail *infra*—defendants' Plan does not comply with our Order. This Court therefore orders defendants to implement the Plan plus an additional population reduction measure as well. This additional measure, in conjunction with the measures included in the Plan submitted by defendants, will constitute the Amended Plan—a plan that will, unlike defendants', reduce the overall prison population to 137.5% design capacity by December 31, 2013.

A. *Defendants' Plan for Non–Compliance*

Defendants again directly defied this Court's orders, this time our April 11, 2013 order. By the terms of our April 11, 2013 order, defendants were required to submit a Plan for compliance with our Population Reduction Order as amended, i.e., to reduce the prison population to 137.5% design capacity by December 31, 2013. Apr. 11, 2013 Order at 3 (ECF No. 2591/4542). Under Realignment and the Blueprint (which was defendants' earlier "effort" to comply with the Order), the prison system is projected, on December 31, 2013, to contain 9,636 prisoners more than permitted by the Population Reduction Order. This includes several thousand prisoners who, under the Blueprint, are due to be returned to the state prison system sometime this year. *Id.; see also* CDCR Blueprint at 6–7 & App. G. Consequently, on December 31, 2013, the prison population was projected to be 149.3% design capacity rather than 137.5%. [19] Accordingly, we directed defendants in our April 11, 2013 order to propose a new Plan that would reduce the state prison population by 9,636 more prisoners by December 31, 2013.

19 The calculations throughout this Opinion & Order are based on projections for prison population and design capacity that defendants have either reported to us in various filings or stated in published reports (e.g., the Blueprint). We accept defendants' reported numbers because, not only does this Court have no independent method to determine such figures, but also plaintiffs have not objected to these numbers. Accordingly, we credit defendants fully with the additional design capacity resulting from construction to be completed between now and December 31, 2013.

We note, however, that defendants' previous estimate for the shortfall between the Blueprint and the 137.5% population figure was 8,790 prisoners. App. A to Grealish Decl. in Supp. of Defs.' Resp. to Oct.

11, 2012 Order (ECF No. 2512/4285). Based on defendants' May 2, 2013 filing, it is apparent that the shortfall is now 9,636 prisoners. Defendants have failed to explain why or how this estimate has changed by almost 1,000 prisoners. It appears to be attributable to an upward revision in the State's general population projections. Defendants' Spring 2013 population projections show the prison population to be higher than was expected in the Fall 2012 projections. Spring 2013 Adult Population Projections at 11, http:// www.cdcr.ca.gov/Repor ts_Research/ Offender_Information_Services_Branch/ Projections/ S13Pub.pdf

*17 It is clear that defendants failed to comply with our April 11, 2013 order, and they have now conceded as much. Defs.' Resp. to April 11, 2013 Order at 5 n.3, 37 (ECF No. 2609/4572) (acknowledging that its latest Plan will not achieve the 137.5% figure by December 31, 2013). Defendants, however, understate the extent of their own non-compliance. Defendants assert that their Plan would achieve a prison population of 140.7% design capacity by December 31, 2013. In fact, however, at best defendants' latest Plan would result in a prison population of 142.6% design capacity by December 31, 2013, assuming that the out-of-state prisoners are actually not to be returned (despite the Governor's termination of his authority to order them housed outside of California). In other words, Defendants submitted a Plan that at best would achieve essentially only half of the prisoner reduction required by our April 11, 2013 order. Demonstrating the discrepancy between defendants' assertions and the reality of their proposed Plan requires some explanation.

Defendants' Plan has five components: (1) expanding the use of fire camps; (2) leasing jail capacity from Los Angeles and Alameda county; (3) expanding good time credits for non-violent offenders prospectively (despite the agreement of all experts that the full expansion of good time credits, retroactively and for all prisoners, was the most promising population reduction measure); (4) expanding some parole categories; and (5) slowing the return of out-of-state prisoners. Defendants estimate the prisoner reduction from each of these measures as follows: [20]

20 Because our April 11, 2013 opinion ordered defendants to ensure that the estimated reductions from the measures in its Plan did not double count the same prisoners, Apr. 11, 2013 Op. & Order at 3 (ECF No. 2591/4542), we assume that the total reduction from the Plan is the simple sum of the individual measures in the Plan.

Component	Reduction by December 31, 2013
1) Fire camps	1,250
2) Leasing jail space	1,600
3) Good time credits (limited)	247
4) Expanding parole	400
5) Out-of-state prisoners not to be returned	3,569
Total achieved by Plan	7,066
Shortfall relative to 9,636 reduction required by population reduction order	2,570

Thus, if defendants were able to implement all the measures included in its Plan and if these estimates accurately reflected the prisoner population reduction that would be achieved under those measures, defendants would fail to comply with our April 11, 2013 order by a total of 2,570 prisoners—i.e., it would fall 27% short of the 9,636 reduction required by that order. Put another way, it would result in a prison population of 140.7% design capacity on December 31, 2013.

Defendants' estimates, however, include reductions that would not be attainable by December 31, 2013. Specifically, the second item on defendants' Plan is not attainable by that date because defendants concede that, even with complete authorization, they will need nine months to negotiate the necessary contracts and thus cannot "fully implement this measure" by the end of the year. Defs.' Resp. to April 11, 2013 Order at 7 (ECF No. 2609/4572). In fact, defendants do not assert that by December 31, 2013 their Plan would achieve any specific reduction in the prison population as a result of the reassignment of prisoners to leased jail space. Consequently, we cannot credit the Plan with the 1,600 prisoner reduction as a result of leasing jail capacity by December 31, 2013. With this adjustment, defendants' Plan is as follows:

Component	Reduction by December 31, 2013
1) Fire camps	1,250
2) Leasing jail space (1,600)	0

3) Good time credits (limited)	247
4) Expanding parole	400
5) Out-of-state prisoners not to be returned	3,569
Total achieved by Plan	5,466
Shortfall relative to 9,636 reduction required by population reduction order	4,170

***18** Eliminating the effect of the proposed jail leasing measure, defendants' Plan fails to comply with our April 11, 2013 order by a total of 4,170 prisoners—i.e., it falls 43% short of the 9,636 reduction required by that order. Put another way, defendants' Plan would actually result in a prison population of 142.6% design capacity on December 31, 2013. In short, defendants' Plan clearly fails to meet the design capacity limit ordered by this Court-and affirmed by the Supreme Court—by a significant amount.

Although defendants' Plan does not come close to meeting the population reduction required by our order, defendants also advise us that this deficient Plan cannot be immediately implemented because all but one of the measures included therein are contrary to state law. This includes the measure to slow the return of out-of-state prisoners, even though the legal authorization to house these prisoners out of state in the first place was provided by Governor Schwarzenegger's Emergency Proclamation, which Governor Brown terminated earlier this year on the erroneous legal ground that no constitutional violation existed any longer in the California prison system. In other words, defendants must now seek authorization (from the Legislature, or from this Court in the form of a waiver of state law) for a new measure that is required only because of the Governor's own prior action in terminating his own emergency authority, and his refusal to reinstate this authority. Defendants' June 17, 2013 status report indicates that they have proceeded no further in making the necessary preparations to implement the measures in the Plan other than to draft proposed legislation.[21] Defs.' June 2013 Status Report (ECF No. 2651/4653). Moreover, with regard to all measures that require authorization, the leader of the State Senate has declared them DOA, dead on arrival. Hardy Decl., ¶ 3, Ex. B (ECF No. 2628/4612). In sum, there is more than merely a substantial numerical deficiency with regard to defendants' Plan.[22]

21 The two exceptions are that they have (a) continued with construction of the California Health Care Facility in Stockton and the DeWitt Nelson Correctional Annex in Stockton; and (b) revised the 2013–2014 budget to include appropriations to increase fire camp capacity. Defs.' June 2013 Status Report 1–2 (ECF No. 2651/4653).

22 There are many other, although more minor, examples of how defendants have failed to follow the clear terms of our April 11, 2013 order. For example, defendants: failed to list the total number of prisoners who would be released as a result of the Plan (violating provision (2)(d) of the order); cited an excluded reason for failing to include various measures on the Plan (e.g., cited public safety as reason for not including expansion of good time credits for all prisoners) (violating provision (2)(e) of the order); failed to provide a substantive explanation as to how the Plan would provide a durable solution to the problem of overcrowding (violating provision (2)(f) of the order); failed to provide an estimate regarding the effect on durability of slowing the return of out-of-state prisoners (violating provision (2)(g) of the order); and failed to use their "best efforts" to implement the Plan. Additionally, defendants failed to provide the necessary information in their May monthly report required by provision (4)(b) of our order.

B. *The Need for Further Relief*

In responding to defendants' submission of a "Plan" that fails to comply with our Order, we begin again with the Supreme Court's prior decision:

> If government fails to fulfill its obligation [to provide care consistent with the Eighth Amendment], the courts have a responsibility to remedy the resulting Eighth Amendment violation. *See Hutto v. Finney,* 437 U.S. 678, 687, n. 9, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978). Courts must be sensitive to the State's interest in punishment, deterrence, and rehabilitation, as well as the need for deference to experienced and expert prison administrators faced with the difficult and dangerous task of housing large numbers of convicted criminals. *See Bell v. Wolfish,* 441 U.S. 520, 547–548, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).

> Courts nevertheless must not shrink from their obligation to "enforce the constitutional rights of all 'persons,' including prisoners." *Cruz v. Beto,* 405 U.S. 319, 321, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972) (per curiam). Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.

***19** *Plata,* 131 S.Ct. at 1928–29. There can be no reasonable dispute that Defendants have failed to meet their obligations. In August 2009, this Court found that defendants must reduce the prison population to 137.5% design capacity in order to resolve the underlying constitutional violations, and we ordered defendants to do so within two years. Aug. 4, 2009 Op. & Order at 183 (ECF No. 2197/3641). In June 2011, the Supreme Court affirmed that determination in full, stating that defendants "shall implement the order without further delay." *Plata,* 131 S.Ct. at 1947. Defendants have now had almost four years to comply with this Order, and we have afforded them another six months for ease of compliance. Defendants have not requested a further extension, yet they submitted a Plan that they concede will not achieve the necessary population reduction by December 31, 2013. Further, there is no indication that the Legislature will enact the necessary authorization for the Plan. Consequently, in the absence of further action by this Court, defendants have guaranteed what would be the perpetuation of constitutional violations in the California prison system for the indefinite future. *See* Receiver's 23rd Report at 35 ("Of greatest concern to the Receivership, the State has deliberately planned not to comply with the Three Judge Court's order to reduce population density to 137.5% of design capacity, a decision that directly impacts our ability to deliver a constitutional level of care.") (ECF No. 2636/4628). This Court cannot permit such a result. We are compelled to enforce the Federal Constitution and to "enforce the constitutional rights of all 'persons,' including prisoners." *Cruz v. Beto,* 405 U.S. 319, 321 (1972) (per curiam). Here, that means ensuring that defendants implement additional measures to reduce the prison population to 137.5% design capacity by December 31, 2013.

Thus far, this Court has taken care to limit the extent to which its orders tell defendants how to administer their prison system. Defendants, however, have continually responded to this Court's deference with defiance. Over the course of the last eighteen months, even as we recognized that defendants were not taking the steps necessary to comply with our Order and repeatedly ordered them to come into compliance, this Court has not ordered defendants to take particular steps or implement particular measures. We left such choices to defendants' discretion. Defendants, however, have refused to take the necessary additional steps beyond Realignment and the Blueprint. Despite this deliberate failure to comply with this Court's repeated orders, we have nevertheless recently granted defendants a six month extension, to afford them yet another opportunity to come into compliance. Additionally, when this Court rejected defendants' Three–Judge Motion, we again granted defendants discretion to design a Plan that would comply with our Order, notwithstanding the fact that the Three–Judge Motion was largely duplicative of defendants' prior request that we had previously advised them we were not inclined to grant. We also asked for a List of possible prison population reduction measures based on the expert testimony in the 14–day trial or on any other suggestion they might have, to be listed in defendants' order of preference. Defendants, however, submitted a Plan that clearly violated the terms of our April 11, 2013 order and refused to express any preference among the various other prison population reduction measures that had been suggested by national prison experts and others, including California prison officials. Regretfully, we are compelled to conclude that defendants must mistake the scope of their discretion. We are willing to defer to their choice for *how* to comply with our Order, not *whether* to comply with it.

***20** Defendants have consistently sought to frustrate every attempt by this Court to achieve a resolution to the overcrowding problem. In February 2012, we initially dismissed plaintiffs' request to investigate defendants' ability to comply with the population reduction order because we accepted defendants' assurances that the Fall 2011 population projections were unreliable. Then, the Spring 2012 projections proved to be largely identical. In May 2012, we did not order defendants to present a plan for complying with our Order, because defendants advised us that they would seek to modify our order. After inquiring closely into the basis for defendants' proposed modification, we explained why we were not inclined to grant any such modification. Rather than ordering defendants to submit a plan for compliance, however, we indicated our receptivity to a six-month extension and ordered settlement talks, by which we hoped that the parties could agree on a solution that would be to their mutual satisfaction. Defendants, however, refused to accede to any solution other than that of the Blueprint and filed a motion to vacate the population reduction order in its entirety. When we rejected this motion, we ordered defendants to submit a Plan for compliance within 21 days. Defendants responded in 21 days, but with a Plan for

noncompliance. In proposing the deficient Plan, the Governor declined to reinstate the emergency powers that he had recently ended erroneously and that would have enabled him to implement by far the largest of the proposed population reduction measures, insisting instead that legislation would be necessary (legislation that would later be declared "dead on arrival"). Defendants' responses to our questions, as well as their actions, have consistently been confusing, contradictory, and unhelpful. [23] Defendants have thus made it clear to this Court that they will not, on their own, comply with our Order.

23 Two examples come from defendants' May 29, 2013 filing. First, defendants assert 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). They have made similar statements in the past. *See, e.g.,* Defs.' Resp. to Apr. 11, 2013 Order at 39 (ECF No. 2609/4572). This statistic is misleading, as it includes reductions made between 2006 and 2009, before we issued our initial population reduction order.

Second, defendants claim that they have "taken all of the 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. *Id.* at 1. Defendants fail to acknowledge that they could have met the 137.5% cap by increasing capacity—a measure that would have reduced overcrowding without releasing prisoners—or, assuming that their representations concerning their inability to take the necessary actions is correct, they could have requested this court to waive restrictions upon which they now rely. Finally, we question the good faith of their arguments, as in January of this year Governor Brown terminated his own emergency authority with respect to the 9,500 prisoners housed out of state on the purported basis that the crisis in the prisons was over.

The Receiver has observed the same, if not worse, type of behavior in his own experience with defendants and their subordinates. We recite his report at length because it too demonstrates the need for further action by this Court:

> Over the course of the last two reporting periods, the substance and tone of leadership set by State officials has changed from acquiescence bordering on support for the Receiver's work, to opposition bordering on contempt for the Receiver's work and for implementation of court orders, including the orders of the Three Judge Court.
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> ...
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> The clear message to the field, from at least early 2012 until the present, is that court orders in Coleman and Plata, and orders from the Three Judge Court, are to be implemented only to the extent that State officials and their legal counsel deem desirable. This message of deliberate non-compliance undermines the legitimacy and integrity of all court orders in these cases and of the Receiver's turnaround plan initiatives. And when that message is reinforced by repeated statements by State leaders that reports from the Special Master in *Coleman* are not worth reading or following, that too many resources and too much money has been spent improving prison healthcare (which ignores the 20% reduction in the cost of prison medical care which the Receivership has achieved over the last four years), and that the State stands ready immediately to take over prison medical care from the Receiver notwithstanding the State's shortcomings, the result has been to freeze and ossify improvement efforts in the field. Clinicians and healthcare leaders in the field are naturally concerned that, when the Receiver leaves, CDCR leadership will tend to favor those who have supported the Administration's position over the Receiver's position and that hard fought changes will be immediately rolled back.
>
> ***21** In short, the tone from the top of the Administration that improvements in prison healthcare have gone too far and that necessary reductions in population density have gone too far interferes with our progress towards a final transition of prison medical care back to the State. We have lost at least six to nine months of time while the State seeks essentially to relitigate claims that it previously lost before the trial courts and the Supreme Court of the United States.

Receiver's 23rd Report at 35 (ECF No. 2636/4628). It is therefore pellucidly clear that if our Population Reduction Order is to be met, this Court must prescribe the specific actions that defendants must take in order to come into compliance. As the Supreme Court stated, "[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. At this point, this Court's "intrusion" into state affairs is necessitated by defendants' own intransigence. Furthermore, the degree of "intrusion" is minimal in this case. This Court asked defendants to list the possible prison population reduction measures in the order of their preference. Apr. 11, 2013 Order at 1–2 (ECF No. 2591/4542). Defendants, however,

chose to submit their List of possible prison population reduction measures "in no particular order of preference." Defs.' Resp. at 5 (ECF No. 2609/4572). Because defendants have expressed no preference at all among the measures on the List, they have forfeited any challenge to this Court's selection of the particular measures that we have ordered.

Our conclusion that we must order defendants to implement additional population reduction measures is compelled by *Hutto v. Finney.* In that case, the district court ordered a 30–day limit on solitary confinement to remedy ongoing Eighth Amendment violations. The Supreme Court fully recognized that such a specific remedy was rare, but affirmed. It did so because the state had repeatedly failed to correct the constitutional violations on its own accord:

> In fashioning a remedy, the District Court had ample authority to go beyond earlier orders and to address each element contributing to the violation. The District Court had given the Department repeated opportunities to remedy the cruel and unusual conditions in the isolation cells. If petitioners had fully complied with the court's earlier orders, the present time limit might well have been unnecessary. But taking the long and unhappy history of the litigation into account, the court was justified in entering a comprehensive order to insure against the risk of inadequate compliance.

437 U.S. 678, 687 (1978). Here, too, we face a "long and unhappy history of litigation." The underlying constitutional violations are the subject of cases that date back between twelve and twenty-three years, and this Court's current population reduction order dates back approximately four years. More important than the length of the litigation, however, has been defendants' conduct throughout. Defendants have continually equivocated regarding the facts and the law, and have consistently sought to delay the implementation of our Order. At the time of the population reduction order, defendants asked this Court to wait for "chimerical" possibilities. As the order was appealed to the Supreme Court, defendants insisted that the Three–Judge Court had been convened prematurely and that alternative remedies to a prisoner release order existed. The Court unhesitatingly rejected these arguments in light of defendants' decade-long failure to remedy the constitutional violations and expressly ordered defendants to "implement the order without further delay." *Plata,* 131 S.Ct. at 1947. That was hardly what followed. Within a year of the Supreme Court's decision, even though it was apparent that Realignment and the Blueprint would be insufficient to comply with our Order, defendants refused to take the necessary additional steps to reduce the prison population to 137.5% design capacity. Rather, they have used this Court's patience and good-faith attempts to achieve a resolution as an excuse for protracting these legal proceedings to a time that could hardly have been imagined when the litigation to constitutionalize California's prison conditions commenced over two decades ago. This Court has nevertheless afforded defendants "repeated opportunities" to bring its prison system into compliance by issuing multiple orders directing defendants to take all steps necessary to satisfy our Order. Most recently, after the filing of our April 11, 2013 Opinion & Order, defendants filed a notice of appeal, in which they stated that they would appeal our order in part because we "did not fully or fairly consider the evidence showing that the State's prisoner health care now exceeds constitutionals standards," Defs.' Notice of Appeal to the Supreme Court at 3 (ECF No. 4605/2621)—notwithstanding the fact that defendants expressly withdrew the question of constitutional compliance from this Court's consideration, *see* discussion *supra* at n. 15. Despite all of our efforts, defendants' conduct to date has persuaded this Court that anything short of an order to implement specific population reduction measures would be futile. Therefore, we issue the order we do today, although we would have greatly preferred that defendants had themselves chosen the means by which California's prison system would be brought into compliance with the Constitution.

C. *This Court's Amended Plan for Compliance*

***22** As explained above, the Plan defendants proffered would, if it could overcome the legal obstacles defendants continually foresaw, achieve a prison population reduction of only 5,466 prisoners between the date of our latest order in April 2013 and December 31, 2013. This is 4,170 prisoners short of the 9,636 necessary to achieve compliance with the Population Reduction Order by December 31, 2013. Thus, for the Amended Plan to comply with our Order, defendants must implement an additional measure or measures that will achieve a reduction of another 4,170 prisoners by the end of the year.

1. *Expansion of Good Time Credits*

A single measure is sufficient to remedy the 4,170 prisoner deficiency: the full expansion of good time credits set forth in Item 4 of defendants' List, submitted on May 2, 2013. The Plan defendants propose to implement includes a highly limited version of good time credits that applies prospectively only and applies to a limited number of prisoners. This limited version would result in the reduction of only 247 prisoners by December 31, 2013. Defs.' Resp. at 35 (ECF No. 2609/4572). If, however, defendants were to implement the full expansion of good time credits set forth in Item 4 of their List—i.e., prospectively and retroactively, for all prisoners—the measure would result in the additional reduction of as many as 5,385 prisoners by December 31, 2013. This is more than sufficient to remedy the 4,170 prisoner deficit and achieve the reduction in the prison population to 137.5% design capacity by December 31, 2013.

Defendants state their reasons for not including the full expansion of good time credits in their Plan as follows: (1) retroactive expansion results in the immediate release of some prisoners, threatening public safety; and (2) expansion of good time credits to prisoners convicted of violent offenses threatens the public safety. Defs.' Resp. at 35 (ECF No. 2609/4572).

We reject these arguments because they are contrary to the express factual findings that this Court has already made and that have been affirmed by the Supreme Court. As explained at length *supra* Section LB, 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, both prospectively and retroactively. Even defendants' expert agreed that there was no statistically significant relationship between early release through good time credits and recidivism. Furthermore, many jurisdictions (including a number of counties in California) had safely used the expansion of good time credits to reduce their prison populations. We therefore concluded that the expansion of good time credits is fully consistent with public safety, and the Supreme Court affirmed this determination.

***23** That the Supreme Court affirmed our factual findings with respect to good time credits is alone a sufficient basis for ordering defendants to implement their full expansion. As stated above (but worth repeating nevertheless), the Supreme Court has already stated that this Court's factual findings on public safety are to be credited over the contrary views of defendants:

> This [public safety] inquiry necessarily involves difficult predictive judgments regarding the likely effects of court orders. Although these judgments are normally made by state officials, they necessarily must be made by courts when those courts fashion injunctive relief to remedy serious constitutional violations in the prisons. These questions are difficult and sensitive, but they are factual questions and should be treated as such. Courts can, and should, rely on relevant and informed expert testimony when making factual findings. It was proper for the three-judge court to rely on the testimony of prison officials from California and other States. Those experts testified on the basis of empirical evidence and extensive experience in the field of prison administration.

Plata, 131 S.Ct. at 1942. We could stop here and order defendants to implement the full expansion of good time credits as set forth in Item 4 of their List. We nevertheless explain why neither of defendants' arguments casts any doubt on our prior factual findings.

Defendants' first argument is that the prospective application of good time credits for prisoners convicted of non-violent offenses is safe but that the retroactive application of these credits to these same prisoners is somehow not safe. In order to present a sound argument of this sort, defendants must demonstrate that individuals who benefit from retroactive application are more likely to commit crimes or recidivate than those who benefit from prospective application. They have, however, provided no support for this highly dubious proposition. Moreover, the evidence before this Court is to the contrary. The Receiver, for example, has endorsed the retroactivity of good time credits expansion as provided in Item 4 on defendant's List submitted on May 2, 2013. Receiver's 23rd Report at 33 (ECF No. 2636/4628) (stating that "expanding credits for minimum custody inmates, expanding milestone credits to include violent and second strikers, increasing credit earning limits

on certain inmates" "could be implemented retroactively to the time of sentencing to achieve maximum benefit"). Additionally, the state's own CDCR Expert Panel *(see* discussion *supra* at 10) recommended making the good time credits changes "retroactive" in the interest of achieving a more timely reduction in the prison population. CDCR Expert Panel, *A Roadmap for Effective Offender Programming in California: A Report to the California Legislature,* June 2007, at 95. Presumably, as a report commissioned by the CDCR, no such recommendation would have been made had it been inconsistent with public safety. As such, to the extent that defendants state their reason for not implementing the retroactive expansion of good time credits as "public safety," this Court rejects that reason as unfounded and contradicted by the evidence.

***24** Defendants' next argument—that good time credits should not be afforded to prisoners convicted of violent offenses—fares only slightly better. Not a single expert we heard drew any distinction between inmates convicted of violent and non-violent crimes for purposes of good time credits. The CDCR Expert Panel, on which we relied heavily, specifically recommended expanding good time credits for all prisoners, "including all sentenced felons regardless of their offense or strike levels." CDCR Expert Panel, *A Roadmap for Effective Offender Programming in California: A Report to the California Legislature,* June 2007, at 92.[24] That CDCR itself recommended extending good time credits to all prisoners further strongly supports the conclusion that there is no significant risk to public safety. In sum, defendants' arguments fail to call into question this Court's prior conclusion that the expansion of good time credits—retroactively and for all prisoners—would be fully consistent with public safety.[25]

24 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.

25 In implementing any good time credits program, the CDCR authorities presumably have the authority to prescribe regulations that ensure that good time credits may be withheld through the application of objective standards when necessary to avoid the premature release of individuals deemed to be particularly serious threats to the public safety.

