No. 13-198

IN THE

Supreme Court of the United States

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

v.

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

Appeals from the United States District Courts for the Eastern District of California and the Northern District of California

OPPOSITION TO APPELLEES' JOINT MOTION TO DISMISS OR AFFIRM

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Appellees' motion to dismiss should be denied because the orders on appeal impose *new* injunctions beyond the relief affirmed in *Brown* v. *Plata*, 131 S. Ct. 1910 (2011). Appellees ignore that the orders prohibit Appellants from executing duly enacted state laws, and compel them to develop a system for releasing prisoners early, to expand prison-sentence credits beyond state law limits, and to persuade the Legislature to enact measures in a court-compelled plan. J.S. 20-22 & n.7; see Mot. 2, 16-21. These orders are appealable under 28 U.S.C. § 1253 because they fall within the very definition of injunctions.

Appellees' motion for summary affirmance should be denied because it does not refute the State's showings that the three-judge court committed multiple legal errors. See J.S. 23-29, 9-10, 19-20; Mot. 24-27. These errors provide a sufficient basis for vacating the orders on appeal without any need to analyze the record. Compare Mot. 22-24, 27-37.

Summarily affirming these rulings would be very harmful to California and to the standards governing institutional reform litigation. The Prison Litigation Reform Act's requirements and this Court's standards governing modification are critical to balancing appropriate judicial oversight with a state's authority over its criminal justice system. The court below ignored these standards, and as a consequence, issued an order threatening Californians with the release of thousands of violent felons into their communities before December 31st. J.S. 4. To "avoid early release[s]" and the imminent harm that would follow, the State enacted legislation authorizing $315 million—this year alone—to lease additional prison capacity. The State never would have spent these

scarce public dollars if the court below had adhered to this Court's majority opinion in *Plata*.

I. APPELLEES' CHALLENGE TO JURISDICTION IS MERITLESS.

Appellees contend that this Court lacks jurisdiction because the orders under appeal purportedly "do not grant new injunctions" appealable under 28 U.S.C. § 1253. Mot. 20. They are wrong.

Section 1253 allows appeal of three-judge court-granted injunctions, *i.e.*, "order[s] commanding or preventing an action." *Black's Law Dictionary* 800 (8th ed. 2004). This Court has held that an order is reviewable under Section 1253 if it is "cast in injunctive terms" by "'direct[ing]'" that the party "'must'" take particular actions. *Aberdeen & Rockfish R.R.* v. *SCRAP*, 422 U.S. 289, 307 (1975); see *id.* at 307-08 (holding that an order with "coercive … effect" which a party "would hardly be free to decline" to effectuate was appealable).

The orders on appeal easily satisfy these criteria. See J.S. 20 n.7, 21. The April Order required Appellants, among other things, "to develop a system to identify prisoners" for early release, App. 178a, and compelled Appellants to seek "authorization, approval, or waivers from the Legislature" to effectuate various population reduction measures,[1] App. 177a. The June Order commanded "defendants to implement an additional measure": retroactive "expansion of good time credits." App. 3a. Moreover, it prohibited Appellants from enforcing a host of "state and local laws and regulations" by waiving them "effective immediately." *Id.*

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[1] Appellants drafted and submitted bills to the Legislature to comply.

These are all *new* injunctions under Section 1253. The orders are plainly "cast in injunctive terms." *Aberdeen & Rockfish*, 422 U.S. at 307. They require Appellants to take actions they previously had no obligation to take,[2] and prohibit actions Appellants were previously free to take. This Court has consistently held that Section 1253 is satisfied when a three-judge court enjoins a state from applying its laws. See, *e.g.*, *Thornburg* v. *Gingles*, 478 U.S. 30, 42 (1986); *Minn. State Bd. for Cmty. Colls.* v. *Knight*, 465 U.S. 271, 279-80 (1984); *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 145-46 (1980). Moreover, Appellants "hardly [are] free to decline" to comply, *Aberdeen & Rockfish*, 422 U.S. at 307, given that the three-judge court stated that noncompliance is grounds for contempt. App. 70a; *cf. Gunn* v. *Univ. Comm. to End the War in Viet Nam*, 399 U.S. 383, 388-89 (1970) (Section 1253 requires that the reviewed order is enforceable through contempt).

