No. 13-

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

JURISDICTIONAL STATEMENT

KAMALA D. HARRIS
ATTORNEY GENERAL OF CALIFORNIA
JONATHAN L. WOLFF
SENIOR ASSISTANT ATTORNEY GENERAL
JAY C. RUSSELL
SUPERVISING DEPUTY ATTORNEY GENERAL
DEBBIE VOROUS
PATRICK R. MCKINNEY
DEPUTY ATTORNEYS GENERAL
455 Golden Gate Avenue
Suite 11000
San Francisco, CA 94102-7004
(415) 703-5500

CARTER G. PHILLIPS*
EAMON P. JOYCE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000
cphillips@sidley.com

MARK E. HADDAD
ROBERT A. HOLLAND
SIDLEY AUSTIN LLP
555 W. 5th Street
Los Angeles, CA 90013
(213) 896-6000

JERROLD C. SCHAEFER
PAUL B. MELLO
HANSON BRIDGETT LLP
425 Market Street
26th Floor
San Francisco, CA 94105
(415) 777-3200

Counsel for Appellants

*Counsel of Record

August 9, 2013

[Additional Counsel on Inside Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TACY F. FLINT
SEAN A. SIEKKINEN
SIDLEY AUSTIN LLP
1 S. Dearborn Street
Chicago, IL 60603
(312) 853-7000

Counsel for Appellants

QUESTIONS PRESENTED

1. Whether the three-judge district court erred in applying this Court's mandate in *Brown* v. *Plata*, 131 S. Ct. 1910 (2011), and the legal standards governing vacatur or modification of injunctive relief.

2. Whether changed circumstances require either elimination or modification of the 137.5% population cap, or further articulation of standards to guide the three-judge district court's review of current circumstances to ensure fidelity to the Prison Litigation Reform Act's limits on, as well as sensitive federalism concerns affecting, federal court mandates to release inmates from state prison.

PARTIES TO THE PROCEEDING

Appellants are the following five defendants:

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 Mental Health (Acting)

Appellees purport to be the following:*

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

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

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

are no longer in office, appears on pages ii-vii of Appellants' Brief in *Brown* v. *Plata*, No. 09-1233 (U.S. filed Aug. 27, 2010).

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OPINIONS BELOW

On April 11, 2013, the three-judge district court (Reinhardt, Henderson, Karlton, J.J.) issued an order, available at 2013 WL 1500989, denying Appellants' motion to vacate or modify the court's 137.5% of design capacity population cap on California's prisons. App. 74a-179a. The order also imposed new injunctive relief. App. 173a-179a.

After further proceedings in response to the April 11, 2013 injunctions, the three-judge court ordered new injunctive relief on June 20, 2013. App. 1a-73a. That order, available at 2013 WL 3326872, compelled Appellants to implement a court-ordered Plan for population reduction, and compelled Appellants to expand the availability of "good time credits" under state law. To effectuate its new injunctions, the court preempted dozens of state laws, and effectively required the preemption of the California Constitution. App. 3a, 35a, 59a-62a.

JURISDICTION

On July 23, 2007, District Courts for the Northern and Eastern Districts of California entered orders convening a three-judge district court to preside over prisoner release proceedings pursuant to the Prison Litigation Reform Act (PLRA), 18 U.S.C. § 3626(a)(3)(B).

After ordering prisoner releases on August 4, 2009 and January 12, 2010, and after this Court remanded this action to the three-judge court, see *Brown* v. *Plata*, 131 S. Ct. 1910 (2011), the three-judge court continued to preside over PLRA-related proceedings. The court's orders of April 11, 2013 and June 20, 2013, grant new injunctive relief against Appellants.

App. 67a-69a, 173a-179a. Appellants timely noticed appeals from those injunctions, and this Court has jurisdiction under 28 U.S.C. § 1253 ("any party may appeal to the Supreme Court from an order granting ... an ... injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges").

Justice Kennedy granted Appellants' application (No. 13A5) to extend the time to file a jurisdictional statement regarding the April 11 order until August 26, 2013. This jurisdictional statement covers the appeals from the orders entered on April 11, 2013 and on June 20, 2013. See Sup. Ct. R. 18.2.

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the PLRA, 18 U.S.C. § 3626, are reproduced at App. 180a-182a. Federal Rule of Civil Procedure 60(b)(5) is reproduced at App. 182a.

STATEMENT OF THE CASE

This appeal involves the three-judge court's failure to comply with this Court's mandate in *Brown* v. *Plata*, 131 S. Ct. 1910 (2011). This Court ordered the lower court to consider Appellants' "significant … progress toward remedying the underlying constitutional violations," *id.* at 1947, and such other significant changes, including to the composition of the prison population, that might moot any need for further prisoner releases. The court below, without reviewing Appellants' progress or pertinent changed conditions, refused to consider whether capping the population of California's prisons at 137.5% of their design capacity ("the 137.5% cap") remains consistent with the limitations of the PLRA and of equity given current conditions. Instead, it issued new injunc-

tions, ordered the release of over 9,000 inmates by December 2013 from a markedly different prison population than when this Court decided *Plata*, and enjoined or preempted the enforcement of multiple state laws.

The three-judge court will not remove or alter the 137.5% cap unless and until Appellants have fully remedied all Eighth Amendment violations. This ruling conflicts with this Court's mandate, with the PLRA, and with the standards set forth and basic principles of federalism reflected in this Court's institutional reform cases, including *Horne* v. *Flores*, 557 U.S. 433, 447 (2009).

Nearly everything of significance in the 2008 record that originally supported the 137.5% cap has changed. Appellants have demonstrably and objectively improved the quality of medical and mental health care throughout the California prison system. Data show that the quality of care provided is high and death rates, particularly those regarding preventable deaths, are low. The State has invested billions of dollars in prison construction and other initiatives to improve the provision of prison health care. These are the very investments that this Court deemed an impossible, "'chimerical'" remedy when this case was last here. *Plata*, 131 S. Ct. at 1938; *id.* at 1939 ("Nothing in the long history of the *Coleman* and *Plata* actions demonstrates any real possibility that the necessary resources would be made available.").

Appellants also achieved comprehensive criminal justice reform that no one foresaw in 2008. Innovative legislative change, "Public Safety Realignment," diverted over 20,000 lower level offenders and parole violators to the counties' supervision, while expansion of good time credits released thousands

more. The consequences of Realignment include not only reduced demand for prison health care services, but also an extraordinary change in the public safety implications of releasing the remaining inmates, which the court below overlooked. The state prison population is comprised of a far greater percentage of serious, violent, and high-risk offenders than when the population cap was imposed and affirmed.

The three-judge district court believes itself bound to ignore these profound changes. It deems itself compelled to order the release of prisoners sufficient to meet the 137.5% cap by December 31, 2013, and potentially to order yet further releases beyond that until each of the two panel-members who individually preside over the single-judge litigations determine that any underlying Eighth Amendment violations have been remedied and the remedy is durable. The three-judge court's decisions are irreconcilable with this Court's mandate and squarely conflict with multiple holdings of this Court addressing the propriety of injunctions.