This Court therefore orders defendants to implement the full expansion of good time credits, as set forth in Item 4 of their List submitted on May 2, 2013. There are, however, modifications that the defendants could make to the good time credits program that would result in the release of the same number of prisoners without releasing prisoners convicted of violent offenses. As a practical matter, none of these changes would 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 awarded. For example, defendants could extend 2–for–1 credit earning to prisoners other than those held in fire camps and minimum custody facilities, increase the available credit ratio for fire camp and minimum custody prisoners to over 2–to–1, increase the credit earning limit for milestone completion credits, or increase the credit earning capacity of non-violent offenders above 34 percent.[26] Plaintiffs' experts and defendants' experts disagree strongly on the changes in prison population that the good time credit measures on Item 4 of defendants' List would produce. Neither party's figures are satisfactorily allocated between violent and non-violent offenders; however, it seems clear from projections made using the numbers provided that moderate changes to the good time credit program could result in the release of an adequate number of prisoners to meet the December 31, 2013 benchmark of 137.5% without the release of violent offenders. Thus, if defendants prefer to amend the good time credit program and not release violent offenders, this Court offers them that option, provided that their amendments result in the release of at least the same number of prisoners as does the full expansion of good time credits, as outlined in Item 4 on their List. We leave it to defendants, however, to determine what modifications they wish to make to the expanded good time credit program in order to achieve the result contemplated by Item 4.

26 Other states have taken similar measures to expand their good time credit programs for non-violent offenders without a subsequent increase in recidivism. For example, in 2003, Washington increased the amount of good time credit available to certain nonviolent drug and property offenders from 33 percent to 50 percent of those offenders' sentences while lowering recidivism and crime rates. *See* Nat'l Conference of State Legislatures, *Cutting Corrections Costs: Earned Time Policies for State Prisoners* at 3 (July 2009), *available at* http://www.ncsl.org/documents/cj/earned_time_report.pdf

Another example is Indiana, which awards six months to two years of credits to prisoners who complete education programs. In contrast, defendants propose a credit-earning cap of six to eight weeks for similar "milestone completion." Defs.' Resp. to Apr. 11, 2013 Order at 10 (ECF No. 2609/4572). Dr. James Austin, plaintiffs' primary expert on good time credits, states that if defendants awarded prisoners four to six months of milestone completion credit and increased the number of programs available to prisoners to earn such credits, they could reduce the prison population by 7,000 prisoners with no adverse impact on public safety. Austin Decl. ¶¶ 12–15 (ECF No. 2420–1/4152–1). The CDCR's expert panel similarly recommended an average of four months for milestone completion credits. CDCR Expert Panel, *A Roadmap for Effective Offender Programming in California: A Report to the California Legislature,* June 2007, at 92.

2. *List of Low–Risk Prisoners*

***25** On April 11, 2013, this Court ordered defendants "to develop a system to identify prisoners who are unlikely to reoffend or who might otherwise be candidates for early release." Apr. 11, 2013 Order at 5 (ECF No. 2591/4542). We further specified that the system should be designed "such that it will be effective irrespective of defendants' partial or full implementation of some or all measures in the Plan." *Id.* This part of our order was based on the Supreme Court's statement that we may "in our discretion" consider whether to order defendants to begin to develop such a system, to be used in the event that it becomes "necessary to release prisoners to comply with the court's order." *Plata,* 131 S.Ct. at 1947. Under the terms of our April 11, 2013 order, defendants are to report to us on their progress in approximately two months, Apr. 11, 2013 Order at 5 (ECF No. 2591/4542), and Secretary Beard acknowledged in his May 3 press conference that defendants are making some progress in developing a list of low-risk prisoners to release ("the Low–Risk List"), if necessary or desirable, CDCR Press Conference May 3, 2013, *available at* http://www. cdcr.ca.gov/News/3_Judge_panel_decision.html. We now order defendants to use the Low–Risk List to remedy any deficiency in the number of prisoners to be released in order to meet the 137.5% population ceiling by December 31, 2013, if for any reason defendants do not reach that goal under the Amended Plan as implemented.

This Court wishes to make it perfectly clear what this means: Defendants have no excuse for failing to meet the 137.5% requirement on December 31, 2013. No matter what implementation challenges defendants face, no matter what unexpected misfortunes arise, defendants shall reduce the prison population to 137.5% by December 31, 2013, even if that is achieved solely through the release of prisoners from the Low–Risk List. This Court acknowledges that requiring defendants to create such a list may prove unnecessary should defendants' implementation of the Amended Plan otherwise result in a reduction in the prison population to 137.5% design capacity by December 31, 2013. However, in the past, defendants have repeatedly found new and unexpected ways to frustrate this Court's orders. Accordingly, the Low–Risk List is intended to obviate any such action. We repeat, defendants shall reduce the prison population to 137.5% by December 31, 2013, in the manner specified in the Amended Plan or through the use of the Low–Risk List, if that proves necessary or desirable.

3. *Reporting*

Instead of submitting monthly reports, defendants shall hereafter submit reports every two weeks that include all of the information that we have previously ordered be given in the monthly reports as well as the specific steps defendants have taken toward implementing each measure in the Amended Plan, any proposed substitutions, and the status of the development of the Low–Risk List. The first report shall be submitted two weeks from the date of this Order. Defendants are to submit a "benchmark" report for December, detailing defendants' progress in meeting the 137.5% population cap, as set forth in our previous order explaining the requirements for such reports. *See* June 30, 2011 Order Requiring Interim Reports at 1–2 (ECF No. 2374/4032). This report shall be submitted no later than December 15, 2013. Defendants shall include in this report (a) the total number of prisoners in California institutions as of December 1, 2013, (b) the number of prisoners permitted under the 137.5% population cap on December 31, 2013, and (c) the number of prisoners, if any, whom defendants expect to release between December 1, 2013 and December 31, 2013. Defendant shall include any additional information necessary for this Court to determine how many prisoners must be released prior to December 31, 2013, and whether defendants plan to release them through the use of the Low–Risk List or some alternative vehicle, such as the adoption of another measure or measures contained on the List that defendants submitted on May 2, 2013. If the latter, there shall be sufficient factual data to prevent this Court to accept or reject the proposal without further inquiry.

4. *Waiver of State and Local Laws and Regulations*

***26** With respect to all measures in the Amended Plan, this Court provides the necessary authorization for defendants to begin implementation immediately. Under the PLRA, this Court may order "prospective relief that requires or permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law" so long as "(i) Federal law requires such relief to be ordered in violation of State or local law; (ii) the relief is necessary to correct the violation of a Federal right; and (iii) no other relief will correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(B). All three conditions have been met, as explained in our August 2009 Opinion & Order and our April 11, 2013 Opinion & Order. To reiterate, defendants have advised us that none of the measures in the Amended Plan (except for the expanded use of fire camps) may be implemented without waiving state laws. The implementation of these measures is required by federal law notwithstanding the violation of state or local laws, and no other relief will correct the violation of plaintiffs' constitutional rights. Accordingly, defendants and their subordinates are ordered to implement the Amended Plan, or any actions authorized by it, notwithstanding any state or local laws or regulations to the contrary.

It appears to us that the simplest, most direct, and most effective remedy is for us to waive, to the extent necessary to implement the Amended Plan, Penal Code Sections 1170, 2900, and 2901, and any other local and state laws and regulations requiring that persons convicted of a felony be housed in a state prison until the end of the term of sentence. We also waive—to the extent necessary to implement the Amended Plan—the State's Administrative Procedure Act and any and all local and state laws and regulations regarding the housing of California prisoners in other states. [27]

27 This waiver is limited to the 3,569 out-of-state prisoners that defendants wish not to be returned to California as scheduled. It is not a permanent waiver of all state laws and regulations regarding housing California prisoners in other states.

Although we do not believe that further waivers are necessary, the state has advised us of additional laws and regulations that it believes must be waived in order to carry out the Amended Plan. *See* Defs.' Resp. to Apr. 11, 2013 Order (ECF No. 2609/4572). We waive these additional laws and regulations, which we list in Appendix A to this Opinion & Order. To the extent that any other state or local laws or regulations impede the immediate implementation of the Amended Plan, we waive those as well, and direct defendants to provide us with a list of such laws and regulations within 20 days of this Opinion & Order. Our purpose for waiving these laws and regulations is to enable defendants to implement or commence implementation of all measures in the Amended Plan immediately. We will therefore not accept as a reason for non-compliance any contention that our Order failed to waive the necessary laws or regulations. Defendants must act forthwith as if they have full legal authorization to do so.

We recognize that defendants have stated that they are seeking legislative approval of the measures in their Plan and that therefore we should delay our issuance of this order, or more specifically our waiver of contrary state laws and regulations, until such efforts have been exhausted. However, as of the date of this Order there is nothing to suggest that defendants have made any progress beyond preliminarily drafting proposed legislation, *see* Defs.' June 2013 Status Report at 2 (ECF No. 2651/4653), Toche Decl., ¶ 3 (ECF No. 2652/5655), and it is entirely unrealistic to believe that the drafted legislation, once submitted, will be approved. Governor Brown has stated that he will prepare the necessary legislation but will not urge its adoption. The leader of the State Senate has announced that defendants' Plan will be DOA, "dead on arrival." Hardy Decl., ¶ 3, Ex. B (ECF No. 2628/4612). Much like defendants' argument that a prisoner release order is unnecessary as the Legislature might fund additional construction, any notion that the California Legislature will authorize the measures in the Plan is "chimerical." The Supreme Court refused to "ignore the political and fiscal reality behind this case," *Plata,* 131 S.Ct. at 1939, and we will follow that lead. [28] Waiting months for what is unlikely legislative authorization will simply amount to yet another unnecessary delay in the resolution of the ongoing constitutional violations in the California prison system. This Court will not accept such needless delay.

28 The challenger in the next gubernatorial campaign is making the topic of prison reform already accomplished, i.e., Realignment, a central component of his platform. Phil Willon, *Abel Maldonado Takes On Jerry Brown, Prison Realignment,* Los Angeles Times, May 25, 2013, http:// www.latimes.com/news/local/la-me-maldonado-prisons20130526,0,5415462.story. This makes it even less likely that Governor Brown will urge the passage of the Plan or that the Legislature will grant its approval.

D. *The Problem of Durability, the Need for Further Information, and the Retention of Continuing Jurisdiction*

*27 The Amended Plan that we order defendants to implement today necessarily entails a problem that we cannot resolve at this time. Simply achieving a prison population at 137.5% design capacity on December 31, 2013, will not cure the constitutional violations if the population increases substantially the next day or over the next few months. What is necessary is that the prison population remain at or below 137.5% design capacity so that defendants may then remedy (as they are currently unable to do) the underlying constitutional violations. In other words, what is necessary is a "durable" solution to the problem of overcrowding if the underlying problem of the deprivation of prisoners' constitutional rights is to be resolved. *Cf. Home v. Flores,* 557 U.S. 433, 447 (2009).

The Amended Plan, which should result in a maximum prison population of 137.5% design capacity on December 31, 2013, will likely not in itself provide a "durable" solution to the problem of overcrowding and therefore of unconstitutional medical and mental health care, for three reasons. First, the measure that is significantly responsible for reducing the prison population to 137.5% design capacity on December 31, 2013—the measure to "slow the return of inmates housed in private contract prisons in other states," Defs.' Resp. at 33 (ECF No. 2609/4572)—appears to be temporary and its effects likely to be counteracted when the prisoners now housed in other states are returned to California in 2014 or later. Second, it appears that the state prison population is growing in excess of defendants' projections. Third, defendants assume that they will shortly be able to construct minor facilities that will provide additional design capacity, despite the fact that, in the past, the timely building of such construction projects has proven unreliable due to a lack of administrative approvals and legislative appropriations.

Our concern regarding durability begins with the Blueprint, in which defendants acknowledge that the prison population as a ratio of design capacity is projected to *increase* progressively from years 2014 through 2016. *See* CDCR Blueprint at App. G. Much of this projected increase appears to be attributable to the fact that the Blueprint eliminates funding for defendants' program that housed 9,500 prisoners out-of-state. *Id.* at 6–7. Defendants have repeatedly objected to the expense of such a program, which they advised us costs $300 million a year. *See* Defs.' Resp. to Aug. 3, 2012 2d Order Requiring Further Briefing at 12 (ECF No. 2463/4226). Accordingly, defendants' Blueprint eliminated funding for the out-of-state program. The necessity to house in the California prison system the large number of prisoners who would have been confined in other states over the next two years, but for the termination of the out-of-state prison housing program, will result in a significant increase in the state prison population. This increase will significantly exceed the additional design capacity that defendants project from the construction of additional prison facilities during that period.

*28 Defendants do *not* describe the measure in their Plan regarding slowing the return of prisoners housed out of state as one to "restore the out-of-state prison program." Rather, they describe the measure as "slow[ing] the returning inmates to California as called for in the Blueprint." Defs.' Resp. at 33 (ECF No. 2609/4572). Defendants do not explain what "slowing the return" means with respect to the prisoners due to be returned between now and December 31, or those due to be returned in 2014. If the planned return this year is slowed down, defendants will likely bring back all the prisoners scheduled to be returned this year and next year during 2014, including the 3,569 due to be returned this year. If so, the slowed down return does not contribute to a durable solution —quite the contrary.

In order to assess accurately the full long-run effect of the elimination of the out-of-state prisoner program on the durability of the Amended Plan, we require much more information from defendants. It appears quite likely, however, that under the Amended Plan the prison population will rise significantly over the next two years, both as an absolute number and as a ratio of design capacity.

Furthermore, the California prison population is likely to increase faster than defendants' projections suggest. We have already noted in this opinion the numerous instances in which defendants have initially reported to us an estimate for the prison population that later proved inaccurate when compared to subsequent reports. In short, defendants' projections consistently underestimated the state prison population. There are many possible reasons for this. One might be that Realignment is having a less significant effect in reducing the population of prisoners than defendants expected it to have. Another might be that the state of California's general population is growing at a faster rate than defendants anticipated. Whatever the reasons, the inaccuracy in defendants' prison population projections are reflected in the Amended Plan, because we have relied on defendants' reported numbers in all of our calculations. Accordingly, if—as is likely—the prison population grows faster than defendants expect, the Amended Plan will fail to

maintain the 137.5% design capacity necessary to remedy the constitutional violations.

Finally, defendants intend to add design capacity through two major construction projects and various minor upgrades. Defendants' intention is generally a positive one, and we have credited defendants with the 1,722 beds that they expect to add and thus to increase design capacity this calendar year. We must recognize, however, the continuing problems with respect to administrative approvals and legislative appropriations that defendants have faced in making progress with their construction projects. Indeed, as the Receiver recently reported, some of these minor upgrade projects have already been subject to delays in funding and approval. *See* Receiver's 23rd Report at 21 (ECF No. 2636/4628). It is therefore possible that defendants' anticipated construction plans for 2014 may be similarly delayed, which would certainly exacerbate the durability issues under the Amended Plan.

***29** It will be necessary to see how these many factors affect the 137 .5% design capacity ratio that is necessary to achieve constitutional compliance. This Court will retain jurisdiction for at least some reasonable period of time to determine how the Amended Plan and the various factors will affect the prison population and the design capacity ratio. This Court may have to determine, based on information to be provided by defendants, what additional steps may be necessary to maintain that ratio, and whether defendants have an adequate plan for doing so. Sometime before the end of the year, defendants shall provide this Court with updated population projections for 2014–2015 under various conditions, including those contemplated in the Blueprint and the Amended Plan, and with whatever other information may be useful to this Court in assessing the conditions inside and outside the state prison system that explain why and how the prison population is changing. We will inform defendants when this information should be submitted and the precise nature of the information we desire to receive at a later date.

E. *Order*

Defendants are hereby ordered to implement the Amended Plan that shall consist of:

(a) the measures proposed in defendants' Plan submitted on May 2, 2013;[29] and

29 Defendants are not required, however, to implement the "Contingency Measures" listed in their Plan because, as defendants acknowledge, these measures cannot be implemented by December 31, 2013. Defs.' Resp. to Apr. 11, 2013 Order at 33 (ECF No. 2609/4572).

(b) a measure consisting of the expansion of good time credits, prospective and retroactive, set forth in Item 4 of defendants' List submitted on May 2, 2013.

If for any reason the implementation of the measures in the Amended Plan does not result in defendants reaching the 137.5% population ceiling by December 31, 2013, defendants shall release enough additional prisoners to do so by using the Low–Risk List. Defendants are ordered to take all steps necessary to implement the measures in the Amended Plan, commencing forthwith, notwithstanding any state or local laws or regulations to the contrary. 18 U.S.C. § 3626(a)(1)(B). All such state and local laws and regulations are hereby waived, effective immediately. This includes all laws that defendants identified in their May 2, 2013 filing as impeding the implementation of the measures in the Amended Plan. We list those laws in Appendix A. To the extent that waiver of any laws and regulations other than those listed in Appendix A is necessary to effectuate the Amended Plan, those laws are also waived, and defendants shall provide us with a list of such laws within 20 days of this Order.

Instead of submitting monthly reports, defendants shall hereafter submit reports every two weeks that shall include all the information that we have previously ordered given in the monthly reports as well as the specific steps defendants have taken toward implementing each measure in the Amended Plan, and the status of the development of the Low–Risk List. The first report shall be submitted two weeks from the date of this Order. Defendants shall also submit a benchmark report, as explained *supra* at 43–44, by December 15, 2013.

***30** This Court desires 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. Accordingly, defendants may, if they wish, make any or all of three substitutions. First, in place of subsection (b) defendants may, if they prefer, revise the expanded good time credit program 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 expanded good time credit program. We leave it to defendants to determine the

particular modifications they wish to make. Defendants must inform this Court, however, of their decision to make such changes.

Second, defendants may substitute for any group of prisoners who are eligible for release under the Amended Plan a different group consisting of no less than the same number of prisoners pursuant to the Low–Risk List. Any substitution or release of prisoners from the Low–Risk List shall be in the order in which they are listed, individually or by category. Defendants need not obtain prior approval for such a substitution, but they must inform this Court that they intend to make it.

Third, defendants may, with this Court's approval, substitute any group of prisoners from the List (i.e., 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. Defendants must provide this Court with incontestable evidence that the substitution will be completed by December 31, 2013. An example of such a substitution would be the substitution of those "Lifers" who, due to age or infirmity, are adjudged to be "low risk" by CDCR's risk instrument. *See* Apr. 11, 2013 Op. & Order at 67–69 (ECF No. 2590/4541). Another example is prisoners who have nine months or less to serve of their sentence and, rather than being sent to state prison, could serve the duration of their sentences in county jails. *See* Aug. 4, 2009 Op. & Order at 149–52 (ECF No. 2197/3641). Or to the extent that defendants are able to reassign prisoners to leased jail space before December 31, 2013, they can substitute members of this group of prisoners for an equal number of prisoners on the Amended Plan.

Absent the three categories of substitutions described above, defendants are ordered to implement the Amended Plan as is. This Court retains jurisdiction over these proceedings pending further order of the Court.

III. CONTEMPT

Plaintiffs have again requested that this Court issue an order to show cause why defendants should not be held in contempt. Pls.' Resp. & Req. for Order to Show Cause Regarding Defs.' Resp. to Apr. 11, 2013 Order at 2 (ECF No. 2626/4611). Their request has considerable merit. We explained at length in our April 11, 2013 Opinion & Order how defendants' conduct between June 2011 and March 2013 has included a series of contumacious actions. Apr. 11, 2013 Op. & Order at 63–65 (ECF No. 2590/4541). The most recent, and perhaps clearest, example of such an action is defendants' failure to follow the clear terms of our April 11, 2013 order, requiring them to submit a Plan for compliance with our Order, not a Plan for non-compliance. This Court would therefore be within its rights to issue an order to show cause and institute contempt proceedings immediately. Our first priority, however, is to eliminate the deprivation of constitutional liberties in the California prison system. To do so, we must first ensure a timely reduction in the prison population to 137.5% design capacity by December 31, 2013. We will therefore **DEFER** ruling on plaintiffs' motion, and defer instituting any contempt proceedings related to defendants' prior acts until after we are able to determine whether defendants will comply with this order, including the filing of bi-weekly reports reflecting the progress defendants have made toward meeting the requirements of the Order issued June 30, 2011. The Supreme Court has stated that contempt proceedings must be a remedy of last resort. *Spallone v. United States,* 493 U.S. 265, 276 (1990) (stating that a federal court must "use the least possible power adequate to the end proposed" in exercising its remedial powers (internal citations omitted)). We leave that problem for another time. Today, we order defendants to immediately take all steps necessary to implement the measures in the Amended Plan, notwithstanding any state or local laws or regulations to the contrary, and, in any event, to reduce the prison population to 137.5% design capacity by December 31, 2013, through the specific measures contained in that plan, through the release of prisoners from the Low–Risk List, or through the substitution of prisoners due to other measures approved by this Court. Failure to take such steps or to report on such steps every two weeks shall constitute an act of contempt.

***31 IT IS SO ORDERED.**

APPENDIX A

Laws Identified by Defendants as Requiring Waiver for Implementation of the Amended Plan [1]

Footnotes

2 Defendants do not list any state laws preventing them from implementing this measure and cite only the need

for a legislative appropriation. Defs.' Resp. to Apr. 11, 2013 Order at 33 (ECF No. 2609/4572).

1 We take these laws directly from defendants' May 2, 2013 filing. *See* Defs.' Resp. to Apr. 11, 2013 Order (ECF No. 2609/4572). We reiterate that this list is not exclusive and we will not accept as a reason for non-compliance any contention that it omits a necessary law. Defendants must proceed as if they have full legal authorization to implement the Amended Plan.

Component	Law
1) Fire camps	—
2) Leasing jail space	Cal. Gov't Code §§ 4525–4529.0, 4530–4535.3, 7070–7086, 7105–7118, & 14835–14837
	Cal. Gov't Code §§ 13332.10, 14660, 14669, 15853
	Cal. Gov't Code § 14616
	Cal. Gov't Code § § 18500 *et seq.*
	Cal. Gov't Code § 19130(a)(3)
	Cal.Penal Code § 1170(a)
	Cal.Penal Code § 1170(h)(3)
	Cal.Penal Code § 1216
	Cal.Penal Code § 2900 & 2901
3) Good time credits (full)	Cal. Penal Code § 2933.05(a), (e)
	Cal.Penal Code § 2933.1
	Cal.Penal Code § 2933.3
	Cal.Penal Code § 667(c)(5)
	Cal.Penal Code § 1170.12(a)(5)
	Cal.Code Regs. tit 15 § § 3042 *et seq.* & 3044(b)(1)
	Cal Gov't Code § § 11340 *et seq.*
4) Expanding parole	Cal. Penal Code § 3550
5) Out-of-state prisoners not to be returned[2]	—

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Exhibit B

2013 WL 1500989
Only the Westlaw citation is currently available.
United States District Court,
E.D. California and
N.D. California.

Ralph COLEMAN, et al., Plaintiffs,
v.
Edmund G. BROWN JR., et al., Defendants.
Marciano Plata, et al., Plaintiffs,
v.
Edmund G. Brown Jr., et al., Defendants.

Nos. 2:90–cv–0520 LKK JFM P,
C01–1351 TEH. | April 11, 2013.

Synopsis
Background: State prison inmates brought Eighth Amendment challenges to adequacy of mental health care and medical health care provided to mentally ill inmates and general prison population, respectively. Inmates moved to convene three-judge panel of district court to enter population reduction order that was necessary to provide effective relief. Motions were granted, 2007 WL 2122657 and 2007 WL 2122636, and cases were assigned to same panel, which ordered state to reduce prison population to 137.5% of design capacity, see 2010 WL 99000,affirmed by 131 S.Ct. 1910, 179 L.Ed.2d 969. State moved to vacate or modify population reduction order.

Holdings: The three-judge panel of the District Court held that:

[1] state's contention that prison crowding was reduced and no longer a barrier to providing inmates with care required by Eighth Amendment did not provide basis for motion to vacate order on ground that changed circumstances made it inequitable to continue applying order;

[2] state failed to establish that prison crowding was no longer barrier to providing inmates with care required by Eighth Amendment, as would warrant vacatur of order;

[3] state failed to establish it had achieved durable remedy to prison crowding, as required for vacatur of order; and

[4] requirement that state propose plan for institution-specific population caps was not warranted as additional.

Motion denied.

West Headnotes (16)

[1] **Evidence**
Judicial Proceedings and Records

On state's motion to vacate order requiring it to reduce prison population to 137.5% of design capacity, three-judge panel of district court would take judicial notice of specific filings relevant to question of prison crowding, which had been made in inmate's action alleging state failed to provide constitutionally adequate mental health care to mentally ill inmates in violation of Eighth Amendment. U.S.C.A. Const.Amend. 8; Fed.Rules Civ.Proc.Rule 60(b)(5), 28 U.S.C.A.

[2] **Federal Civil Procedure**
Hearing and Determination

State waived hearsay objection to admission of declaration describing reports submitted by state explaining need for further improvements to medical treatment space in state prison system, where state relegated objection to mere footnote and failed to provide supporting legal analysis in its motion to strike declaration, which was submitted by inmates in opposition of state's motion to vacate order of three-judge panel of district court that required state to reduce prison population to 137.5% of design capacity in order to provide remedial relief for Eighth Amendment violations in provision of mental health care and medical care to inmates. U.S.C.A. Const.Amend. 8; Fed.Rules Civ.Proc.Rule 60(b)(5), 28 U.S.C.A.

