

No. 13-198

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IN THE

**Supreme Court of the United States**

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

v.

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

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

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**APPELLANTS' SUPPLEMENTAL BRIEF  
REGARDING THREE-JUDGE COURT'S ORDER  
PROHIBITING APPELLANTS FROM  
CONTRACTING FOR CAPACITY**

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## APPELLANTS' SUPPLEMENTAL BRIEF

Pursuant to this Court's Rule 18.10, Appellants submit this supplemental brief relevant to consideration of their jurisdictional statement and opposition to Appellees' motion to dismiss or summarily affirm. Yesterday, within minutes of Appellants' filing of that opposition in this Court ("Appellants' Opp."), the three-judge court issued *sua sponte* yet another injunction in this case. See Appellants' Supplemental Appendix 1-3. This latest injunction commands that "defendants shall not enter into any contracts or other arrangements to lease additional capacity in out-of-state facilities or otherwise increase the number of inmates who are housed in out-of-state facilities." *Id.* at 3. The court forbids Appellants from doing so immediately, during a court-ordered meet-and-confer with Appellees, and indefinitely thereafter "until further order of the Court." *Id.*

The three-judge court did not cite anything in the Prison Litigation Reform Act (PLRA), its prior orders, or any other authority that grants it the power to limit the sovereign State of California's ability to enter contracts—let alone contracts used to exercise the State's core police powers. And in issuing this *ultra vires* injunction, the court imposed its policy preferences for how to reduce prison crowding.

The court purported to enjoin the State's ability to contract in the face of S.B.-105, which the Governor signed into law on September 12, 2013 after its nearly unanimous approval by the Legislature. S.B.-105, 2013-14 Reg. Sess. (2013); see Appellants' Opp. 1, 8-9 (discussing legislation); see also Appellees' Supplemental Brief 1-6 (U.S. filed Sept. 24, 2013)

(same).<sup>1</sup> To “avoid early release” of inmates that would have followed from the three-judge court’s orders on appeal and to “protect public safety,” S.B.-105 §§ 1, 22, the State enacted S.B.-105. The law “appropriate[s] from the General Fund” \$315 million to the California Department of Corrections and Rehabilitation (CDCR) to “spend ... on immediate capacity to meet the federal court orders issued in the Three Judge Court proceedings [*i.e.*, the population cap] only to the extent needed to avoid early release.” *Id.* § 22(a).<sup>2</sup> The legislation permits any “agency or officer of this state to commit or transfer an inmate ... to any institution within or *without this state if this state has entered into a contract or contracts for the confinement of inmates in that institution.*” *Id.* sec. 17(a), § 1191(a) (emphasis added); see also *id.* sec. 17(c), § 1191(c) (allowing Secretary of CDCR to “transfer an inmate to a facility in another state without the consent of the inmate”).<sup>3</sup>

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<sup>1</sup> Curiously, although S.B.-105 was enacted on September 12, 2013 and it and competing bills had been introduced in the Legislature for some time before, *see* Appellees’ Mot. Dismiss or Affirm 14, 34-36, Appellees delayed filing their supplemental brief regarding SB-105 until mid-day *yesterday*, the deadline for Appellants’ opposition to the motion to dismiss or summarily affirm.

<sup>2</sup> *See also* S.B.-105 § 22(b) (providing that if the three-judge court eliminated the need to obtain such capacity or extended the deadline to meet such capacity, the State Department of Finance would prepare revised fiscal estimates of the expenditures needed to satisfy the orders); *id.* § 22(c) (allowing first \$75 million of savings to be transferred to a Recidivism Reduction Fund).

<sup>3</sup> Prior law allowed inmate transfers to out-of-state institutions only after the inmates had “executed written consent to the transfer.” S.B.-105, Legislative Digest § 6.

After S.B.-105's enactment, Appellants filed with the three-judge court on September 16, 2013 a request for a three-year extension of the time to comply with the 137.5% population cap by developing further effective reforms. *Coleman* D.E. 4803/*Plata* D.E. 2713, at 2, 9; see also S.B.-105 § 22(b). Appellants stated that unless the extension issued, the State would "use the money appropriated under SB 105 to reach the 137.5% cap [by December 2013] by sending thousands of additional inmates out of state." *Coleman* D.E. 4803/*Plata* D.E. 2713, at 2.