The three-judge court issued the new injunctions without examining the full record of progress toward remedying the violations, or the public-safety implications today of a massive prisoner release. Absent significant legislative action to appropriate funds to acquire additional capacity, the court's orders directly threaten the release of "inmates convicted of violent or serious felonies" that Appellees' trial expert Dr. Jeffrey Beard, who now is the Secretary of the California Department of Corrections and Rehabilitation (CDCR), testified will "come at a significant cost to the State, and to public safety." Decl. of Jeffrey Beard ¶ 25, Nos. 2:90-cv-00520-LKK-JFM/No. 3:01-cv-1351-TEH (E.D. Cal./ N.D. Cal. Jan. 7, 2013) (*Coleman* D.E. 4281/*Plata*

D.E. 2508).[1] The three-judge court's latest order vitiates dozens of state laws that embody the State's core police powers. Whether such orders can be reconciled with this Court's mandate, the PLRA, this Court's institutional reform jurisprudence, and principles of federalism present substantial legal questions of fundamental importance.

This Court should order plenary review to determine whether, at a minimum, the three-judge court has understood and applied the correct legal standards to the facts before it. This Court also should accept review to address whether the 137.5% cap retains any validity or requires upward adjustment—or, if this Court delegates those decisions to the three-judge court, whether this Court should do so with more definite standards to guide the district court's review of current circumstances to ensure compliance with the limitations that Congress imposed in the PLRA.

A. Statutory Background

Under the PLRA, only a three-judge district court may enter a "prisoner release order," 18 U.S.C. § 3626(a)(3)(C), which includes "any order ... that has the purpose or effect of reducing or limiting the prison population," *id.* § 3626(g)(4). Such orders are authorized "only if the court finds by clear and convincing evidence that—(i) crowding is the primary cause of the violation of a Federal right; and (ii) no other relief will remedy the violation of the Federal right." *Id.* § 3626(a)(3)(E). Any such relief must be

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[1] Appellants cite the records in *Plata*, No. 3:01-cv-1351-TEH (N.D. Cal.), and *Coleman*, 2:90-cv-00520-LKK-JFM (E.D. Cal.), by docket entry number, *i.e.*, "*Plata* D.E. __" and "*Coleman* D.E. __." The three-judge court's records typically appear on both dockets.

"narrowly drawn, extend[] no further than necessary to correct the violation of the Federal right, and [be] the least intrusive means necessary." *Id.* § 3626(a)(1)(A). A court "shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." *Id.*

Under Rule 60(b)(5) of the Federal Rules of Civil Procedure, a party may obtain relief from a judgment where, *inter alia*, "applying it prospectively is no longer equitable." "'[A] significant change in factual conditions'" may render continued enforcement inequitable. *Horne*, 557 U.S. at 447. In "'institutional reform litigation,'" "Rule 60(b)(5) serves a particularly important function." *Id.* at 447-48. "[C]ourts must take a 'flexible approach' to Rule 60(b)(5) motions addressing [institutional reform] decrees." *Id.* at 450. "[T]he passage of time frequently brings about changed circumstances," including "changes in the nature of the underlying problem" and "new policy insights," "that warrant reexamineation of the original judgment." *Id.* at 448. Additionally, "institutional reform injunctions often raise sensitive federalism concerns" relevant to the Rule 60(b)(5) inquiry. *Id.* at 448-50.

B. Factual Background

1. These appeals involve further prisoner release-related proceedings in the three-judge court since this Court's decision in *Plata*, 131 S. Ct. 1910. In *Plata*, this Court affirmed the three-judge court's orders imposing a 137.5% of design capacity population cap on California's prisons as a remedy for then-ongoing Eighth Amendment violations.

These class action cases once were about whether the medical care and mental health care provided to

two discrete classes of inmates violated the Eighth Amendment, and what remedies were necessary to remedy any such Eighth Amendment violations. In 1994, following a bench trial, the *Coleman* court found that the State prisons' mental health care violated the Eighth Amendment. *Coleman* v. *Wilson*, 912 F. Supp. 1282 (E.D. Cal. 1995). In 2002, the State entered into a consent decree, approved by the *Plata* court, "to provide only the minimum level of medical care required under the Eighth Amendment" to a class of inmates with "serious medical conditions." *Plata* v. *Davis*, No. 3:01-cv-1351-TEH, ¶ 4 (N.D. Cal. June 13, 2002) (D.E. 68).[2] Years of remedial proceedings followed the *Coleman* post-trial order and the *Plata* consent decree.

In July 2007, remedial proceedings culminated in the *Coleman* and *Plata* courts granting plaintiffs' motions to convene a three-judge district court pursuant to the PLRA, 18 U.S.C. § 3626(a)(3), to consider a prisoner release order. See *Plata*, 131 S. Ct. at 1927-28. The three-judge court held a trial in late 2008 and early 2009. *Id.* at 1928. During trial, Appellants were not permitted to challenge whether California's prisons provided health care and mental health care to the two inmate classes that satisfies the Eighth Amendment. *Coleman/Plata* v. *Schwarzenegger*, 2009 WL 2430820, at *31 n.42 (E.D. Cal./N.D. Cal. Aug. 4, 2009). Moreover, the evidenti-

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[2] The decree addressed only the objective side of the Eighth Amendment analysis. *See*, *e.g.*, *Plata* D.E. 68, ¶¶ 4, 24-25; *see generally Helling* v. *McKinney*, 509 U.S. 25, 35 (1993). But it said nothing about the requirement that "a prison official must have a 'sufficiently culpable state of mind'" for any Eighth Amendment violation to exist. *Farmer* v. *Brennan*, 511 U.S. 825, 834 (1994).

ary record closed in August 2008. See *Plata*, 131 S. Ct. at 1935.

Based on the conditions that existed in the prison system as of August 2008 (and before) and on the three-judge court's consideration of the various remedies already in place, the court held in August 2009 that a prisoner release order satisfied the PLRA. *Coleman/Plata*, 2009 WL 2430820, at *115; see *Plata*, 131 S. Ct. at 1929. In doing so, the three-judge court held that crowding was the "primary cause" of the alleged Eighth Amendment violations and that no other relief could remedy the violations. 2009 WL 2430820, at *62, 75; *Plata*, 131 S. Ct. at 1933, 1936-39. The court imposed a 137.5% of "design capacity" population cap on California's prisons, and ordered Appellants to meet the cap within two years of the order taking effect. 2009 WL 2430820, at *84; *Coleman/Plata* v. *Schwarzenegger*, 2010 WL 99000, at *3 (E.D. Cal./N.D. Cal. Jan. 12, 2010), *aff'd*, 131 S. Ct. 1910 (2011); see also *Plata*, 131 S. Ct. at 1939-47.[3]

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[3] "Design capacity" is a misnomer that does not reflect how prisons were designed for use. In California, "design capacity" is based "'on one inmate per cell, single bunks in dormitories, and no beds in space not designed for housing'" regardless of how a prison was designed to be used. *Coleman/Plata*, 2009 WL 2430820, at *21. Simply illustrated, if a facility is designed, built and staffed to house two inmates per cell and fully occupied in that manner, it nonetheless would be rated 200% of design capacity. This mismatch in how California defines capacity conflicts with how capacity and crowding are assessed by the federal government and by correctional standards commonly used nationwide. *See*, *e.g.*, Fed. Bureau of Prisons, No. 1060.11, *Program Statement: Rated Capacities for Bureau Facilities* 1-2 (June 30, 1997) ("[r]ated capacity" is "the baseline for the statistical measurement of prison crowding," and "[r]ated capacity is not necessarily the same as any institution's design … capacity").