[3] **Federal Civil Procedure**
Hearing and Determination

State prison inmates' arguments that little weight should be given to declarations of Inspector General and Secretary of California Department of Rehabilitation and Corrections were based on logic, and thus lack of supporting evidence provided no ground for striking arguments from inmates' opposition to state's motion to vacate order of three-judge panel of district court that required state to reduce prison population to 137.5% of design capacity in order to provide remedial relief for Eighth Amendment violations in provision of mental health care and medical care to inmates. U.S.C.A. Const.Amend. 8; Fed.Rules Civ.Proc.Rule 60(b)(5), 28 U.S.C.A.

[4] **Federal Civil Procedure**
Amending, Opening, or Vacating
Federal Civil Procedure
Grounds
Injunction
Grounds in General
Injunction
Evidence and Affidavits

Party seeking relief from a final judgment or order on ground that applying it prospectively is no longer equitable bears the burden of establishing that changed circumstances warrant relief, but once a party carries this burden, a court abuses its discretion when it refuses to modify an injunction or consent decree in light of such changes. Fed.Rules Civ.Proc.Rule 60(b)(5), 28 U.S.C.A.

[5] **Federal Civil Procedure**
Grounds

Party seeking relief from a final judgment or order on ground that applying it prospectively is no longer equitable may not meet its initial burden of establishing a significant change in circumstances by challenging the legal conclusions on which the judgment or order rests, rather, moving party must point to a significant change either in factual conditions or in law that renders continued enforcement of a final judgment inequitable. Fed.Rules Civ.Proc.Rule 60(b)(5), 28 U.S.C.A.

[6] **Federal Civil Procedure**
Grounds

Party seeking relief from a final judgment or order on ground that applying it prospectively is no longer equitable due to a change in the law must generally demonstrate that the statutory or decisional law has changed to make legal what the decree was designed to prevent. Fed.Rules Civ.Proc.Rule 60(b)(5), 28 U.S.C.A.

[7] **Federal Civil Procedure**
Grounds

Party seeking relief from a final judgment or order on ground that applying it prospectively is no longer equitable due to a change in facts must demonstrate: (1) that changed factual conditions make compliance with the decree substantially more onerous; (2) that the decree is unworkable because of unforeseen obstacles; or (3) that enforcement of the decree without modification would be detrimental to the public interest. Fed.Rules Civ.Proc.Rule 60(b)(5), 28 U.S.C.A.

[8] **Federal Civil Procedure**
Grounds

Party seeking relief from a final judgment or order on ground that applying it prospectively is no longer equitable due to a change in facts may not rely on events that actually were anticipated at the time of the judgment or order. Fed.Rules Civ.Proc.Rule 60(b)(5), 28 U.S.C.A.

[9] **Federal Civil Procedure**
Hearing and Determination

State would be permitted to modify its arguments in support of its motion to vacate order of three-judge panel of district court that required state to reduce prison population to 137.5% of design capacity, by abandoning argument that state was now providing mental health care and medical care to inmates in compliance with Eighth Amendment, and seeking vacatur only on ground that prison crowding was

no longer barrier to providing adequate care; although inmates devoted substantial portion of their opposition on constitutional compliance, they were not prejudiced by modification that limited evidentiary and legal support for state's position. U.S.C.A. Const.Amend. 8; Fed.Rules Civ.Proc.Rule 60(b)(5), 28 U.S.C.A.

[10] **Federal Civil Procedure**

Grounds

State's contention that prison crowding was reduced and no longer a barrier to providing inmates with the mental health and medical care required by Eighth Amendment did not provide basis for motion to vacate order of three-judge panel of district court, which required state to reduce prison population to 137.5% of design capacity, on ground that changed circumstances made it inequitable to continue applying order; state identified neither change in law nor in the facts, but merely sought to relitigate legal conclusion that Eighth Amendment compliance could not be achieved with prison population above 137.5% design capacity. U.S.C.A. Const.Amend. 8; Fed.Rules Civ.Proc.Rule 60(b)(5), 28 U.S.C.A.

[11] **Federal Civil Procedure**

Grounds

State failed to establish that prison crowding was no longer barrier to providing inmates with the mental health and medical care required by Eighth Amendment, as would warrant vacatur of order of three-judge panel of district court, which required state to reduce prison population to 137.5% of design capacity, on ground that changed circumstances made it inequitable to continue order; state partially complied with order by reducing population to 150% of capacity, but there was no evidence of significant change in conditions such as inadequate treatment space and severe staff shortages that were caused by crowding and prevented provision of adequate care. U.S.C.A. Const.Amend. 8; Fed.Rules Civ.Proc.Rule 60(b)(5), 28 U.S.C.A.

[12] **Federal Civil Procedure**

Grounds

State failed to establish it had achieved durable remedy to prison crowding that prevented state from providing inmates with the mental health and medical care required by Eighth Amendment, as required for vacatur of order of three-judge panel of district court, which required state to reduce prison population to 137.5% of design capacity, on ground that changed circumstances made it inequitable to continue order; although state's partial compliance with order reduced population to 150% of capacity, state planned to end program to house inmates out of state, which would increase capacity to 162% capacity. U.S.C.A. Const.Amend. 8; Fed.Rules Civ.Proc.Rule 60(b)(5), 28 U.S.C.A.

[13] **Federal Courts**

Criminal Matters; Obscenity Laws

State continued to provide inadequate mental health and medical care to prison inmates in violation of Eighth Amendment, as required for continued enforcement of order of three-judge panel of district court that required state to reduce prison population to 137.5% of design capacity to achieve compliance with Eighth Amendment. U.S.C.A. Const.Amend. 8; 18 U.S.C.A. § 3626(a).

[14] **Federal Courts**

Criminal Matters; Obscenity Laws

Existence of an ongoing constitutional violation is required for a prisoner release order by a three-judge panel of a district court. 18 U.S.C.A. § 3626(a).

[15] **Federal Courts**

Criminal Matters; Obscenity Laws

Requirement that state propose plan for institution-specific population caps was not warranted as additional relief to order of three-

judge panel of district court that required state to reduce prison population to 137.5% of design capacity to remedy Eighth Amendment violations in provision of mental health and medical care to inmates; additional relief was premature, as it had not yet been demonstrated that single systemwide cap provided inadequate relief, and additional relief would also undermine flexibility state needed to achieve compliance with order. U.S.C.A. Const.Amend. 8.

[16] **Federal Courts**

Criminal Matters; Obscenity Laws

In light of state's openly contumacious conduct in failing to take necessary steps to comply with order of three-judge panel of district court to reduce prison population to 137.5% of design capacity to remedy Eighth Amendment violations in provision of mental health and medical care to inmates, state would be ordered to list, in order of preference, all possible measures to reduce population suggested by court or identified by parties, extent of population reduction that could be accomplished by each measure, and which measures required court to override state law, also, state would be ordered to begin without delay to develop system to identify prisoners unlikely to reoffend or who might otherwise be candidates for early release. U.S.C.A. Const.Amend. 8; 18 U.S.C.A. § 3626(a)(1)(B).

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STEPHEN REINHARDT, Circuit Judge, LAWRENCE K. KARLTON and THELTON E. HENDERSON, Senior District Judges.

Opinion

OPINION AND ORDER DENYING DEFENDANTS' MOTION TO VACATE OR MODIFY POPULATION REDUCTION ORDER

***1** On January 7, 2013, defendants filed a Motion to Vacate or Modify Population Reduction Order. Defs.' Mot. to Vacate or Modify Population Reduction Order (ECF No. 2506/4280) ("Three–Judge Motion"). [1] Defendants contend that a significant and unanticipated change in facts renders inequitable our June 30, 2011 Population Reduction Order (amended as of January 29, 2013) ("Order"). They request a complete vacatur of our Order under Federal Rule of Civil Procedure 60(b)(5). On January 29, 2013, this Court stayed consideration of the Three–Judge Motion. This Court now lifts that stay and DENIES defendants' Three–Judge Motion. On February 12, 2013, plaintiffs filed a cross-motion requesting this Court to order defendants to develop institution-specific population caps. Pls.' Opp'n to Three–Judge Mot. and Cross–Mot. for Additional Relief (ECF No. 2528/4331) ("Pls.' Opp'n" and/or "Cross–Mot."). This Court DENIES plaintiffs' Cross–Motion. Defendants must immediately take all steps necessary to comply with this Court's June 30, 2011 Order, as amended by its January 29, 2013 Order, requiring defendants to reduce overall prison population to 137.5% design capacity by December 31, 2013. We issue a separate order to that effect concurrently herewith. [2]

I. PROCEDURAL HISTORY

Given the lengthy history of this case, a brief (or not-so-brief) synopsis is in order. Defendants seek vacatur of a population reduction order that this Court issued in order to provide remedial relief for Eighth Amendment violations found in two independent legal proceedings. Aug. 4, 2009 Op. & Order at 54 (ECF No. 2197/3641). The first, *Coleman v. Brown,*

began in 1990 and concerns California's failure to provide constitutionally adequate mental health care to its mentally ill prison population. The second, *Plata v. Brown,* began in 2001 and concerns the state's failure to provide constitutionally adequate medical health care to its prison population. In both cases, the district courts found constitutional violations and ordered injunctive relief. As time passed, however, it became clear that no relief could be effective in either case absent a reduction in the prison population. [3]

Congress restricted the ability of federal courts to enter a population reduction order in the Prison Litigation Reform Act of 1996 ("PLRA"), Pub.L. No. 104–134, 110 Stat. 1321 (codified in relevant parts at 18 U.S.C. § 3626); Aug. 4, 2009 Op. & Order at 50–51 (ECF No. 2197/3641) (explaining why a population reduction order is a "prisoner release order," as defined by the PLRA, 18 U.S.C. § 3626(g)(4)). Such relief can be provided only by a specially convened three judge court after it has made specific findings. 18 U.S.C. § 3626(a).

In 2006, the plaintiffs in *Coleman* and *Plata* independently filed motions to convene a three judge court to enter a population reduction order. Both courts granted plaintiffs' motions and recommended that the cases be assigned to the same three judge court "[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; *see also Brown v. Plata,* —— U.S. ——, ——, 131 S.Ct. 1910, 1922, 179 L.Ed.2d 969 (2011) ("Because the two cases are interrelated, their limited consolidation for this purpose has a certain utility in avoiding conflicting decrees and aiding judicial consideration and enforcement."). The Chief Judge of the United States Court of Appeals for the Ninth Circuit agreed and, on July 26, 2007, convened the instant three judge district court pursuant to 28 U.S.C. § 2284. [4]

A. *This Court's August 2009 Opinion & Order*

***2** In August 2009, after a fourteen-day trial, this Court issued an Opinion & Order designed to remedy the ongoing constitutional violations with respect to both medical and mental health care in the California prison system. The order directed defendants, including the Governor, then Arnold Schwarzenegger, and the Secretary of the California Department of Rehabilitation and Corrections ("CDCR"), then Matthew Cate, to reduce the institutional prison population to 137.5% design capacity within two years. This Court made extensive findings, as set forth in our 184–page opinion. We repeat here only those findings that are necessary or relevant to the determination of the motions pending before us.

First, based on the testimony of seven expert witnesses (including Jeffrey Beard [5]), the defendants' own admissions, and the extensive data on prison crowding in the record, this Court found that "crowding is the primary cause of the violation of a Federal right." 18 U.S.C. § 3626(a)(3)(E)(i). [6] Indeed, we devoted approximately 25% of our Opinion—46 out of 184 pages—to demonstrating how "crowding creates numerous barriers to the provision of medical and mental health care that result in the constitutional violations...." Aug. 4, 2009 Op. & Order at 57 (ECF No. 2197/3641); *see id.* at 55–101. Two barriers were particularly important. First, a lack of treatment space "prevent[ed] inmates from receiving the care they require." *Id.* at 57. Second, "[c]rowding also render[ed] the state incapable of maintaining an adequate staff." *Id.* In short, because California had too many prisoners, it lacked the staff and space to provide constitutionally adequate medical health care and mental health care.

Second, after finding that "no other relief will remedy the violation of the Federal right," 18 U.S.C. § 3626(a)(3)(E)(ii), Aug. 4, 2009 Op. & Order at 101–19 (ECF No. 2197/3641), this Court faced the challenging question of designing an order that was "narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and [was] the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A). In this context, this meant determining the population level at which defendants could begin to provide constitutionally adequate medical and mental health care. It was a predictive judgment that, as we acknowledged, was "not an exact science." Aug. 4, 2009 Op. & Order at 124 (ECF No. 2197/3641) (quoting plaintiffs' expert, Dr. Craig Haney). Accordingly, this Court considered the testimony of various experts. Many of these experts believed that a prison population at 100% design capacity [7] was required. Plaintiffs' experts, however, sought a population cap at 130% design capacity, believing that constitutional care could be provided at that population level. Defendants, meanwhile, suggested that if ordered, a population cap at 145% design capacity was the most acceptable, citing a single analysis by the Corrections Independent Review Panel in 2004. The Panel's analysis, however, suffered from a "potentially fatal flaw," *id.* at 128, in that it failed to account for the ability to provide medical and mental health care. As this was the critical question, this Court found that "the Panel's 145%

estimate clearly exceeds the maximum level at which the state could provide constitutionally adequate medical and mental health care in its prisons." *Id.* at 129. Evaluating the expert evidence in light of the caution demanded by the PLRA, this Court decided to impose a population cap of 137.5% design capacity. *Id.* at 130.

***3** Third, this Court gave "substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." 18 U.S.C. § 3626(a)(1)(A). In fact, we devoted 10 days out of the 14–day trial to the issue of public safety; we also devoted approximately 25% of our Opinion—49 out of 184 pages—to it. We concluded that the evidence clearly established that "the state *could* comply with our population reduction order without a significant adverse impact upon public safety or the criminal justice system's operation." Aug. 4, 2009 Op. & Order at 133 (ECF No. 2197/3641). Specifically, we identified a variety of measures to reduce prison population: (1) early release through the expansion of good time credits; (2) diversion of technical parole violators; (3) diversion of low-risk offenders with short sentences; (4) expansion of evidence-based rehabilitative programming in prisons or communities; and (5) sentencing reform and other potential population reduction measures. *Id.* at 137–57. After evaluating the testimony and evidence —including the fact that many of the identified measures had been successfully implemented in other jurisdictions without any meaningful harm—we found that all of these measures could be implemented without adversely affecting public safety or the operation of the criminal justice system. *Id.* at 157–81. Indeed, given the criminogenic nature of overcrowded prisons, *id.* at 133–37, substantial evidence supported the conclusion "that a less crowded prison system would in fact benefit public safety and the proper operation of the criminal justice system." *Id.* at 178. Finally, but perhaps most important, expert testimony—specifically the report of the Expert Panel on Adult Offender Recidivism Reduction Programming—supported the conclusion that these measures could, if implemented in combination, sufficiently reduce prison population to within the range necessary to comply with a 137.5% population cap. *Id.* at 177–81. This Court did not, however, order defendants to adopt any one of these measures. This Court role's was merely to determine that defendants *could* comply with the population reduction order. The question of *how* to do so was properly left to defendants. [8]

Defendants timely appealed to the Supreme Court.

B. *The Supreme Court's June 2011 Opinion*

In June 2011, the Supreme Court affirmed this Court's order in full. Again, we repeat here only those portions of the Supreme Court opinion that are relevant to the motions pending before us. First, with respect to the question of whether overcrowding was the primary cause of ongoing constitutional violations, the Supreme Court noted with approval the extensive evidence presented in our Opinion & Order—specifically, the high rates of vacancy for medical professions, the lack of physical space, and the testimony from experts who testified that crowding was the primary cause of the failure to provide constitutionally adequate medical and mental health care. *Plata,* 131 S.Ct. at 1932–34. In light of this evidence, the Supreme Court deferred to this Court's factual determination that overcrowding was the primary cause of ongoing constitutional violations. *Id.* at 1932 ("With respect to the three judge court's factual findings, this Court's review is necessarily deferential. It is not this Court's place to 'duplicate the role' of the trial court. The ultimate issue of primary cause presents a mixed question of law and fact; but there, too, 'the mix weighs heavily on the fact side.' Because the 'district court is better positioned ... to decide the issue,' our review of the three judge court's primary cause determination is deferential." (internal citations omitted)).

***4** Second, with respect to this Court's determination that a prison population of 137.5% design capacity was necessary in order to begin to solve the ongoing constitutional violations, the Supreme Court was even more solicitous. The Supreme Court began its discussion by stating:

> Establishing the population at which the State could begin to provide constitutionally adequate medical and mental health care, and the appropriate time frame within which to achieve the necessary reduction, requires a degree of judgment. The inquiry involves uncertain predictions regarding the effects of population reductions, as well as difficult determinations regarding the capacity of prison officials to provide adequate care at various population levels. Courts have substantial flexibility when making these judgments. "Once invoked, 'the scope of a district court's equitable powers ... is broad, for breadth and flexibility are inherent in equitable remedies.' " *Hutto* [*v. Finney,* 437 U.S. 678, 687, n. 9, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978)] (quoting *Milliken v. Bradley,* 433 U.S. 267, 281, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977), in turn quoting *Swann v. Charlotte–Mecklenburg Bd. of Ed.,* 402 U.S. 1, 15, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971)).

Id. at 1944. The Supreme Court described the evidence before us, much of which supported "an even more drastic remedy," *id.* at 1945, i.e., a population cap lower than 137.5% design capacity. Because our Court had closely considered all the evidence, the Supreme Court affirmed our determination that 137.5% was the correct figure, stating that "[t]here 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." *Id.*

Third, the Supreme Court recognized that this Court had extensively considered the question of public safety. *Id.* at 1941 ("The court devoted nearly 10 days of trial to the issue of public safety, and it gave the question extensive attention in its opinion."). It expressly noted the evidence cited in our Opinion & Order that other jurisdictions had reduced prison population without adversely affecting public safety. *Id.* at 1942–43. It also listed the measures identified in our Opinion & Order as "various available methods of reducing overcrowding [that] would have little or no impact on public safety." *Id.* at 1943. Specifically, the Supreme Court stated 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.* Again, the Supreme Court deferred to our Court's factual determination, especially as our finding was informed by many experts who "testified on the basis of empirical evidence and extensive experience in the field of prison administration." *Id.* at 1942.

Throughout its opinion, the Supreme Court expressly and repeatedly noted the flexibility of our order, which did not "limit[ ] the State's authority to run its prisons." *Id.* at 1941. By adopting a population percentage (not a strict number of prisoners to release), our order permits defendants to "choose whether to increase the prisons' capacity through construction or reduce the population." *Id.* at 1941; *see also id.* at 1937–38 (explaining that defendants can also comply through "new construction" and "out-of-state transfers"). Additionally, by identifying various measures by which defendants could reduce the prison population, our order "took account of public safety concerns by giving the State substantial flexibility to select among these and other means of reducing overcrowding." *Id.* at 1943. Furthermore, our order, by not selecting particular classes of prisoners to be released, "g[ave] the State substantial flexibility to determine who should be released." *Id.* at 1940. Finally, because our order is systemwide, "it affords the State flexibility to accommodate differences between institutions." *Id.* at 1940–41. The Supreme Court stated—even more directly than our Court did—that if defendants fail to take advantage of the flexibility that our order permits, they will be required to release some prisoners:

> ***5** The order leaves the choice of means to reduce overcrowding to the discretion of state officials. But absent compliance through new construction, out-of-state transfers, or other means —or modification of the order upon a further showing by the State—the State will be required to release some number of prisoners before their full sentences have been served.

Id. at 1923. In such an instance, this Court is empowered to order defendants to develop a plan for the release of prisoners who pose the lowest risk for public safety:

> 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. 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. To do so safely, the State should devise systems to select those prisoners least likely to jeopardize public safety. An extension of time may provide the State a greater opportunity to refine and elaborate those systems.

Id. at 1947. In short, our order—and the Supreme Court's affirmance of our order—left the question of how to comply in the discretion of defendants, but not the question of whether to comply.

In the final section of its opinion, the Supreme Court discussed the possibility of defendants seeking modification of our order. The Supreme Court was specifically addressing defendants' challenge to the portion of this Court's order requiring them to achieve a prison population of 137.5%

design capacity *within two years. Id.* at 1945. The Supreme Court affirmed this aspect of our order principally because defendants had not requested—either at trial or on appeal—an extension of the two-year timeline. *Id.* at 1945 ("At trial and closing argument before the three judge court, the State did not argue that reductions should occur over a longer period of time."); *id.* at 1946 ("Notably, the State has not asked this Court to extend the 2–year deadline at this time."). The Supreme Court also noted that, because our order was stayed pending appeal, defendants effectively will have had four years in which to comply. *Id.* at 1946 ("The 2–year deadline, however, will not begin to run until this Court issues its judgment. When that happens, the State will have already had over two years to begin complying with the order of the three judge court."). Immediately after affirming this Court's two-year timeline, the Supreme Court discussed the possibility of modification:

> The three judge court, however, retains the authority, and the responsibility, to make further amendments to the existing order or any modified decree it may enter as warranted by the exercise of its sound discretion. "The power of a court of equity to modify a decree of injunctive relief is long-established, broad, and flexible ." *New York State Assn. for Retarded Children, Inc. v. Carey,* 706 F.2d 956, 967 (C.A.2 1983) (Friendly, J.). A court that invokes equity's power to remedy a constitutional violation by an injunction mandating systemic changes to an institution has the continuing duty and responsibility to assess the efficacy and consequences of its order. *Id.,* at 969–971. Experience may teach the necessity for modification or amendment of an earlier decree. To that end, the three judge court must remain open to a showing or demonstration by either party that the injunction should be altered to ensure that the rights and interests of the parties are given all due and necessary protection.

***6** *Id.* at 1946. If defendants believe that a change has occurred "regarding the time in which a reduction in the prison population can be achieved consistent with public safety," "[a]n extension of time may allow the State to consider changing political, economic, and other circumstances and to take advantage of opportunities for more effective remedies that arise as the Special Master, the Receiver, the prison system, and the three judge court itself evaluate the progress being made to correct unconstitutional conditions." *Id.; see also id.* at 1947 ("An extension of time may provide the State a greater opportunity to refine and elaborate those [systems to select those prisoners least likely to jeopardize public safety]."). Public safety was not the only rationale mentioned by the Supreme Court as a basis for modification. The Supreme Court also stated:

> 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 (emphasis added). The Supreme Court concluded by reminding this Court that, if defendants request modification, we "should give any such requests serious consideration." *Id.*

C. *Three–Judge Court Proceedings since June 2011*

Having been affirmed, our Court issued an order setting the following schedule by which defendants must reduce the prison population to 137.5% design capacity within two years:

> Defendants must reduce the population of California's thirty-three adult prisons as follows:
>
> a. To no more than 167% of design capacity by December 27, 2011.
>
> b. To no more than 155% of design capacity by June 27, 2012.
>
> c. To no more than 147% of design capacity by December 27, 2012.
>
> d. To no more than 137.5% of design capacity by June 27, 2013.

June 30, 2011 Order Requiring Interim Reports at 1–2 (ECF No. 2374/4032). Defendants were also ordered to file detailed reports at the end of each of the six-month intervals, advising this Court whether they were able to achieve the required population reduction and, if not, why this was the case and what measures they have taken or propose to take to remedy the failure. *Id.* at 2. Defendants were also ordered to file monthly reports with "a discussion on whether defendants expect to meet the next six-month benchmark and, if not,

what further actions are contemplated and the specific persons responsible for executing those actions." *Id.* at 3.

Defendants informed this Court that they would accomplish the population reduction primarily through Assembly Bill 109, often referred to as "Realignment." Defs.' Resp. to Jan. 12, 2010 Court Order (ECF No. 2365/4016).[9] Realignment would shift responsibility for criminals who commit "non-serious, non-violent, and non-registerable sex crimes" from the state prison system to county jails. This would apply both to incarceration and parole *supervision and revocation,* and to current and future inmates convicted of such crimes. Defs.' Resp. to June 30, 2011 Court Order (ECF No. 2387/4043). Realignment came into effect in October 2011, and its immediate effects were highly productive, as thousands of inmates either serving prison terms or parole revocation terms for "non-serious, non-violent, and non-registerable sex crimes" were shifted to county jails. Defendants were thus able to comply with the first benchmark, albeit shortly after the deadline. Defs.' Jan. 6, 2012 Status Report (ECF No. 2411/4141). It also appeared that Defendants would easily meet the second benchmark and would likely meet the third benchmark. *Id.*

***7** It soon became equally apparent, however, that Realignment was not sufficient on its own to achieve the 137.5% benchmark by June 2013 or to meet the ultimate population cap at any time thereafter, in the absence of additional actions by defendants. In February 2012, plaintiffs filed a motion requesting this Court to order defendants to demonstrate how they intended to meet the 137.5% figure by June 2013. Pls.' Mot. for an Order Requiring Defs. to Demonstrate How They Will Achieve the Required Population Reduction by June 2013 (ECF No. 2420/4152). Plaintiffs argued that, based on CDCR's own population projections (as of Fall 2011), defendants would not achieve a prison population of 137.5% by June 2013. *Id.* at 2–3. Defendants responded that, because the Fall 2011 projections predated the implementation of Realignment, they were not reliable. Defs.' Opp'n to Pls.' Mot. for Increased Reporting in Excess of the Court's June 30, 2011 Order at 2–3 (ECF No. 2423/4162). They stated that the forthcoming Spring 2012 population projections would give a more accurate indication of whether defendants would meet the 137.5% figure by June 2013. *Id.* at 4. This Court accepted defendants' representations and denied plaintiffs' motion without prejudice to the filing of a new motion after CDCR published the Spring 2012 population projections. Mar. 22, 2012 Order Denying Pls.' Feb. 7, 2012 Mot. (ECF No. 2428/4169).

