No. 13A57

In the

Supreme Court of the United States

EDMUND G. BROWN JR., ET AL.,

Appellants,

v.

MARCIANO PLATA AND RALPH COLEMAN, ET AL.,

Appellees.

On Application to Stay Judgment Pending Appeal

JOINT MEMORANDUM IN OPPOSITION TO APPLICATION FOR STAY

DONALD SPECTER
Counsel of Record
STEVEN FAMA
ALISON HARDY
SARA NORMAN
REBEKAH EVENSON
PRISON LAW OFFICE
1917 Fifth Street
Berkeley, CA 94710
(510) 280-2621
dspecter@prisonlaw.com

Counsel for the *Plata* Appellees

PAUL D. CLEMENT
Counsel of Record
ZACHARY D. TRIPP
MICHAEL H. MCGINLEY
BANCROFT PLLC
1919 M Street NW
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

Counsel for the *Coleman* Appellees

(Additional Counsel Listed on Inside Cover)

July 19, 2013

MICHAEL W. BIEN
JANE E. KAHN
ERNEST GALVAN
LISA ELLS
AARON J. FISCHER
KRISTA STONE-MANISTA
MARGOT MENDELSON
LORI RIFKIN
ROSEN BIEN GALVAN &
GRUNFELD LLP
315 Montgomery Street,
Tenth Floor
San Francisco, CA 94104
(415) 433-6830

Additional Counsel for the *Coleman* Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

BACKGROUND 5

A. This Court's Decision in *Brown v. Plata* 6

B. Subsequent Proceedings 7

STANDARD 12

ARGUMENT 13

I. This Court Is Unlikely To Note Probable Jurisdiction and There Is Not a Fair Prospect This Court Would Reverse. 14

A. This Court Lacks Jurisdiction Over This Appeal. 14

B. The Federal Questions Here Are Insubstantial and Properly Left to the Lower Court's Discretion. 17

1. The Standard of Review Is Highly Deferential. 18

2. Appellants Have Waived Any Claim That They Have Remedied The Constitutional Violations. 19

3. The Three-Judge Court Did Not Abuse Its Discretion In Denying Appellants' Rule 60(b)(5) Motion In Light of Current Evidence. 20

II. Appellants Will Not Be Irreparably Harmed Without a Stay. 26

III. Granting a Stay Would Substantially Harm Plaintiffs. 30

IV. The Equities Weigh Heavily Against a Stay. 31

CONCLUSION 35

EXHIBITS

EXHIBIT A: Three-Judge Court Order Denying Defendants' Motion to Stay, *Coleman, et al. v. Brown, et al.*, No. 90-cv-0520 (E.D Cal. July 3, 2013) & No. C01-1351 (N.D. Cal. July 3, 2013)

EXHIBIT B-1: Photograph of California Institution for Men Dorm Unit Housing Mental Health Patients and General Population, Feb. 12, 2013 (*Coleman* Doc. 4378, Photo Ex. W)

EXHIBIT B-2: Photograph of Salinas Valley State Prison Standing Cages Used to Hold Suicidal Prisoners, Jan. 28, 2013 (*Coleman* Doc. 4381, App. K)

EXHIBIT B-3: Photograph of Mule Creek State Prison Treatment Cages for Individual Mental Health Clinical Contacts, Feb. 7, 2013 (*Coleman* Doc. 4375, Photo Ex. E)

EXHIBIT B-4: Photograph of California Institution for Men Double-Bunked Cell for Mental Health Patients, Feb. 12, 2013 (*Coleman* Doc. 4378, Photo Ex. U)

TABLE OF AUTHORITIES

Cases

Beame v. Friends of the Earth,
434 U.S. 1310 (1977) 27

Brown v. Plata,
131 S. Ct. 1910 (2011). ..... *passim*

Cutter v. Wilkinson,
544 U.S. 709 (2005) 20

Descamps v. United States,
133 S. Ct. 2276 (2013) 16

Gerstein v. Coe,
417 U.S. 279 (1974) 14

Gonzalez v. Automatic Emps. Credit Union,
419 U.S. 90 (1974) 15

Graves v. Barnes,
405 U.S. 1201 (1972) 12, 13, 30

Gulfstream Aerospace Corp. v. Mayacamas Corp.,
485 U.S. 271 (1988) 16

Gunn v. Univ. Comm. to End the War in Viet Nam,
399 U.S. 383 (1970) 15, 16

Horne v. Flores,
557 U.S. 433 (2009) 18, 21

In re Borlik,
194 Cal. App. 4th 30 (Ct. App. 2011) 28

In re Slagle,
504 U.S. 952 (1992) 15

Johnson v. United States,
529 U.S. 694 (2000) 28

Lucas v. Townsend,
486 U.S. 1301 (1988) 12

Lynce v. Mathis,
519 U.S. 433 (1997) 28

Maryland v. King,
133 S. Ct. 1 (2012) 29

MTM, Inc. v. Baxley,
420 U.S. 799 (1975) 15

Munaf v. Geren,
553 U.S. 674 (2008) 14, 17

New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.,
434 U.S. 1345 (1977) 29

Nken v. Holder,
556 U.S. 418 (2009) 12

Patrick v. Burget,
486 U.S. 94 (1988) 19

Peugh v. United States,
133 S. Ct. 2072 (2013) 28

Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.,
324 U.S. 806 (1945) 33

Rogers v. Tennessee,
532 U.S. 451 (2001) 27

Ruckelshaus v. Monsanto Co.,
463 U.S. 1315 (1983) 1, 12, 27

Russello v. United States,
464 U.S. 16 (1983) 14

United States v. United Mine Workers of America,
330 U.S. 258 (1947) 32

W.R. Grace & Co. v. Local Union 759,
461 U.S. 757 (1983) 32

Walker v. City of Birmingham,
388 U.S. 307 (1967) 32

Williams v. Zbaraz,
442 U.S. 1309 (1979) 13

Statutes

18 U.S.C. § 3626 6

18 U.S.C. § 3626(a)(1)(B) 29

28 U.S.C. § 1253 4

28 U.S.C. § 1292(a)(1) 4, 14

Other Authorities

Governor of the State of California, Edmund G. Brown, Jr.,
Proclamation (Jan. 8, 2013), http://bit.ly/VOb1jV 2