Appellees simply ignore *these* injunctions. Instead, they selectively discuss other provisions compelling Appellants to submit and implement plans to achieve compliance with the previously affirmed population cap. Mot. 16-17, 20-21. Given the unquestionably new obligations and prohibitions, the orders appealed are not simply "modifications," and it is unnecessary for this Court to assess whether other provisions are

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[2] This Court's *Plata* opinion, for instance, makes clear that the State had no obligation to commit its resources to establishing an early-release "system." To the contrary, this Court suggested that the three-judge court could "consider" whether ordering the State to take such action was "appropriate." 131 S. Ct. at 1947.

new injunctions or "repeat[] an old command" as Appellees assert. Mot. 15, 20-21 & n.2.[3]

II. SUMMARY AFFIRMANCE IS INAPPROPRIATE.

Appellees' motion for summary affirmance also should be denied.

1. Appellees' motion is built on the flawed premise that summary affirmance is appropriate because this Court would apply a highly deferential standard of review to this appeal. Mot. 22-24; see also *id.* at 28-37. But an error of law *is* an abuse of discretion. See J.S. 29. The legal errors on appeal provide ample basis for vacating the orders and injunctions—and for doing so without detailed factual inquiries. The only appropriate summary disposition here would be summary *vacatur* based on these errors of law.

2. Appellees are mistaken in suggesting that the three-judge court faithfully applied this Court's legal standards, including *Plata*'s mandate, 131 S. Ct. at 1947. See Mot. 23-27, 11-13.

First, Appellees have *no response* to Appellants' showing that the three-judge committed a critical legal error in holding that "'*Horne* [wa]s inapplicable'" to Appellants' motion. J.S. 26-27 (quoting App. 119a); see Mot. 22, 24 (citing *Horne* v. *Flores*, 557 U.S. 433 (2009), in passing). In conflict with *Horne* and other circuits' holdings, the three-judge court erroneously held that *Horne* applies only when a defendant

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[3] Appellees also are mistaken in that analysis, because before the April Order, the State had no obligation to submit a Plan or to "immediately commence taking the steps necessary to implement" the measures in the Plan. App. 173a, 176a-177a. Indeed, the court repeatedly said its orders required "additional" or "further" action. App. 5a, 42a-43a, 48a.

contends that modification is appropriate because all outstanding violations have been cured. See J.S. 26-27. The failure to conduct *Horne*'s inquiries is a substantial issue that alone justifies plenary review, if not summary vacatur. See also *infra* at 8 & n.6 (discussing three-judge court's reliance on Ninth Circuit's pre-*Horne* law).

Second, summary affirmance would be improper because there is no question that the three-judge court disregarded this Court's mandate to consider "'significant progress toward remedying'" Eighth Amendment violations. See J.S. 24-25 (discussing App. 119a). Instead, the court incorrectly required Appellants to have """remed[*ied*]""" all outstanding violations before allowing modification of the population cap. *Id.* (alteration in original).

Appellees respond that the three-judge court's revision to the mandate is immaterial because the court's reference to "remedied" was in the context of its (incorrect) holding that Appellants abandoned their argument that they had remedied all outstanding constitutional violations. See Mot. 25-26; App. 118a-122a. Appellees' arguments do not fairly reflect the record, or diminish the error or the need for review.

Appellees' argument takes significant liberties with the record. Appellants never "abandoned" a request that the three-judge court find that they had "remedied" all violations. Rather, Appellants contended that changed circumstances—primarily improvements to inmate care (including care that the State submitted satisfied the Eighth Amendment)—were so significant that a population cap no longer satisfied the PLRA or equity generally, or that a higher cap was

mandated by those changed circumstances.[4] Appellants made clear that relief was warranted *regardless* of complete Eighth Amendment compliance, and that they were not asking the three-judge court to decide that question. *E.g.*, *Plata* D.E. 2529, at 4-5 (emphasizing ""significant change[s] in … factual conditions"" including improved care, satisfied this Court's "express[] invit[ation] [to] the State to move to modify the order" because "the facts have changed sufficiently from those that justified entry of the order. *A showing of constitutional compliance in the underlying cases is not required*.") (emphasis added, citation omitted).