On appeal, this Court affirmed the propriety of the prisoner release order, see *Plata*, 131 S. Ct. at 1932-39, as well as the imposition of the 137.5% cap and the two-year period for implementing the cap, *id.* at 1939-47. In doing so, this Court recognized that "[a]s 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." *Id.* at 1941 (emphasis added). It therefore stated that "[t]he 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." *Id.*

This Court acknowledged that in selecting a remedy, the district court was required to balance the PLRA's narrow tailoring requirements against the requirement that it give substantial weight to public safety. 18 U.S.C. § 3626(a)(1)(A), (a)(3)(E); *Plata*, 131 S. Ct. at 1929, 1939, 1944. The Court also recognized that the 137.5% of design capacity cap resulted from "difficult predictive judgments regarding the *likely effects* of court orders." 131 S. Ct. at 1942 (emphasis added). It held that the district court's weighing of evidence supporting the population cap "was not clearly erroneous," adding that the "[t]he three-judge court made the most precise determination it could *in light of the record before it*." *Id.* at 1945 (emphasis added). In affirming the deadline, this Court noted that the State did not "contest the issue at trial" or "ask[] this Court to extend the 2-year deadline at this time." *Id.* at 1946.

This Court, however, emphasized that the three-judge court "retains the authority, *and the responsibility*, to make further amendments to the existing order." *Id.* (emphasis added). It explained

that "[e]xperience may teach the necessity for modification or amendment" and "the three-judge court must remain open to a showing or demonstration ... that the injunction should be altered to ensure that the rights and interests of the parties are given all due and necessary protection." *Id.* ("the three-judge court must give due deference to informed opinions as to what public safety requires"). Among other things, this Court recognized that an extension of the time for compliance "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 three-judge court ... evaluate[s] the progress being made to correct unconstitutional conditions." *Id.*; see *id.* at 1947 ("extend[ing] the deadline for the required reduction to five years from the entry of the judgment of this Court" may be warranted).

The Court made crystal clear the need for the three-judge court to attend to changed circumstances that would warrant eliminating or modifying the 137.5% cap: "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.* (emphases added). It ordered that the three-judge court "should give any such requests [for modification] serious consideration," and the prisoner release order "must remain open to appropriate modification." *Id.*

2. Following remand to the three-judge court, the State embarked on a significant program of prison population reduction and concurrently worked to

improve the quality of health care and mental health care in California's prisons.

a. When the record supporting the prisoner release order closed in August 2008, California's prison population was 156,352, or 195.9% of design capacity. 2009 WL 2430820, at *19, 23. Today, California's prisons house 36,500-plus fewer inmates, and operate at 146.6% of design capacity. CDCR, *Weekly Report of Population* (Aug. 5, 2013). Less than one year after this Court's decision, the State had "eliminated all nontraditional beds in gymnasiums and dayrooms and reinstated them as program space." Beard Decl. ¶ 12 (*Coleman* D.E. 4281/*Plata* D.E. 2508).

Appellants accomplished such substantial population reductions through concerted executive action and historic cooperation with the Legislature and local authorities that also led to systemic reforms in the administration of criminal justice. In 2009, after closure of the evidentiary record upon which this Court affirmed the 137.5% cap, 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 reformed sentencing laws. See S.B. 18, 2009-2010 Leg., Reg. Sess. (Cal. 2009); *Coleman* D.E. 4284/*Plata* D.E. 2511, at 5. All of these measures served to reduce the number of offenders sent to or kept in state prison.

More significantly, in 2011, Governor Brown signed into law Assembly Bill 109 ("Realignment"). See A.B. 109, 2011-2012 Leg., Reg. Sess. (Cal. 2011); see also *Coleman* D.E. 4284/*Plata* D.E. 2511, at 4. Realignment diverts lower level offenders and parole vio-

lators to local authorities and dedicates resources for evidence-based community rehabilitative programs. *Id.* The new legislation reformed the State penal code by shifting incarceration and post-release responsibilities for offenses defined as non-serious, non-violent, and non-registerable sex crimes from the State prison system to county supervision. *Id.* Realignment applies to current and future inmates with respect to incarceration, as well as to parole supervision and revocation. Realignment alone reduced California's prison population by almost 25,000 inmates in less than one year.[4]

Contrary to the three-judge court's suggestions that the executive branch is obstructionist, the Board of Parole Hearings has exponentially increased its grants of parole to inmates serving sentences for life with the possibility of parole. Shaffer Decl. ¶ 3 (increasing from 52 grants in 2000 to 670 grants in 2012) (*Coleman* D.E. 4565/*Plata* D.E. 2602). And Governor Brown has reversed a much smaller percentage of parole grants than any of his predecessors. *Id.*; *Coleman* D.E. 4572/*Plata* D.E. 2612, at 1. In 2011 and 2012, Governor Brown reversed approximately 16% of the Board's parole grants, whereas Governor Schwarzenegger reversed approximately 74% of the Board's grants, and Governor Davis reversed approximately 98% of the Board's grants. *Id.* Furthermore, the Governor led the negotiations for Realignment, and, in 2012, personally and successfully campaigned for an amendment to the California Constitution that

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[4] Through S.B. 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. See, *e.g.*, *Coleman/Plata*, 2009 WL 2430820, at *20, 25; App. 80a-81a.

guarantees—on a permanent basis—funding for the diversion of less serious offenders to the county level where they can receive the services they require.

The aforementioned reforms mean that the State not only has reduced the prison population, but has made lasting reforms that will control the population going forward.

b. These class actions were filed, and prisoner releases have been ordered, *not* to remedy overcrowding per se, but to remedy allegedly cruel and unusual punishment caused by medical and mental health care. Thus, the most significant facts concern the changes the State has made to the provision of this care. The improvements have been dramatic.

The State has completed significant construction projects and has begun or continued work on other projects at its facilities; it has increased the number and the quality of its medical staff; it has implemented comprehensive programs for suicide prevention, and it has implemented the Turnaround Plan of Action of the Receiver, whom the *Plata* district court appointed to run CDCR's health care system.

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.*, Meyer Decl. ¶¶ 3-15 (*Coleman* D.E. 4278). Nearly $1 billion in additional expenditures recently have been secured in the budget that are earmarked for improvements to prison health care facilities and inmate medical services. Beard Decl. ¶¶ 21-22 (*Coleman* D.E. 4281/*Plata* D.E. 2508). These investments ought to resolve this Court's previous doubts about whether the political branches could cooperate to ensure new

construction and other investment in improving prison conditions. See *Plata*, 131 S. Ct. at 1931, 1938-39 (discussing construction delays and "vast expenditures of resources by the State" that other remedies would require, and stating there was no "real possibility that the necessary resources would be made available").