California Dep't of Corrections & Rehabilitation,
The Future of California Corrections (2012), http://bit.ly/ImbE08 24

Paige St. John, *Jerry Brown Extends Private Prison Deal—Without Funds Budgeted*, L.A. Times, July 10, 2013 29

Robert L. Stern & Eugene Gressman,
Supreme Court Practice & Procedure (8th ed. 2002) 13, 15

16 Charles Alan Wright & Arthur R. Miller,
Federal Practice & Procedure (2d ed. 2013) 18

INTRODUCTION

The remedy Appellants seek is truly extraordinary. A stay pending appeal is granted "only under extraordinary circumstances, and a district court's conclusion that a stay is unwarranted is entitled to considerable deference." *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1316 (1983) (Blackmun, J., in chambers). The three-judge district court below issued a thorough opinion finding a stay unwarranted. Order Denying Stay at 2 (July 3, 2013) ("Stay Order") (attached as Ex. A). That decision is correct, and this Court should deny the stay.

Only two years ago, this Court affirmed the three-judge court's mandate that Appellants reduce California's prison population to 137.5% of design capacity within two years. *Brown v. Plata*, 131 S. Ct. 1910, 1923 (2011). This injunction gave Appellants "substantial flexibility" to decide how to comply with the 137.5% cap. *Id.* at 1943. Among many other options, they could transfer prisoners to out-of-state facilities, reform sentencing or the parole system, build new facilities, and expand "good-time credits" to give "early release to only those prisoners who pose the least risk of reoffending." *Id.* at 1923, 1943. Appellants complained that this discretion would not be enough, and they warned of needing to release 38,000 to 46,000 prisoners and "jeopardiz[ing] the safety of California residents." Defs.' Br. in *Plata* at 10 (Aug. 27, 2010) ("Defs.' *Plata* Br."). This Court heard those arguments and rejected them. While emphasizing Appellants' flexibility to comply with the cap in ways that maximized state autonomy and minimized the risk to public safety, this Court made clear that compliance with the cap and the Constitution could not be indefinitely deferred and that prisoners may ultimately need to be released. *See*

Plata, 131 S. Ct. at 1947. This Court ordered Appellants to reduce the population "without further delay." *Id*. at 1947.

On remand, Appellants took some initial steps to comply, but all understood those measures would be inadequate. Since then, rather than redoubling their efforts, Appellants have adopted a stance of outright defiance. For example, the three-judge court issued a direct and unambiguous order requiring Appellants to submit a plan for compliance. They instead submitted a "plan for non-compliance" that "at best would achieve essentially only half" of the required reductions. June 20, 2013 Order at 26–27 ("June Order") (Stay App. Ex. A). By disobeying direct court orders, Appellants are frustrating this Court's expectation that state officials would take the lead in resolving California's prison crisis.

Appellants are not merely dragging their feet; they are making the problem worse. In the face of this Court's holding that "serious constitutional violations" have "persisted for years" and "remain uncorrected," *Plata*, 131 S. Ct. at 1922, and lower court findings that violations continue today, California's Governor unilaterally "declar[ed] that the crisis in the prisons was resolved" and "terminated his emergency powers." Stay Order at 7; *see* Governor of the State of California, Edmund G. Brown, Jr., Proclamation (Jan. 8, 2013), http://bit.ly/VOb1jV ("Proclamation"). This proclamation cannot be dismissed as wishful thinking or even mere rhetorical defiance. It terminated the Governor's emergency power to transfer prisoners out of state and threatened to return approximately 9,500 out-of-state prisoners to California. Stay Order at 7.

In the wake of that self-inflicted wound, Appellants ask this Court for a stay. Amazingly, after insisting that compliance is all but impossible, they informed the court below that they *will* "take steps necessary to ensure timely compliance" if they do not get a stay. Defs.' Motion for Stay at 2 (June 28, 2013) (Doc. 2665/4673). In other words, Appellants will not comply unless this Court tells them to not just once but twice. Such open defiance of the federal judiciary, while not unprecedented, has always deserved the same swift response. This Court should deny the application and make clear that one mandate from this Court more than suffices.

Appellants' arguments for a stay are déjà-vu all over again. They argue again that the three-judge court "refused to consider [evidence] regarding significantly changed conditions." Stay Appl. at 1; *see* Defs.' *Plata* Br. at 3, 26, 42 (court "refused to consider current conditions"). They argue again that the three-judge court "d[id] serious violence" to the governing legal standard. Stay Appl. at 26; *see* Defs.' *Plata* Br. at 13 (same). And although Appellants are not required to release a single prisoner, have had four years to build new prisons, and the orders below would at most lead to a smaller and more targeted release of low-risk offenders than this Court contemplated when affirming in 2011, Appellants argue yet again that the orders below threaten public safety by "forc[ing] the early release of thousands of inmates by the end of the year, including violent and serious offenders." Stay Appl. at 1; *see* Defs.' *Plata* Br. at 10, 53–56. This Court rejected these arguments once, deferring to the lower courts' findings of fact. They should fare no better the second time around.

In denying Appellants' motion for a stay, the three-judge court found that they are unlikely to prevail on the merits, will not suffer irreparable harm without a stay, and that the equities weigh heavily against a stay. The three-judge court was correct. At the outset, Appellants are unlikely to succeed on the merits because this Court lacks jurisdiction. This Court has jurisdiction over three-judge court orders "granting or denying" injunctions, not over orders modifying (or refusing to vacate or modify) preexisting injunctions that this Court has already affirmed. *Compare* 28 U.S.C. § 1253, *with* 28 U.S.C. § 1292(a)(1). Even if this Court had jurisdiction, Appellants' arguments are factbound, meritless, and reviewed for clear error or abuse of discretion. In a carefully reasoned 71-page opinion, the three-judge court closely examined the persistently grave situation in California today and found "without a doubt" that the facts had not changed so significantly as to warrant Appellants' request of vacating the injunction entirely. Order Denying Motion to Vacate at 55 (April 11, 2013) ("April Order") (Stay. App. Ex. B). Overcrowding is currently at 149.2%, far above the limit this Court approved and demanded. Stay Order at 19; *Plata*, 131 S. Ct. at 1944–45. Among many other problems, there is still "inadequate treatment space"; "staff shortages are far worse this year than in prior years"; and "suicides are occurring at virtually the same rate and with virtually the same degree of inadequacies in assessment, treatment and intervention." April Order at 43, 45, 51–52; Order Denying Motion to Terminate in *Coleman* at 33–34 (April 5, 2013) (Doc. 4539) ("*Coleman* Order"). Without a significant change in facts, Appellants' request to vacate the injunction is no more

than an effort "to relitigate a thoroughly reasoned decision of the Supreme Court, *Brown v. Plata*, issued two years ago." Stay Order at 2.