The three-judge court did not rule on Appellants' request to extend the deadline for compliance to December 2016. Appellants' Supp. App. 1-3. Instead, it ordered Appellants to participate in a mediated meet-and-confer process with Appellees about reducing the population, *id.* at 2,<sup>4</sup> and moved the deadline for meeting the 137.5% cap to January 27, 2014 from December 31, 2013, *id.* at 3. Critically, however, the three-judge court flatly prohibited defendants from contracting for out-of-state capacity or increasing the

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<sup>4</sup> Appellants have no opposition to participating in the mediated meet-and-confer. The State long has been committed to developing further reforms to its criminal justice system, and has achieved landmark solutions to prison crowding and to improve the quality of health care in California's prisons. As the President Pro Tempore of the California Senate told the three-judge court in a September 23, 2013 letter supporting Appellants' request for a three-year extension, "California continues to pursue a broad array of reforms which furthers our commitment to 'right-size' our prison population," and "the measures enacted by California over the last several years represent the greatest reforms in our systems of criminal justice in over 30 years." Appellants' Supp. App. 9-10. The recently enacted SB-105 cements the State's commitment to further reform, including measures to reduce recidivism. It does so in a way that ensures effectiveness, durability and public safety.

number of inmates housed out-of-state, *id.*, which—pursuant to S.B.-105—the Legislature and the Governor have determined are key to “protect[ing] public safety” while meeting the cap. S.B.-105 § 1. At the same time, the court compelled the parties to specifically discuss the court’s preferred measures to reduce the prison population. Appellants’ Supp. App. 2-3.

The three-judge court’s latest injunction confirms the need for plenary review, if not summary vacatur of the orders on appeal. This order, like the court’s other recent actions, disregards the law and the role of the judiciary. The three-judge court ignored this Court’s mandate in *Plata*, this Court’s cases governing modification of injunctive relief, and the public safety implications that the PLRA requires it to consider. By doing so, the three-judge court set off legislative action that never would have occurred absent the threat of imminent releases. See Appellants’ Opp. 1-2, 9. Yet, even once the political process had run its course by appropriating funds to meet the population cap while ensuring public safety, the three-judge court again acted well outside the bounds of its authority by purporting to prohibit Appellants from executing a duly enacted law.

The three-judge court’s latest injunction underscores that its orders no longer have anything to do with ensuring that inmates in two discrete classes receive health care that satisfies the Eighth Amendment—which is what these cases should be about. Nor are they concerned with meeting the 137.5% of prison design capacity population cap, which purportedly is designed to cure care that violates the Eighth Amendment. Rather, the court’s interest appears to be in legislating criminal justice policy by reducing the prison population through

outright releases of inmates that it—and Appellees’ counsel<sup>5</sup>—do not believe should be incarcerated. See Appellants’ Supp. App. 2-3 (agenda for meet-and-confer includes discussion of releases of certain categories of inmates the State already has shown would present public safety risks).

### CONCLUSION

For these reasons, those stated in the Jurisdictional Statement and in the Opposition to Appellees’ Motion to Dismiss or Summarily Affirm, the Court should summarily vacate the orders on appeal, or note probable jurisdiction and expedite this case.

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<sup>5</sup> See, e.g., C. Megerian & A. York, *Jerry Brown has plan to ease prison crowding without early releases*, L.A. Times, Aug. 27, 2013 (“Don Specter, a lawyer for inmates who have sued the state over prison conditions, said leasing more prison space would be ‘an incredible waste of hundreds of millions of dollars for no benefit to public safety.’ He said the state should consider some early releases, by expanding the credit prisoners can earn for good behavior or freeing inmates who are elderly and sick.”).

Respectfully submitted,

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September 25, 2013

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**SUPPLEMENTAL  
APPENDIX**

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**SUPPLEMENTAL APPENDIX A**

IN THE UNITED STATES DISTRICT COURTS  
FOR THE EASTERN DISTRICT OF CALIFORNIA  
AND THE NORTHERN DISTRICT OF  
CALIFORNIA

UNITED STATES DISTRICT COURT  
COMPOSED OF THREE JUDGES

PURSUANT TO SECTION 2284, TITLE 28  
UNITED STATES CODE

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NO. CIV S-90-0520 LKK JFM P  
Three-Judge Court

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RALPH COLEMAN, ET AL.,  
*Plaintiffs,*

v.

EDMUND G. BROWN JR., ET AL.,  
*Defendants.*

---

NO. C01-1351 THE  
Three-Judge Court

---

MARCIANO PLATA, ET AL.,  
*Plaintiffs,*

v.

