CHAPTER 14—SUPPLEMENT
(after p. 811)

OPINION AND ORDER REQUIRING DEFENDANTS TO IMPLEMENT AMENDED PLAN, COLEMAN V. BROWN & PLATA V. BROWN

952 F. Supp. 2d 901 (E.D. Cal. & N.D. Cal. 2013) (Three Judge Court)

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. 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"). On May 2, 2013, defendants submitted this List and their Plan. * * *

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"). 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, [omitted]. * * *

B. The Need for Further Relief

* * *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.") 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 non-compliance. * * * 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. 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 for implementation of court orders, including the orders of the Three Judge Court.
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> The clear message to the field, from at least early 2012 until the present, is that court orders in Coleman and Plata, and orders from the Three Judge Court, are to be implemented only to the extent that State officials and their legal counsel deem desirable. This message of deliberate non-compliance undermines the legitimacy and integrity of all court orders in these cases and of the Receiver's turnaround plan initiatives.
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> 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.
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> 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. 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, 563 U.S. at 511. 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. Defendants, however, chose to submit their List of possible prison population reduction measures "in no particular order of preference." 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.* * *

[As in *Hutto*,] 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. * * * [Defendants]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, 563 U.S. at 545. 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"—

notwithstanding the fact that defendants expressly withdrew the question of constitutional compliance from this Court's consideration. 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. [Detailed discussion of adopted measures omitted]

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. 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.

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. 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, and it is entirely unrealistic to believe that the drafted legislation, once submitted, will be approved. Governor Brown has stated that he will prepare the necessary legislation but will not urge its adoption. The leader of the State Senate has announced that defendants' Plan will be DOA, "dead on arrival." 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, 563 U.S. at 530, and we will follow that lead. 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 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. Horne 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"—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. * * * 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. Defendants have repeatedly objected to the expense of such a program, which they advised us costs $300 million a year. 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." 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. 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 * * *

III. CONTEMPT

Plaintiffs have again requested that this Court issue an order to show cause why defendants should not be held in contempt. 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. 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.* * *

The state promptly sought a stay of the district court order from the Supreme Court, applying to Justice Kennedy, who was the 9th Circuit "circuit justice"—the Supreme Court justice assigned to receive emergency motions from that Circuit. The Excerpts from the brief California filed in support of its stay application follows:

STAY APPLICATION BY GOVERNOR EDMUND G. BROWN, JR., TO CIRCUIT JUSTICE ANTHONY M. KENNEDY, COLEMAN V. BROWN & PLATA V. BROWN

NO. 13A57 (U.S. JULY 10, 2013)

Applicants Governor Edmund G. Brown Jr. et al. respectfully request a stay of the injunctive relief ordered on June 20, 2013 by the three-judge district court presiding over "prisoner release"-related proceedings pursuant to the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626. The three-judge court has now invoked the PLRA to enjoin the enforcement of dozens of statutory and regulatory provisions and, effectively, the California Constitution. ("June 20 Order") Its order will force the early release of thousands of inmates by the end of the year, including violent and serious offenders.

Critically, the three-judge court issued these injunctions after having refused to consider Applicants' showings regarding significantly changed conditions in California's prisons that required vacating or modifying the 137.5% of design capacity cap. The record confirms substantial improvements to the health care California inmates receive. The prison conditions that exist today do not resemble the conditions present in 2008, upon which three-judge court and this Court predicted that the 137.5% cap would be necessary to remedy outstanding Eighth Amendment violations. But the three-judge court refused to give a full or fair examination of how these conditions have changed. Indeed, it failed to comply with this Court's unequivocal mandate that "[t]he three-judge court must remain open to a showing or demonstration . . . that the injunction should be altered." Brown v. Plata, 563 U.S. 493, 543 (2011). This Court specifically instructed that "[a]s the State makes further progress, the three-judge court should evaluate whether its order remains appropriate. *If significant progress is made toward remedying the underlying constitutional violations*, that progress may demonstrate that further population reductions are not necessary or are less urgent than previously believed." Id. at 544 (Eemphasis added.); see also id. at 533–35, 541–43.

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

standards deemed necessary for constitutionally adequate medical care, and the Receiver's staff has concluded that the care provided is comparable in critical respects to those of large medical systems that serve non-prison populations.

Rather than considering Applicants' "significant progress . . . toward remedying the underlying constitutional violations[,]" the court held that it would be inappropriate to consider *any* changes to the population cap unless Applicants could demonstrate that the Eighth Amendment deficiencies had been *completely* resolved. * * * And, contrary to this Court's mandate, the three-judge court mistakenly held that *res judicata* precluded it from re-examining the need for a population cap of 137.5% of prison design capacity based on circumstances today. Adherence to this Court's mandate in *Plata* requires just the opposite. The mandate requires, rather than bars, a re-examination of the need to reach the 137.5% cap when changed circumstances are presented.