The equities also strongly oppose a stay. The three-judge court correctly found that Appellants will not be irreparably injured without a stay. Among other things, Appellants still have the flexibility to comply without releasing a single prisoner and thus without any risk to public safety at all. Yet for decades, thousands of Plaintiff prisoners have been suffering severe constitutional violations at Appellants' hands. A stay would extend those substantial injuries even further. Enough is enough. As this Court held, the 137.5% cap is appropriately tailored to remedy Appellants' constitutional violations without posing an undue risk to public safety. Nothing has changed to make the equities shift in Appellants' favor. To the contrary, granting a stay would reward openly defiant and contumacious conduct, while denying a stay would support the overriding public interest in the orderly administration of justice and promote due respect for court orders.

BACKGROUND

This Court's opinion in *Plata* fully describes the history of this case, and the three-judge court's Stay Order summarizes subsequent events and forcefully articulates the compelling reasons why a stay is inappropriate. That opinion, attached as the first appendix to this memorandum, provides all the background necessary to reject the stay application. Nonetheless, in light of Appellants' one-sided statement of the case, some points merit emphasis.

A. This Court's Decision in *Brown v. Plata*

Two years ago, this Court affirmed the three-judge district court's injunction mandating that California reduce overcrowding to 137.5% of design capacity within two years. Specifically, this Court held, consistent with the requirements of the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626, that (1) overcrowding was the "primary cause" of "the severe and unlawful mistreatment" of Plaintiffs; and (2) the order was "narrowly drawn" and gave "substantial weight" to public safety considerations. 131 S. Ct. at 1923, 1939, 1944–45.

Notably, the injunction "left the choice of how best to comply with its population limit to state prison officials." *Id.* at 1943. Among other options, California could build new facilities, transfer prisoners out of state, reform parole or sentencing, or expand "good-time credits" to give "early release to only those prisoners who pose the least risk of reoffending." *Id.* at 1923, 1943. Appellants also already had "over two years to begin complying." *Id.* at 1946. For that reason, the Court ordered Appellants to "implement the order without further delay." *Id.* at 1947.

The Court explained that, as with any injunction, the three-judge court could exercise its "sound discretion" to consider modifying the decree as appropriate. *Id.* at 1946. "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. But this Court also expected that the end result could be the release of prisoners. "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." *Id.* Again, this was a question left to the lower court: "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." *Id.*

B. Subsequent Proceedings

On remand, Appellants implemented "realignment," a first step that primarily shifted certain inmates to county jails. Stay Order at 5. "It soon became apparent, however, that realignment alone would not be sufficient to meet the 137.5% design capacity benchmark" by the June 2013 deadline. *Id.*

Since then—frustrating this Court's expectation that state officials would take the lead in choosing how best to comply and openly disregarding the three-judge court's orders—Appellants have steadfastly refused even to take steps towards compliance. *See id.* For example, in their January, February, and March 2013 status reports, Appellants forthrightly declared that they "would take no further action to comply with the Order." *Id.* at 7. Making matters worse, Governor Brown "terminated his emergency powers, declaring that the crisis in the prisons was resolved." *Id.* This ended the State's ability "to contract to house approximately 9,500 prisoners in out-of-state prisons," thus threatening "a

scheduled partial return of these prisoners during 2013, and a consequent increase in the prison population." *Id.*

1. In January 2013, Appellants moved in the *Coleman* district court to terminate all injunctive relief, arguing that mental health care now complies with the Eighth Amendment. *Coleman* Order at 2, 26. The district court denied the motion, finding Appellants' evidence "woefully inadequate." *Id.* at 27. "[S]uicides are occurring at virtually the same rate and with virtually the same degree of inadequacies in assessment, treatment and intervention." *Id.* at 33–34. And "[c]hronic understaffing continues to hamper the delivery of constitutionally adequate medical care and is a central part of the ongoing constitutional violation." *Id.* at 62. It thus held that prospective relief remains necessary. *Id.* at 63–67.

Appellants have not even moved in the *Plata* district court to argue that the constitutional violations have been remedied. The Receiver, J. Clark Kelso, recently found "no persuasive evidence" that care had reached the constitutional minimum. *Plata* Receiver's Twenty-Second Tri-Annual Report at 2 (Jan. 25, 2013) (Doc. 2525), http://bit.ly/1brEECM.

2. In January 2013, Appellants also moved in the three-judge district court to "vacate or modify" the population reduction order. Stay Order at 7; April Order at 1–2. But Appellants did not actually ask to raise the cap or extend the deadline; they only asked for "complete vacatur" of the injunction. June Order at 21. Appellants initially argued that they had "remed[ied] the underlying constitutional violations," but they later chose "*not* [to] seek vacatur on [this] basis." April Order

at 30, 33. Instead, they argued that "overcrowding is no longer the primary barrier prohibiting the State from providing constitutionally adequate medical and mental health care." *Id.* at 27 (quotation marks omitted).

On April 11, 2013, the three-judge court issued a thorough 71-page order denying Appellants' motion to vacate. *See id.* at 1. First, the court held that, without evidence of a significant change in facts beyond the mere passage of time, Appellants were simply trying to relitigate the merits of the 137.5% population cap—which they had already litigated and lost in the Supreme Court. *Id.* at 35–36. Subjecting predictive judgments to vacatur "based solely on a contention that some time has passed," the three-judge court explained, would permit "unbounded relitigation." *Id.* at 37.