EDMUND G. BROWN JR., ET AL.,  
*Defendants.*

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ORDER TO MEET AND CONFER

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This Court has ordered defendants to reduce the state prison population to no more than 137.5% design capacity by December 31, 2013. On September 16, 2013, defendants filed a request to extend that deadline to December 31, 2016, and informed the Court that, absent an extension, they will begin sending additional prisoners to out-of-state facilities on September 30, 2013. Defs.' Req. for Extension of Dec. 31, 2013 Deadline (ECF No. 2713/4803).<sup>1</sup>

IT IS HEREBY ORDERED that the parties shall meet and confer, beginning immediately, regarding defendants' pending request. Pursuant to this Court's prior authorization, the Honorable Peter Siggins will facilitate the meet-and-confer process. This process shall be confidential and informal. On or before *October 21, 2013*, Justice Siggins will informally report to this Court the status of the discussions and provide his recommendations for future actions by this Court or the parties. He shall immediately report to the Court if, at any time, he determines that further discussions between the parties would be unproductive.

The meet-and-confer process shall explore how defendants can comply with this Court's June 20, 2013 Order, including means and dates by which such compliance can be expedited or accomplished and how this Court can ensure a durable solution to the prison crowding problem. The discussions shall specifically include: (a) three strikers; (b) juveniles; (c) the elderly and the medically infirm; (d) Immigration and Customs Enforcement prisoners; (e) the implementation

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<sup>1</sup> 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.). This Court includes the docket number of *Plata* first, then *Coleman*.

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of the Low Risk List; and (f) any other means, including relocation within the state, that are included in defendants' May 2, 2013 List. Justice Siggins and the parties may also discuss any necessary or desirable extension of the December 31, 2013 deadline beyond that provided for in the final paragraph of this order, as well as any other matters they deem appropriate.

The December 31, 2013 deadline shall be extended until *January 27, 2014*, without prejudice to the parties' filing a joint request for a further extension or the Court so ordering. During the meet-and-confer process and until further order of the Court, defendants shall not enter into any contracts or other arrangements to lease additional capacity in out-of-state facilities or otherwise increase the number of inmates who are housed in out-of-state facilities.

IT IS SO ORDERED.

Dated: 09/24/13

/s/ Stephen Reinhardt

STEPHEN REINHARDT  
UNITED STATES CIRCUIT JUDGE  
NINTH CIRCUIT COURT OF APPEALS

/s/ Lawrence K. Karlton

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

/s/ Thelton E. Henderson

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

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**SUPPLEMENTAL APPENDIX B**

CALIFORNIA STATE SENATE  
SENATOR  
DARRELL STEINBERG  
PRESIDENT PRO TEMPORE  
SIXTH SENATE DISTRICT

[SEAL]

State Capitol	Standing Committees
Room 205	Senate Rules
Sacramento, CA 95814	Chair
Tel (916) 651-4006	Appropriations
Fax (916) 323-2263	Public Safety

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September 23, 2013

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Re: *Plata v. Brown*, No. CO1-1351 THE (N.D. Cal.)

*Coleman v. Brown*, No. 90-cf-520-LKK (E.D. Cal.)

Letter in Support of Governor's Request for  
Extension of Deadline

Judges Reinhardt, Karlton and Henderson:

I respectfully submit this letter in strong support of Governor Brown's request for an extension to comply with the Three-Judge Panel's overcrowding reduction order.<sup>1</sup> The Governor's request reflects the State's enactment of Senate Bill 105, which presents a clear policy choice for the future of California's criminal justice system. S.B. 105, 2013-14 Reg. Sess. (Cal. 2013) (hereinafter, SB 105). The State can continue the failed policies of prison-building and cell-rental that do nothing to reduce recidivism or crime. Or the State can invest in short, medium and long term strategies and policies to reduce recidivism, crime, and the prison population which will deliver durable and sustainable solutions to the State's prison overcrowding and prison health care crisis.

I am deeply concerned that the Court not view the State's most recent request for a delay as lacking in key details, or as yet another legal maneuver in this long-standing litigation. The Legislature's work with

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<sup>1</sup> On September 16, 2013, the Defendants in the above referenced cases filed a REQUEST FOR AN EXTENSION OF DECEMBER 31, 2013 DEADLINE AND STATUS REPORT IN RESPONSE TO JUNE 30, 2011, APRIL 11, 2013, JUNE 20, 2013, AND AUGUST 9, 2013 ORDERS. Defs.' Req. for Extension *Plata v. Brown*, No. C01-1351 THE (N.D. Cal.) (ECF No. 2714) and *Coleman v. Brown*, No. 90-cf-520-LKK (E.D. Cal.) (ECF No. 4803). All references to the filings herein under the Three Judge Court in these cases will reference the docket number in *Plata* first, then *Coleman*.