Furthermore, each of the six core objectives of the Receiver's Turnaround Plan of Action is substantially complete, with most items completed more than a year ago. *Plata* D.E. 2415-1, 2476; see generally *Plata* D.E. 1229, letter at ii (the *Plata* single-judge court approved the Turnaround Plan in 2008 to "correct constitutional deficiencies in California's prison health care system"); *Plata*, 131 S. Ct. at 1931. 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. 3:01-cv-1351-TEH, slip op. at 1-2 (N.D. Cal. Jan. 17, 2012) (D.E. 2417).

Similarly, in mid-2012, Judge Karlton commended the Appellants "for the remarkable accomplishments to date in addressing the problems in access to inpatient mental health care," *Coleman* v. *Brown*, 2:90-cv-00520-LKK-JFM, slip op. at 1 (E.D. Cal. July 13, 2012) (D.E. 4214). The Special Master recognized that the Appellants' ability to eliminate mental health care wait lists constituted "a dramatic improvement that is unprecedented in the history of the *Coleman* remedial effort," *Coleman* D.E. 4205, at 9. The State has now implemented a comprehensive suicide prevention program, which includes dedicated prevention and response improvement teams, extended staff hours to improve intervention, new

procedures for prevention, response and reporting, and thorough training for staff. See, *e.g.*, *Coleman* D.E. 4529, at 42-49. The State also has instituted a Quality Improvement Process, which the *Coleman* Special Master described just days ago as "a significant advancement by CDCR within a relatively short period of time." *Coleman* D.E. 4730, at 30.

On the central question of measuring progress toward remedying any outstanding Eighth Amendment violations, namely 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. 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 and State Prisons, 2000-2010-Statistical Tables* 18 tbl.20 (Dec. 2012). The national average is 245. *Id.* at 1 & fig.2. For 2011, the court-appointed Receiver's staff reported that 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).

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 and 10 of the "possibly preventable" deaths occurred at outside facilities not controlled by the Receiver or state officials. See *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 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). These findings of improved care contrast sharply with the facts on significant lapses in care, dated as they were, that this Court previously understood to be representative of current conditions. See *Plata*, 131 S. Ct. at 1927 (crediting findings made *in 2005* that unconstitutional care causes a needless death "'every six to seven days'").

Other independent evaluations, including reports of the Office of Inspector General (OIG), confirm significant progress. The OIG reports—on which plaintiffs repeatedly relied earlier in this litigation to support their allegations of Eighth Amendment inadequacies and which the *Plata* district court had held were a benchmark for assessing constitutional adequacy[5]—now demonstrate that the quality of care has improved substantially since this case was last before this Court. California's prisons now have an *average* overall score of 87.0%, which reflects "High

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[5] *See*, *e.g.*, *Plata* v. *Brown*, No. 3:01-cv-1351-TEH, slip op. at 9, ¶ 3 (N.D. Cal. Sept. 5, 2012) (D.E. 2470); Br. for Plata Appellees at 14, No. 09-1233 (U.S. filed Oct. 25, 2010) (OIG's findings of "deficiencies"); *Coleman/Plata,* 2009 WL 2430820, at *34 (OIG audit reports).

Adherence" to the medical policies and procedures the Receivership instituted to achieve constitutional compliance. OIG, *Comparative Summary and Analysis of the First, Second, and Third Medical Inspection Cycles of California's 33 Adult Institutions* i-ii (July 2013); see also *Plata* D.E. 2603-1. By contrast, when OIG completed its first cycle of medical inspections of California's 33 prisons in June 2010, just eight prisons had an overall score of at least 75 percent and the overall CDCR average was 71.9%. OIG, *supra*, at ii. Today, every institution's score exceeds 75%, all but seven have scores of 85% or higher, and all but three exceed 80%. *Id.* at vi; *id.* at 4 (lowest score at any institution is 77.6%). 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," *Coleman* D.E. 4282, ¶ 15, and that "it is abundantly clear that the system provides timely and effective medical care," *id.* ¶ 16.

The OIG Reports document clear improvement along parameters previously deemed relevant, but they also demonstrate something more. 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* D.E. 2672-1 (facility-by-facility populations). The OIG reports thus provide clear evidence of precisely what this Court anticipated might prove true: that "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." *Plata,* 131 S. Ct. at 1941.

3. Given the significant progress the State had made in improving the quality of medical and mental

health care and doing so at population levels that exceeded 137.5% of design capacity, in May 2012, Appellants informed the three-judge court that they intended to seek modification of the cap. App. 91a. Appellants stated that changed conditions provided the basis for the anticipated filing. See *id.* at 93a.

The court, however, issued an order in September 2012 stating that because "whether Eighth Amendment compliance could be achieved with a prison population higher than 137.5% design capacity" 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." *Coleman/Plata* v. *Brown*, 2012 WL 3930635, at *1 (E.D. Cal./N.D. Cal. Sept. 7, 2012). The court suggested that unless Appellants finished "completing correction of the underlying Eighth Amendment violations," *id.* n.2, no modification would be considered.

Nonetheless, Appellants moved to vacate or modify the cap in January 2013. See App. 101a-102a.[6] Appellants presented evidence that the original predictive judgment—based on the record as of 2008—that constitutionally adequate medical and

[6] Appellants simultaneously submitted a plan to achieve the required 137.5% cap by June 27, 2013 and, alternatively, by December 27, 2013. *Coleman* D.E. 4284/*Plata* D.E. 2511. It 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 the single-judge *Coleman* court to terminate all its injunctive relief because the mental health care no longer created a substantial risk of serious harm to the class, and because Appellants were not deliberately indifferent. *Coleman* D.E. 4275. Judge Karlton denied that motion. *Coleman* v. *Brown*, 2013 WL 1397335, at *12-24 (E.D. Cal. Apr. 5, 2013).

mental health care could be provided only by reducing the population to 137.5% of design capacity was no longer sound. See, *e.g.*, *Coleman* D.E. 4280/*Plata* D.E. 2506, at 1-2, 15-19 (improvements in care); *Coleman* D.E. 4332/*Plata* D.E. 2529, at 2.

Additionally, the State submitted that because Realignment had so substantially changed the character of the remaining prison population, further releases could not be achieved without compromising public safety. *Coleman* D.E. 4280/*Plata* D.E. 2506, at 20. CDCR Secretary Beard, Appellees' former expert, testified that enforcing the 137.5% cap "would ... come at a significant cost ... to public safety." *Coleman* D.E. 4281/*Plata* D.E. 2508, ¶ 25. To reach the cap by December 2013 would require the State to reduce its prison population by approximately 9,600 more inmates. App. 39a-40a. Given the changed nature of California's prison population post-Realignment, Dr. Beard testified the cap "cannot be achieved without the early release of inmates convicted of violent or serious felonies." *Coleman* D.E. 4281/*Plata* D.E. 2508, ¶ 25; compare, *e.g.*, *Coleman*/*Plata*, 2009 WL 2430820, at *86, 88, 90, 92, 95, 110-11 (crediting Dr. Beard's trial testimony that releasing categories of inmates *formerly* in the prisons would not adversely affect public safety).