Second, the three-judge court held that, although Appellants *could* move to modify based on a significant change in facts, Appellants had not carried their burden of showing that such a change had occurred. They were required to "point to evidence that actually supports invoking this Court's equitable power to modify final judgments." *Id.* The court closely examined the evidence, *id.* at 39–60, but found that Appellants failed to show a significant change of facts that would warrant the sweeping equitable relief Appellants sought. *Id.* at 35, 40.

Among other things, the three-judge court found that Appellants had not shown a change in the barriers to adequate treatment—"inadequate treatment space" and "severe staff shortages"—that were the focus of its order and this Court's analysis in *Plata*. *Id.* at 43; *see also* 131 S. Ct. at 1933–34. Instead, Appellants

could point only to an overall reduction in overcrowding. April Order at 38. But "[n]othing could be more anticipated" than the beginnings of population reduction, as this Court's order mandated it. *Id.* at 39. At bottom, California confused *partial* compliance as a reason to remove any obligation to achieve *full* compliance. *See id.* at 41. The three-judge court thus found, based on current evidence, that overcrowding was still the primary cause of the ongoing violations. *Id.* at 56–60.

The three-judge court warned Appellants that their intransigence risked contempt. "Defendants have thus far engaged in openly contumacious conduct by repeatedly ignoring both this Court's Order and at least three explicit admonitions to take all steps necessary to comply with that Order." *Id.* at 63; *see also id.* at 65 ("[F]or approximately a year, defendants have acted in open defiance of this Court's Order."). "If defendants do not take all steps necessary to comply" with court orders, they will "be subject to findings of contempt, individually and collectively." *Id.* at 71.

Appellants filed a notice of appeal. Rather than moving for a stay or to expedite, they sought and received a 45-day extension of time to file their Jurisdictional Statement. *See Brown v. Plata*, No. 13A5 (U.S.).

3. The three-judge court also issued a separate order on April 11, 2013, directing Appellants "to list, *in their order of preference*, … all possible measures to reduce the prison population" and a plan for compliance. April Order at 69; *see also* Order Requiring List of Proposed Population Reduction Measures at 1–4 (Apr. 11, 2013) (Doc. 2591/4542). Notwithstanding the three-judge court's warning that they

risked contempt, Appellants directly disobeyed the clear order that they provide a plan for compliance with a ranked list of population-reduction measures. Appellants' proposal on its face failed to meet the 137.5% goal and listed measures "in no particular order of preference." *See* June Order at 2, 27; Defs.' Resp. to April 11, 2013 Order at 5 (Doc. 2609/4572). This "plan for non-compliance" exceeded the population cap by 4,170 prisoners, falling 43% short of the needed reduction. June Order at 29.

On June 20, 2013, faced with Appellants' defiance, the three-judge court modified its preexisting injunction. Appellants still must reach the same preexisting goals of 137.5% population by December 27, 2013. But given their inaction, Appellants now must take specific steps to get there: They must adopt their non-compliant plan and also expand "good time" credits both prospectively for certain prisoners (as proposed) as well as retroactively for all prisoners. June Order at 2, 37–41. Nonetheless, the three-judge court still preserved Appellants' flexibility by allowing them to substitute virtually any other measure that would reduce the population as effectively. *Id.* at 2–3, 49–50. And the three-judge court waived the state and local laws that Appellants had themselves identified as barriers to compliance. *Id.* at 2, 43–45. The court also warned again that it would "be within its rights to … institute contempt proceedings immediately," but it deferred any such proceedings. *Id.* at 50–51.

4. Appellants moved for a stay. On July 3, 2013, the three-judge court denied the motion, issuing the opinion in Appendix A, which forcefully exposed the failure of Appellants to satisfy the requirements for a stay.

STANDARD

A stay pending appeal from a three-judge court is an extraordinary remedy, and this Court gives "considerable deference" to a three-judge court's conclusion that a stay is unwarranted. *Ruckelshaus*, 463 U.S. at 1316; *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers). The applicant must show that four Justices will vote to note probable jurisdiction and that there is a fair prospect that five Justices will vote to reverse. *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers). Because the "lower court judgment [was] entered by a tribunal that was closer to the facts than the single Justice, [it] is entitled to a presumption of validity." *Graves*, 405 U.S. at 1203. Given the close correspondence between the three-judge court's decision below and this Court's decision in *Plata*, the presumption of validity should be particularly strong, indeed well-nigh conclusive.

The applicant also must show that, without a stay, it will suffer irreparable harm, that a stay will not substantially injure the other parties, and that the balance of the equities favors a stay. *E.g., Ruckelshaus*, 463 U.S. at 1316; *Graves*, 405 U.S. at 1203; *see also Nken v. Holder*, 556 U.S. 418, 434 (2009) (discussing stay standard). This Court "weigh[s] heavily" a three-judge court's refusal to stay its own order, which indicates that the court closer to the facts "was not sufficiently

persuaded of the existence of potentially irreparable harm as a result of enforcement of its judgment in the interim." *Graves*, 405 U.S. at 1203–04. "Balancing the equities is always a difficult task," and "[w]here there is doubt, it should inure to the benefit of those who oppose grant of the extraordinary relief which a stay represents." *Williams v. Zbaraz*, 442 U.S. 1309, 1315–16 (1979) (Stevens, J., in chambers).[1]

ARGUMENT

This Court should deny Appellants' application for a stay. First, the three-judge court correctly determined that Appellants are unlikely to succeed on the merits. Indeed, this Court lacks jurisdiction over their appeal, and their claims are either foreclosed by *Plata*, or are reviewed on a deferential standard and are factbound and meritless. Second, the three-judge court correctly found that denying a stay will not cause Appellants irreparable harm, and that granting a stay would irreparably harm thousands of prisoners in the Plaintiff classes. Granting a stay would also be inequitable for an even more basic reason: It would reward Appellants' outright disregard for the three-judge court's orders, while denying the stay will bring them into compliance with those orders and this Court's judgment in *Plata*. Accordingly, this Court should deny the extraordinary relief Appellants seek.