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the Executive Branch over the last month is anything but a delay tactic. I wish to emphasize in the strongest possible terms that these actions have created an unprecedented opportunity to achieve the durable and sustainable solution to prison overcrowding that the Three-Judge Panel has consistently required. June 20, 2013 Op. & Order (ECF No. 2659/4662).

First, I wish to underscore the significance of the recent enactment of SB 105. This measure will have an immediate impact on reducing prison overcrowding. Specifically, this measure appropriates \$315 million and authorizes the State to take steps immediately to reduce prison overcrowding by contracting with in-state and out-of-state facilities to house California prison inmates. In the alternative, if the Court approves an extension of time to comply with the June 20, 2013 Opinion and Order, SB 105 does the following:

1. Requires the Department of Finance to report to the Legislature, *within 15 days*, if the court grants California reprieve from the existing order. The Department of Finance's report to the Legislature must also include specific details, including the associated cost savings, necessary to comply with a revised order. S.B. 105, sec. 22. *Since the nature and duration of the Court's extension could not be known at the time SB 105 was enacted, this provision provides an immediate mechanism to identify the savings that would be generated from not having to reach the overcrowding reduction order by December 31, 2013.*
2. Provides that the amount of funding the California Department of Corrections and Rehabilitation may expend to procure additional

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inmate housing capacity shall not surpass the level necessary to adhere to federal court orders and avoid the early release of prison inmates. S.B. 105, sec. 22. *This provision, by definition, limits the opportunity for out-of-state placements if a substantial enough delay in the order is extended. Furthermore, the longer the extension of time, the more savings will be generated for redirection into overcrowding and recidivism reduction efforts.*

3. Creates the Recidivism Reduction Fund to be available for appropriation by the Legislature for activities aimed at reducing the State's prison population, including, but not limited to, reducing recidivism. SB 105 also provides that if the amount of funding necessary to comply with a revised court order is less than the \$315 million appropriated by this measure, the Director of Finance shall direct the Controller to transfer the first \$75 million of such savings to the Recidivism Reduction Fund. Any additional savings shall be allocated as follows: 50 percent shall revert to the General Fund and 50 percent shall be transferred to the Recidivism Reduction Fund. S.B. 105, secs. 12 and 22. *These transfers shall occur within 45 days of an order extending the deadline to comply. Therefore, these funds will be available for appropriation by the Legislature when the 2013-14 Legislative Session resumes in January 2014.<sup>2</sup> I will commit that*

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<sup>2</sup> S.B. 105 also provides that any amount of the original \$315 million appropriation that is not expended pursuant to Sec. 21, nor transferred pursuant to Sec. 22, at the end of the fiscal year

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*the Senate will pass the first appropriation of these funds from the Recidivism Reduction Fund within the first months of the year.*

In addition and without respect to whether an extension of time is granted by the Court, SB 105 strengthens the existing California Performance Incentive Act of 2009 (S.B. 678, 2009-10 Reg. Sess. (Cal. 2009), which will provide an estimated \$100 million for an immediate increase in the rate at which counties are reimbursed for reducing felony probation failure rates. SB 105 makes these additional resources available to provide services to the felony probation population to improve their chances of success.

I respectfully submit that the following terms for the extension sought by the State would provide the necessary framework to further reduce prison overcrowding in the short-term and sustain those reductions for the long-term:

1. *Require the State to reduce overcrowding to 145 percent of design capacity by December 31, 2013. This is consistent with the State's plan to expand **in-state** capacity through the use of county facilities and private contracts. Defs.' Req. for Extension at 3.*
2. *Require the State to reduce overcrowding to 142.5 percent of design capacity by December 31, 2014.*
3. *Require the State to reduce overcrowding to 140 percent of design capacity by December 31, 2015.*

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ending June 30, 2014, shall be transferred to the Recidivism Reduction Fund. S.B. 105, sec. 22.