On April 11, 2013, the three-judge court denied the motion to vacate or modify. App. 74a-179a. True to the word of its September 2012 order, the court held that the State's request to vacate or modify the cap based on changed conditions was improper. It reasoned that:

> (1) under this Court's mandate, the only basis for modification would be "if [Appellants] had 'remed[*ied*] the underlying constitutional violations,'" App. 119a (emphasis added; alteration

by the three-judge court) (quoting *Plata*, 131 S. Ct. at 1947);

(2) the standards governing modification set forth in *Horne* were "inapplicable" absent a showing that Appellants had "remedied the underlying constitutional violation," *id.*;

(3) Rule 60(b)(5) requires an "unanticipated change in facts" to support modification, *id.* at 115a, 122a, 129a, and because the court "anticipated the issue of public safety," *id.* at 148a, and "anticipated" that crowding would decrease under its order, no relief was warranted, *id.* at 127a-128a, 116a n.25, 157a n.42; and

(4) "fundamental principles of res judicata" prohibited the court from vacating or modifying the cap, *id.* at 124a.

Having rejected the request for vacatur or modification, the court ordered new injunctive relief. See *id.* at 173a-179a.[7] Appellants noticed an appeal to this Court from the order.

Despite Appellants' position that no further population reduction measures were necessary, they began complying with the new injunctions. See, *e.g.*,

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[7] The injunctions required Appellants to: submit a List of population reduction measures; submit a Plan to reach the 137.5% cap; submit a list of state laws that had to be preempted to allow Appellants to satisfy the cap; immediately implement the portions of the Plan within the Executive's power; "attempt in good faith to obtain the necessary authorization, approval, or waivers from the Legislature or any relevant administrative body or agency" as to measures that the Executive lacks authority to implement; and "to develop a system to identify prisoners who are unlikely to reoffend or who might otherwise be candidates for early release." App. 177a-178a.

Coleman D.E. 4572/*Plata* D.E. 2609. Among other things, Appellants submitted both a List and a Plan for population reduction 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.

Appellees responded by seeking further injunctive relief, including outright releases of inmates, and by requesting that the court initiate contempt proceedings. *Coleman* D.E. 4611. On June 20, the three-judge court issued an order deferring the request for contempt, see App. 69a-71a, and imposing additional injunctive relief. The court compelled Appellants 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 4,170 more inmates by December 31, 2013. *Id.* at 51a.[8] To facilitate the relief ordered, the court waived or preempted numerous provisions of state and local law. *Id.* at 3a, 35a, 59a-62a.[9] Furthermore, the court required that if any of the measures compelled were insufficient to

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[8] By Appellants' calculations, if the Legislature enacted or the court preempted the state laws necessary for Appellants to implement the measures in the court-ordered Plan, the population would decrease by 7,066 inmates by December 31, 2013, creating a 2,570 inmate shortfall. App. 38a-39a. Because the court refused to credit a 1,600 inmate reduction in the Plan, it calculated a 4,170 shortfall. *Id.* at 39a-40a.

[9] At the three-judge court's invitation, Appellants submitted a list of additional state laws, including multiple sections of the California Constitution, that the court would need to preempt to allow Appellants to effectuate the relief ordered. *Coleman* D.E. 4686/*Plata* D.E. 2674.

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 Appellants to begin formulating in its April 11 order. *Id.* at 4a. Although the court claimed that its orders give Appellants "flexibility," *id.* at 68a, the court has held that it will not authorize the transfer of additional inmates out-of-state, see *Coleman* v. *Brown*, 2013 WL 3356910, at *7 n.5 (E.D. Cal. July 3, 2013).

As noted, the State timely appealed the April 10 order. On June 24, the State timely appealed the June 20 order. Appellants now timely file this jurisdictional statement covering both appeals. Sup. Ct. R. 18.2.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The gravity of this litigation to the State of California and California's public is obvious. So too is the importance of ensuring that federal courts heed this Court's mandates and its precedents regarding the initiation and modification of injunctive relief, particularly in one of the most sweeping federally mandated state-institutional reform litigations over which this Court has presided. The legal questions presented here are of considerable importance, and plenary review is warranted.

I. THE THREE-JUDGE COURT FAILED TO HEED THIS COURT'S MANDATE AND MISINTERPRETED THIS COURT'S CASES GOVERNING INSTITUTIONAL REFORM INJUNCTIONS.

The three-judge court's decision denying Appellants' motion to vacate or modify the 137.5% cap conflicts with this Court's mandate in *Plata* and with many other holdings of this Court, particularly in the institutional reform context. These legal errors present substantial issues worthy of this Court's review.

1. The standard to which the three-judge court held Appellants is irreconcilable with this Court's express mandate in *Plata*. See 131 S. Ct. at 1941-42, 1946-47.

This Court recognized that the record that existed in August 2008 allowed the three-judge court to make only "difficult predictive judgments regarding the likely effects of court orders." *Id.* at 1942. This Court further acknowledged that "time and experience" may reveal that other remedies—ostensibly including those this Court originally rejected—"will end the constitutional violations even without a significant decrease in the general prison population." *Id.* at 1941. Therefore, it instructed that the three-judge court "must remain open to a showing or demonstration ... that the injunction should be altered." *Id.* at 1946. It broadly recognized that "changing political, economic and other circumstances" were potentially relevant, as were "informed opinions as to what public safety requires." *Id.*

Critically, this Court commanded that: "As the State makes further progress, the three-judge court *should evaluate* whether its order remains appro-

priate. 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 was anything but "open" to showings "that the injunction should be altered." For instance, when Appellants disclosed that they intended to move for modification, the court below said that it "is not inclined to permit" litigation of "whether Eighth Amendment compliance could be achieved with a prison population higher than 137.5% design capacity," and advised Appellants that "available time and resources would be better spent completing correction of the underlying Eighth Amendment violations." *Coleman*/*Plata*, 2012 WL 3930635, at *1 & n.2.

Then, in denying Appellants' motion to vacate or modify the population cap, the three-judge court rewrote the central passage of this Court's mandate. Despite that this Court articulated a "significant progress toward remedying" standard, the three-judge court denied the motion based on its claim that "the Supreme Court suggested that defendants could seek modification if they had 'remed*[ied]* the underlying constitutional violations.'" App. 119a (emphasis added; alteration by the three-judge court) (quoting *Plata*, 131 S. Ct. at 1947).

By re-formulating this Court's mandate, the three-judge court dodged whether the "significant progress" or other changed circumstances required relief. It reasoned that because Appellants had not moved the three-judge court to find *all* Eighth Amendment violations had been remedied (*i.e.*, moved for termination of all PLRA relief), there was no basis

upon which to vacate or modify the population cap. *Id.* at 116a-122a.[10] As a result, the three-judge court never applied this Court's mandated "significant progress toward remedying" standard to the evidence Appellants submitted. See *id.* at 117a-159a.