[1] There are pending motions to file briefs as amici curiae in support of this application. Neither S. Ct. Rule 22 governing applications nor Rule 37 governing amicus briefs permits such filings. They also violate Rule 37.2(b)'s 10-day notice requirement. The California Sheriffs et al. also improperly attempt to introduce evidence relating to adjudicative facts that they could have presented below (but did not). Stern & Gressman, *Supreme Court Practice & Procedure* 650–51 (8th ed. 2002).

I. This Court Is Unlikely To Note Probable Jurisdiction and There Is Not a Fair Prospect This Court Would Reverse.

A. This Court Lacks Jurisdiction Over This Appeal.

While the three-judge court correctly resolved the issues before it, Appellants face a more basic obstacle in this Court: They are not likely to succeed on the merits because this Court lacks jurisdiction even to reach the merits. *See Munaf v. Geren*, 553 U.S. 674, 690 (2008) (doubt about jurisdiction makes success on the merits "more *unlikely*"). In 28 U.S.C. § 1253, Congress gave this Court appellate jurisdiction to review decisions of three-judge courts "granting or denying" injunctions. This is markedly narrower than Congress's parallel grant of jurisdiction to the courts of appeals: Those courts are empowered to review orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court." 28 U.S.C. § 1292(a)(1). Congress thus knows how to grant jurisdiction over a wider array of orders, including those modifying (or refusing to vacate or modify) a preexisting injunction previously affirmed on appeal. Congress gave this broader jurisdiction to the courts of appeals, but conspicuously withheld it from the Supreme Court. *See Gerstein v. Coe*, 417 U.S. 279, 279 (1974) (per curiam) (three-judge court orders that fall outside § 1253 are "appealable to the Court of Appeals"). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quotation marks and alterations

omitted). The narrow language of § 1253 thus expresses Congress' intent to withhold jurisdiction in precisely these circumstances.

This plain reading of § 1253 also makes practical sense. It avoids the spectacle of an endless loop of relitigation based on an unsuccessful litigant's obstinacy and a three-judge court's understandable disinclination to modify an injunction this Court already approved. And it is further buttressed by the rule that "only a narrow construction" of this statute "is consonant with the overriding policy, historically encouraged by Congress, of minimizing the mandatory docket of this Court in the interests of sound judicial administration." *Gonzalez v. Automatic Emps. Credit Union*, 419 U.S. 90, 98 (1974). This Court wisely guards its appellate jurisdiction. For example, this Court has held that orders only "deny" injunctions, within the meaning of § 1253, if the denial "rests upon resolution of the merits of the constitutional claim presented below." *MTM, Inc. v. Baxley*, 420 U.S. 799, 804 (1975). *See also In re Slagle*, 504 U.S. 952, 952 (1992) (opinion of White, J.); Stern & Gressman, *supra* n.1, at 92. But reading § 1253 loosely—to say the least—to include orders modifying or refusing to vacate or modify injunctions that this Court has already affirmed would create a significant loophole. A party subject to a three-judge court injunction that this Court already affirmed could again obtain mandatory appellate review in this Court any time it wished, simply by filing a new motion to vacate or modify.[2]

[2] Appellants argue that this Court has jurisdiction over any three-judge court order "impos[ing] new obligations." Stay App. 22 (citing *Gunn v. Univ. Comm. to End the War in Viet Nam*, 399 U.S. 383 (1970)). But *Gunn* does not establish this broad rule; it construed § 1253 narrowly to dismiss an

This Court lacks jurisdiction because Appellants seek a stay pending appeal of the April and June Orders, but neither order grants or denies an injunction. First, the April Order denied Appellants' "motion to vacate or modify" the injunction that this Court affirmed in *Plata*. Defs.' Motion to Vacate or Modify at 1 (Jan. 7, 2013) (Doc. 2506/4280) ("Motion to Vacate"); April Order at 1–2. It thus did not grant or deny an injunction; it "refus[ed] to dissolve or modify" a preexisting injunction. § 1292(a)(1). Nor did the three-judge court "grant injunctive relief" by separately requiring Appellants to submit a plan for compliance. Stay Appl. at 21. That separate order was a run-of-the-mill case management order requiring Appellants to identify a plan for complying with the preexisting injunction by the preexisting deadline. *See Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 279 (1988) ("An order … that relates only to the conduct or progress of litigation before that court ordinarily is not considered an injunction…."). This Court thus lacks jurisdiction to review these orders.

Second, the June Order does not "grant" a new injunction; it merely modifies the preexisting injunction that this Court already affirmed. *Cf. Descamps v. United States*, 133 S. Ct. 2276, 2291 (2013) ("'[T]o modify' means to change moderately or in minor fashion." (quotation marks omitted)). In light of Appellants' contumacious refusal to comply (and much less to take the lead in crafting a durable remedy), the June Order refined the preexisting injunction to be more specific about how to reach

---

order that did *not* "grant or deny" an injunction. *Id.* at 389–90. Appellants' view that a minor change to a preexisting injunction "grants" a new one is contrary to ordinary English usage, and it would render superfluous Congress' choice to give the circuit courts jurisdiction over orders "modify[ing]" an injunction—but *not* to give this jurisdiction to the Supreme Court.

the preexisting mandate. June Order at 31–36. Appellants must implement their "plan for non-compliance" and must also expand "good time" credits, both prospectively and retroactively; or they may adopt alternative population reduction measures that are equally effective. *Id.* at 48–50. The three-judge court waived the state laws that Appellants have claimed are barriers to compliance. *Id.* at 2, 43–45. And exercising "its discretion," the three-judge court "order[ed] 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," just as this Court contemplated. *Id.* at 26; *Plata*, 131 S. Ct. at 1947. This is no more (or less) onerous than the order this Court affirmed; it is simply more specific. The June Order thus does not grant a new injunction. It makes modest changes, consistent with this Court's expectations, to refine the injunction this Court already affirmed. Section 1253 does not allow an appeal of such an order. At a minimum, there are real doubts as to jurisdiction, making Appellants' success on the merits much "more *unlikely*." *Munaf*, 553 U.S. at 690.