In May 2012, plaintiffs renewed their objection. 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 correctly observed that, despite defendants' assurances that the Fall 2011 projections were outdated and unreliable, the Spring 2012 population projections were not substantively different. *Id.* at 3–4.[10] Plaintiffs also pointed to a new public report issued in the intervening months, titled "The Future of California Corrections" (known as "The Blueprint"), in which defendants stated that they would not meet the 137.5% figure by June 2013 and announced their intention to seek modification of this Court's Order. *See* CDCR, *The Future of California Corrections: A Blueprint to Save Billions of Dollars, End Federal Court Oversight, and Improve the Prison System,* Apr. 2012 ("CDCR Blueprint").[11] Based on this evidence, plaintiffs repeated their request that this Court order defendants to demonstrate how they would comply with this Court's June 30, 2011 Order. Pls.' Renewed Mot. for an Order Requiring Defs. to Demonstrate How They Will Achieve the Required Population Reduction by June 2013 at 5–6 (ECF No. 2435/4180). They further contended that defendants' delaying tactics and "failure to take reasonable steps to avert a violation of this Court's Order would amount to contempt of court." *Id.* at 6.

Defendants' responsive filing confirmed their intent to seek modification of the Court's Order from 137.5% design capacity 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. 2442/4191). Defendants also stated that they did not believe it was appropriate for them to demonstrate how they will achieve 137.5% if they intended to seek modification of that requirement. *Id.* at 7–8. Defendants responded to the contempt allegation by stating that there is "no doctrine of 'anticipatory contempt.' " *Id.* at 7 (quoting *United States v. Bryan,* 339 U.S. 323, 341, 70 S.Ct. 724, 94 L.Ed. 884 (1950)).

***8** This Court ordered supplemental briefing on defendants' anticipated motion to modify. June 7, 2012 Order Requiring Further Briefing (ECF No. 2445/4193); Aug. 3, 2012 2d Order Requiring Further Briefing (ECF No. 2460/4220).[12] We asked defendants[13] to identify the legal basis for the intended modification, to set forth the factual basis for their modification request, and to answer additional factual

questions. Aug. 3, 2012 Order at 3–4 (ECF No. 2460/4220). Additionally, because defendants had suggested that they were not currently on track to reduce prison population to 137.5% design capacity, this Court asked the following:

> [I]f the Court ordered defendants "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," *Plata,* 131 S.Ct. at 1947, by what date would they be able to do so and, if implemented, how long would it take before the prison population could be reduced to 137.5%? By what other means could the prison population be reduced to 137.5% by June 27, 2013? Alternatively, what is the earliest time after that date that defendants contend they could comply with that deadline?

Id. at 4. This Court further stated that, until such time as this Court declares otherwise, "defendants shall take all steps necessary to comply with the Court's June 30, 2011 order, including the requirement that the prison population be reduced to 137.5% by June 27, 2013." *Id.*

Defendants' responsive briefing identified Federal Rule of Civil Procedure 60(b)(5) as the legal basis for their intended modification request. Defs.' Resp. to Aug. 3, 2012 2d Order Requiring Further Briefing at 1–3 (ECF No. 2463/4226). As their factual basis, defendants stated that they would seek to prove that Eighth Amendment compliance could be achieved with a prison population higher than 137.5% design capacity. *Id.* at 6 ("Defendants' motion will demonstrate that a population density of 145% does not prohibit Defendants from providing constitutionally adequate care."). Defendants defiantly refused to answer the final question as to when they would be able to comply with our June 30, 2011 Order, [14] contending that our inquiry—in which we quoted the Supreme Court opinion—was not authorized by the Supreme Court and that it was not necessary to respond because they believed our Order should be dissolved. *Id.* at 11–12. Defendants did appear to state, however, that, if the motion to modify were to be denied, they could comply with a six-month extension. *Id.* at 12 ("If the Court for some reason disagrees and insists that the final benchmark cannot be modified, Defendants' only method of achieving the 137.5% target, without the early release of prisoners or further legislative action to shorten prison time, would be to maintain the out-of-state program. If the Court were to order that the current out-of-state capacity be maintained and waived the associated state laws, the prison population should reach 137.5% by December 31, 2013 ."). Defendants offered no explanation, however, why they could not release low-risk prisoners early or obtain any necessary legislative action for other measures identified in our June 2011 Order. Plaintiffs again asked this Court to find defendants in contempt, because defendants refused to answer a material question we asked of them and because "Defendants have all but stated that they have no intention of complying with this part of the Court's Orders." Pls.' Request for Disc. & Order to Show Cause Re: Contempt at 1 (ECF No. 2467/4230).

***9** In September 2012, this Court ruled on the pending motions. Sept. 7, 2012 Order Granting in Part & Denying in Part Pls.' May 9 and Aug. 22, 2012 Mots. (ECF No. 2473/4235). We stated that the question whether Eighth Amendment compliance could be achieved with a prison population higher than 137.5% design capacity "has already been litigated and decided by this Court and affirmed by the Supreme Court, and this Court is not inclined to permit relitigation of the proper population cap at this time." *Id.* at 2–3. Accordingly, this Court stated that we were "not inclined to entertain a motion to modify the 137.5% population cap based on the factual circumstances identified by defendants." *Id.* at 2. This Court further stated that we will, "however, entertain a motion to extend the deadline for compliance with the June 30, 2011 order." *Id.* at 3. We also ordered defendants to answer the question to which they had failed to respond, *id.* at 3, and we further asked whether "the Governor has the authority ... under the existing emergency proclamation concerning prison overcrowding" to implement the methods identified in our prior opinion for reducing the prison population to 137.5% design capacity. *Id.* at 3–4. [15]

Defendants filed a response in which they answered the aforementioned questions. Specifically, they stated that they would need six months to develop a program for releasing low-risk offenders. Defs.' Resp. to Sept. 7, 2012 Order at 5 (ECF No. 2479/4243). Additionally, they contended that the available options to achieve 137.5% prison population were limited, partly because they had implemented many of the methods identified in our prior opinion through Realignment [16] and partly because the remaining methods —sentencing reform and further expansion of good time credits—required legislative approval. *Id.* at 3–5; *see also id.* at 4–5 ("[I]t appears unlikely that the existing emergency proclamation confers the Governor with unilateral authority to implement expansion of good time credits or sentencing reform."). Nevertheless, defendants advised us that they could comply with a six-month extension, largely by maintaining the out-of-state program. *Id.* at 6 ("Based on the Spring 2012 population projections, by increasing capacity when

the California Health Care Facility in Stockton opens and maintaining the out-of-state program, the prison population will reach 137.5% by December 31, 2013.").

Plaintiffs filed a response in which they contended that compliance was far easier than defendants suggested. Pls.' Resp. to Defs.' Resp. to Sept. 7, 2012 Order (ECF No. 2481/4247). According to plaintiffs, it would not take six months "to identify low risk prisoners and develop a good-time credit program." *Id.* at 3. Plaintiffs contended that defendants already had risk instruments by which they could identify low risk prisoners for release and that implementing a good time credit program was quite straightforward. *Id.* Moreover, plaintiffs noted that defendants "made no effort to seek the needed legislation" on good time credits or sentencing reform. *Id.* at 2. [17]

***10** Nevertheless, it appeared, from the parties' filings, that resolution was not far off. Even defendants acknowledged that they could comply by December 2013. The parties disagreed, but perhaps not irreconcilably, over whether defendants could comply by the original date for compliance, June 2013. Accordingly, in October 2012, this Court ordered both parties to meet and confer, to develop, and to submit (preferably jointly) "plans to achieve the required population reduction 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). We asked the parties to include in their plans a discussion of "all of the alternatives that this Court, affirmed by the Supreme Court, found could be implemented without an adverse impact on public safety or the operation of the criminal justice system." *Id.* at 1–2. We asked how compliance could be achieved if defendants returned out-of-state prisoners. *Id.* at 2. We further inquired whether any of these alternatives required the waiving of state law or whether they could be achieved by the Governor under his emergency powers. *Id.* ("Defendants shall identify in their filing, whether joint or separate, which, if any, state laws would have to be waived for the provisions proposed jointly or by either party. Defendants shall also specify which of these laws may be waived by the Governor and which, if any, it contends that this Court is without authority to waive. Defendants shall provide justifications for their assertions, and plaintiffs may state their objections to defendants' contentions."). Finally, we informed the parties "that the Honorable Peter Siggins remains available to assist the parties during the meet-and-confer process." *Id.* at 3. [18] The plans were due on January 7, 2013.

In mid-November 2012, defendants advised this Court that they would miss the third benchmark, i.e., they would not achieve a prison population of 147% by December 2012. Accordingly, they sought modification of our June 30, 2011 Order by extending the 147% and the 137.5% requirement by six months each. Defs.' Nov. 2012 Status Report & Mot. to Modify June 30, 2011 Order (ECF No. 2494/4259). Plaintiffs opposed the modification, stating that "Defendants' defiant position is only the latest in a long string of filings in which they announce that they will maintain the prison population above the court-ordered cap." Pls.' Opp'n to Mot. to Modify & Order to Show Cause Re: Contempt at 1 (ECF No. 2497/4264). Plaintiffs again requested this Court to issue an order to show cause regarding contempt. *Id.* at 1–3.

This Court, being more interested in the January 7 filings, denied most of both parties' requests. Dec. 6, 2012 Order Denying Defs.' Mot. for Six–Month Extension & Pls.' Mot. for Order to Show Cause Re: Contempt (ECF No. 2499/4269). With regard to defendants' request for a six-month extension of the 137.5% benchmark, we denied the request as premature because the issue was to be addressed in the January 7 filings. *Id.* at 2. With regard to defendants' request for a six-month extension of the 147% benchmark, we granted defendants' request to be relieved of their obligation to file a report. As we stated:

> ***11** While the Court is concerned that defendants have not done everything in their power to achieve the 147% benchmark, the Court is more interested at this time in the additional steps that defendants will take to achieve the final 137.5% benchmark.

***Id.* We then denied plaintiffs' contempt motion as premature. *Id.* In concluding, we stated:**

> Defendants correctly observe that substantial progress has been made as a result of this Court's orders and the Supreme Court's affirmance of the population reduction order. However, much work remains to be done, and defendants must take further steps to achieve full compliance. The Court expects the parties' proposed plans to provide a specific means for doing so, while providing all the specific information called for in this Order as well as in the October 11, 2012 Order, including without limitation paragraph four of the October Order [in which we inquired

whether any of the population reduction measures could be achieved by the Governor under his emergency powers]. *Id.* at 2–3.

On January 7, 2013, both parties filed plans to meet the 137.5% population cap. Defendants' plan suggested that, although compliance by June 2013 would require the outright release of thousands of prisoners, compliance by December 2013 would require virtually no release of prisoners. Defs.' Resp. to Oct. 11, 2012 Order (ECF No. 2511/4284).[19] Plaintiffs disputed this and contended that defendants could easily comply by June 2013. Pls.' Statement in Resp. to Oct. 11, 2012 Order Re: Population Reduction (ECF No. 2509/4283). Defendants further contended that virtually every measure identified in their plans required the waiver of state laws, some of which—they asserted—this Court was without power to waive.[20] Furthermore, despite our explicit reminder that defendants were obligated to advise this Court which, if any, of the potential measures could be implemented under the Governor's emergency powers, defendants made no answer, although they had previously stated that the current out-of-state prisoner placement program was the only method of meeting the 137.5% goal "without the early release of prisoners or further legislative action to shorten prison time." Defs.' Resp. to Aug. 3, 2012 2d Order Requiring Further Briefing at 12 (ECF No. 2463/4226). The Governor had the authority to continue the out-of-state program under his then-existing emergency powers. Instead of answering our question, the Governor terminated his emergency powers, arrogating unto himself the authority to declare, notwithstanding the orders of this Court, 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 ("[P]rison crowding no longer poses safety risks to prison staff or inmates, nor does it inhibit the delivery of timely and effective health care services to inmates.") ("Gov. Brown, Jan. 8, 2013 Proclamation").[21]

***12** Equally significant for our purposes, defendants also filed on January 7, 2013, motions to terminate the ongoing proceedings. In this Court, defendants filed the Three–Judge Motion, which did not seek modification of the Order to 145% or renew their request to extend the deadline by six months. Rather, defendants requested complete vacatur of our Order. *Id.* at 3. In the *Coleman* court, defendants also filed a motion to terminate all injunctive relief in that case. Mot. to Terminate & to Vacate J. & Orders (*Coleman* ECF No. 4275). Notably, defendants did not file a similar motion in the *Plata* court.

This Court ordered supplemental briefing and amended our June 2011 Order. Jan. 29, 2013 Order Re: Three–Judge Mot. (ECF No. 2527/4317). Defendants were ordered to advise the Court whether they intended to file a motion to terminate in *Plata. Id.* at 1–2. In the meantime, this Court stayed consideration of the Three–Judge Motion. *Id.* at 2. Plaintiffs, who had failed to respond to the Three–Judge Motion, were ordered to file a response and provide good cause for their failure to do so by the applicable deadline. *Id.* Finally, defendants—who had stated in their January status report that, despite not being in compliance with this Court's order, they would take no further action to comply with it, Defs.' Jan. 2013 Status Report at 1 (ECF No. 2518/4292) ("Based on the evidence submitted in support of the State's motions, further population reductions are not needed....")—were specifically ordered once again to comply with their continuing obligation to follow this Court's Order. Jan. 29, 2013 Order at 2 (ECF No. 2527/4317) ("Neither defendants' filings of the papers filed thus far nor any motions, declarations, affidavits, or other papers filed subsequently shall serve as a justification for their failure to file and report or take any other actions required by this Court's Order."). This Court then granted defendants a six-month extension so that they could more easily comply with this Court's Order. *Id* . at 2–3. In both of defendants' subsequent status reports, however, they have repeated verbatim the statement from their January status report that they would not make any further attempts to comply with the Order. Defs.' Feb. 2013 Status Report at 1 (ECF No. 2538/4342) ("Based on the evidence submitted in support of the State's motions, further population reductions are not needed...."); Defs.' March 2013 Status Report at 1 (ECF No. 2569/4402) (same). Despite our specific reminders, at no point over the past several months have defendants indicated any willingness to comply, or made any attempt to comply, with the orders of this Court. In fact, they have blatantly defied them.

On February 12, 2013, plaintiffs filed a response to the Three–Judge Motion and requested additional relief, which we discuss in greater detail below. Pls.' Opp'n & Cross–Mot. (ECF No. 2528/4331). On the same day, defendants filed a response to our January 29, 2013 order, requesting this Court to lift the stay. Def's Resp. to Jan 29, 2013 Order (ECF No. 2529/4332) ("Defs.' Resp."). On February 14, 2013, plaintiffs filed a motion opposing defendants' request to lift the stay. Pls.' Opp'n to Defs.' Mot. to Lift Stay (ECF No. 2535/4338). On February 19, 2013, defendants filed a reply, in which they moved to strike various portions of plaintiffs' February 12, 2013 response and plaintiffs' February 14, 2013 opposition.

Defs.' Reply Br. in Supp. of Three–Judge Mot. (ECF No. 2543/4345) ("Defs.' Reply"). On February 26, 2013, plaintiffs filed a reply. Pls.' Reply Br. in Supp. of Counter–Mot. (ECF No. 2551/4355).

***13** On March 11, 2013, plaintiffs filed a request for leave to file a supplemental brief in opposition to defendants' Three–Judge Motion and in support of their Cross–Motion. Pls.' Supp. Br. Re: Mot. to Vacate or Modify (ECF No. 2562/4373). On March 18, 2013, defendants filed a response opposing this request. Defs.' Opp'n to Pls.' Supp. Br. Re: Mot. to Vacate or Modify (ECF No. 2573/4415). On March 20, 2013, plaintiffs requested that some of their filings in the *Coleman* termination proceedings be included as part of the record in this Court. Req. for Pls.' *Coleman* Filings to Be Deemed & Considered as Supp. Pleadings in Opp'n to Defs.' Three–Judge Mot. & in Supp. of Pls.' Counter–Mot. (ECF No. 2577/4426). Defendants filed an opposition to this request. Defs.' Opp'n to Pls.' Req. (ECF No. 2588/4533).

The pending matters before this Court are as follows:

- Defendants' Three–Judge Motion, filed on January 7, 2013;
- Order to Show Cause against Plaintiffs, filed on January 29, 2013;
- Defendants' Request to Lift Stay, filed on February 12, 2013;
- Plaintiffs' Cross–Motion, filed on February 12, 2013;
- Defendants' Motion to Strike Plaintiffs' Opposition to Defendants' Request to Lift Stay, filed on February 19, 2013;
- Defendants' Motions to Strike Portions of Plaintiffs' Opposition to Three–Judge Motion, filed on February 19, 2013;
- Plaintiffs' Request for Leave to File a Supplemental Brief in Opposition to Defendants Three–Judge Motion and in support of their Counter–Motion, filed on March 11, 2013; and
- Plaintiffs' Request for *Coleman* Filings to Supplement their Opposition to Defendants' Three–Judge Motion and in support of their Counter–Motion, filed on March 20, 2013.

We decide each of these matters in this Opinion, but withhold for now any order that may be warranted by defendants' contumacious conduct.

II. PRELIMINARY MATTERS

Defendants' Three–Judge Motion and plaintiffs' Cross–Motion are critical to the outcome of this litigation and we give special consideration to each below. Before doing so, this Court addresses the other pending matters. For the reasons discussed below, this Court first DISCHARGES the order to show cause against plaintiffs. Second, this Court GRANTS defendants' request to lift the stay on consideration of the Three–Judge Motion. Accordingly, this Court VACATES as moot defendants' motion to strike plaintiffs' opposition to defendants' request to lift the stay and DENIES both of plaintiffs' requests to supplement their opposition to defendants' Three–Judge Motion and in support of their Cross–Motion. Third, this Court DENIES defendants' motions to strike portions of Plaintiffs' Opposition.

A. *Order to Show Cause*

On January 29, 2013, this Court ordered plaintiffs to show cause for their failure to file a timely reply to the Three–Judge Motion. Jan. 29, 2013 Order at 2 (ECF No. 2527/4317). Under our April 25, 2008 Order, plaintiffs were required to file a reply by January 21, 2013 but failed to do so. On February 12, 2013, plaintiffs explained their failure as follows:

> ***14** Plaintiffs incorrectly relied on this Court's October 10, 2007 Order (*Plata* Dkt. No. 880) regarding briefing schedules, which [cites to Local Rule 78–230, stating that the court will issue an order establishing a briefing schedule after a motion has been filed]. Plaintiffs neglected to note that the order had been superseded by this Court April 25, 2008 Order. Plaintiffs regret the inconvenience to this Court and to defendants.

Pls.' Opp'n at 27–28 (ECF No. 2528/4331). Defendants respond that this excuse is insufficient, and that we should deem the Three–Judge Motion unopposed and submitted. Defs.' Reply at 1 n.1 (ECF No. 2543/4345).

Reviewing the matter, this Court elects not to exercise its discretion to find plaintiffs in contempt and DISCHARGES

the January 29, 2013 order to show cause. Plaintiffs are reminded, however, to follow this Court's deadlines in the future.

B. *Lifting the Stay and Related Matters*

On January 29, 2013, this Court issued an order staying consideration of the Three–Judge Motion. As we stated in that order, "one of defendants' principal contentions in the Three–Judge Motion is that there are no ongoing systemwide constitutional violations in medical and mental health care." Jan. 29, 2013 Order at 1 (ECF No. 2527/4317). Defendants made that same argument with respect to mental health care in the motion to terminate in *Coleman.* However, defendants had not made the same argument with respect to medical health care in *Plata.* As we stated in that order, "[i]t would be a waste of judicial resources for this Court to begin to determine any issue until it is made aware of defendants' filing plans regarding the constitutional question [in *Plata.*]" *Id.* at 2. This Court ordered defendants to advise us whether they intended to file a motion to terminate in *Plata* and, if so, when. Accordingly, we stayed our consideration of the Three–Judge Motion pending an answer as to defendants' intentions regarding the constitutional question in *Plata.*

On February 12, 2013, defendants requested that this Court lift the stay on the Three–Judge Motion. Defs.' Resp. at 1 (ECF No. 2529/4332). Specifically, defendants modified their Three–Judge Motion such that it is no longer based on the constitutional question but solely on the claim that "the greatly reduced prison population is [no longer] the primary barrier prohibiting the State from providing constitutionally adequate medical and mental health care." *Id.* at 4. Defendants also contend that they have provided sufficient evidence in the Three–Judge Motion to prevail on this claim. *Id.* at 1 ("It is unnecessary for the State to bring a motion to terminate *Plata* for this Court to decide the pending motion because more than enough evidence has already been presented."); *id.* at 5 ("[T]he State must show—as it has in the motion to vacate—that the greatly reduced current population levels do not prevent the State from providing constitutionally adequate medical and mental health care."); *see generally* Defs.' Reply at 2–10 (ECF No. 2543/4345) (contending that Defendants have "carried their burden" in the "motion to vacate and accompanying evidence"). In short, defendants assert that, regardless of the state of the health care that is currently being provided, the primary cause of any failure to provide better care is no longer overcrowding. Thus, defendants urge this Court not to delay our adjudication of the Three–Judge Motion and, on the record before us, to vacate the Population Reduction Order of June 30, 2011. Defs.' Resp. at 4, 6 (ECF No. 2529/4332); Defs.' Reply at 18–19 (ECF No. 2543/4345) (opposing plaintiffs' request for discovery as "futile" and urging this Court not to delay). Plaintiffs filed an opposition to lifting the stay on February 14, 2013, Pls.' Opp'n to Defs.' Mot. to Lift Stay (ECF No. 2535/4338), and defendants moved to strike this filing on February 19, 2013. Defs.' Reply at 18–19 (ECF No. 2543/4345). Additionally, defendants have opposed both attempts by plaintiffs to supplement their briefing. Pls.' Supp. Br. Re: Mot. to Vacate or Modify (ECF No. 2562/4373); Defs.' Opp'n to Pls.' Supp. Br. Re: Mot. to Vacate or Modify (ECF No. 2573/4415); Req. for Pls.' *Coleman* Filings to Be Deemed and Considered as Supp. Pleadings in Opp'n to Defs.' Three–Judge Mot. & in Supp. of Pls.' Counter–Mot. (ECF No. 2577/4426); Defs.' Opp'n to Pls.' Req. (ECF No. 2588/4533).

***15** **[1]** This Court agrees with defendants with regard to the procedural status of these matters. Defendants have modified the Three–Judge Motion such that it is based not on the constitutional question but solely on the crowding question. The substantive effect of this modification is discussed *infra.* The procedural effect is to provide a sufficient basis for lifting the stay of the Three–Judge Motion. This Court therefore GRANTS defendants' request to lift this Court's stay of our consideration of the Three–Judge Motion. Accordingly, this Court VACATES as moot defendants' motion to strike plaintiffs' opposition to lifting the stay. Additionally, because the burden of proof in justifying vacatur lies with defendants and because defendants have repeatedly contended that they have met that burden based on the evidence filed in conjunction with the Three–Judge Motion, this Court finds that there is no need for discovery. Any pending discovery requests are therefore dismissed, and this Court DENIES both of plaintiffs' requests to supplement their briefing. [22]

C. *Motions To Strike*

[2] Defendants also move to strike two portions of Plaintiffs' Opposition to the Three–Judge Motion. The first is the section of Plaintiffs' Opposition relying on the declaration by Steven Fama, who describes recent reports that defendants had filed with the Receiver in which defendants explain the need for further improvements to treatment space in the California prison system. Pls .' Opp'n at 12–14 (ECF No. 2528/4331); Exs. B to I to Fama Decl. in Supp. of Pls.' Opp'n (ECF No. 2528–2/4331–2). Defendants move to strike this evidence as "inadmissible hearsay and irrelevant." Defs.' Reply at

2, 5 n.2 (ECF No. 2543/4345). The second is the section of Plaintiffs' Opposition in which plaintiffs argue that the declarations of Robert Barton and Jeffrey Beard are entitled to little weight. Pls.' Opp'n at 17–18 (ECF No. 2528/4331). Defendants moved to strike these arguments as "scurrilous attacks ... which are unsupported by any evidence." Defs.' Reply at 2, 6–7 (ECF No. 2543/4345).

Defendants' motions border on the frivolous. With regard to evidence in the Fama declaration, these reports consist of defendants' requests for additional funding to increase healthcare infrastructure. Any suggestion that these reports—which demonstrate that defendants themselves represented to other agencies that there is insufficient treatment space in the California prison system—are "irrelevant" to assessing the Three–Judge Motion is clearly meritless.

Nor is their admissibility controversial. To begin, defendants relegated this argument to a mere footnote and failed to provide any legal analysis in support of their contention regarding hearsay. It is thereby waived. *See Hilao v. Estate of Marcos,* 103 F.3d 767, 778 n. 4 (9th Cir.1996) ("The summary mention of an issue in a footnote, without reasoning in support of the appellant's argument, is insufficient to raise the issue on appeal."). Moreover, these CDCR records would appear to fall under an exception to the rule against hearsay—either as the admission of a party opponent under Federal Rule of Evidence 801(d)(2) or as a public record under Federal Rule of Evidence 803(8). Finally, any attempt to exclude such evidence from this Court's consideration is meaningless in the context of this case. Defendants have *already* provided these reports to the Receiver. Because the Receiver is an arm of the Court, not only is this Court entitled to consider such evidence, it is prudent for us to do so.