Moreover, Appellees' observation that the three-judge court's opinion continued for "over 20 additional pages" after finding abandonment is a red herring. Mot. 25. In those pages, the court *never* considered whether Appellants had made "significant progress toward remedying" any constitutional violations. App. 123a-159a. In fact, the court's *only* mention of *Plata*'s "significant progress" standard was in the paragraph when it converted that standard into an inquiry into whether Appellants had "'remedied'" all

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[4] For instance, Appellants' pre-motion brief stated: "These improvements [to care] (which were practically unimaginable in 2007) … will allow Defendants to provide a constitutional level of healthcare at a higher prison-population density than originally contemplated." *Plata* D.E. 2442, at 2. Appellants' motion stated: "Given the superior health care system that now exists, continued enforcement of the population reduction order would be inequitable, violate principles of federalism, and jeopardize public safety." *Coleman* D.E. 4280, at 2; *see id.* at 3, 4-5 (discussing "terminat[ing] or modif[ing]" the cap). In further briefing, Appellants pressed these arguments, *Plata* D.E. 2529, at 4-5, and their final brief on the motion reiterated, rather than abandoned, them. *Plata* D.E. 2543, at 2, 4-5, 11-18 (invoking "significant progress" standard and discussing care).

outstanding Eighth Amendment violations. App. 119a. If the court had correctly applied *Plata*'s mandate, its holding surely would have reflected the mandate's language. Instead, the court denied Appellants' motion because "the constitutional violations with respect to the provision of medical and mental health care *are still ongoing*." App. 159a (emphasis added).

Indeed, the three-judge court admitted that it did not analyze whether significant progress in improving care necessitated vacatur or modification. To the contrary, having contrived its abandonment rationale, the court stated that it did not need to rule on "a significant portion" of the motion, including a section "devoted to presenting evidence" on the level of medical and mental health care in the prison system. App. 117a. A subsequent order confirmed that the court "'did not consider'" Appellants' evidence regarding improved care. J.S. 25 n.11.[5]

Only by refusing to analyze Appellants' significant progress toward remedying any underlying Eighth Amendment violations was the three-judge court able to erect the strawman, repeated by Appellees, that Appellants sought relief "'based solely on a contention that some time has passed.'" Mot. 12; *id.* at 11 ("mere passage of time"); *id.* at 28 ("'the passage of time [does not] constitute[] a "changed circumstance"'"); App. 151a ("defendants' true claim [is] that the mere passage of time demonstrates the error").

That was decidedly not Appellants' position. *Supra* at 5-6. Had the three-judge court not dodged the

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[5] The court's limited discussion of Appellants' evidence was in the context of considering whether crowding itself had changed, *see*, *e.g.*, App. 130a-131a, 150a, 152a, and it held that a completed remedy was required, *see* J.S. 25.

inquiry this Court mandated in *Plata*, it could not have mischaracterized Appellants' motion as resting on the passage of time alone.

Third, Appellees make a surprising claim that Appellants "distort the lower court's opinion to argue that it 'misread *Rufo* … to require in all cases that the "moving party must demonstrate a significant and unanticipated change in facts."'" Mot. 26. Appellees ignore where the three-judge court unequivocally did so:

> 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 979, 979 (9th Cir. 2005) (summarizing *Rufo*, 501 U.S. at 384-86).

App. 129a, *quoted in* J.S. 28; *accord* App. 32a.[6] The court repeatedly stated that it denied relief because changes were not unanticipated.[7] App. 122a (finding no "significant and unanticipated change in circumstances, as required under Rule 60(b)(5)"); App. 150a, 152a (same); App. 130a ("reduction in crowding was contemplated to occur"); *accord* App. 151a, 126a. The court's failure to properly apply *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), warrants plenary review.

3. Contrary to Appellees' suggestions, the need for review is not diminished because the Governor

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[6] Tellingly, the Ninth Circuit relied on *Asarco*'s articulation of Rule 60(b)(5)'s standards in *Flores* v. *Arizona*, 516 F.3d 1140, 1163, 1167, 1170 (9th Cir. 2008), *rev'd sub. nom.* 557 U.S. 433 (2009), but has not relied on *Asarco* in that way since *Horne*.

[7] The three-judge court also analyzed the motion through the wrong lens by failing to assess whether the quality of prison health care had significantly changed; instead, it analyzed how *crowding* had changed. *E.g.*, App. 131a; *supra* at 6-7 & n.5.

recently sought additional capacity for housing prisoners, Mot. 14-15, 34-36, and two weeks ago the State enacted legislation "to avoid early release of inmates," which appropriates funds for additional capacity if the three-judge court does not extend the deadline for meeting the 137.5% cap. S.B.-105, 2013-14 Reg. Sess. § 1 (2013).

First, it is exceptionally important to review this case because the State remains subject to the 137.5% cap despite its significant progress toward remedying any underlying constitutional violations. The additional capacity S.B.-105 authorizes is a substantial redirection of scarce resources. Approximately $315 million will be appropriated during the current fiscal year alone. *Id.* § 22(a). Those appropriations would not have been made, and would be available for other needs, but for the three-judge court's refusal to follow the law.