B. The Federal Questions Here Are Insubstantial and Properly Left to the Lower Court's Discretion.

Two years ago, this Court affirmed the three-judge court's order mandating that Appellants reduce overcrowding to 137.5% of design capacity within two years and declared that the three-judge court, "in its discretion," could order Appellants to develop a list of offenders to be released early. *Plata*, 131 S. Ct. at 1947. Appellants now argue that this Court is likely to note probable jurisdiction yet again on

strikingly similar—if not identical—issues, but to reach the polar opposite result. Even if this Court had jurisdiction, Appellants would be wrong on both fronts.

1. The Standard of Review Is Highly Deferential.

The courts of appeals review a decision modifying or refusing to vacate or modify an injunction for abuse of discretion. *See, e.g.*, 16 Wright & Miller, *Federal Practice & Procedure* § 3924.2 (2d ed. 2013); *Horne v. Flores*, 557 U.S. 433, 447 (2009). This "narrow scope of appeal" is needed to keep in check "[p]otential abuse" of § 1292(a)(1)'s right to appeal. Wright & Miller § 3924.2. Review is particularly deferential when the original injunction has already been affirmed on appeal: It "should be disturbed only on a compelling showing of changed circumstances not adequately considered by the trial court." *Id.* Otherwise, "[a] dissatisfied litigant who has been enjoined and lost an initial appeal … need only apply for dissolution or modification to produce a new opportunity." *Id.*[3]

Plata itself establishes that the three-judge court's conclusions, even on an initial appeal, are reviewed deferentially. "It is not this Court's place to duplicate the role of the trial court." *Plata*, 131 S. Ct. at 1932. Findings of fact are reviewed for clear error; "review of the … primary cause determination is deferential"; and the lower court has "substantial flexibility" in crafting a remedy. *Id.* at 1932, 1944.

[3] We are unaware of any Supreme Court case setting a standard of review of a three-judge court decision modifying (or refusing to vacate or modify) an injunction this Court previously affirmed. This, of course, is because this Court does not have and has never exercised jurisdiction over such an appeal. If this Court had such jurisdiction, however, it would presumably apply the well-established standard that the circuit courts apply, if not a standard even less inviting to relitigation efforts.

"Once invoked, the scope of a district court's equitable powers is broad, for breadth and flexibility are inherent in equitable remedies." *Id*. at 1944.

Plata also emphasized the three-judge court's discretion to consider potential modifications. *Id.* at 1946–47. If the state shows "significant progress made toward remedying the underlying constitutional violations," the court "in the exercise of its discretion could consider whether it is appropriate to extend or modify [the] timeline." *Id*. at 1947. But "[e]ven 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." *Id*. Accordingly, the three-judge court, "in its discretion," could choose to require Appellants "to identify prisoners who are unlikely to reoffend or who might otherwise be candidates for early release." *Id*.

2. Appellants Have Waived Any Claim That They Have Remedied The Constitutional Violations.

Appellants appear not to argue that they have remedied the constitutional violations here. To the extent they raise this issue, this Court would not likely review it or reverse. First, the three-judge court correctly found that Appellants had waived this argument. Stay Order at 17–18. Appellants "initially posed this question" to the three-judge court, but then expressly "modified the[ir] motion by removing any constitutional question from the purview of [that] Court." *Id*. at 18. This Court is unlikely to note probable jurisdiction and reverse to undo Appellants' waiver. *Cf. Patrick v. Burget*, 486 U.S. 94, 99 n.5 (1988).

Furthermore, Appellants' claims are factbound and meritless. This Court held in 2011 that "serious constitutional violations" have "persisted for years" and

"remain uncorrected." *Plata*, 131 S. Ct. at 1922. In January 2013, Appellants moved to terminate in the *Coleman* court, arguing that they had remedied these violations. But that court—intimately familiar with the current facts on the ground—held that "ongoing constitutional violations remain." *Coleman* Order at 67. If Appellants disagree, their recourse is in the Ninth Circuit. Remarkably, Appellants have not even challenged the *Plata* court's finding that constitutional violations are ongoing. Stay Order at 18. This Court is not likely to note probable jurisdiction to conduct a fact-intensive inquiry in the first instance on an issue that is not even appropriately before this Court, much less to reverse. *Cf. Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view….").

3. The Three-Judge Court Did Not Abuse Its Discretion In Denying Appellants' Rule 60(b)(5) Motion In Light of Current Evidence.

Appellants primarily argue that this Court will note probable jurisdiction and reverse on the grounds that the 137.5% cap is no longer necessary. This argument has not been waived, but it is factbound, insubstantial, and meritless. Two years ago, this Court held that the 137.5% cap *is* necessary to remedy ongoing and severe constitutional violations. *Plata*, 131 S. Ct. at 1945. Eighteen months later, Appellants moved to "vacate or modify" that order, but the caption is misleading. Appellants did not ask to raise the cap or "extend or modify [the] timeline" because the need was "less urgent than previously believed." *Id.* at 1947. Instead, they swung for the fences and asked only for complete relief: "[T]his Court must vacate

the 137.5% population cap order." Motion to Vacate at 2, 21; *see also id.* at 20 ("the Court must discontinue prospective enforcement of the population reduction order").

The three-judge court did not abuse its discretion in denying that motion. First, the three-judge court correctly stated the legal standard. Appellants "may not … challenge the legal conclusions" undergirding the prior judgment, but instead bear the burden of showing "a significant change in facts" warranting the relief they seek. April Order at 29 (quoting *Horne*, 557 U.S. at 447; *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 393 (1992)). While courts adopt a "flexible approach" in institutional reform litigation to ensure that an injunction remains "equitable," relief will not be granted simply because the defendant finds compliance "is no longer convenient." *Id.* at 30.