***16** **[3]** With regard to the Barton and Beard declarations, plaintiffs have presented reasoned arguments why some of the statements in these declarations go beyond the expertise and the information available to Barton and Beard—and therefore why this Court should give little weight to those statements. These arguments require no evidence, just logic. We thus find unpersuasive defendants' contention that these arguments must be struck because they "present no competent evidence to rebut the factual statements in those declarations." Defs.' Reply at 7 (ECF No. 2543/4345).

Plaintiffs make arguments with which defendants may disagree, but there is simply no legal basis for striking any portion of Plaintiffs' Opposition. This Court therefore DENIES defendants' motions to strike, and defendants are advised not to again unnecessarily complicate an already complex case of the utmost public interest with arguments that are patently of little merit. Such arguments serve no purpose other than to consume the Court's time and further delay the ultimate resolution of the legitimate issues raised by the parties.

III. DEFENDANTS' THREE–JUDGE MOTION

This Court now turns to defendants' Three–Judge Motion. In that motion, defendants move, under Federal Rule of Civil Procedure 60(b)(5), for vacatur of our Order. They contend that, due to "the greatly reduced prison population," overcrowding is no longer "the primary barrier prohibiting the State from providing constitutionally adequate medical and mental health care." Defs.' Resp. at 4 (ECF No. 2529/4332); *see also* Defs.' Reply at 11 (ECF No. 2543/4345). Moreover, Defendants contend that this Court can rely solely on the evidence filed in conjunction with the Three–Judge Motion. Defs.' Resp. at 1, 5 (ECF No. 2529/4332); *see generally* Defs.' Reply (ECF No. 2543/4345). Having reviewed the relevant evidence in support of the Three–Judge Motion, this Court DENIES that motion for the reasons discussed below.

A. *Legal Standard*

[4] The legal basis that defendants rely on for their Three–Judge Motion is Federal Rule of Civil Procedure 60(b)(5). [23] Three–Judge Mot. at 5–6 (ECF No. 2506/4280). In relevant part, Rule 60(b)(5) permits a party to be relieved from a final judgment or order if "applying it prospectively is no longer equitable." Fed.R.Civ.P. 60(b)(5). In *Rufo v. Inmates of Suffolk Cnty. Jail,* 502 U.S. 367, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992), the Supreme Court set forth a two-pronged inquiry for Rule 60(b)(5) motions. First, as a threshold matter, the party seeking modification "bears the burden of establishing that a significant change in circumstances warrants revision of the decree." *Id.* at 383. Second, "[i]f the moving party meets this standard, the court should consider whether the proposed modification is suitably tailored to the changed circumstances." *Id.* "The party seeking relief bears the burden of establishing that changed circumstances warrant relief, but once a party carries this burden, a court abuses its discretion 'when it refuses to modify an injunction or consent decree in light of such changes.' " *Horne v. Flores,* 557 U.S. 433, 447, 129 S.Ct. 2579, 174 L.Ed.2d 406 (2009) (quoting *Agostini v. Felton,* 521 U.S. 203, 215, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997)) (other internal citations omitted).

*17 [5] [6] [7] In meeting the threshold inquiry, the moving party "may not ... challenge the legal conclusions on which a prior judgment or order rests." *Id.* Rather, it must point to "a significant change either in factual conditions or in law" that renders continued enforcement of a final judgment inequitable. *Id.* (quoting *Rufo,* 502 U.S. at 384, 112 S.Ct. 748). For a change in law, the moving party must generally demonstrate that "the statutory or decisional law has changed to make legal what the decree was designed to prevent." *Rufo,* 502 U.S at 388.[24] For a change in facts, the moving party must demonstrate (1) that "changed factual conditions make compliance with the decree substantially more onerous"; (2) that "a decree proves to be unworkable because of unforeseen obstacles"; or (3) that "enforcement of the decree without modification would be detrimental to the public interest." *Id.* at 384.

[8] A moving party alleging a "significant change in facts" faces an additional burden. Ordinarily, the party may not rely on "events that actually were anticipated at the time it entered into a decree." *Id.* at 385. Indeed, in *Rufo,* the Supreme Court remanded for the district court to "consider whether the [changed circumstance] was foreseen by petitioners." *Id.; see also id.* at 385–87 (explaining why, under the facts of the case, it was unlikely that petitioners anticipated the changed circumstances). Similarly, in *Agostini v. Felton,* the Supreme Court rejected a claim of changed factual circumstances based on the "exorbitant costs of complying," because both parties were "aware that additional costs would be incurred" due to the court's judgment. 521 U.S. at 215–16. "That these predictions of additional costs turned out to be accurate does not constitute a change in factual conditions warranting relief under Rule 60(b)(5)." *Id.* at 216. In short, the moving party must demonstrate a significant and unanticipated change in facts.

The touchstone of Rule 60(b)(5) analysis is that "a district court should exercise flexibility in considering requests for modification of an institutional reform consent decree." *Rufo,* 502 U.S. at 383, 112 S.Ct. 748. "A flexible approach allows courts to ensure that 'responsibility for discharging the State's obligations is returned promptly to the State and its officials' when the circumstances warrant." *Horne,* 557 U.S. at 450 (quoting *Frew v. Hawkins,* 540 U.S. 431, 442, 124 S.Ct. 899, 157 L.Ed.2d 855 (2004)). However, "it does not follow that a modification will be warranted in all circumstances. Rule 60(b)(5) provides that a party may obtain relief from a court order when 'it is no longer equitable that the judgment should have prospective application,' not when it is no longer convenient to live with the terms of a consent decree." *Rufo,* 502 U.S. at 383, 112 S.Ct. 748.[25]

B. *Defendants' Argument, Evidence, and Choice of Forum*

[9] Since the filing of the Three–Judge Motion, defendants have modified their argument. As explained above, one of defendants' principal contentions in the Three–Judge Motion as filed was the lack of ongoing constitutional violations. Jan. 29, 2013 Order at 1 (ECF No. 2527/4317) ("One of defendants' principal contentions in the Three–Judge Motion is that there are no ongoing systemwide constitutional violations in medical and mental health care."). Defendants have now represented to this Court that they do *not* seek vacatur on the basis that there are no longer ongoing constitutional violations. Defs.' Resp. at 4 (ECF No. 2529/4332) ("The issue to be decided by this Court is not constitutional compliance...."). As they now assert, the constitutional question is for the individual *Plata* and *Coleman* courts. *Id.* (stating that "constitutional compliance ... is for the underlying district courts to decide"); *see also* Defs.' Reply at 11 (ECF No. 2543/4345) ("The constitutionality of the mental health and medical care provided in prison will be decided by the *Coleman* and *Plata* courts respectively and individually."). The question before this Court is purely remedial, specifically whether a population reduction order is justified—or, to put it in terms defendants might employ, the question is whether a population reduction order is no longer justified. Defendants now state that the sole basis for their vacatur request is that "the greatly reduced prison population is [no longer] the primary barrier prohibiting the State from providing constitutionally adequate medical and mental health care." Defs.' Resp. at 4 (ECF No. 2529/4332); *see also* Defs.' Reply at 11 (ECF No. 2543/4345) ("Here, the relevant inquiry is whether overcrowding is no longer the primary barrier to the provision of constitutional care."). In short, defendants have drastically modified their position and are now, in this motion, challenging only the determination that overcrowding is the primary cause of the unconstitutional prison conditions, not that prison conditions are no longer unconstitutional.

*18 This modification is significant, in that defendants have effectively abandoned (at least for purposes of this proceeding) a significant portion of their Three–Judge Motion. For example, Part III of defendants' Three–Judge Motion was devoted to presenting evidence that "California's Prison Health Care System Exceeds the Level of Care

Required By the Constitution." Three–Judge Mot. at 15–19 (ECF No. 2506/4280). As would be expected, the argument presented in Part III was that defendants have achieved constitutional compliance. *Id.* at 16 (contending that "the State is already providing" "effective mental health care"); *id* . at 17 (arguing that "the State provides quality prison medical care that 'far exceeds' constitutional minima"); *id.* at 18 (citing the most recent statistics on "likely preventable deaths"); *id.* (citing a statement by Dr. Steven Tharratt as "[f]urther evidence of constitutionality"). Nor was this focus on constitutional compliance limited to Part III. In the introductory section, defendants authoritatively stated that California prisons have achieved constitutional compliance. *E.g., id.* at 1 ("California's vastly improved prison health care system now provides inmates with superior care that far exceeds the minimum requirements of the Constitution."). In Part IV, defendants contended that, because "adequate medical and mental health care is being provided to California's inmates," they have achieved a durable remedy with respect to the provision of care that complies with the Eighth Amendment. *Id.* at 19. Defendants concluded by stating:

> The evidence proves that there are no systemic, current, and ongoing federal law violations. All evidence indicates that at the current population density, inmates are receiving health care that exceeds constitutional standards.

Id. at 21. Defendants have abandoned these arguments before this Court, and this Court is not required to consider any evidence related solely to the constitutional question, i.e., whether prison conditions continue to remain unconstitutional.

The modification also renders inapplicable case law on which defendants relied in the Three–Judge Motion. Specifically, defendants repeatedly cited *Horne v. Flores,* 557 U.S. 433, 129 S.Ct. 2579, 174 L.Ed.2d 406. Three–Judge Mot. at 3, 5–6, 19–20 (ECF No. 2506/4280); *see also* Defs.' Reply at 2 (ECF No. 2543/4345) (criticizing plaintiffs for failing to cite *Horne*). At issue in *Horne* was a consent decree that was more protective than what federal law required. The question in *Horne* was whether, although the defendants had not complied with the terms of a consent decree, they were permitted to seek modification under Rule 60(b)(5) on the basis that the underlying "violation of federal law ha[d] been remedied" and thus "the objects of the decree ha[d] been attained." *Horne,* 557 U .S. at 451, 452 (internal citations omitted). The Supreme Court held that modification was permissible because, in the context of institutional reform litigation, district courts must flexibly analyze changed circumstances. *Id.* at 455–56. *Horne* is inapplicable here. Most obviously, we do not deal with a consent decree that was more protective than what federal law required. More fundamental, the *Horne*-type argument for modification—that defendants have remedied the underlying constitutional violation—is no longer before this Court, as per defendants' modification of the motion.

***19** Additionally, in the Three–Judge Motion, defendants relied on a particular passage from the Supreme Court opinion in this case:

> As the State makes further progress, the three judge court should evaluate whether its order remains appropriate. 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* .

Plata, 131 S.Ct. at 1947 (emphasis added); Three–Judge Mot. at 3 (ECF No. 2506/4280); *see also* Defs.' Reply at 3 (ECF No. 2543/4345). In this passage, the Supreme Court suggested that defendants could seek modification if they had "remed[ied] the underlying constitutional violations." That contention, however, is no longer the basis for defendants' Three–Judge Motion, as per their own modification. [26]

Plaintiffs object to defendants' modification of their motion. Plaintiffs devoted a substantial portion of their February 12, 2013 response to the question of constitutional compliance. Pls.' Opp'n at 1–2, 4–8, 15–17, 20–21 (ECF No. 2528/4331). After defendants modified their argument and disavowed any reliance on constitutional compliance in their February 12, 2013 filing, plaintiffs filed papers objecting to defendants' revised position. Pls.' Opp'n to Defs.' Mot. to Lift Stay (ECF No. 2535/4338). Specifically, plaintiffs assert that defendants are "attempt[ing] to shift the basis for their motion to vacate the Population Reduction Order." *Id.* at 2. They state

that defendants' contention—that crowding is no longer the primary cause of any ongoing violations—"was not raised in the motion, nor did Defendants submit evidence to support it." *Id.* Accordingly, plaintiffs ask this Court to deny the Three–Judge Motion.

Although this Court is sympathetic to plaintiffs' objection, it does not establish a sufficient basis for denying the Three–Judge Motion for two reasons. First, defendants' contention regarding crowding was, in fact, raised in the Three–Judge Motion. Specifically, Part II of the motion is devoted to the question of crowding. Plaintiffs are therefore incorrect to state that defendants are "shifting the basis for their motion." Rather, as explained above, defendants are abandoning a principal argument. Second, plaintiffs are not prejudiced by defendants' modification. In fact, as explained above, the Three–Judge Motion is now more limited in its evidentiary and legal support. Moreover, defendants simultaneously contend that they have provided sufficient evidence in their Three–Judge Motion to prevail. Defs.' Resp. at 1, 5 (ECF No. 2529/4332); *see generally* Defs.' Reply (ECF No. 2543/4345). By abandoning a significant portion of the Three–Judge Motion *and* simultaneously advising this Court that it need look no further than the Three–Judge Motion, defendants have adopted a position that benefits plaintiffs.

***20** Before considering defendants' Three–Judge Motion, as modified, we make clear that we do not decide here whether the question of the continuing unconstitutionality of prison conditions should be presented to this Three–Judge Court, or to the underlying one—judge courts—in this case, the *Plata* and *Coleman* courts respectively—or whether it may be presented to either. Nor do we determine whether the Three–Judge Court may decide, within its discretion, on the basis of the particular circumstances of the litigation involved, which forum or fora are appropriate for making the determination of such claim or claims. Here, after vacillating between this Three–Judge Court and the respective *Plata* and *Coleman* one-judge courts, defendants decided to withdraw the question from this Three–Judge Court and have presented it thus far only to the *Coleman* court, which held on the merits that "ongoing constitutional violations remain" "in the delivery of adequate mental health care." Apr. 5, 2013 Order at 67 (ECF No. 4539 *Coleman*). Plaintiffs protested the withdrawal of the question from the Three–Judge Court only on the ground that defendants were changing the basis of their motion, an argument that we reject *supra.* In this case, under all of the circumstances, this Court offers no objection to the withdrawal of the question whether medical and mental health care services are still provided at an unconstitutional level or the timely presentation of that question to the *Coleman* court.[27]

C. *Analysis of Three–Judge Motion, as Modified*

In light of defendants' modification, this Court now turns to the only relevant portion of the Three–Judge Motion: Part II, in which defendants contend that "the Prison Population Does Not Prevent the State From Providing Constitutionally Adequate Care." Three–Judge Mot. at 7–15 (ECF No. 2506/4280). Having closely reviewed the arguments and evidence contained therein, this Court DENIES the Three–Judge Motion for three reasons. First, defendants have not identified a proper basis for modification or vacatur under Rule 60(b)(5) and are instead seeking to relitigate the 137.5% population cap. Second, defendants' evidence in support of their request for modification or vacatur fails to demonstrate a significant and unanticipated change in circumstances, as required under Rule 60(b)(5). Third, even if defendants had demonstrated that *current* conditions warranted modification, they have failed to demonstrate a "durable remedy" as they intend to increase the prison population by approximately 9,500 prisoners by eliminating the out-of-state prisoner program. We address these points in turn.

1. *Defendants' Contention Is Not a Proper Basis for Modification or Vacatur Under Rule 60(b)(5)*

[10] Defendants' characterization of their argument as relating to "primary cause" obscures their true basis for seeking modification or vacatur of this Court's order. Defendants state that they seek vacatur because "the greatly reduced prison population is [no longer] the primary barrier prohibiting the State from providing constitutionally adequate medical and mental health care." Defs.' Resp. at 4 (ECF No. 2529/4332); *see also* Defs.' Reply at 11 (ECF No. 2543/4345). In fact, however, defendants' challenge is to the 137.5% population cap. *See, e.g.,* Three–Judge Mot. at 7 (ECF No. 2506/4280) (stating that the "evidence relied upon by this Court in reaching its 137.5% finding was presented at a trial that began over four years ago").[28] According to defendants, because constitutional care can be provided at the current level of overcrowding, this Court must have erred in concluding that the prison population must be reduced to 137.5% design capacity in order to resolve the underlying constitutional violations. Thus, defendants' true basis for seeking vacatur is their contention that (1) this Court erred in choosing the 137.5% figure and (2) the passage of time

constitutes a "changed circumstance" sufficient to justify a Rule 60(b)(5) motion.

***21** Defendants cannot seek modification or vacatur on this basis. In 2009, when the population level in California prisons was at 190% design capacity, this Court made a *predictive judgment* based on the overwhelming weight of expert testimony that Eighth Amendment compliance could not be achieved with a prison population above 137.5% design capacity. This was not a factual assessment based on current circumstances. Rather, it was a determination of what population level *would be required in the future* to allow defendants to be able to provide constitutional care. As the Supreme Court recognized, there are "no scientific tools available to determine the precise population reduction necessary to remedy a constitutional violation of this sort." *Plata,* 131 S.Ct. at 1944.

If defendants could challenge this Court's predictive judgment on the basis they have identified here, it would undo fundamental principles of res judicata. A losing party who disagrees with a predictive judgment need only allow some time to pass—thus constituting a "changed circumstance"—and then file a motion alleging that the court's judgment was proven to be wrong. In short, nothing would prevent continual relitigation of a court's predictive judgments. For example, although defendants filed this motion after the prison population reached 150% design capacity, nothing in their argument would have prevented them from filing a motion at 160% or 165%. Indeed, defendants could have immediately requested vacatur a mere month after this Court's Order became effective in June 2011. They could have argued then that "the evidence ... was presented at a trial that began over" two years ago. *Cf.* Three–Judge Mot. at 7 (ECF No. 2506/4280). We would, of course, have rejected any such requests on the merits. That point notwithstanding, permitting unbounded relitigation, based solely on a contention that some time has passed, would fundamentally undermine the finality of predictive judgments. *Sys. Fed'n No. 91 Ry. Employees' Dep't v. Wright,* 364 U.S. 642, 647, 81 S.Ct. 368, 5 L.Ed.2d 349 (1961) ("Firmness and stability must no doubt be attributed to continuing injunctive relief based on adjudicated facts and law, and neither the plaintiff nor the court should be subjected to the unnecessary burden of re-establishing what has once been decided.") . [29]

This is not to say that parties may never seek modification of a court's predictive judgments. They certainly may do so; they must, however, identify a "changed circumstance" that is more than the mere passage of time and must point to evidence that actually supports invoking this Court's equitable power to modify final judgments. This would ordinarily involve defendants pointing to a change in *background* assumptions on which this Court relied in making its 137.5% determination. For example, if a new Supreme Court decision regarding the Eighth Amendment significantly changed the feasibility and implementation, or even the timeline, of Defendants' intended measures to achieve the 137.5% figure, a party could certainly seek modification on this basis. *See Rufo,* 502 U.S. at 386–87, 112 S.Ct. 748 (holding that defendants had identified a legitimate basis for modification in pointing to an acceleration in the incarceration rate, which may not have been anticipated by the district court at the time of the consent decree). Alternatively, if defendants found *new* remedies to the overcrowding problem that would permit resolution of the constitutional violations without reducing the prison population, that would justify modification as well. As the Supreme Court stated:

> ***22** As the State implements the order of the three judge court, time and experience may reveal targeted and effective remedies that will end the constitutional violations even without a significant decrease in the general prison population. The State will be free to move the three judge court for modification of its order on that basis, and these motions would be entitled to serious consideration.

Plata, 131 S.Ct. at 1941. Here, however, defendants point to no *new* remedies. Nor do they identify any change in background assumptions on which this Court relied. Rather, all they point to—as is explained in detail *infra*—is that prison crowding has been reduced. This, however, was the intended effect of our Order, which required defendants to reduce the prison population over a period of time. Nothing could be more "anticipated" than the consequent decline in crowding to which defendants point. In short, defendants have failed to cite any "changed circumstance," as that term was intended to be understood in *Rufo* or, indeed, as it would be construed under any reasonable interpretation of the term.

Defendants are simply seeking to relitigate the 137.5% question. Defendants characterize their claim as one of "error," but they merely disagree with this Court's conclusion on a question that inherently involved uncertainty. *Plata,* 131 S.Ct. at 1944 ("The inquiry involves uncertain predictions

regarding the effects of population reductions, as well as difficult determinations regarding the capacity of prison officials to provide adequate care at various population levels."). Defendants are, in effect, challenging a legal conclusion, which is not a permissible basis for modification. *Horne,* 557 U.S. at 447 ("Rule 60(b)(5) may not be used to challenge the legal conclusions on which a prior judgment or order rests."). Moreover, defendants have already exercised their right to challenge this Court's conclusion. Defendants appealed the 137.5% figure to the Supreme Court, and the Court affirmed our conclusion. *Plata,* 131 S.Ct. at 1945 ("The three judge court made the most precise determination it could in light of the record before it."). Defendants have already lost this argument, and they should not be allowed to litigate it once again.

This Court's conclusion should come as no surprise to defendants. When defendants first advised this Court that they intended to file a motion to modify, this Court sought extensive briefing on the legal and factual basis for defendants' anticipated modification request. June 7, 2012 Order Requiring Further Briefing (ECF No. 2445/4193); Aug. 3, 2012 2d Order Requiring Further Briefing (ECF No. 2460/4220). This Court advised defendants that, "based on the factual circumstances identified" by defendants, the Court was "not inclined to entertain a motion to modify the 137.5% population cap." Sept. 7, 2012 Order at 2 (ECF No. 2473/4235). We explained:

> Defendants' initial briefing suggested that the only question that they would seek to litigate on a motion to modify is whether Eighth Amendment compliance could be achieved with a prison population higher than 137.5% design capacity. That question has already been litigated and decided by this Court and affirmed by the Supreme Court, and this Court is not inclined to permit relitigation of the proper population cap at this time.

***23** *Id.* at 2–3. The Three–Judge Motion is, in all relevant ways, identical to what this Court has previously stated is not a proper basis for modification. If anything, defendants seek greater relief today, in that they seek complete vacatur of this Court's population reduction order, not a modification of the cap to 145%. Yet defendants have made no argument in their Three–Judge Motion to the effect that this Court erred in holding that defendants had failed to identify a proper basis for modification. This Court therefore finds that defendants are not permitted to seek modification or vacatur on the basis that they have identified in the Three–Judge Motion now before us.

2. *Defendants' Evidence Fails To Demonstrate a Significant Change in Circumstances*

[11] Even if defendants were not seeking to relitigate the 137.5% figure or even if such a challenge would be permitted, this Court would nevertheless deny the Three–Judge Motion, as modified, because defendants have failed to meet their evidentiary burden in demonstrating that overcrowding is no longer the primary cause of ongoing constitutional violations in the provision of constitutionally adequate medical and mental health care.

In the Three–Judge Motion, defendants offer the following six items of evidence in support of their contention that overcrowding is no longer the primary cause of ongoing constitutional violations: (1) that Realignment has reduced the prison population by approximately 24,000 inmates; (2) that California has increased capacity in the prison system through new construction; (3) that California no longer uses gymnasiums and dayrooms to house prisoners; (4) that the Inspector General, Robert Barton, has stated that crowding is no longer a factor in the provision of medical care; (5) that now-Secretary Jeffrey Beard has stated that overcrowding is no longer a barrier to the provision of care; and (6) that neither the Receiver nor Special Master stated, in their most recent report, that overcrowding is a problem. Three–Judge Mot. at 7–15 (ECF No. 2506/4280).

The burden falls on defendants to demonstrate a "significant and unanticipated change in factual conditions warranting modification." *United States v. Asarco Inc.,* 430 F.3d 972, 979 (9th Cir.2005) (summarizing *Rufo,* 501 U.S. at 384–86). This standard imposes a high, but not impossible, bar for defendants to meet. Defendants must present persuasive evidence that the very aspects of overcrowding that this Court found pernicious in the past—the severe staff shortages, the complete lack of treatment space, etc.—have been remedied through measures that were not envisioned at the time of our Court's order. Additionally, defendants could—as they have in one instance—supplement this evidence with testimony from the numerous experts in the initial case who, having reviewed the prison system, have concluded that overcrowding is no longer a barrier. Were such credible

evidence presented to this Court, we would, of course, consider modifying the Order.

***24** Defendants, however, have fallen far short of this requirement. In the Three–Judge Motion, they have presented very little evidence. Most of this evidence is irrelevant, as it points to partial compliance with this Court's Order and not to a resolution of the problems of overcrowding. The remaining, relevant evidence is far too minimal to persuade this Court that overcrowding is no longer the primary cause of ongoing constitutional violations.

a. *Evidence of Reduced Crowding*

Defendants' first, second, and third items of evidence all suffer from the same fatal flaw: Defendants cannot simply point to a reduction in crowding that was contemplated to occur at the time it did and assert that this provides a sufficient basis for modification. Reduced crowding, after all, was the intended effect of our Order. The Supreme Court expressly stated that defendants "may choose whether to increase the prisons' capacity through construction or reduce the population." *Plata,* 131 S.Ct. at 1941. The evidence that defendants point to—the reduction in the prison population, the elimination of the use of gymnasiums and dayrooms as housing, and new prison construction—demonstrates that defendants have done both in their partial compliance thus far with our Order. Oddly, defendants appear to read the results of their partial compliance with the Order in a rather unusual manner. They argue that, because the Order thus far has been effective in making progress toward its ultimate objective, we should terminate it, call off the rest of the plan, and declare victory before defendants can meet the Order's most important objective—to reduce the population to 137.5% design capacity and eliminate overcrowding as the primary cause of unconstitutional medical and mental health conditions. That is not the way the judicial system, or any other national system, functions. Indeed, the 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.