The three-judge court admittedly did not consider some of Appellants' evidence,[11] and the evidence it did examine was under its erroneous standard of requiring a completed remedy. See, *e.g.*, App. 129a (Appellants "must present persuasive evidence that ... the severe staff shortages, the complete lack of treatment space, etc.—*have been remedied*"); *id.* at 130a (most of Appellants' evidence is "*irrelevant*, as it points to *partial compliance* with this Court's Order and not to a *resolution of the problems*"); *id.* at 149a ("equity supports granting relief" when "a party *has achieved* a 'durable remedy'") (all emphases above added).

The lower court's misreading of this Court's mandate presents a most substantial issue. To begin with, this Court's enforcement of its mandates is an essential function. See, *e.g.*, *Wong* v. *Belmontes*, 558 U.S. 15, 16, 26-28 (2009) (per curiam); *Penry* v. *Johnson*, 532 U.S. 782, 797 (2001). That function is more important when, as here, a lower court chooses

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[10] The court disingenuously implied that Appellants should or could have moved it for such relief. App. 121a-122a. In 2008, the three-judge court held that any argument that Eighth Amendment compliance had been achieved was "not for this Court to consider, and would instead be properly presented to the individual *Plata* and *Coleman* courts." *Plata* D.E. 1786, at 28:16-29:2.

[11] The three-judge court stated that "[w]e did not consider this evidence" Appellants submitted showing the current quality of the State's prison health care. *Coleman*, 2013 WL 3356910, at *5 n.2.

to "flout [this Court's] reasoning." *Deschamps* v. *United States*, 133 S. Ct. 2276, 2288 (2013). Moreover, given this litigation's long history and the three-judge court's signals that it intends to maintain jurisdiction over prisoner release proceedings for a long time yet, see *Coleman*, 2013 WL 3356910, at *13 n.9, this Court's review is critical to ensuring that Appellants' receive a fair opportunity to demonstrate that the 137.5% cap or other injunctive relief requires modification in light of changed conditions.

2. This Court's review is equally warranted because the three-judge court introduced artificial limitations into the necessarily broad standards under Rule 60(b)(5) for evaluating injunctions that reform state institutions, as this Court articulated them in *Horne*, 557 U.S. 433.

The rule itself speaks in open-ended terms, allowing relief whenever "applying [a judgment] prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5). In *Horne*, moreover, this Court recognized that in the context of institutional reform litigation that analysis of a Rule 60(b)(5) motion must be "broad and flexible." 557 U.S. at 456. The Court emphasized that "a flexible approach to Rule 60(b)(5) relief is *critical*" where the injunction implicates federalism concerns. *Id.* at 452 (emphasis added). Rather than hew to this Court's holding in *Horne*, the three-judge court reasoned that "*Horne* is inapplicable" except where "defendants have remedied the underlying constitutional violation." App. 119a (calling this a "fundamental" principle of *Horne*). This is the antithesis of the "flexible approach" this Court requires. It conflicts with *Horne* itself and circuit law. *Horne* expressly noted that Rule 60(b)(5) allows federal courts to modify relief that was "'overbroad or outdated.'" 557 U.S. at 449. The courts of appeals

have understood *Horne* to require exactly that. See, *e.g.*, *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc.* v. *Westchester Cnty.*, 712 F.3d 761, 775 (2d Cir. 2013) (*Horne* requires courts to "carefully consider the validity *and scope* of consent decrees") (emphasis added); *League of United Latin Am. Citizens, Dist. 19* v. *City of Boerne*, 659 F.3d 421, 437 (5th Cir. 2011) (*Horne*'s "flexible approach" applies to determining whether a modification "'is suitably tailored'").

3. The three-judge court's decision similarly conflicts with *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), upon which *Horne* relies. In *Rufo*, this Court held that modification is available whenever a party "establish[es] that a significant change in circumstances warrants revision of the decree." 502 U.S. at 383. The Court explained that modification may be appropriate in any number of circumstances short of when the underlying violation that gave rise to the injunction has been completely remedied, including "when enforcement of the decree without modification would be detrimental to the public interest." *Id.* at 385. It also specifically endorsed a Seventh Circuit decision permitting modification "to avoid pretrial release of accused violent felons." *Id.*[12]

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[12] That decision, *Duran* v. *Elrod*, 760 F.2d 756 (7th Cir. 1985), parallels the circumstances here in significant respects. Judge Posner's opinion rejected the district court's view that because the injunction was previously affirmed, it was insulated from further challenges. *Id.* at 762 (holding instead that the public's interest in public safety was paramount). The court recognized that "fugitive and recidivist data" that had emerged since the injunction was affirmed constituted a sufficient change in circumstances to modify the decree. *Id.*

The three-judge court misread *Rufo*. The court interpreted *Rufo* to require in all cases that "the moving party must demonstrate a significant and *unanticipated* change in facts." App. 115a (emphasis added); see *id.* at 122a (an "unanticipated change in circumstances [is] required under Rule 60(b)(5)"); *id.* at 129a ("The burden falls on defendants to demonstrate a 'significant and unanticipated change in factual conditions warranting modification.'"). *Rufo* contains no such requirement.

Although *Rufo* acknowledged that unforeseen circumstances are a relevant consideration, 502 U.S. at 385, it rejected the argument "that modification should be allowed only when a change in facts is both 'unforeseen and unforeseeable,'" *id.*; see *id.* at 395 (O'Connor, J., concurring in the judgment) (the fact that an event "was foreseen should not have been a dispositive factor in the court's decision").

4. The three-judge court also erred in holding that vacating or modifying the population cap was prohibited by "fundamental principles of res judicata." App. 124a; *accord id.* at 31a. Its reasoning is irrational in the context of a Rule 60(b)(5) motion based on changed circumstances, and in tension with this Court's decision in *System Federation No. 91, Railway Employees' Department* v. *Wright*, 364 U.S. 642 (1961). There, this Court held that federal courts sitting in equity have "the right ... to apply modified measures to changed circumstances." *Id.* at 647-48. It advised 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 have since arisen." *Id.* (holding that lower court erred in refusing to modify consent decree). Cf. *Horne*, 557 U.S. at 452 (the court of appeals erred in believing itself bound by

the conclusions in an earlier order "lest it allow [appellants] to 'reopen matters made final'").

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For each of these reasons, the three-judge court applied a legally incorrect standard to an unduly narrow subset of the relevant evidence. For this reason alone, the challenged orders reflect an abuse of the court's discretion, and require reversal. See, *e.g.*, *Koon* v. *United States*, 518 U.S. 81, 101 (1996) ("A district court by definition abuses its discretion when it makes an error of law."). Thus, at the very least, the Court should reverse the challenged orders and remand for consideration of the full record under the proper legal standards.

II. THE FUNDAMENTALLY CHANGED CIRCUMSTANCES REQUIRE VACATING OR MODIFYING THE POPULATION CAP, OR AMENDING THE MANDATE.

This Court affirmed the 137.5% cap based on assumptions drawn from a record that closed five years ago. Those assumptions included that California would never appropriate meaningful funds to improve the quality of medical and mental care provided to state prison inmates, see *Plata*, 131 S. Ct. at 1937-39, and that California would never pass legislation that fundamentally reformed the state penal system. Neither assumption is true today. California has spent and appropriated billions of dollars to improve the quality of medical and mental health care, including opening a new 1,818-bed facility in July 2013 dedicated to treating inmates with special medical or mental health care needs. And California radically reduced the size and altered the composition of its state prison population through Realignment and expansion of good time credits.