Appellants take a single word from the April Order out of context and argue that the three-judge court believed it could not grant any relief until the violations have been completely "remed[ied]," while this Court stated that modification may be appropriate in light of "significant progress towards remedying" them. Stay Appl. 26 ("the three-judge court re-wrote a key passage of this Court's mandate," doing "serious violence to this Court's command"); *see* April Order at 33. Appellants are grasping at straws. The sentence they attack addresses waiver, not the Rule 60(b) standard, and states that Appellants no longer argued that they had "remed[ied] the underlying constitutional violations." April Order at 33; *see also id.* ("That contention … is no longer the basis for defendants' Three-Judge Motion…."). Directly above this sentence, the court correctly quoted the relevant passage from

Plata—and emphasized the language Appellants contend it overlooked. *Id.* And if the three-judge court actually believed that it could not modify the injunction without a complete remedy, its opinion would have stopped at page 34 after finding that Appellants waived the argument that they had remedied the violations. The opinion instead continues until *page 60*, closely examining Appellants' progress—or lack thereof—*towards remedying* the violations.

The three-judge court also properly exercised its discretion in applying this standard, consistent with this Court's expectations. The three-judge court concluded that Appellants could not seek to modify the injunction on the grounds that (1) the 137.5% figure was erroneous; and (2) "the passage of time constitutes a 'changed circumstance' sufficient to justify a Rule 60(b)(5) motion." *Id.* at 36. To the extent Appellants seek to relitigate the 137.5% number based solely on the passage of time, that request is barred by *res judicata* and law of the case principles. *See id.* at 35–36. "Defendants are, in effect, challenging a legal conclusion, which is not a permissible basis for modification" under Rule 60(b)(5), particularly where this Court has already affirmed that legal conclusion. *Id.* at 38. Appellants "already lost this argument," and "should not be allowed to litigate it once again." *Id.*

The three-judge court explained that Appellants *could* move to modify by "point[ing] to evidence that actually supports invoking [that] Court's equitable power to modify final judgments." *Id.* at 37. But the three-judge court correctly found that Appellants had "fallen far short" of carrying their burden. *Id.* at 40.

Appellants claim, as they did in *Plata*, that the court below failed to look at current conditions. *Plata*, 131 S. Ct. at 1935. Here again, "[t]his suggestion lacks a factual basis." *Id.* More than 20 pages of the April Order—pages 39 to 60—are devoted to assessing the current state of affairs. The three-judge court found, among other things, that the population reductions thus far, although laudable, were not a "significant change," they were evidence of *partial* compliance with an effective order. "Nothing could be more 'anticipated' than the consequent decline in crowding to which defendants point." *Id.* at 38. "[T]he 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." *Id.* at 41. The current evidence also shows California has a long way to go. Overcrowding is currently at 149.2%, far above the limit this Court affirmed. Stay Order at 19; *see Plata*, 131 S. Ct. at 1945 (discussing evidence that even 145% is too high).

Appellants also failed to identify a "significant change *in the barriers* that prison crowding raised and that prevented the provision of constitutionally adequate medical and mental health care." April Order at 42–43. These barriers include "inadequate treatment space and severe staff shortages." *Id.* "With regard to staffing, defendants' [motion] is conspicuously silent." *Id.* at 43. Indeed, "staff shortages are far worse this year than in prior years." *Id.*; *see Coleman* Special Master's Twenty-Fifth Round Monitoring Report at 44 (Doc. 4298). Lack of treatment space is still a major problem. The three-judge court found that, "[f]or mentally ill patients, defendants lack sufficient bed space" and "the conditions

described" in *Plata* "continue to persist." April Order at 43–44. And California officials have recently admitted that there is "inadequate treatment space" that "hinder[s] the department's ability to deliver care." CDCR, *The Future of California Corrections* at 35 (2012), http://bit.ly/ImbE08. California's application does not even mention these findings.[4]

Current evidence regarding mental health care shows that "[s]ystemic failures persist in the form of inadequate suicide prevention measures, excessive administrative segregation of the mentally ill, lack of timely access to adequate care, insufficient treatment space and access to beds, and unmet staffing needs." *Coleman* Order 64–65. "[I]nmate suicides are occurring at virtually the same rate and with virtually the same degree of inadequacies in assessment, treatment and intervention." *Id.* at 33–34. The mental health staffing vacancy rate is 29%, "nearly as high as it was at the time of the trial." April Order at 43–45. Overcrowding forces clinicians to "treat" patients in metal cages that are clustered together like open-air confessionals and lack any semblance of confidentiality. *See* Ex. B-3. And remarkably, Appellants still use the same "telephone-booth sized cages without toilets" to hold suicidal inmates for extended periods of time because of a shortage of crisis beds. *Plata*, 131 S. Ct. at 1924 & App. C (photograph of cages); *see* April Order at 44. Indeed, they are still using these cages in the very

[4] Appellants make much of Office of the Inspector General (OIG) reviews and scores. Stay Appl. 14–15. The three-judge court found that these scores are "not a reliable basis for drawing any conclusions regarding the relationship between prison crowding and constitutional care." April Order at 48. They relate only to *Plata*, and have no bearing on *Coleman*. The OIG scores do not measure constitutional conditions, and are based on sample sizes too small to be reliable. *Id.* at 47–49.

same room pictured in *Plata*, with the only apparent "improvement" being a fresh coat of paint. *See* Ex. B-2.[5]

Current evidence similarly shows that health care remains dire. In May 2013, the Receiver found that "overcrowding continues to interfere with the ability to deliver constitutionally acceptable medical and mental health care." *Plata* Receiver's Twenty-Third Tri-Annual Report at 30 (Doc. 2636), http://bit.ly/11ZS0Dd ("Receiver's 23rd Report"). Notwithstanding the population reductions, the number of high-risk patients has increased. *Id.* at 32. Overcrowding also exacerbates thousands of prisoners' risk of death from Valley Fever, a fungal disease endemic to the Central Valley that disproportionately harms certain groups, including African-Americans. Order re: Valley Fever at Pleasant Valley and Avenal State Prisons in *Plata* at 3 (June 24, 2013) (Doc. 2661) ("Valley Fever Order"). Despite knowing for years that Valley Fever is "a public health emergency" in two prisons, the State did not remove all at-risk inmates from these prisons in part because there was no place to put them. *Id.* at 11, 20. As a result, inmates have "suffer[ed] unnecessary and unreasonable harm," showing again that "Defendants lack the will, capacity, and leadership to maintain a system of providing constitutionally adequate medical