Such a re-examination is now critical because the extensive prisoner releases ordered by the court would undermine the balance Congress struck in the PLRA between respect for State's democratic processes, including their expert analyses of public safety issues, and the need to remedy constitutional violations through prisoner release. After this Court's decision in *Plata*, all impacted stakeholders, including state legislators, county officials and law enforcement, worked together through the political process to achieve Realignment's historic reforms. As a result of Realignment and other comprehensive criminal justice reforms, California's prison population has fallen by more than 37,000 inmates since the evidentiary record previously before the three-judge court and this Court closed.

While Realignment has reduced the prison population, it has also increased county jail populations and placed increased demands on county probation departments and mental health and drug treatment services. At the same time, as a result of the diversion of low-risk prisoners to the counties, the composition of the California prison population is fundamentally different than it was in 2006–07 when the expert panel convened by the California Department of Corrections and Rehabilitation (CDCR) made recommendations for reforming California's prisons, or in 2009 when the three-judge court first established the 137.5% cap. Whereas there were once tens of thousands of non-violent, non-serious offenders in the California prisons, that is simply no longer the case. Accordingly, the three-judge court's most recent order requiring the release of thousands of more offenders by the end of the year will thrust serious and violent individuals on the counties, placing even more difficult obligations on them when they are already working to meet the real and substantial challenges presented by Realignment. Moreover, because the California prison population today is fundamentally different than it was before, so too are the potential public safety risks. * * *

STATEMENT

* * * As a result of Realignment as well as * * * other criminal justice reforms * * *, the State has staunched prison population growth, substantially improving upon projections made in Spring 2008 * * *.

At the same time, the State has continued to make and maintain the significant improvements to the quality of medical and mental health care that already were underway when this case was before this Court in 2010. The State has continued to complete and embark on significant construction projects at its facilities, to increase its staffing and the quality of its staff, and to implement the 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. Moreover, each of the six core objectives of the Receiver's Turn Around Plan of Action is substantially complete, with most items completed more than a year ago.

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." Similarly, in mid-2012, the *Coleman* court commended the Applicants "for the remarkable accomplishments to date in addressing the problems in access to inpatient mental health care." The Special Master similarly recognized that the Applicants' ability to eliminate wait lists for mental health care constituted "a dramatic improvement that is unprecedented in the history of the *Coleman* remedial effort." Thus, he advocated a "shift . . . toward streamlining monitoring by the special master, as CDCR institutions begin to take on an increasing role in self-monitoring and begin their move toward assuming responsibility for all of it."

On the critical question of whether classmembers are "needless[ly] suffering and d[ying]" as a result of medical care in the prisons, Plata, 563 U.S. at 501, 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. This is on par with the national average of 245. During 2011, the most recent period examined by the court-appointed Receiver's staff, the death rate fell to 240 inmates per 100,000.

Moreover, the Receiver's staff found that of 388 deaths in the California prison system in 2011, only *two* were "likely preventable" had there not been lapses in care, and just 41 were "possibly preventable." One of the two "likely preventable" deaths occurred at an outside hospital not controlled by the Receiver or state officials, and 10 of the "possibly preventable" deaths resulted from such outside care. Furthermore, the number of preventable lapses in care fell to the lowest levels in the history of the Receivership. 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]." Indeed, the Receiver's staff acknowledged both that "lapses in care occur commonly in medical practice" regardless of the setting, and that the lapses that the Receiver's staff had observed in the California prisons are now "similar to those found in other large integrated health systems."

Other independent evaluations confirm significant progress. * * * The reports of the Office of the Inspector General (OIG)—on which plaintiffs repeatedly relied on at earlier stages of this litigation to identify alleged Eighth Amendment inadequacies and which the *Plata* district court has held are a benchmark for assessing constitutional adequacy—demonstrate that the quality of care has improved by leaps and bounds since this case was last before this Court. The California prisons now have an *average* overall score on OIG evaluations of 86.9%, which reflects "High Adherence" to the medical policies and procedures the Receivership instituted to achieve constitutional compliance. By contrast, when OIG completed its first cycle of medical inspections of the state's 33 prisons in June 2010, just nine prisons had an overall score of at least 75 percent and the overall CDCR average was 72%. Today, every institution's score exceeds 75%, all but seven have scores of 85% or higher, and all but three exceed 80%. 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," and that "it is abundantly clear that the system provides timely and effective medical care." Particularly relevant to the question of whether conditions warrant vacating or modifying the population cap, of the institutions with an overall score of at least 85%, 20 have a population that exceeds 137.5% of design capacity.

In light of these substantial improvements in the quality of care in the California prisons and the prisons' ability to deliver (and to continue delivering) such care at current population levels, in May 2012, Applicants advised the three-judge court that they intended to seek a modification of the 137.5% of design capacity population cap. * * * Thereafter, the court stated in a September 2012 order that because Eighth Amendment compliance had "already been litigated and decided by this Court and affirmed by the Supreme Court, this Court is not inclined to permit relitigation of the proper population cap at this time." The court treated the cap as immovable even though the factual record that the cap was based on had closed in *2008*, and is starkly different from the current conditions in California prisons.