These are fundamental, structural changes. They have enormous implications for the legitimacy of any federal court order demanding that state prison doors be opened today to those serving terms of incarceration duly authorized under California law. This Court can and should decide whether there is any valid basis under the PLRA for the population cap to remain in place or remain at this level. Alternatively, this Court could take the opportunity to remand to the district court for consideration of changed conditions under an even clearer amended mandate.

First, given the quality of care being provided and the other remedies in place, the population level in California's prisons today no longer is the primary cause of any outstanding Eighth Amendment violations. 18 U.S.C. § 3626(a)(3)(E). Moreover, today's record, unlike that in 2008, forecloses any reasonable judgment that "no other relief will remedy [any outstanding] violation of the [Eighth Amendment] right," and that the 137.5% cap "is narrowly drawn, extends no further than necessary to correct the violation[s] ... and is the least intrusive means necessary to correct the violation[s]." *Id.* § 3626(a)(1), (a)(3)(E).

The systemic improvements to medical and mental health care—which will continue irrespective of a population cap—have bettered health outcomes under *all objective* measures that appear in the record. *Supra* at 15-18. Increased funding for construction, staffing, and training, coupled with the reduction of the prison population by more than 36,500 inmates, means the State now has ample resources and flexibility to administer Eighth Amendment-compliant care. The State has made precisely the investments in new medical facilities

and state-of-the-art medical care that the courts rejected as "'chimerical'" because it seemed implausible that the political branches would cooperate. *Plata*, 131 S. Ct. at 1938; *Coleman/Plata*, 2009 WL 2430820, at *65-67.

There is no basis for a continuing finding that a 137.5% cap is well-tailored to remedying any arguable shortfall that exists to achieving constitutionally adequate care. For example, the Mule Creek State Prison and the Correctional Training Facility have populations of 167.0% and 156.9% of design capacity, respectively (*Plata* D.E. 2672-1), yet the OIG scores for both facilities average above 88%, and OIG Reports also show substantial improvement in scores over the years in these and other institutions with populations that remain high. OIG, *supra*, at iv, 50-51.

Second, new evidence about public safety risks associated with California's current prison population demonstrates that requiring continued compliance with the 137.5% cap now conflicts with the PLRA's requirement that "substantial weight" be given to "any adverse impact on public safety." 18 U.S.C. § 3626(a)(1). It is hard to think of a more profound example of changed circumstances than those created by Realignment. This Court could not have foreseen them; no one did. The California prison population today is fundamentally different from the population in 2008, and the record now contains data regarding recidivism of inmates deemed low-risk under risk-assessment instruments that *did not exist* at the time the record closed.

The 2009 trial testimony concerning the possibility of releases, as well as the court's discussion of the "low risk" of recidivism associated with such releases, centered on generic categories such as "property,

drug and non-violent offenders." *Plata* D.E. 1920, at 1750:1-6 (*cited in Coleman/Plata*, 2009 WL 2430820, at *101). No one foresaw a legislative restructuring that would divert low-level offenders and parole violators to the counties. Today, however, there is no doubt about the nature of California's prison population. See, *e.g.*, *Plata* D.E. 2679, at 7. California's prisons no longer hold four-thousand-plus inmates who could be released without a significant impact on public safety. See, *e.g.,* Beard Decl. ¶ 7 (*Coleman* D.E. 4346/*Plata* D.E. 2544); Beard Decl. ¶ 15 (*Coleman* D.E. 4566/*Plata* D.E. 2603). Dr. Beard now has testified without challenge that, absent legislative action to secure additional capacity, "[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." Beard Decl. ¶ 25 (*Coleman* D.E. 4281/*Plata* D.E. 2508); compare *Plata*, 131 S. Ct. at 1943 (suggesting that the population could be reduced with "little or no impact on public safety" because the State could do so "without releasing violent convicts").

New data on recidivism underscore the newly increased risk to public safety. For instance, only in January 2008 did CDCR produce a risk assessment tool (the California Static Risk Assessment (CSRA)), and there were no publications regarding the CSRA until November 2009. See S. Turner et al., *Development of the California Static Risk Assessment Instrument* (2009). Using the CSRA, the data now show that 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) (citing Turner, *supra*, and evaluating CDCR's October 2012 recidivism report applying the CSRA). Based on the data that exists today, Dr. Petersilia—whose opinions on release-associated risks the three-judge court repeatedly credited in 2009—has concluded that "regardless of how one slices the data, California counties are dealing with a risky offender population." *Id.*; compare *Coleman/Plata*, 2009 WL 2430820, at *101 (contemplating an overall recidivism rate of just 17% among offenders then-characterized as "low risk").[13]

Given these significant changes, there is no basis consistent with the PLRA to compel releases of the remaining inmates necessary to achieve a 137.5% cap—or, at minimum, to require doing so by December 2013. See *Plata*, 131 S. Ct. at 1946 (in considering modification, the "court must give due deference to informed opinions as to what public safety requires"). This is because (i) it now is certain that releases will compromise public safety in a completely different manner today than was predicted based on the 2008 record; and (ii) the record is bereft of any evidence that releasing these inmates would enable the State to provide a constitutionally sufficient level of medical and mental health care that it is not already providing, or could not provide, through other means.

The challenged orders demonstrate a conspicuous insensitivity to the balances Congress struck in the

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[13] Today, there are fewer than 1,800 inmates defined as "low risk" under the CSRA who have not committed in-prison felonies within 10 years, and have not been validated as gang members. *Coleman* D.E. 4697/*Plata* D.E. 2679, at 8.

PLRA, see 18 U.S.C. § 3626(a)(1), the considerations this Court's mandate deemed relevant, see *Plata*, 131 S. Ct. at 1946, and the critical analyses under Rule 60(b)(5) in state-institutional reform litigation, see *Horne*, 557 U.S. at 448-49. This Court should vacate and moot the 137.5% cap entirely or order that it be adjusted upward, or remand for consideration of the full record of changed conditions under a newly articulated standard that compels adherence to the PLRA, federalism concerns, and other limits on ordering the release of properly incarcerated state inmates.

CONCLUSION

The Court should either summarily reverse with instructions to stay the currently ordered releases pending reevaluation of the most current record under the correct legal standards, or note probable jurisdiction and schedule this case for expedited plenary review.