Of course, if defendants had demonstrated that the overcrowding problem has been solved, then vacatur might be appropriate. However, defendants' evidence merely demonstrates that defendants have eliminated, as one of the declarants represented, the "most egregious and obvious aspects of prison overcrowding." Haney Decl. ¶ 35 (*Coleman* ECF No. 4378). Indeed, the current prison population is approximately 150% design capacity, as of April 3, 2013. *See* CDCR, *Weekly Rpt. of Population,* Apr. 3, 2013. California still houses far more prisoners than its system is designed to house. Indeed, according to the most recent national statistics, California's prison system is the second most crowded in the country with respect to design capacity.[30] Furthermore, Clark Kelso, the Receiver in the *Plata* case, reported in January 2013 that "[o]vercrowding and its consequences *are and* have been a chronic, widespread and continuing problem for almost twenty years." Receiver's Twenty–Second Tri–Annual Report at 30 (*Plata* ECF No. 2525) (emphasis added) ("Receiver's 22nd Report").[31] The Receiver clearly is of the opinion that overcrowding persists, and this Court credits his expert opinion. *See Plata,* 131 S.Ct. at 1938–39 (stating that the Receiver's reports on overcrowding were "persuasive evidence").[32] Simply put, the evidence does not demonstrate that "the State has eliminated overcrowding." Defs.' Reply at 3 (ECF No. 2543/4345). It merely demonstrates that defendants have thus far generally taken actions in compliance with our Order to reduce the extent of overcrowding to 150% design capacity. That our Order has been successful thus far cannot constitute a "change in circumstances" that renders our Order inequitable.

***25** Rather, in order to properly persuade this Court of a "change in circumstances," defendants would have to present compelling evidence that there has been a significant change *in the barriers* that prison crowding raised and that prevented the provision of constitutionally adequate medical and mental health care. As stated above, in our prior Opinion & Order, we focused on two particular barriers: inadequate treatment space and severe staff shortages. *See also Plata,* 131 S.Ct. at 1933–34 (focusing on staff and space). Here, we look to evidence of a change in circumstances, and we find none.

With regard to staffing, defendants' Three–Judge Motion is conspicuously silent. Defendants' failure to discuss staffing is glaring in light of the evidence that staff shortages continue to plague the California prison system, specifically with regard to mental health care. In its April 5, 2013 order, the *Coleman* court found that evidence tendered by defendants showed a 29 percent vacancy rate in mental health staffing at the end of November 2012, a rate "higher than that reported by the Special Master in his Twenty–Fifth Round Report." Apr. 5, 2013 Order at 57 (*Coleman* ECF No. 4539).[33] This is nearly as high as it was at the time of the trial. Aug. 4, 2009 Op. & Order at 76–77 (ECF No. 2197/3641). In fact, as the *Coleman* court found, according to the Special Master California appears to be regressing, as the staff shortages

are far worse this year than in prior years. *Id.* (quoting Special Master's Twenty–Fifth Round Monitoring Report at 44 (*Coleman* ECF No. 4298) ("Special Master's 25th Report")). Psychiatrists at Salinas Valley State Prison (SVSP) are now writing directly to plaintiffs' counsel to inform them that, due to a patient/doctor ratio that is three to four times higher than the appropriate level, they are unable to provide care. Exs. A & B to Bien Decl. in Supp. of Pls.' Mot. to Take Dep. of Dr. John Brim (*Coleman* ECF No. 4354–1). Thus, it continues to be the case that "demand for care ... continues to overwhelm the resources available." *Plata,* 131 S.Ct. at 1933 (quoting expert testimony from Opinion & Order).

With regard to space, the record supports the conclusion that it continues to be a significant problem. For mentally ill patients, defendants lack sufficient bed space. *See* Apr. 5, 2013 Order at 53 (*Coleman* ECF No. 4539); *see also* Special Master's 25th Report at 38–44 (*Coleman* ECF No. 4298). Much of this can be explained by the fact that, although the prison population has declined overall, the mentally ill population is largely unchanged. *Id.* Defendants have not, however, made sufficient investments to provide more beds for these mentally ill individuals. As a result, the conditions described in our prior Opinion & Order continue to persist. Mentally ill individuals face extended delays in receiving treatment. In some cases, they are left in containment cells for extended periods of time. *Id.; see also* Apr. 5, 2013 Order (*Coleman* ECF No. 4539).

***26** Defendants respond that "the State has invested in substantial construction and renovation projects to more than adequately meet both the present and future health care needs of the State's inmate-patients." Three–Judge Mot. at 8 (ECF No. 2506/4280); *see id.* at 8–10 (listing individual construction projects). It is true that there is *more* treatment space today than in 2008. Defendants, however, fail to demonstrate that there is *enough* treatment space today. Indeed, this was the "fatal flaw" in defendants' argument at trial. In our prior Opinion & Order, this Court rejected defendants' preferred percentage—145% design capacity—because the underlying analysis had a "potentially fatal flaw." Aug. 4, 2009 Op. & Order at 128 (ECF No. 2197/3641). Based on the reports and testimony of at least three of plaintiffs' experts, this Court concluded:

> Plaintiffs' experts convincingly demonstrated that, in light of the wardens' failure to consider the provision of medical and mental health care to California's inmates and in light of their reliance on maximum operable capacity, which does not consider the ability to provide such care, the Panel's 145% estimate clearly exceeds the maximum level at which the state could provide constitutionally adequate medical and mental health care in its prisons.

Id. at 129. Defendants now point to renovation and upgrades, but offer no expert testimony that the renovations have overcome the previously identified "fatal flaw" or offer any conclusion as to the maximum population consistent with the provision of constitutional medical and mental health care. In the absence of such testimony, this Court will not simply credit defendants' assertion that there is adequate treatment space today.

Moreover, defendants' own reports contradict any conclusion that there is adequate treatment space today. In the Blueprint, defendants state that the prison infrastructure is "aging" and there is "inadequate treatment space" that "hinder[s] the department's ability to deliver care." CDCR Blueprint at 35. Moreover, the reports submitted by defendants, included in Steven Fama's declaration, provide direct evidence that defendants have represented to other agencies that there is inadequate treatment space in the California prison system today:

> Currently there is insufficient (and in some instances, no) facility space and infrastructure in CDCR institutions to appropriately perform medication distribution activities. Lack of adequate medication distribution rooms and windows does not allow for timely, effective and secure medication distribution.... [E]xisting space is inadequately sized to accommodate proper distribution protocols and procedures.

Ex. I to Fama Decl. at 3 (ECF No. 2528–2/4331–2). The evidence in these reports overwhelmingly supports the conclusion that defendants themselves recognize the current inadequacy of treatment space in California's prisons. *See* Exs. B to I to Fama Decl. (ECF No. 2528–2/4331–2).

***27** Additionally, defendants' plan to construct the necessary treatment space—the Healthcare Facility

Improvement Program ("HCFIP")—is in its early stages and thus continues to be at risk of non-completion. According to the Receiver, HCFIP "upgrade projects at several locations have now received *initial approval* from the Public Works Board (PWB)." Receiver's 22nd Report at 23 (*Plata* ECF No. 2525) (emphasis added). "The remaining HCFIP projects are being sequenced by CDCR for submittal to the PWB upon completion and review of site-specific plans." *Id.* Defendants state that the process for construction is streamlined, Three–Judge Mot. at 8 (ECF No. 2506/4280), but—even with such streamlining—the earliest and most optimistic estimate for completing HCFIP is 2017.

> With the streamlined PWB and legislative oversight processes approved through SB 1022, and with the recent progress that was made on seven of the HCFIP projects, it is possible for the HCFIP and medication distribution upgrades at existing prisons to be substantially completed by 2017, with the priority focus of the upgrades at the "intermediate level-of-care" facilities substantially completed by 2016. However, these projects require two approvals by the PWB (one for project authorization and one for approval of preliminary plans) and interim funding by the PMIB. Thus, if these projects continue to experience delays as they have in the last two months, this program is at risk for completion.

Receiver's 22nd Report at 23 (*Plata* ECF No. 2525). As the Receiver correctly notes, such long-term plans are always at risk. Indeed, already "several projects were delayed in the submissions to the PWB." *Id.* Given the lack of completion and the inherent risk in defendants' construction plans, defendants cannot demonstrate that there is adequate treatment space *today*. Moreover, the continuation of this Court's population reduction order can serve only to motivate defendants to continue or redouble their efforts to meet the objectives set forth above.

Finally, even if defendants could demonstrate with surety that their long-term plans will come to fruition, it would still not support vacatur of the population reduction order. As plaintiffs correctly note, this evidence would at best tend only to support a conclusion that our Order should be modified to a higher design capacity. Pls.' Opp'n at 19 (ECF No. 2528/4331). Defendants, however, no longer seek such a modification. They seek vacatur of the Order in its entirety, a conclusion that is not supported by the new construction and an action that would serve only to permit defendants to avoid any further obligation to complete the scheduled construction.

The burden falls on defendants to meet the threshold condition for modification or vacatur. The partial reduction in crowding and various renovations are, without a doubt, important. This Court will not, however, modify our Order in the absence of compelling evidence of a resolution to the barriers that overcrowding causes. Because defendants fail to present evidence on this critical issue, they have not presented evidence of a "*significant* change in circumstances." *Rufo,* 502 U.S. at 383, 112 S.Ct. 748 (emphasis added).

b. *Declaration of Robert Barton, Inspector General*

***28** Turning to the fourth item of evidence, defendants state that, "according to Robert Barton, the Inspector General, population is no longer a factor affecting the State's ability to provide constitutionally adequate medical or mental health care in prison." Three–Judge Mot. at 13 (ECF No. 2506/4280). Barton explains that the Office of Inspector General ("OIG") has instituted a scoring system, by which it evaluates the provision of medical health care in California prisons. In his concluding paragraph, he states that "some high scoring prisons also have high population densities." He concludes that "[o]vercrowding is no longer a factor affecting CDCR's ability to provide effective medical care in its prisons." Barton Decl. in Supp. of Three–Judge Mot. ¶ 15 (ECF No. 2507/4282).

There are many problems with this conclusion. First, Barton's analysis relies exclusively on the OIG scores, which provide no statistical basis to draw inferences regarding constitutionally adequate care. In the Receiver's most recent report, he explains that

> the OIG scores cannot be used by themselves to establish the constitutional line. First, the scale for the OIG scores has never been validated for purposes of making constitutional measurements, and although the parties agreed to use the OIG audit as an indicator of improved performance over time, the parties never agreed to any

> particular scale. For management purposes and for convenience, the Receivership established cut-lines for "high adherence," "medium adherence," and "low adherence." But these lines were never intended to have any constitutional significance at all. Second, the scores on individual items in the OIG audit frequently depend upon sample sizes so small (e.g., less than 5 items may be examined for a particular question) that the confidence intervals for the items are unusually large (e.g., a score of 70% on an item may have a confidence interval stretching from 50% to 90%). In short, the OIG audits are a statistically soft measure of performance.

Receiver's 22nd Report at 30 (*Plata* ECF No. 2525). The Receiver's concerns with the OIG scores may well prove prescient. The *Plata* court has begun conducting a rigorous review of all prisons with high OIG scores.[34] Of the four prisons reviewed thus far, Richard J.

Donovan Correctional Facility ("RJD") received a very high OIG score—87.3%— but the Plata experts concluded that RJD is "not providing adequate medical care, and that there are systemic issues that present an ongoing serious risk of harm to patients and result in preventable morbidity and mortality." Health Care Evaluation of R.J. Donovan Correctional Facility by Court Medical Experts at 5 (Plata ECF No. 2572). The striking gap between the OIG scores and adequate care led the experts to state the following:

> These report findings raise questions regarding the OIG Cycle 3 report that reflected a score of 87.3%. The question is whether the score accurately reflected adequate care that has since deteriorated, or whether the OIG review failed to capture problems related to poorly functioning systems and quality of care issues....
>
> ***29** A distinguishing characteristic between RJD and the other 3 facilities we have evaluated that scored>85% is that the population at RJD was 160.9% of design capacity at the time of our review, whereas the other 3 facilities ranged between 128 to almost 134% of design capacity.

Id. at 6. Thus, not only is the OIG scoring system unreliable as a general matter, it may be especially unreliable when the prison suffers from overcrowding. It is perforce not a reliable basis for drawing any conclusions regarding the relationship between prison crowding and constitutional care.

Second, even if the OIG scoring system were reliable, Barton's inference would not be. Barton's claim is that the lack of a *perfect* correlation between prison crowding and OIG scores—because *some* prisons with high density have high scores—proves that overcrowding is no longer a factor in the provision of constitutional care. This conclusion in no way follows from the evidence. Were it so—i.e., were the lack of perfect correlation a barrier to drawing statistical inferences —all social science would be discredited. Moreover, the Receiver has explained why there will never be a perfect correlation:

> [T]he key elements of timely access to care and proper distribution of medications are very much influenced by each institution's total population level compared with its design capacity, the precise mix of inmates at different security levels, the precise mix of inmates belonging to various gang groups, the level of violence at a prison, the prevalence of lockdowns at an institution, and other operational factors that play out at both the institution and system-wide levels, all of which are influenced by overcrowding.

Receiver's 22nd Report at 29 (*Plata* ECF No. 2525). For example, Avenal State Prison can achieve a high OIG score, despite a 184% population density, because:

> it is easier to provide care even at higher population densities at a low-security level prison (such as Avenal State Prison) that does not have a gang population prone to violence, includes a significant number of inmates with reduced mobility or who are wheel-chair-bound, and has a very low level of modified program or lockdown.

Id. The Receiver concludes, "our experience at that type of prison does not mean that a constitutional level of care can

be delivered system-wide at a higher system-wide population density given the differences among the prisons." *Id.* In short, the lack of a perfect correlation proves nothing. In light of the Receiver's most recent report, this Court finds defendants' fourth item of evidence to be unpersuasive.

c. ***Declaration of Jeffrey Beard, CDCR Secretary***

Turning to the fifth item of evidence, defendants rely on Jeffrey Beard, the newly appointed Secretary of CDCR. Beard now testifies via declaration that, having visited a majority of California's 33 prisons, "prison population density is no longer a factor inhibiting California's ability to provide constitutionally adequate medical or mental health care in its prisons." Beard Decl. in Supp. of Three–Judge Mot. ¶¶ 9–10 (ECF No. 2508/4281).

***30** Beard was one of seven experts for plaintiffs who testified that overcrowding was the primary cause of ongoing violations. Suffice it to say that Beard's position at the time of the trial was as an independent expert (who was uncompensated). Today, he is a party to the proceedings, and accordingly, his testimony must be regarded in that light. *See United States v. Abel,* 469 U.S. 45, 52, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984) (stating that a "witness' self interest" "might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party").

Additionally, the substance of Secretary Beard's declaration is not persuasive in light of the record before this Court. Much of Beard's declaration repeats the points discussed above; he points to the numerical decline in prison population and the new construction. Beard Decl. ¶¶ 10–12. He makes no mention whatsoever of staff or treatment space, which —as explained above—are the two most important reasons that overcrowding was the primary cause of constitutional violations. Accordingly, Beard's declaration fails to rebut the overwhelming evidence before this Court that staff shortages and a lack of physical treatment space continue to plague the California prison system. Moreover, the evidence that Beard does mention—a safer prison system and reduced spread of disease—has no factual basis in the record. *Id.* ¶ 12. Beard cites no evidence of fewer lockdowns, although such information should be readily available. He makes an assertion about the spread of disease that, while appropriate for an expert declaration, should be made by a medical health professional, or at least supported by facts and figures. This leaves only one assertion of consequence: reduced crowding in reception areas. *Id.* ¶¶ 13–14. This Court credits the Receiver for working closely with defendants to remedy the 300% overcrowding in reception areas. That said, this singular improvement does not persuade the Court that overcrowding is no longer the primary cause of ongoing constitutional violations.

Finally, Beard's testimony is not the only expert testimony available to this Court. The Receiver stated, in his most recent report, that:

> Overcrowding and its consequences are and have been a chronic, widespread and continuing problem for almost twenty years. The overcrowding reduction order entered by the court recognizes that the connection between overcrowding in the prisons and the provision of constitutionally adequate medical and mental health care is complex, with *overcrowding creating a cascade of consequences that substantially interferes with the delivery of care.*

Receiver's 22nd Report at 30 (*Plata* ECF No. 2525) (emphasis added). Reviewing the evidence presented by defendants in the Three–Judge Motion, he concludes:

> [A]t present, there is no persuasive evidence that a constitutional level of medical care has been achieved system-wide at an overall population density that is significantly higher than what the three judge court has ordered.

***31** *Id.* at 30–31. Moreover, in the Coleman termination proceedings, plaintiffs submitted declarations by Four experts, all of whom contend that overcrowding continues to be a serious problem.[35] According to Dr. Craig Haney, the problems of overcrowding are no better than when he visited the prison system in 2008. He writes:

The CDCR's continuing inability to provide for the mental health needs of its prisoners is produced in large part by a nexus of persistent problems that my inspections made clear have hardly been faced at all, much less satisfactorily addressed. That nexus includes continuing and in some cases even more drastic shortages of mental health and correctional staff; lack of adequate clinical space; and widespread levels of inmate-patient idleness and lack of meaningful treatment opportunities that were as bad and often worse than those I observed at the time of my 2007 and 2008 tours.

Haney Decl. ¶ 35 (*Coleman* ECF No. 4378). Dr. Edward Kaufman found severe staffing shortages, insufficient treatment space, and a lack of beds. Kaufman Decl. ¶¶ 22–23 (*Coleman* ECF No. 4379). Dr. Pablo Stewart, describes these very problems as "endemic in overcrowded prison systems." Stewart Decl. ¶ 44 (*Coleman* ECF No. 4381). Stewart also explained why California's high rate of suicides (discussed in the recent *Coleman* order, *see* Apr. 5, 2013 Order at 32–43 (*Coleman* ECF No. 4539)) is related to current overcrowding. *Id.* ¶ 174. Finally, with regard to condemned prisoners (death row), former CDCR Secretary Jeanne Woodford declared that "there is insufficient capacity to appropriately house the growing condemned population" and, with respect to mental health needs, "certainly insufficient staffing." Woodford Decl ¶¶ 37, 43 (Coleman ECF No. 4380). The unanimous opinion of the Receiver and these four experts—each of whom is evaluating current conditions, and none of whom is employed by defendants—is that overcrowding remains a significant barrier to the provision of constitutional care. Even in the absence of the testimony of these other experts, Secretary Beard's reversal—given his newly-acquired self-interest and the weakness of his arguments—is not persuasive to this Court.

d. *The Receiver and Special Master*

Turning to the sixth item of evidence, Defendants state that "[t]he *Plata* receiver and *Coleman* special master no longer cite crowding as a factor inhibiting the State's ability to provide adequate medical and mental health care." Three–Judge Mot. at 14 (ECF No. 2506/4280). Defendants' suggestion is that these court-appointed representatives, by failing to discuss crowding, must believe that crowding is no longer a barrier to the provision of care. In the words of the Receiver, this claim "distorts the content of our reports and misrepresents the Receiver's position." Receiver's 22nd Report at 29 (*Plata* ECF No. 2525). In his most recent report, filed on January 25, 2013, the Receiver states:

> ***32** Overcrowding and its consequences are and have been a chronic, widespread and continuing problem for almost twenty years. The overcrowding reduction order entered by the court recognizes that the connection between overcrowding in the prisons and the provision of constitutionally adequate medical and mental health care is complex, with overcrowding creating a cascade of consequences that substantially interferes with the delivery of care.

Id. The Special Master's January 2013 report supports the same conclusion. Special Master's 25th Report at 38–44 (Coleman ECF No. 4298). Thus, there is no merit to defendants' sixth item of evidence.

e. *Public Safety*

Finally, although not explicitly listed as an item of evidence in their Three–Judge Motion, defendants repeatedly state that complying with the Order would harm public safety. Three–Judge Mot. at 2, 20 (ECF No. 2506/4280); Defs.' Resp. at 6 (ECF No. 2529/4332); Defs.' Reply at 20–22 (ECF No. 2543/4345). Modification, however, is not appropriate "where a party relies upon events that actually were anticipated at the time it entered into a decree." *Rufo,* 502 U .S. at 385. This Court anticipated the issue of public safety in our original Opinion & Order and, after considering extensive evidence, concluded that releasing comparatively low-risk inmates somewhat earlier than they would otherwise have been released has no adverse effects on public safety. Aug. 4, 2009 Op. & Order at 131–81 (ECF No. 2197/3641). The Supreme Court affirmed that determination and stated the following:

> 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. 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. To do so safely, the State should devise systems to select those prisoners least likely to jeopardize public safety.

Plata, 131 S.Ct. at 1947. The Supreme Court thus clearly agreed that the early release of low-risk prisoners—if done in a systematic fashion—would be consistent with public safety. Defendants therefore repeat arguments that both this Court and the Supreme Court rejected. [36]

3. *Defendants Have Not Achieved a Durable Remedy*

[12] Finally, even if defendants had demonstrated that overcrowding was not *currently* the primary cause of ongoing constitutional violations, their intention to eliminate the out-of-state prisoner program—and thus increase prison crowding by 9,500 prisoners or approximately 12% design capacity—demonstrates that this resolution would very quickly become outdated. In constitutionally relevant terms, it demonstrates that defendants have not achieved a "durable remedy" to the problem of overcrowding.

The responsibility to modify is one of equity. When a party has achieved a "durable remedy" and seeks modification on that basis, equity supports granting relief from a final judgment. *Horne,* 557 U.S. at 447.[37] Here, however, defendants have achieved no such remedy. In the Blueprint (which, as explained *supra,* represents defendants' plan for the future of California corrections), defendants state their intention to eliminate the program to house prisoners out-of-state. *See* CDCR Blueprint at 6–7. On January 8, 2013, roughly concurrently with filing this Three–Judge Motion, Governor Brown terminated the Emergency Proclamation that provided the legal basis for the out-of-state program. The unmistakable effect of defendants' decision to eliminate the out-of-state program will be to increase the institutional prison population by approximately 9,500 prisoners. *Id.* at 6–7 & App. G. Because California's prison population today is at 150% design capacity, this decision would, in the absence of other changes, increase California's institutional prison population to approximately 162% design capacity. With such a significant increase in prison population in the near term, it is entirely premature for defendants to seek vacatur. Whatever resolution defendants contend that they have achieved, that resolution is, without a doubt, not a durable one.

***33** Moreover, defendants are fully responsible for the lack of durability. This is not a case in which the prison population is expected to increase for unanticipated or uncontrollable reasons. Rather, defendants have chosen to eliminate the out-of-state program and thus to prevent themselves from achieving a long-term solution to the overcrowding problem without taking a number of steps that they could but are unwilling to take. Perhaps most disturbing is Governor Brown's unilateral termination of the Emergency Proclamation relating to Prison Overcrowding. On the day after he filed the Three–Judge Motion, he proclaimed that "prison crowding [is] no longer ... inhibit[ing] the delivery of timely and effective health services to inmates." Gov. Brown, Jan. 8, 2013 Proclamation. No convincing evidence to that effect has been submitted to this Court or to the *Plata* or *Coleman* courts, and the Order that governs the actions that the Governor is required by law to take is directly contrary to the representations he has made in his official capacity, as well as to the official actions he has taken in this case. This raises serious doubts as to the Governor's good faith in this matter and in the prison litigation as a whole. For this reason as well, this Court will not exercise its equity power to grant defendants relief.

4. *Conclusion as to Three–Judge Motion, as Modified*

In sum, defendants' contention that the continued enforcement of the population reduction order would be inequitable fails on numerous levels. First, defendants' true claim—that the mere passage of time demonstrates the error in this Court's choice of a 137.5% figure for the population cap—does not provide a valid basis for modification or vacatur of a predictive judgment. The changes that have occurred thus far represent the intended effect of our Order, as contemplated by this Court and as affirmed by the Supreme Court. The success of our Order thus far therefore provides no basis whatsoever for its vacatur but rather constitutes a reason for its continuance until its goal is met.

Second, and more important, defendants have failed entirely to meet their evidentiary burden. There has, without a doubt, been no significant and unanticipated change in circumstances that warrants vacatur of our Order. Defendants have represented that we may rely solely on their written submissions to demonstrate that there has been a change in circumstances and that the overcrowding that constituted the primary cause of the unconstitutional medical and mental health care conditions no longer is responsible for those conditions. Having carefully reviewed the evidence contained in those submissions individually and collectively, this Court finds that defendants failed completely to support their contentions. Defendants point to some changes they have made (e.g., upgrades), but no credible evidence supports a conclusion that these changes have removed the principal *barriers* that prison crowding has raised and that have prevented the provision of constitutionally adequate medical and mental health care: inadequate treatment space and severe staff shortages. The burden falls on defendants to demonstrate the inequity of our Order, and they have failed to meet that burden here.[38]

*34 Third, and finally, defendants have failed to demonstrate that they have achieved a durable remedy. Even if crowding at its current level—at 150% design capacity—were not the primary cause of ongoing constitutional violations, defendants intend to increase the prison population by 9,500 prisoners, or to 162% design capacity, by eliminating the out-ofstate prisoner program. With such a significant increase in prison crowding planned for the near term, this Court will not exercise its equity power to order vacatur on the basis that the crowding problem has been resolved.