Nonetheless, after further proceedings related to extending the time to meet the 137.5% cap, Applicants moved to vacate or modify the cap in January 2013. Applicants presented evidence that the original predictive judgment, based on the 2008 record, that constitutionally adequate medical and mental health care could be provided only by reducing the number of inmates to 137.5% of design capacity was no longer sound. * * * [InsteadNonetheless, the three-judge court] issued order[s] imposing additional injunctive relief. [Description of April 11 and July 20, 2013 orders omitted] * * *

A stay should issue here because: (1) there is a "reasonable probability" that this Court will note probable jurisdiction; (2) a "fair prospect" exists that this Court will conclude that the decision below was erroneous; (3) California will suffer irreparable harm without a stay; and (4) the relative harm to California and the interests of the public at large outweigh any

harm to the plaintiff-classmembers that a stay pending review might cause. See, e.g., Lucas, 486 U.S. at 1304 (Kennedy, J). * * *

The Supreme Court denied the stay:

DENIAL OF APPLICATION FOR A STAY, COLEMAN V. BROWN & BROWN V. PLATA

570 U.S. 938 (2013)

The application for stay presented to JUSTICE KENNEDY and by him referred to the Court is denied. JUSTICE ALITO would grant the application for stay.

JUSTICE SCALIA, with whom JUSTICE THOMAS joined, dissenting.

When this case was here two Terms ago, I dissented from the Court's affirmance of the injunction, because the District Court's order that California release 46,000 prisoners violated the clear limitations of the Prison Litigation Reform Act, 18 U.S.C. § 3626(a)(1)(A)—"besides defying all sound conception of the proper role of judges." Brown v. Plata, 563 U.S. 493, 564 (2011). The Court's opinion approving the order concluded with what I described as a "bizarre coda," id. at 560, which said that "[t]he State may wish to move for modification" of the injunction, and that the District Court "may grant such a request provided that the State satisfies necessary and appropriate preconditions.," id. (internal quotation marks omitted). More specifically, the opinion suggested that modification might be in order if the State makes "significant progress . . . toward remedying the underlying constitutional violations" and "demonstrate[s] that further population reductions are not necessary." Id. at 544. These "deliberately ambiguous . . . suggestions on how to modify the injunction," were, I observed, "just deferential enough so that [the Court] can say with a straight face that it is 'affirming,' just stern enough to put the District Court on notice that it will likely get reversed if it does not follow them." Id. at 562 (dissenting opinion). That was in my view "a compromise solution" that is "unknown in our legal system," which does not permit appellate courts to prescribe in advance the exercise of district-court discretion. I warned, moreover, that "the judges of the District Court are likely to call [the Court's] bluff, since they know full well it cannot possibly be an abuse of discretion to refuse to accept the State's proposed modifications in an injunction that has just been approved (*affirmed*) in its present form."

The bluff has been called, and the Court has nary a pair to lay on the table. The State, seeking to invoke the ex ante appellate control of district-court discretion, and to compel the modification decreed by the Court's raised eyebrow, provided evidence that it has made meaningful progress and that population reductions to the level required by the injunction are unnecessary. But the latter argument was made and rejected in the last round, and the former hardly requires (*demands*) modification of the injunction. It was predictable two Terms ago that the State *would* make progress—indeed, it promised to do so. If the reality of incremental progress makes the injunction now invalid, the probability (indeed, one might say the certainty) of incremental progress made the injunction an

overreach two Terms ago. Surely it is not the case that when a party subject to an injunction makes substantial progress toward compliance it is an abuse of discretion not to revise the injunction.

But as I suggested in my dissent, perhaps the Court never meant to follow through on its revision suggestions. Perhaps they were nothing more than "a ceremonial washing of the hands—making it clear for all to see, that if the terrible things sure to happen as a consequence of this outrageous order do happen, they will be none of this Court's responsibility. After all, did we not want, and indeed even suggest, something better?" Id. So also today, it is not our fault that California must now release upon the public nearly 10,000 inmates convicted of serious crimes—about 1,000 for every city larger than Santa Ana—three-quarters of whom are moderate (57%) or high (74%) recidivism risks.

It appears to have become a standard ploy, when this Court vastly expands the Power of the Black Robe, to hint at limitations that make it seem not so bad. See, e.g., Lawrence v. Texas, 539 U.S. 558, 604 (2003) (Scalia, J. dissenting); United States v. Windsor, 570 U.S. 744, 801 (2013) (Scalia, J., dissenting). Comes the moment of truth, the hinted-at limitation proves a sham. As for me, I adhere to my original view of this terrible injunction. It goes beyond what the Prison Litigation Reform Act allows, and beyond the power of the courts. I would grant the stay and dissolve the injunction.