Plenary review is warranted because the three-judge court's orders have the effect of "dictating" California's political process and "budget priorities." *Horne*, 557 U.S. at 448. After vigorous debate and compromise, the Assembly passed SB-105 by a 78-0 margin and the Senate did so 35-2. This near-unanimous support underscores the radical nature of the three-judge court's rulings. Faced with the profound public safety implications that experts determined were posed by the imminent releases, the Legislature acted to "avoid early release" and "protect public safety" by authorizing previously unthinkable expenditures for additional capacity. S.B.-105 §§ 1, 22.

Second, summarily affirming the three-judge court's erroneous legal rulings would cement them, and be highly detrimental for these cases and others. See, *e.g.*, *Hicks* v. *Miranda*, 422 U.S. 332, 344 (1975)

(summary dispositions are binding); *Evans* v. *Buchanan*, 555 F.2d 373, 377 (3d Cir. 1977) (en banc) (rulings summarily affirmed are law of the case). Before the *Plata* and *Coleman* cases end, it is inevitable that the State will move to vacate or modify some of the many existing injunctions in these decades-old cases. If the challenged decision is summarily affirmed, the three-judge court and the single-judge courts will not hesitate to apply the three-judge court's erroneous rulings as law of the case. Cf. App. 31a-32a, 124a-125a (res judicata).

4. Lastly, although this Court can vacate the orders on appeal without delving into the record again, if this Court directly applies the proper standards to this record—rather than remanding for the court below to do so—the record supports reversal.

Appellees' presentation of the record, see Mot. 2-13, 27-34, ignores significant progress while taking liberty with the facts for the sake of shock value. For instance, while scolding Appellants for "speak[ing] as if the [Eighth Amendment] violations are a distant memory for which they are no longer responsible," Mot. 2, Appellees support their desired view with findings *from **2005***. Mot. 4 (discussing *Plata*, 131 S. Ct. at 1926-27, which was quoting *Plata* v. *Schwarzenegger*, 2005 WL 2932253, at *1, *14-15 (N.D. Cal. Oct. 3, 2005)); see also *Plata*, 131 S. Ct. at 1961-62 (Alito, J., dissenting) (recognizing those findings were outdated).

Similarly, Appellees invoke the purported need for 10,000 additional beds, see Mot. 6-7, 31, while failing to mention that—as the Receiver acknowledged *years ago*—the "10,000-bed construction plan … was never approved by the District Court [and] was abandoned by the Receiver long ago." Receiver's Br. 2, *Plata* v. *Schwarzenegger*, No. 09-15864 (9th Cir. filed Aug. 31,

2009). Only by freezing this case in time can Appellees ignore the billions of dollars in infrastructure expenditures and improvements the State has made, *Coleman* D.E. 4803, at 8, exponential increases in health care spending per-inmate ($17,924, versus $5,958 in New York), *id.*, and comprehensive criminal justice reforms, *id.* at 5-8. All have greatly improved health care in California's prisons and mark significant progress toward remedying any outstanding violations. J.S. 11-18.

Appellees' glance at recent facts is at odds with reality, and the relevant standards. For instance, they repeatedly rely upon the *Coleman* single-judge court's findings regarding staff shortages, suicides and other subjects. Mot. 8-9. But those findings were in the inapposite context of a motion seeking *termination* of all PLRA remedies. There, granting relief would have required that *no* Eighth Amendment violations existed rather than "significant progress" as here. Moreover, Appellees ignore countervailing facts, including that: California's suicide rates are now consistent with those nationwide; suicides are rising in the non-prison population nationwide; and staffing vacancies in *Coleman* largely result from newly approved positions whereas staffing in *Plata* is robust. See Reply Supp. Stay 24-26, 27-29, *Brown* v. *Plata*, No. 13A57 (U.S. filed July 22, 2013). They discuss Valley Fever, which they admit is "endemic to the Central Valley," Mot. 10—and other areas of the country—while claiming that crowding "has contributed" to incidence of Valley Fever, *id.*, despite that neither the order they cite nor the Receiver has suggested such a link. Stay Reply 26-27. And they rely on isolated lapses in care at a few prisons, Mot. 10-11, while ignoring that lapses are common in all medical settings, J.S. 16. More-

over, lapses do not override the overall improvements of care throughout the prison system. J.S. 13-18.

CONCLUSION

The Court should deny Appellees' motion and summarily vacate with instructions to stay the injunctions, as well as the deadline for complying with the population cap pending consideration of the State's motion on remand. Alternatively, it should note probable jurisdiction and expedite this case.

Respectfully submitted,

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