D. *Crowding vis-a-vis Constitutional Violation*

[13] There are various interlocking relationships, including the elements of proof, between the issue whether crowding is still the primary cause of the constitutional violations in medical and mental health care and whether there are still constitutional violations regarding the failure to provide the requisite level of care. We have thus far bifurcated the Three–Judge Motion, pursuant to defendants' request, and have attempted to resolve only the former question—i.e., whether, regardless of the existence or non-existence of ongoing constitutional violations, defendants have met their burden of proving that prison crowding is no longer the primary cause.

To some extent, however, these questions are inseparable. For example, crowding could not be the primary cause of continuing constitutional violations if there were no longer such violations, and much of the evidence and argument advanced by defendants in the Three–Judge Motion necessarily addresses the latter question, as well as the former. *See, e.g.,* Three–Judge Mot. at 21 (ECF No. 2506/4280) ("The evidence proves that there are no systemic, current, and ongoing federal law violations. All evidence indicates that at the current population density, inmates are receiving health care that exceeds constitutional standards."). Had defendants presented the contention of constitutional compliance to this Court (or rather, had they not abandoned that contention), we would, of course, be required to consider whether they had demonstrated that there was no longer a constitutional violation that warranted the continued imposition of a remedy, i.e., the reduction in the size of the California prison population to 137.5% design capacity. *Horne,* 557 U.S. at 447.[39] Thus, while the evidence submitted by defendants does not support a vacatur of the population cap on the ground that overcrowding is no longer the primary cause of the current prison conditions, it could—in theory—support the vacatur of the population cap on the ground that the unconstitutional prison conditions on which our Order was based no longer exist. Because the existence of a constitutional violation is a condition precedent to continued enforcement of this Court's population reduction order, and because we believe it desirable that it be clear that there is a sound legal basis to our Order, we explain briefly the basis for our continuing authority to issue remedial orders and to enforce compliance with them by means of contempt or otherwise.

*35 [14] It is necessary to first provide some context to this Court's population reduction order. The existence of an ongoing constitutional violation is required for a prisoner release order. *Plata,* 131 S.Ct. at 1929 ("Before a three judge court may be convened, a district court first must have entered an order for less intrusive relief that failed to remedy the constitutional violation and must have given the defendant a reasonable time to comply with its prior orders."). Here, there had been numerous orders in both *Plata* and *Coleman* for less intrusive relief over a period of many years prior to the convening of the three judge court, and those orders had failed to remedy the constitutional violations with respect to medical *and* mental health care. Aug. 4, 2009 Op. & Order at 54 (ECF No. 2197/3641) ("The *Plata* and *Coleman* courts years ago identified the constitutional deficiencies underlying this proceeding."). The three judge court was thus convened to provide remedial relief for two distinct, separate, and independent constitutional violations in failing to provide essential care in the California prison system. Following fourteen days of hearings, this Court found that overcrowding was the primary cause of the ongoing constitutional violations with respect to both medical *and* mental health care. Most important, there was sufficient evidence in *each* case to support a population reduction order.[40] In other words, had there been only a medical health care case, this Court would have ordered defendants to achieve a maximum prison population of 137.5% design capacity. Similarly, had there been only a mental health care case, this Court would have ordered defendants to achieve that same population cap.[41] It follows that, even if defendants were able to achieve constitutional compliance in one case, so long as there were ongoing constitutional violations in the other, this Court's Order would be necessary and would remain in effect.

It has recently been determined that there are still ongoing constitutional violations with respect to the provision of mental health care in the California prison system. On April 5, 2013, the *Coleman* court found that "ongoing

constitutional violations remain" "in the delivery of adequate mental health care." Apr. 5, 2013 Order at 67 (*Coleman* ECF No. 4539). We accept that holding. Additionally, nothing presented by defendants here would cause us to question the result found by the *Coleman* court. The *Coleman* court holding alone is sufficient for this Court to find a continuing constitutional violation, and that holding—together with our holding regarding crowding—requires us to conclude that the primary cause of the continuing constitutional violations in *Coleman* continues to be overcrowding.[42] Moreover, because the *Coleman* case provides a distinct, separate, and independent basis for our Order, this conclusion compels the continuation in effect of our June 2011 Order and each of its terms and provisions.

***36** The constitutional question is also resolved, at least for the purposes of this proceeding, with respect to the provision of medical health care in the California prison system. Defendants initially presented this Court with the contention that they have achieved Eighth Amendment compliance with respect to medical health care, Three–Judge Mot. at 16–17 (ECF No. 2506/4280), but later withdrew that contention from this Court's consideration. Defs.' Resp. at 1 (ECF No. 2529/4332). Unlike in *Coleman,* however, they have not filed a motion in *Plata* to terminate on the ground that there are no longer continuing constitutional violations with respect to medical health care.[43] At the same time, defendants have urged this Court to rule promptly on the Three–Judge Motion. *Id.* at 4. We do so here and must presume, as the evidence indicates, *see* Receiver's 22nd Report at 30–31 (*Plata* ECF No. 2525), that the unconstitutional provision of medical health care continues unabated,[44] and thus *Plata,* like *Coleman,* provides a distinct, separate, and independent basis for our June 2011 Order and each of its terms and provisions.

On the basis of the above, we hold that not only must the Three–Judge Motion be dismissed because defendants have failed to carry their burden with respect to the "primary cause" question, but that the constitutional violations with respect to the provision of medical and mental health care are still ongoing. This Court therefore DENIES the Three–Judge Motion.

IV. PLAINTIFFS' CROSS–MOTION

[15] On February 12, 2013, plaintiffs filed a cross-motion for additional relief. Plaintiffs contend that, even while overcrowding in the California prison system overall has lessened, overcrowding in certain California prisons has persisted or increased. Because the severe overcrowding at these prisons prevents compliance with the Eighth Amendment, plaintiffs request that this Court supplement the systemwide population cap and "order defendants to propose a plan for institution-specific population caps, based on the ability of each institution to provide constitutionally adequate care." Cross–Mot. at 23 (ECF No. 2528/4331).

There is some merit to plaintiffs' argument. As a preliminary matter, this Court observes that plaintiffs are *not* seeking a 137.5% population cap for each prison. Plaintiffs' requested order would require defendants to "develop a plan for prison-specific caps ... that includes a discussion of each prison's clinical and custody staffing levels, staffing vacancies, physical plant limitations, prisoner custody level and available programs." Cross–Mot. at 24 (ECF No. 2528/4331). This request finds some support in the Receiver's most recent report. He describes the differences among various prison institutions and writes that "care at some institutions may require a lower population density while care at other institutions may be constitutional even at higher population densities." Receiver's 22nd Report at 29 (*Plata* ECF No. 2525).

***37** This Court, however, rejects plaintiffs' Cross–Motion for two reasons. First, plaintiffs' request is premature. This Court has previously stated, "[u]nless and until it is demonstrated that a single systemwide cap provides inadequate relief, we will limit the relief we order to that form of order." Aug. 4, 2009 Op. & Order at 121 (ECF No. 2197/3641). Because defendants have not yet met the systemwide cap of 137.5%, it is difficult to determine whether that cap provides inadequate relief. Indeed, as defendants reduce the prison population from 150% to 137.5% design capacity at a systemwide level, the population levels at specific institutions may decline in unexpected ways. Accordingly, it is best to wait and reassess the need for institution-specific caps, if they are needed, when defendants reduce the systemwide prison population to 137.5% design capacity, or at some other time deemed appropriate by the Receiver and Special Master.

Second, it undermines state flexibility at a time when the need for such flexibility is paramount. As this Court stated previously, "an institution-by-institution approach to population reduction would interfere with the state's management of its prisons more than a single systemwide cap, which permits the state to continue determining the

proper population of individual institutions." Aug. 4, 2009 Op. & Order at 121 (ECF No. 2197/3641). The Supreme Court agreed, stating that our systemwide relief order leaves discretion to state officials to "to shift prisoners to facilities that are better able to accommodate overcrowding, or out of facilities where retaining sufficient medical staff has been difficult." *Plata,* 131 S.Ct. at 1941. The need for such flexibility has not abated. Defendants must reduce the institutional prison population by approximately 9,000 more prisoners to comply with this Court's order to reduce the prison population to 137.5% design capacity. Such a reduction, although certainly feasible (for reasons we discuss *infra*) will involve significant effort. This Court will not add to those efforts unnecessarily. [45]

Accordingly, this Court DENIES plaintiffs' Cross–Motion without prejudice to refiling when defendants reduce the systemwide prison population to 137.5% design capacity, or at such other time as this Court may deem appropriate.

V. COMPLIANCE

[16] Having denied the Three–Judge Motion to vacate this Court's population reduction order, we advise defendants once again that they must take all steps necessary to comply with this Court's June 30, 2011 Order, as amended by the January 29, 2013 Order, requiring defendants to reduce the overall prison population to 137.5% design capacity by December 31, 2013.

A. *Defendants' Contumacious Conduct*

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. Although our Order was delayed for two years pending review by the Supreme Court, and thus defendants were effectively afforded four years in which to achieve the reduction in prison population, defendants developed only one solution: Realignment, which became effective in October 2011. While Realignment was, to defendants' credit, a significant step forward in reducing the prison population, it became clear by early 2012 at the latest, on the basis of defendants' own Blueprint, that Realignment alone could not achieve the necessary reduction to 137.5% design capacity. Yet defendants took no further steps to achieve compliance. Defendants did subsequently report to this Court regarding various measures that could reduce the prison population to 137.5% design capacity by June 2013 or December 2013 but explicitly stated that these measures "do not comprise the State's plan because the State has already issued its plan for the future of the State's prison system, the Blueprint." Defs.' Resp. to Oct. 11, 2012 Order at 8 (ECF No. 2511/4284). Because the Blueprint will not reduce the prison population to 137.5% design capacity by June 2013, or December 2013, the Blueprint is not a plan for compliance; it is a plan for non-compliance. In other words, the Blueprint describes what defendants have done and what they will do with respect to complying with our Order. What they have done is make various changes to the state prison system with the expected outcome that California prisons will house 9,000 more inmates than our Order permits at the extended deadline of December 2013. What further steps they will take in order to comply is equally clear: None.

***38** In August 2012, this Court advised defendants that their intention to file a modification motion provided no excuse for their failure to take steps to comply with this Court's Order in the meantime:

> Pending further order of the Court, defendants shall take all steps necessary to comply with the Court's June 30, 2011 order, including the requirement that the prison population be reduced to 137.5% by June 27, 2013.

Aug. 3, 2012 Order at 4 (ECF No. 2460/4220). Defendants, however, took no such steps. As plaintiffs correctly observed, despite defendants' own acknowledgment that further steps to achieve the necessary population reduction—such as good time credits or sentencing reform—required legislative authorization, they "made no effort to seek the needed legislation." Pls.' Resp. to Defs.' Resp. to Sept. 7, 2012 Order at 2 (ECF No. 2481/4247). In December 2012, this Court again reminded defendants that they "must take further steps to achieve full compliance." Dec. 6, 2012 Order at 2–3 (ECF No. 2499/4269). Instead of doing so, defendants filed a motion to vacate our Order altogether and took no further action. Three–Judge Mot. (ECF No. 2506/4280). That same month, defendants filed a status report, in which they admitted non-compliance and made it clear that they had no intention of taking further steps to comply. Defs.' Jan. 2013 Status Report at 1 (ECF No. 2518/4292) ("Based on the evidence submitted in support of the State's motions, further population reductions are not needed...."). This Court then reiterated, for the third time, that such filings do not excuse defendants from taking steps toward compliance with our Order:

> Neither defendants' filings of the papers filed thus far nor any motions, declarations, affidavits, or other papers filed subsequently shall serve as a justification for their failure to file and report or take any other actions required by this Court's Order.

Jan. 29, 2013 Order at 2 (ECF No. 2527/4317). Defendants, instead of taking further steps to comply with our Order, submitted status reports for February and March 2013 that repeated the language of non-compliance verbatim from the January 2013 order. Defs.' Feb. 2013 Status Report at 1 (ECF No. 2538/4342); Defs.' March 2013 Status Report at 1 (ECF No. 2569/4402). In short, for approximately a year, defendants have acted in open defiance of this Court's Order.

Being more interested in achieving compliance with our Order than in holding contempt hearings, this Court has exercised exceptional restraint. Reserving its right to take whatever action may be appropriate with respect to defendants' past conduct, this Court now orders defendants once more to take steps *beyond* that of Realignment and to do so forthwith. Realignment has been a constructive measure, but its effects have reached their maximum, and it will not reduce the prison population to 137.5% design capacity. Defendants have been granted a six-month extension, and this Court expects them to use that time to institute additional measures that will serve to reduce the prison population by an additional 9,000 inmates by December 2013.[46]

B. *Defendants' January 7, 2013 Filings*

***39** In a recent filing, defendants identified various measures by which they could achieve the necessary population reduction by December 2013. Defs.' Resp. to Oct. 11, 2012 Order (ECF No. 2511/4284). They state in that filing, however, that (1) they have "taken major action in all five of the[ ] areas" listed in our prior Opinion & Order and that therefore any "further actions in these areas could not be implemented without adversely impacting public safety," *id.* at 3, and (2) "[e]ach of the prison population reduction measures described below would require rewriting or waiving state statutes and constitutional provisions," *id.* at 6. The first statement is inaccurate, and the second is misleading. What is evident, however, is that defendants do not intend to adopt those measures.

Although defendants may have taken *some* action in the five areas identified in our prior Opinion & Order, they have not taken the *degree* of action in any of them that this Court determined was necessary, and that could be taken without adversely impacting public safety. For example, with respect to the second and third areas—the diversion of technical parole violators and the diversion of low-risk offenders with short sentences—Realignment diverts only a small subset of low-risk prisoners and parolees to county jails. Significant opportunity for further diversion thus remains. *See, e.g.,* Defs.' Resp. to Oct. 11, 2012 Order at 11–12 (ECF No. 2511/4284) (identifying a possible population reduction measure involving the diversion to the county jail system of inmates with "nine months or less" time to serve remaining). With respect to the fifth category—other reforms including changes to sentencing law—defendants have not pursued "release or diversion of certain [s]ub-populations, such as women, the elderly and the sick from prison to community-based facilities." Aug. 4, 2009 Op. & Order at 154 (ECF No. 2197/3641). In particular, despite the fact that 14% of California's misnamed "Lifer"[47] population—which consists of over 30,000 inmates—are over 55 years old, defendants have taken no meaningful action to release elderly low-risk prisoners in this category. *See* Robert Weisberg et al., Stanford Criminal Justice Center, *Life in Limbo: An Examination of Parole Release for Prisoners Serving Life Sentences with the Possibility of Parole,* Sept. 2011, at 16–17. It is more than likely that defendants could reduce the deficit with respect to the 137.5% population cap by approximately half, without risk to public safety, were it to make the appropriate assessments and take the appropriate actions with respect to these so-called "Lifers" alone. Clearly, much benefit could be obtained with respect to the second, third, and fifth categories identified in our prior Opinion & Order were defendants to take even moderate steps in those areas. Yet, as far as legislative action is required, defendants have not advised us of anything they have done to obtain waivers of legislative obstacles.

***40** Perhaps defendants' greatest failure to act, however, is with respect to the first category identified in our prior Opinion & Order: the expansion of good time credits. Although defendants have expanded the good time credits program somewhat under Senate Bill 18, the current system falls far short of what this Court described as being a feasible means of reducing the prison population without having any adverse impact on public safety. Aug. 4, 2009 Op. & Order at 139–45 (ECF No. 2197/3641).[48] California continues to limit excessively the length, and to restrict the availability,

of good time credits, despite this Court's determination that eliminating these restrictions would enable defendants to safely reduce the prison population. *Id.* at 177–81 (citing Expert Panel on Adult Offender Recidivism Reduction Programming at 95[49]). Accordingly, if defendants were to adopt the policies of other jurisdictions and increase the length of good time credits to 4–6 months and award credits to inmates regardless of their offense or strike level, these changes would, on their own, reduce the prison population by far more than the amount necessary to comply with the 137.5% population cap. Again, even a moderate change in policy would enable defendants to comply with this Court's Order, and, again, defendants have not advised us that they have sought such a change.

Contrary to Defendants' representations, not all measures identified in defendants' filing require the waiver of state laws. For example, the out-of-state prisoner program was initially enacted under the Governor's emergency powers. It therefore follows that it could be continued or reinstated under those powers.[50] We note that continuance of the out-of-state prisoner program is not necessary to enable defendants to comply with our Order. It is, of course, defendants' choice how they will comply. As we have explained, among the many means for reducing the prison population, the expansion of good time credits would alone enable defendants to comply, and the early release of low-risk elderly "Lifers," in combination with other equally minor reforms, would do the same. Certainly some combination of some of these low-risk reforms would enable defendants to reduce the prison population to well below 137.5% design capacity even while terminating the out-of-state prisoner program, which defendants have advised us is extremely costly, and which has the further disadvantage of preventing prisoners from maintaining relationships with family members.

Although they have done little if anything to obtain various state waivers, defendants have advised this Court that such waivers will be necessary if defendants are to implement some of the measures in question. Defs.' Resp. to Oct. 11, 2012 Order (ECF No. 2511/4284). This Court is empowered to override the applicable state provisions, if necessary, 18 U.S.C. § 3626(a)(1)(B),[51] but will do so only as a matter of last resort. It would be more in keeping with principles of federalism, however, were the Governor to use his best efforts to obtain such waivers. Nothing in the record to date suggests that he has done so. In a concurrently filed order, we therefore order defendants to list, *in the order of their preference,* (1) all possible measures to reduce the prison population that have been suggested by this Court or identified as possible prison reduction measures by plaintiffs or defendants in the course of these proceedings; (2) the extent of population reduction that could be accomplished by each measure, including retroactive application where applicable; and (3) which measures require waivers of state law (and which specific laws). Additionally, because defendants' projections may prove inaccurate, as they have in the past, this Court orders defendants "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." *Plata,* 131 S.Ct. at 1947. The details are available in the concurrently filed order.

***41** We note that, although defendants have identified ten patchwork steps—steps that are neither retroactive nor sustained—that in combination would serve to reduce the prison population to the requisite number by December 31, 2013, some of the measures that we have discussed in this Section would be more effective and desirable if adopted as permanent, substantive changes in prison policy. In one case, the implementation of the measure in itself would enable defendants to achieve compliance; in another, the implementation of the measure, along with only one of a number of other measures, would enable defendants to reach that goal readily. *See* Pls.' Statement in Resp. to Oct. 11, 2012 Order Re: Population Reduction (ECF No. 2509/4283). Furthermore, adopting a number of the measures discussed in this Section as substantive changes would benefit the administration of the prison system over the long run. It is that long-term obligation that defendants must bear in mind in achieving a "durable remedy" to the problem of prison crowding. Accordingly, in responding to our concurrently filed order that directs defendants to provide us with a plan for compliance with our Order, defendants must provide assurances that those measures will remain in effect for an indefinite future period, and that the prison population will be maintained at 137.5% design capacity pending further order of this Court.

C. *Compliance Going Forward*

Finally, this Court observes that the prison overcrowding crisis has plagued California for over twenty years and defied the efforts made in good faith by Governor Brown's predecessors, including Governor Deukmejian and Governor Schwarzenegger. Fully aware of this context, the Supreme Court affirmed this Court's determination that the prison population must be reduced to 137.5% design capacity within a two-year period. Accordingly, Governor Brown has a duty to exercise in good faith his full authority, including seeking

any changes to or waivers of state law that may be necessary to ensure compliance with the Supreme Court's judgment. *See, e.g., Cooper v. Aaron,* 358 U.S. 1, 18, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958); *United States v. Barnett,* 376 U.S. 681, 84 S.Ct. 984, 12 L.Ed.2d 23 (1964).

This Court reminds defendants *yet again* that they continue to be subject to the terms of this Court's order. As the Supreme Court explained in *Maness v. Meyers,* 419 U.S. 449, 458, 95 S.Ct. 584, 42 L.Ed.2d 574 (1975):

> We begin with the basic proposition that all orders and judgments of courts must be complied with promptly. If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal. Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect.

Id. at 458. The rule in Maness that parties must comply whether or not they believe a court's order is incorrect and must do so during any period that they may be contesting its validity is applicable to public and private parties alike. Specifically, the rule is applicable to Governor Brown, as well as the lowliest citizen. That Governor Brown may believe, contrary to the evidence before this Court, that "prison crowding [is] no longer ... inhibit[ing] the delivery of timely and effective health services to inmates,"[52] will not constitute an excuse for his failure to comply with the orders of this Court. Having been granted a six-month extension, defendants have no further excuse for non-compliance. If defendants do not take all steps necessary to comply with this Court's June 30, 2011 Order, as amended by this Court's January 29, 2013 Order, including complying with the order filed in conjunction with this opinion, they will without further delay be subject to findings of contempt, individually and collectively. We make this observation reluctantly, but with determination that defendants will not be allowed to continue to violate the requirements of the Constitution of the United States.

***42 IT IS SO ORDERED.**

ORDER REQUIRING LIST OF PROPOSED POPULATION REDUCTION MEASURES

Concurrently with the filing of this order, this Court denies defendants' Motion to Vacate or Modify Population Reduction Order (*Plata* ECF No. 2506/ *Coleman* ECF No. 4280). We reiterate that defendants must immediately take further steps to comply with this Court's June 30, 2011 Order, as amended on January 29, 2013 ("Order"), requiring defendants to reduce the overall prison population to 137.5% design capacity by December 31, 2013. To ensure that they do so, IT IS HEREBY ORDERED that:

1. Within 21 days of the date of this order, defendants shall submit a list ("List") of *all* prison population reduction measures identified or discussed as possible remedies in this Court's August 2009 Opinion & Order, in the concurrently filed Opinion & Order, or by plaintiffs or defendants in the course of these proceedings (except for out-of-state prisoner housing, discussed in 2(g)). Defendants shall also include on the List any additional measures that they may presently be considering. Defendants shall list all of these measures in the order that defendants would prefer to implement them, without regard to whether in defendants' view they possess the requisite authority to do so. For each measure, defendants shall include the following information:

a. Defendants' best estimate as to the extent to which the measure would, in itself, assist defendants in reducing the prison population to 137.5% design capacity by December 31, 2013, including defendants' best estimate as to the number of prisoners who would be "released," *see* 18 U.S.C. § 3626(g)(4), as a result of the measure. If the measure permits retroactive application, defendants shall include two sets of estimates—one calculated on the basis of applying the measure prospectively only, and the other calculated on the basis of applying the measure both prospectively and retrospectively.

b. Whether defendants, including Governor Edmund G. Brown Jr., currently possess the authority to implement the measure and, if not, what action or actions must be taken by the Legislature or any administrative body or agency before defendants may implement the measure and, if such action or actions have not yet been taken, which specific constitutional provisions, statutes, regulations, or rules must be amended, modified, or waived in order for defendants to be able to implement the measure.

c. If defendants must obtain further authorization to implement the measure, the latest date by which that authorization must be obtained for the measure to have a substantial effect on defendants' ability to comply with the Order.

d. A list of specific steps necessary to implement the measure, other than those related to obtaining the necessary authorization, and the dates by which these specific steps must be taken for the measure to have a substantial effect on defendants' ability to comply with the Order.

***43** 2. Within 21 days of the date of this order, defendants shall submit a plan ("Plan") for compliance with the Order. This Plan shall identify measures from the List that defendants propose to implement, without regard to whether in defendants' view they possess the requisite authority to do so. The Plan shall include a number of additional measures (contingency measures) should any of these measures prove infeasible or fail to meet the anticipated numbers. Defendants shall also include the following information regarding the Plan:

a. *For each measure in the Plan as to which defendants currently possess the requisite authority:* the dates by which the specific steps to implement the measure will be taken, and the person or persons responsible for taking each step.

b. *For each measure in the Plan as to which defendants currently lack the requisite authority:* the necessary authorization, approval, or waivers, including listing the specific constitutional provisions, statutes, regulations, or rules involved.

c. *For each measure in the Plan:* defendants' best estimate as to the extent to which the measure would assist defendants in reducing the prison population to 137.5% design capacity by December 31, 2013, including defendants' best estimate as to the number of prisoners who would be "released" as a result of the measure.

d. *For the Plan as a whole but excluding contingency measures:* defendants' best estimate as to the total number of prisoners who would be "released" and defendants' best estimate as to the remaining prisoner population as a percentage of design capacity. These estimates shall not double count prisoners who may fall within more than one measure.

e. *For the measures included in the List but not in the Plan:* defendants' reasons, excluding lack of authority, why they do not propose to implement these measures. Other reasons that shall be excluded are all reasons that were previously offered at the trial leading to this Court's August 2009 Opinion & Order and rejected in that Opinion & Order.

f. An explanation of how the measures in the Plan would, individually and collectively, provide a durable solution to the problem of prison overcrowding, such that the prison population would be sustained at a level at or below 137.5% design capacity beyond the December 31, 2013 deadline.

g. If defendants wish to include in the Plan a measure relating to slowing or eliminating the return of inmates being housed in out-of-state prisons, they shall include an estimate regarding the extent to which this measure would assist defendants in reducing the prison population to 137.5% design capacity by December 31, 2013. They shall also explain the effect on durability of failing to return the number of prisoners anticipated to be returned in the Blueprint during the current year, and in particular whether those prisoners and other out-of-state prisoners will be added to the prison population in future years.

***44** 3. All defendants, including the Governor, shall use their best efforts to implement the Plan.

a. *For each measure in the Plan as to which defendants currently possess the requisite authority:* Defendants shall immediately commence taking the steps necessary to implement the measure.

b. *For the remaining measures in the Plan:* Defendants shall forthwith attempt in good faith to obtain the necessary authorization, approval, or waivers from the Legislature or any relevant administrative body or agency.