Respectfully submitted,

KAMALA D. HARRIS
ATTORNEY GENERAL OF CALIFORNIA
JONATHAN L. WOLFF
SENIOR ASSISTANT ATTORNEY GENERAL
JAY C. RUSSELL
SUPERVISING DEPUTY ATTORNEY GENERAL
DEBBIE VOROUS
PATRICK R. MCKINNEY
DEPUTY ATTORNEYS GENERAL
455 Golden Gate Avenue
Suite 11000
San Francisco, CA 94102-7004
(415) 703-5500

TACY F. FLINT
SEAN A. SIEKKINEN
SIDLEY AUSTIN LLP
1 S. Dearborn Street
Chicago, IL 60603
(312) 853-7000

CARTER G. PHILLIPS*
EAMON P. JOYCE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000
cphillips@sidley.com

MARK E. HADDAD
ROBERT A. HOLLAND
SIDLEY AUSTIN LLP
555 W. 5th Street
Los Angeles, CA 90013
(213) 896-6000

JERROLD C. SCHAEFER
PAUL B. MELLO
HANSON BRIDGETT LLP
425 Market Street
26th Floor
San Francisco, CA 94105
(415) 777-3200

Counsel for Appellants

August 9, 2013

*Counsel of Record

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT,
E.D. CALIFORNIA.

Nos. 2:90-cv-0520 LKK JFM P, C01-1351 TEH

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.

June 20, 2013

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.

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

[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.*

submitted their monthly status report. Defs.' June 2013 Status Report (ECF No. 2651/4653).

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 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.

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]

In *Coleman*, defendants proved unable to remedy the constitutional violations despite over a decade of

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[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).

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 *l-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]

"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).

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

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[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.

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

[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.

opinion. We repeat here only those findings that are necessary or relevant to the determination of the issues before us.

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.

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 oppor-

tunity 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.

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.

Defendants were thus ordered to submit a plan for compliance within 45 days of our order. *Id.* at 183.

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[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/downloads/pdf/articles/2007/July2007/document03.pdf

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

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.

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.

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.

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.*

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

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[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).

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).

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).

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[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 http://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:

> [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

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[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.

> 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 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]

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

[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.

capacity. CDCR, *Weekly Rpt. of Population*, June 12, 2013, *available at* http://www.cdcr.ca.gov/reports_research/offender_information_services_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.*

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

[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,

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 con-

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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.

tracts 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."

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.").

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

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

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[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

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:

> 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.

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.

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.

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

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

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:

> 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

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[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.

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.

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

[19] The calculations throughout this Opinion & Order are based on projections for prison population and design capacity that

that would reduce the state prison population by 9,636 more prisoners by December 31, 2013.

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

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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/Reports_Research/Offender_Information_Services_Branch/Projections/S13Pub.pdf

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]

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

[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.

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	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

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]

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[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

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.

Plata, 131 S.Ct. at 1928-29. There can be no reasonable dispute that Defendants have failed to meet their

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(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.

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.

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.

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

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[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.

for implementation of court orders, including the orders of the Three Judge Court.

. . .

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.

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

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.

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.

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]

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

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[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.

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

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[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.

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.

2. List of Low-Risk Prisoners

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

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]

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[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

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

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is not a permanent waiver of all state laws and regulations regarding housing California prisoners in other states.

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.

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

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

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[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.

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.

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.

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

(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.

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[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).

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.

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.

IT IS SO ORDERED.

APPENDIX A

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

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

[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.

	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]	——

[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).

APPENDIX B

Only the Westlaw citation is currently available.

UNITED STATES DISTRICT COURT,
E.D. CALIFORNIA AND
N.D. CALIFORNIA

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Nos. 2:90-cv-0520 LKK JFM P,
C01-1351 TEH

———

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.

———

April 11, 2013

———

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

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

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]

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[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.

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).

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[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.

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

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

[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.

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

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[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).

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

[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).

Court decided to impose a population cap of 137.5% design capacity. *Id*. at 130.

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

[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.

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)).

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:

> 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.

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 "Realign-

ment." 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*.

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.

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[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).

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

[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.

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 require-

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[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.

ment. *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)).

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:

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[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.

> [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] con-

[14] Defendants did answer our other questions. First, defendants believed it premature to begin modification proceedings

tending 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. &

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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/reportsresearch/offenderinformation_services_branch/WeeklyWed/TPOP1A/TPOP1Ad130403.pff.

Order to Show Cause Re: Contempt at 1 (ECF No. 2467/4230).

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

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

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

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[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.

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]

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

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[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.

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

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[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).

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:

> 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

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[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).

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]

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

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[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.

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).

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:

> 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 Reduc-

tion 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).

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

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

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[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 filings, 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).

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.

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

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.

[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.
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> Second, this Opinion would constitute the "written findings based on the record that prospective relief remains

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.*

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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).

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).

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.

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."

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[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.

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]

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[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

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

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

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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*.

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.

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.

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,

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[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.

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.

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 prison-

[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.

ers 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)

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.

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[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.

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

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[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.

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:

> 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 un-

derstood 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.

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

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.

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

[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.

(*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).

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[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).").

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.

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. &

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[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).

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).

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).

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

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,

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[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

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. . . .
>
> 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

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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.

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 wheelchair-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).

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 prob-

> lem 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.

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

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

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:

> 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]

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[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

3. Defendants Have Not Achieved a Durable Remedy

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]

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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

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.

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

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finds that Defendants have not met the conditions identified in that case.

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]

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[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) over-

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-of-state 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

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

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crowding 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).

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

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[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.

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.

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

[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

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

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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*.

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.

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.

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[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.

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

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[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.

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

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).

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

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

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[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.

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.

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]

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[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.

B. Defendants' January 7, 2013 Filings

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

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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.

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

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[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-

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.

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

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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.").

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

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[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://sentencing.nj.gov/downloads/pdf/articles/2007/July2007/document03.pdf

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 mat-

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[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

ter 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.

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

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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).

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,

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

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.

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.

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.

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.

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

IT IS SO ORDERED.

APPENDIX C

STATUTORY PROVISION AND RULE INVOLVED

18 U.S.C. § 3626. Appropriate remedies with respect to prison conditions

(a) Requirements for relief.—

(1) Prospective relief.—(A) Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends 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. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

(B) 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.

(C) Nothing in this section shall be construed to authorize the courts, in exercising their remedial powers, to order the construction of prisons or the

raising of taxes, or to repeal or detract from otherwise applicable limitations on the remedial powers of the courts.

* * * *

(3) Prisoner release order.—(A) In any civil action with respect to prison conditions, no court shall enter a prisoner release order unless—

(i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and

(ii) the defendant has had a reasonable amount of time to comply with the previous court orders.

(B) In any civil action in Federal court with respect to prison conditions, a prisoner release order shall be entered only by a three-judge court in accordance with section 2284 of title 28, if the requirements of subparagraph (E) have been met.

(C) A party seeking a prisoner release order in Federal court shall file with any request for such relief, a request for a three-judge court and materials sufficient to demonstrate that the requirements of subparagraph (A) have been met.

(D) If the requirements under subparagraph (A) have been met, a Federal judge before whom a civil action with respect to prison conditions is pending who believes that a prison release order should be considered may sua sponte request the convening of a three-judge court to determine whether a prisoner release order should be entered.

(E) The three-judge court shall enter a prisoner release order only if the court finds by clear and convincing evidence that—

(i) crowding is the primary cause of the violation of a Federal right; and

(ii) no other relief will remedy the violation of the Federal right.

* * * *

Fed. R. Civ. P. 60. Relief From a Judgment or Order

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(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

* * * *

(5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

* * * *