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4. *Require the State to reduce overcrowding to 137.5 percent of design capacity by December 31, 2016.*
5. *Require the parties to provide additional briefing on meeting these revised targets.*

If the Court is inclined to provide a shorter extension, I would again respectfully suggest that the court consider an order that provides additional time (until December 31, 2016) to meet 137.5% of design capacity if the State continues to enact substantial or comprehensive reforms of its sentencing laws that are designed to maintain and enhance public safety while also reducing unnecessary prison incarceration.

The Governor's request importantly describes critical steps and reforms already enacted. Defs.' Request for Extension at 5-9. Moreover, California continues to pursue a broad array of reforms which furthers our commitment to "right-size" our prison population. For example:

- California is leading the nation on implementing the Federal Affordable Care Act, which will provide access to healthcare to felons and parolees including medical, mental health and substance abuse treatment. Providing these basic services to criminal offenders have been shown to reduce the rates at which they re-offend.
- The 2013-14 California State Budget included a historic augmentation of \$200 million for mental health funding that will include mental health and substance abuse treatment for crisis treatment beds, mental health triage personnel, and mobile crisis support teams, all of which are available to the offender

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populations. A.B. 110, 2013-14 Reg. Sess. (Cal. 2013)

- The Budget Act also established Medi-Cal enrollment assistance and outreach for those transitioning from county jails and state prisons, and tripled the capacity of the Integrated Services for Mentally Ill Parolees (ISMIP) program. *Id.* Providing comprehensive mental health services has shown dramatic results, cutting the recidivism rate by more than half. For the 1,502 individuals in the program over the last three years, the recidivism rate was only 24 percent compared to 71 percent for other parolees.
- As mentioned in the Governor's request, in 2012 California voters enacted Proposition 36, which revises the three strikes law to impose life sentence only when the new felony conviction is "serious or violent" and authorizes re-sentencing for offenders currently serving life sentences if their third strike conviction was not serious or violent and if the judge determines that the re-sentence does not pose unreasonable risk to public safety. State and local officials can continue to work toward processing eligible cases in an expedient manner. California Penal Code §§ 667, 667.1, 1170.12, and 1170.125.

Taken together, the measures enacted by California over the last several years represent the greatest reforms in our systems of criminal justice in over 30 years. Still, as required by SB 105, we are fully prepared to continue to work towards developing and implementing additional changes that will improve

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public safety and effectively manage our prison population. These efforts can include review of the State's policy regarding Immigration Customs Enforcement (ICE) prisoners; increase resources to permit the prompt review of youthful offenders and life term inmates; make more effective use of the State's existing alternative custody program; and provide additional incentives and strategies to improve outcomes among criminal offenders.

The Court may be further informed by ordering the parties to provide input on these specific steps that can be undertaken to comply with the Court's extended deadline. I am optimistic that the parties would find conceptual agreement that these proposals would reduce overcrowding in a manner more durable than adding temporary bed capacity. Moreover, many of these remedies could be put into place relatively quickly. These are all among the menu of remedies the State could deploy if granted sufficient time for them to be implemented and take effect. The effectiveness of these actions will be further advanced through the active engagement and collaboration of state and local stakeholders, which already have begun as indicated in the Governor's request for an extension. Defs. Req for Extension at 4.

If this Court grants an extension of time to comply with the overcrowding reduction order, there will be additional time and resources to build an enduring solution, one that recalibrates the balance and resources of our correctional system in a way that emphasizes improved outcomes among offenders through evidence-based practices and policies. Furthermore, it will avoid the need to send California inmates to out-of-state institutions. While California's fiscal situation has improved as a result of significant

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cuts that have been enacted in recent years, if the State is required to spend the resources needed to comply with the current Court order, which I'm informed will exceed \$1 billion over the next three years, there simply will not be anything left to invest for the more prudent, durable approaches to reducing overcrowding listed above.

As I have previously indicated, California is at a crossroads: we can spend hundreds of millions of taxpayer dollars annually to essentially rent more out-of-state, private prison beds, or we can invest in reducing the need for increased prison capacity through more effective local criminal justice practices and programs. Therefore, I respectfully urge the Court to approve an extension under the terms recommended above.

Thank you for your consideration.

Respectfully submitted,

/s/ Darrell Steinberg  
DARRELL STEINBERG  
President pro Tempore

DS:aw

Cc: The Honorable Edmund G. Brown, Governor of California

The Honorable John A. Perez, Speaker of the Assembly

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Mr. Michael Bien, Counsel for the Plaintiffs  
(*Coleman*)