4. Following the filing of the List and the Plan, defendants shall include in their monthly status reports the following information:

a. *For each measure in the Plan as to which defendants currently possess the requisite authority:* the steps that have been taken towards such implementation. If any step has not been taken by its intended date (as provided for in 2(a)), defendants shall explain the reasons and list specific steps, including revised dates and persons responsible, such

that the measure will be implemented in time to have a substantial effect on defendants' ability to comply with the Order. "Reasons" shall not include any explanation that challenges the validity of this Court's orders or the necessity of defendants' compliance.

b. *For the remaining measures in the Plan:* all actions that have been taken by defendants, including the Governor, to obtain the necessary authorization, approval, or waivers from the Legislature or any relevant administrative body or agency, and the specific actions taken by the Legislature or the administrative body or agency in response, if any.

5. Two years ago, the Supreme Court stated: "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." *Brown v. Plata,* —— U.S. ——, ——, 131 S.Ct. 1910, 1947, 179 L.Ed.2d 969 (2011). We have inquired about defendants' ability to develop such a system, and they have advised us that they are able to do so. Defs.' Resp. to Sept. 7, 2012 Order at 5 (*Plata* ECF No. 2479/ *Coleman* ECF No. 4243). Given the passage of time and defendants' failure to take all steps necessary to comply with our Order thus far, we now order defendant to develop a system to identify prisoners who are unlikely to reoffend or who might otherwise be candidates for early release, to the extent that they have not already done so. If defendants fail to reduce the prison population to 137.5% design capacity in a timely manner, this system will permit defendants to nevertheless comply with the Order through the release of low-risk prisoners. Accordingly, defendants shall design the system such that it will be effective irrespective of defendants' partial or full implementation of some or all of the measures in the Plan. Within 100 days of the date of this order, defendants shall submit a report to this Court regarding the actions taken thus far regarding this identification system, its current status as of that date, and—if the system is not yet fully developed—defendants' best estimate as to when it will be fully developed.

***45** For the purposes of this order, the term "defendants" shall refer to each defendant, individually and collectively.

IT IS SO ORDERED.

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 Opinion, when we cite to such filings, we include 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* .

2 Other pending matters are addressed in Part II of this Opinion & Order. Any matter not specifically mentioned is denied without prejudice.

3 For those interested in the extensive (and unsuccessful) remedial efforts in both the *Plata* and *Coleman* cases, see our August 4, 2009 Opinion & Order at 10–36 (ECF No. 2197/3641), which provides a detailed summary of those proceedings.

4 In accordance with the circuit's procedure for the assignment of circuit court judges, Judge Stephen Reinhardt was drawn as the third member of this Court.

5 Jeffrey Beard, who was then the Secretary of the Pennsylvania Department of Corrections and testified on behalf of plaintiffs, has been recently appointed as the new CDCR Secretary. He has since revised his position on the crowding issue, a point we discuss *infra.*

6 As stated in our prior Opinion & Order, "the words crowding and overcrowding have the same meaning, and we use them interchangeably." Aug. 4, 2009 Op. & Order at 56 (ECF No. 2197/3641).

7 "Design capacity" is based on one inmate per cell, single bunks in dormitories, and no beds in space not designed for housing. Aug. 4, 2009 Op. & Order at 39–42 (ECF No. 2197/3641) (explaining various measures of prison capacity).

8 On January 12, 2010, this Court issued an order accepting defendants' two-year plan for achieving a prison population of 137.5% design capacity without ordering implementation of any specific population reduction measures. Rather, this Court ordered defendants to reduce prison population to 167%, 155%, 147%, and 137.5% at six-month benchmarks. Jan. 12, 2010 Order to Reduce Prison Population at 4 (ECF No. 2287/3767). This Court stayed the effective date of that order while the appeal was pending before the Supreme Court. *Id.* at 6.

9 California had also enacted Senate Bill 18, which made various reforms to its goodtime credits, parole policy, community rehabilitation programs, and sentences. Defs.' Resp. to Jan. 12, 2010 Court Order at 4–5 (ECF No. 2365/4016).

10 Moreover, plaintiffs submitted a declaration from James Austin, an expert in criminology, who explained why defendants' projections for the decline in prison population were overly optimistic. *Id.* at 5–6.

11 The Blueprint represents defendants' current plan for the California prison system. It, however, makes no attempt to reduce prison crowding further than Realignment. To the contrary, it calls for the elimination of California's program that houses approximately 9,500 inmates in out-of-state prisons, which—as explained *infra*—will have the result of increasing prison crowding. The Blueprint is therefore, in all ways relevant, merely the updated version of the Realignment program, and we use the terms Realignment and Blueprint interchangeably. The Blueprint can be found at http://www.cdcr.ca.gov/2012plan/docs/plan/complete.pdf.

12 Defendants' initial briefing was unclear and did not satisfactorily respond to this Court's question as to what the legal and factual basis for the motion to modify would be. Additionally, their answer raised further factual questions. For example, defendants assured this Court that they would not use modification as a delaying tactic because they would seek modification promptly after the prison population fell to 145%, which they projected would happen in December 2012. Defs.' Resp. to June 7, 2012 Order Requiring Further Briefing at 1, 2 (ECF No. 2447/4203). Their projection, however, appeared to be outdated. The then-current prison population was higher than defendants estimated, as the rate of prison population decline was already slowing considerably. If defendants failed to take additional measures until after they filed a motion to modify and would not file the motion until the prison population fell to 145%, it was unclear whether, if ever, a motion would be filed. Accordingly, this Court ordered a second round of briefing.

13 Our order was directed at both parties, but the answers we sought were from defendants only.

14 Defendants did answer our other questions. First, defendants believed it premature to begin modification proceedings before the prison population reached 145%. Defs.' Resp. to Aug. 3, 2012 2d Order Requiring Further Briefing at 9–10 (ECF No. 2463/4226). Second, they conceded that their population projections were flawed and now stated that they believed the prison population would reach 145% by February or March 2013, at which point they would seek modification. *Id.* at 10–11. As of this date, the prison population is close to 150%. *See* CDCR, *Weekly Rpt. of Population,* Apr. 3, 2013, *available at* http://www.cdcr.ca.gov/reports research/offender information_services_branch/WeeklyWed/TPOP1A/TPOP1Ad130403.pff.

15 By this time, Edmund G. Brown Jr. had succeeded Arnold Schwarzenegger as Governor.

16 This contention is inaccurate, for reasons explained in detail *infra.* In short, Realignment diverted only those who had committed "non-serious, non-violent, and nonregisterable sex crimes ." Additionally, the scope of defendants' current good time credits program is very limited, compared to those other jurisdictions—discussed in our prior Opinion & Order—that have safely reduced prison population through good time credits.

17 Additionally, Proposition 36—the retroactive elimination of three-strikes for nonserious, non-violent offenses—should result in a substantial reduction in the prisoner population. Defendants stated that approximately 2,800 prisoners "could be eligible for resentencing." Defs.' Resp. to Sept. 7, 2012 Order at 6 (ECF No. 2479/4243). Thus, the enactment of Proposition 36 may by itself reduce the prison population by several percentage points.

18 The Honorable Peter Siggins is presently a state Court of Appeal Justice who previously worked as the lead lawyer for the defense of correctional law cases in the Attorney General's Office of the California Department of Justice and as the Legal Affairs Secretary to Governor Schwarzenegger, the original Defendant–Governor in this case. Earlier in the proceedings, he served in a role as a settlement consultant with the consent of all parties. Aug. 4, 2009 Op. & Order at 48–49 (ECF No. 2197/3641).

19 In September 2012, Defendants stated that they could achieve compliance by December 2013 based on new construction and maintaining the out-of-state program alone, Defs.' Resp. to Sept. 7, 2012 Order at 6 (ECF No. 2479/4243) ("Based on the Spring 2012 population projections, by increasing capacity when the California Health Care Facility in Stockton opens and maintaining the out-of-state program, the prison population will reach 137.5% by December 31, 2013."). However, in their January 7 filings, defendants advised this Court that compliance by December 2013, although still feasible, would require the combination of approximately ten other measures. App. A to Grealish Decl. in Supp. of Defs.' Resp. to Oct. 11, 2012 Order (ECF No. 2512/4285).

20 Despite their assertions that complying with the 137.5% population cap might, in some circumstances, require waiving or modifying state laws, defendants have not

sought such change or modification from the Legislature (aside from the 2011 Realignment legislation, nor have they requested this Court to take such action.

21 Available at http://gov.ca.gov/news.php?id=17885.

22 To the extent that specific filings in *Coleman* are particularly relevant to the crowding question, and to the extent that defendants have not presented a specific objection to those portions of those filin s, this Court takes judicial notice of those filings as appropriate. *Harris v. Cnty. of Orange,* 682 F.3d 1126, 1132 (9th Cir.2012) (taking judicial notice of declarations filed in a related case).

23 Defendants cite two provisions of the PLRA, 18 U.S.C. § 3626(a)(1)(A) & § 3626(a)(3)(E), Three–Judge Mot. at 6–7 (ECF No. 2506/4280), but these provisions do not provide a legal basis for modification or vacatur. Section 3626(a) of the PLRA relates to the initial grant of prospective relief. By contrast, § 3626(b) of the PLRA relates to the termination of prospective relief. Defendants are fully aware of the distinction. Mot. to Terminate & to Vacate J. & Orders (*Coleman* ECF No. 4275) (seeking termination under 18 U .S.C. § 3626(b)). Accordingly, the sections of the PLRA cited by defendants provide no legal basis for their motion to vacate the relief ordered by this Court.

Moreover, even if defendants had invoked 18 U.S.C. § 3626(b), this would have had no bearing on our analysis of the Three–Judge Motion for two reasons. First, the operative provision of § 3626(b) comes into effect "2 years after the date the court granted or approved the prospective relief." 18 U.S.C. § 3626(b)(1)(A)(i). Because this Court's Order was issued in June 2011, those two years have not yet transpired. Moreover, even were that not the case, the circumstances in this case would not justify termination under 18 U.S.C. § 3626(b)(1). This provision was intended by Congress to enable defendants who have dutifully complied with a court order to obtain relief and thus "guard against court-ordered caps dragging on and on, with nothing but the whims of federal judges sustaining them." H.R.Rep. No. 104–21, at 8 (1995). Here, however, defendants are not in compliance and actually refuse to take appropriate action, as explained further *infra.* Permitting Defendants to seek termination when they have not achieved compliance would reward intransigence by Defendants, not police against overly intrusive federal courts. In sum, applying the termination provision in this case would contravene clear congressional intent.

Second, this Opinion would constitute the "written findings based on the record that prospective relief remains necessary" under 18 U.S.C. § 3626(b)(3). In *Gilmore v. California,* 220 F.3d 987 (9th Cir.2000), the Ninth Circuit held that, under 18 U.S.C. § 3626(b), a district court is "bound to maintain or modify any form of relief necessary to correct a current and ongoing violation of a federal right, so long as that relief is limited to enforcing the constitutional minimum," *id.* at 1000, and that "nothing in the termination provisions can be said to shift the burden of proof from the party seeking to terminate the prospective relief," *id.* at 1007. Accordingly, for the reasons explained *infra,* this Court finds that defendants have failed to demonstrate that our population reduction order to 137.5% design capacity no longer "remains necessary to correct a current and ongoing violation of the Federal right," "extends [ ] further than necessary to correct the violation of the Federal right," or "the prospective relief is [not] narrowly drawn [or is no longer] the least intrusive means to correct the violation." 18 U.S.C. § 3626(b)(3).

24 The Supreme Court also stated that, "[w]hile a decision that clarifies the law will not, in and of itself, provide a basis for modifying a decree, it could constitute a change in circumstances that would support modification if the parties had based their agreement on a misunderstanding of the governing law." *Rufo,* 502 U.S. at 390, 112 S.Ct. 748.

25 This Court observes that much of the Supreme Court's case law regarding modification or vacatur under Rule 60(b)(5) has arisen in the context of consent decrees. *E.g., Rufo,* 502 U.S. at 383, 112 S.Ct. 748. Here, we deal not with a consent decree, but with a decree that defendants vigorously resisted. It may well be the case that defendants bear a higher burden in the latter case. It matters not in this case as defendants fail under either scenario. Here, defendants fall short of meeting the conditions warranting modification or vacatur of a consent decree, and fall even shorter of meeting the conditions' application to a contested decree, as many of defendants' arguments are simply restatements of the positions they adopted in opposing the decree in the first instance and none involves conditions that were not fully anticipated at the time of the issuance of the decree. *See* discussion *infra.*

26 Even if this passage were applicable to the crowding issue, the proper conclusion to draw would be that, if defendants can prove crowding is a "less urgent" problem, this Court should "extend or modify" the two-

year timeline—which this Court has already done—not vacate the population reduction order.

27 Although we offer no objection to defendants' modification of the Three–Judge Motion and analyze it accordingly in Section III.C, we nevertheless briefly discuss the Three–Judge Motion without such modification in Section III.D.

28 Defendants fail to note that, had they complied with our order when it was initially issued in August 2009, they would have arrived at the 137.5% population cap almost two years ago.

29 Defendants, citing *Gonzalez v. Crosby,* 545 U.S. 524, 529, 125 S.Ct. 2641, 162 L.Ed.2d 480 (2004), contend that finality is not a relevant concern here because Rule 60(b)(5) is an exception to finality. Three–Judge Mot. at 6 (ECF No. 2506/4280). This is generally true, but the Supreme Court has also stated the Rule 60(b) exception to finality cannot be interpreted in such a way that "would swallow the rule." *United Student Aid Funds, Inc. v. Espinosa,* 559 U.S. 260, 130 S.Ct. 1367, 1377, 176 L.Ed.2d 158 (2010). As explained above, in the context of a predictive judgment, it would fundamentally undermine finality if the losing party could seek modification because (1) time had passed and (2) the party simply alleged that the ultimate predictive judgment was wrong.

30 Bureau of Justice Statistics, U.S. Dep't of Justice, *Prisoners in 2011,* Dec. 2012, App. 14 at page 31, *available at* http:// www.bjs.gov/content/pub/pdf/p11.pdf.

31 Defendants objected to these statements in the Receiver's Report and moved to have them stricken. Defs.' Objections to Receiver's 22nd Report (*Plata* ECF No. 2532). These objections were rejected by the *Plata* court. Feb. 28, 2012 Order Overruling Defs.' Objections to Receiver's 22nd Report (*Plata* ECF No. 2554).

32 Although it should go without mention, it bears repeating that both the Receiver and Special Master are officers of the Court and thus deserve the same deference that the parties would provide to this Court directly. *Plata,* 131 S.Ct. at 1947 (referring to the Special Master and the Receiver in conjunction with this Court). Defendants have not always maintained appropriate propriety in their filings with regard to their statements regarding these officers. Feb. 13, 2012 Order to Show Cause at 2 (*Coleman* ECF No. 4335) ("As plaintiffs point out, defendants' attack consists of a raw assertion of unethical conduct, with no supporting evidence nor even any hint that defendants actually believe the attack they make. This court takes very seriously any allegation of unethical conduct. It would not countenance any attempt by plaintiffs, or anyone, to prevent defendants from making any non-frivolous assertions having evidentiary support, and made for purposes other than harassment or other improper purpose. *See* Fed.R.Civ.P. 11(b). However, the court can only be dismayed by the cavalier manner in which defendants, in objections signed by their attorney of record, level a smear against the character and reputation of the Special Master, without any apparent regard for whether the attack is consistent with defense counsel's obligations under Rule 11 (providing sanctions for presenting pleadings without an evidentiary basis, or made to harass, or for other improper purposes).").

33 The *Coleman* Special Master's Twenty–Fifth Round Monitoring period ended in September 2012. *See* Apr. 5, 2013 Order at 6 (*Coleman* ECF No. 4539).

34 The *Plata* court's ongoing review of the provision of medical care in the California prison system demonstrates two additional points of significance. First, contrary to defendants' public representations otherwise, this Court and the individual *Plata* and *Coleman* courts have met our "continuing duty and responsibility," as set forth by the Supreme Court, "to assess the efficacy and consequences" of our orders. *Plata,* 131 S.Ct. at 1946. Second, defendants' attempt to terminate these proceedings are wholly premature. Although the *Plata* court ordered the parties to meet and confer on post-Receivership planning over a year ago because it believed the "end of the Receivership appear[ed] to be in sight," Jan. 27, 2012 Order to Meet & Confer re: Post–Receivership Planning at 2 (*Plata* ECF No. 2417), that does not justify defendants' declaration of "mission accomplished." To the contrary, the parties took several months to meet and confer, after which time the *Plata* court proposed a transition plan and allowed the parties an opportunity to respond. On September 5, 2012, the *Plata* court issued an order setting forth the framework for transitioning away from the Receivership and determining when medical care would be deemed constitutionally adequate. Sept. 5, 2012 Order re: Receivership Transition Plan & Expert Evaluations (*Plata* ECF No. 2470). The court's order was based in part on the parties' original stipulation that any institution found to be in substantial compliance by the court experts—all of whom were appointed pursuant to the parties' stipulation—would be providing constitutionally adequate care. *Id.* at 4. As the Receiver has noted, "it will be the experts' reports that create the primary factual record from which the *Plata* court can make a finding that medical care is being provided consistent

with constitutional minimums." Receiver's 22nd Report at 30 (*Plata* ECF No. 2525). To date, the experts have completed evaluations of only four institutions. Also, as the record reveals, the confidence of defendants in their ability to achieve the required 137.5% population figure by December 2013, let alone June 2013, lessened as the results of their Realignment program became evident. At the same time, the willingness of defendants to comply with this Court's Order to reduce the number of prisoners being held in California's prisons lessened correspondingly.

35 As stated *supra,* this Court takes judicial notice of these declarations.

36 Defendants assert, without evidence, that the public safety problem is different today from that which our Court initially considered in the prior Opinion & Order, because Realignment has resulted in the diversion of the low-risk prisoners, leaving only (as they contend) serious or violent offenders in the California prison system. Three–Judge Mot. at 19–20 (ECF No. 2506/4280); Defs.' Reply at 21–22 (ECF No. 2543/4345). Their assertion, however, is contradicted by their own evidence. In our prior Opinion & Order, this Court determined that a reduction of approximately 46,000 prisoners—enough to achieve the 137.5% reduction—was feasible without endangering public safety. Aug. 4, 2009 Op. & Order at 177–81 (ECF No. 2197/3641). The Supreme Court agreed, in affirming this Court's order. *Plata,* 131 S.Ct. at 1923 (noting that our order might, as an upper limit, involve the release of 38,000–46,000 prisoners). Realignment, however, has only resulted in the release of 24,000 prisoners from the state prison system. Thus, as a matter of simple math, Realignment could not have already resulted in the early release of all prisoners that this Court previously determined could be released consistent with public safety. Defendants should still able to reduce the prison population by at least 10,000 prisoners—which would be sufficient to achieve the 137.5% figure—without adversely affecting public safety.

37 As stated *supra, Horne v. Flores* relates largely to the resolution of the underlying violation of federal law, here the constitutional question, which is not before this Court. However, to the extent that Defendants contend otherwise, this Court finds that Defendants have not met the conditions identified in that case.

38 The vast majority of Defendants' arguments are based on the inequitable-prospective-application provision of Rule 60(b)(5). Defendants, however, make stray mention of another provision in Rule 60(b)(5), which permits modification or vacatur if "the judgment has been satisfied." Three–Judge Mot. at 5 (ECF No. 2506/4280). Defendants further state, in a rather offhand way, that "[b]y any reasonable measure, the intent of the population reduction order has been achieved." *Id.* at 19.

Not only have Defendants entirely ailed to present any factual argument based on the judgment-satisfied provision of Rule 60(b)(5), this provision is wholly inapplicable. In no way has this Court's judgment been satisfied. Defendants have failed to prove that (1) there are no longer ongoing constitutional violations; (2) overcrowding has been eliminated; (3) overcrowding is no longer the primary cause of ongoing constitutional violations; or (4) 137.5% is not an appropriate population cap. For all the reasons explained herein, this Court finds that the judgment has not been satisfied under Rule 60(b)(5).

39 We could alternatively have referred the issue to the *Plata* and *Coleman* courts separately or collectively, or determined that the question must be directed to them directly. As stated *supra,* we make no decision here as to the procedural issue in question.

40 *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).

41 That one three judge court was convened, instead of two, was 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.*

42 We recognize that, for purposes of the denial of this motion to vacate, we need only determine, as we have *supra,* that defendants failed to show a significant and unanticipated change in circumstances that renders continued enforcement of our Order inequitable.

43 Recently, following our unsuccessful efforts to obtain any answer to our inquiries as to whether or when a motion to terminate might be filed, Defs.' Resp. at 1 (ECF No. 2529/4332) (stating that they might file a motion to terminate "in a few months"), the *Plata* court issued an order in that case requiring 120–day notice before the filing of a motion to terminate. Feb. 21, 2013 Order Granting in Part & Denying in Part Pls.' Mot. for Disc. at 5 (*Plata* ECF No. 2546). Although defendants have filed an interlocutory appeal of that order, the appeal has no effect on our decision here or on defendants' obligation to comply with our Order.

44 The determination that medical care in the California prison system does not meet constitutional standards is set forth in the *Plata* court's 2005 ruling appointing a receiver to manage the delivery of medical care for CDCR. Oct. 3, 2005 FF & CL, 2005 WL 2932253, at * 1 ("The Court has given defendants every reasonable opportunity to bring its prison medical system up to constitutional standards, and it is beyond reasonable dispute that the State has failed."). That determination remains in effect.

45 Contrary to defendants' suggestion, the Supreme Court did not "unambiguously reject[ ] institution-specific caps." Defs.' Reply at 19 (ECF No. 2543/4345). To the contrary, the Supreme Court's discussion was limited to rejecting defendants' argument that our order was overbroad because our order was flexible. Recognizing the flexibility of our order does not compel, or even imply, the conclusion that institution-specific caps could not subsequently be appropriate.

46 We assume, for practical reasons, that defendants will not be able to institute and complete any new construction projects between now and December 2013 that would increase capacity. Accordingly, we assume that, at this stage, compliance with the 137.5% population cap could be achieved only by reducing the prison population by 9,000 inmates.

47 "Lifer" refers principally to inmates serving a "term-to-life" sentence with the possibility of parole. The term "Lifer" incorrectly conveys the impression that any such inmate must have committed a horrendous crime in order to have received a life sentence. To the contrary, under California's determinate sentencing scheme, most Lifers are given a minimum prison term (generally 15–20 years), after which they are eligible for parole unless they are deemed a threat to public safety. Lifers include, for example, individuals who committed vehicular homicide—individuals who were extremely reckless when younger but are far less so having reached middle age or more. *E.g., Sass v. California Bd. of Prison Terms,* 461 F.3d 1123 (9th Cir.2006), *overruled on other grounds by Hayward v. Marshall,* 603 F.3d 546 (9th Cir.2010) (en banc). Very few Lifers have been released, however, despite their low risk of recidivism. As a result, the Lifer population now constitutes 20% of the entire California prison system. *See generally* Robert Weisberg et al., Stanford Criminal Justice Center, *Life in Limbo: An Examination of Parole Release for Prisoners Serving Life Sentences with the Possibility of Parole,* Sept. 2011, available at http://blogs.law.stanford.edu/newsfeed/files/2011/09/SCJC_report_Parole_Release_for_ Lifers.pdf.

Although defendants object to the release of elderly Lifers on the ground of public safety, Defs.' Resp. to Oct. 11, 2012 Order at 19–20 (ECF No. 2511/4284), it appears that 75% of these Lifers have been placed in CDCR's lowest risk category, and the historical recidivism rate of Lifers is approximately 1%—in comparison to California's overall recidivism rate of 48%. *See* Weisberg, *Life in Limbo,* at 16–17. Moreover, elderly individuals are much less likely to recidivate as they are generally less likely to commit crimes. *Id.* at 17 ("For most offenses—and in most societies—crime rates rise in the early teenage years, peak during the mid-to-late teens, and subsequently decline dramatically. Not only are most violent crimes committed by people under 30, but even the criminality that continues after that declines drastically after age 40 and even more so after age 50.").

48 Dr. James Austin, plaintiffs' primary expert on good time credits, submitted a declaration stating that, if California were to bring its good time credits program in line with other jurisdictions that have safely implemented such programs—i.e., permitting four to six months of credit—

it would reduce the prison population by 7,000 inmates. Austin Decl. ¶¶ 12–15 (ECF No. 2420–1 /4152–1).

49 This report described various good time credit reforms that had the potential to reduce the prison population by 32,000 inmates. Very few of these reforms have been implemented, and thus the opportunity for further reduction in the prison population through expansion of good time credits remains significant. The report is available at http://sentenci ng.nj.gov/downloads/pdf/articles/2007/July2007/document03.pdf

50 That the Governor has prematurely declared the overcrowding problem over is of no consequence, given the facts established in this case.

51 This provision of the PLRA reads: "The court shall not order any prospective relief that requires or permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law, unless—(i) Federal law requires such relief to be ordered in violation of State or local law; (ii) the relief is necessary to correct the violation of a Federal right; and (iii) no other relief will correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(B).

52 Gov. Brown, Jan. 8, 2013 Proclamation.

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Exhibit C

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))).

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[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.

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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,

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[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 &

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[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

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[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/WeeklyWed/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

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[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

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[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