[5] In 2013, prisoners with serious mental illness were still housed in overcrowded dorms and doubled up in cells that are too small, even under American Correctional Association standards, for a single prisoner. *See* Ex. B-1 (dorm with mentally ill inmates mixed with general population); Ex. B-4 (small double-bunked cell with one inmate sleeping on floor). The *Coleman* court also recently found "significant and troubling evidence" of failures in inpatient care, including policies that "may in fact cause additional harm," and the "denial of basic necessities including clean underwear…." *Coleman* July 11, 2013 Order at 10–11 (Doc. 4688) ("July 11 *Coleman* Order").

health care services to class members." *Id.* at 24.[6] In painting a rosy picture of care, Appellants "have simply divorced themselves from reality." July 11 *Coleman* Order at 2 n.2.

In sum, this Court is unlikely to note probable jurisdiction, and much less likely to reverse. Section 1253 does not give this Court appellate jurisdiction over orders, like those below, modifying (or refusing to vacate or modify) three-judge court orders this Court has previously affirmed. And even if this Court had jurisdiction, Appellants largely seek to relitigate *Plata* and otherwise raise factbound questions reviewed only for clear error or abuse of discretion. The three-judge court thoroughly assessed the current evidence and its holdings are correct.

II. Appellants Will Not Be Irreparably Harmed Without a Stay.

1. The three-judge court also correctly found that Appellants "will not be irreparably injured absent a stay." Stay Order at 20. At the outset, Appellants' failure to move expeditiously belies their claim of irreparable harm. The three-judge court denied their motion to vacate on April 11, 2013. They waited more than a month to appeal in this Court—and never moved for a stay or to expedite. They instead obtained a *45-day extension of time* to file. Following the June Order, Appellants waited over a week before seeking a stay from the three-judge court, and another week before seeking a stay from this Court. This "failure to act with

[6] Appellants' failure to respond to Valley Fever is only the tip of the iceberg. Indeed, a recent review at one prison found that overcrowding and lack of space leads to patients being examined in open hallways, visible to other prisoners, with no sinks, lights, or fixed equipment. R.J. Donovan Correctional Facility Health Care Evaluation in *Plata* at 14–15 (March 18, 2013) (Doc. 2572). These unconstitutional conditions contribute to systematically unsound treatment and "result in preventable morbidity and mortality." *Id.* at 25–26, 48.

greater dispatch tends to blunt [Appellants'] claim of urgency and counsels against the grant of a stay." *Ruckelshaus*, 463 U.S. at 1318; *see also Beame v. Friends of the Earth*, 434 U.S. 1310, 1313 (1977) (self-inflicted delay "vitiates much of the force of … allegations of irreparable harm"). Appellants' claim to irreparable harm is also undercut by their assurance that they will comply if and when this Court denies a stay. This is not irreparable harm, it is footdragging combined with a lawless insistence that they will comply only if this Court affirms not just once but twice.

2. In any event, this Court should defer to the three-judge court's finding that Appellants would not suffer irreparable harm. In seeking a stay below, Appellants primarily argued that expanding "good time" credits would be an irreparable harm because it would threaten public safety and could not be undone consistent with the Ex Post Facto clause. Defs' Motion for Stay at 6–7. The three-judge court correctly disagreed. First, Appellants' public safety argument runs headlong into this Court's decision, which affirmed the finding that expanding "good time" credits would "have little or no impact on public safety." 131 S. Ct. at 1943; *see* Stay Order at 20. Appellants' "new evidence" to the contrary (a law review article untested through cross-examination) was "not sufficient to rebut the extensive testimony [the three-judge] Court considered after fourteen days of trial in 2009." Stay Order at 20–21.

Second, expanding "good time" credits would not be irrevocable, and Appellants conspicuously fail to provide legal analysis showing that it would be. *See* Stay. Appl. 36. "The Ex Post Facto Clause, by its own terms, does not apply to courts." *Rogers v. Tennessee*, 532 U.S. 451, 460 (2001). Even statutes increasing

credits for existing prisoners could be revoked without ex post facto concerns, because revocation would not "rais[e] the penalty from whatever the law provided when [a defendant] acted." *Johnson v. United States*, 529 U.S. 694, 699 (2000); *cf. Lynce v. Mathis*, 519 U.S. 433, 441 (1997) (clause prohibits laws "increas[ing] punishment beyond what was prescribed when the crime was consummated"). And however implemented, there would be "fair warning" that credits granted pursuant to the three-judge court's orders could be revoked if those orders were reversed on appeal. *See Peugh v. United States*, 133 S. Ct. 2072, 2085 (2013); *Lynce*, 519 U.S. at 441 (a "central concer[n]" is "the lack of fair notice and governmental restraint"); *see also, e.g.*, *In re Borlik*, 194 Cal. App. 4th 30 (Ct. App. 2011) (California released prisoner after court granted additional credits; he was returned to prison when the decision was reversed on direct appeal).

More fundamentally, Appellants do not have to release *any* prisoners; they have wide latitude to substitute other methods for reducing overcrowding. "[A]lthough [the three-judge] Court believes the expanded good time credits measure is the simplest and best way for defendants to comply," it did not "requir[e] defendants to implement this measure." Stay Order at 21; *see* June Order at 49–50. For example, Appellants could "reassign prisoners to leased jail space," without any impact on public safety whatsoever. June Order at 50.

Indeed, in response to the three-judge court's recent decisions, the Governor has finally gotten creative and relied on his residual emergency powers (which he revoked but were still operative) to enter into a contract to lease beds—reportedly

more than 8,000—in privately-run prisons. Paige St. John, *Jerry Brown Extends Private Prison Deal—Without Funds Budgeted*, L.A. Times, July 10, 2013. This action completely belies Appellants' claim to irreparable harm. Appellants *can* comply without any threat, real or imagined, to public safety. But without ongoing pressure from the courts, they will do nothing.

3. Appellants also argue that waiving state-law barriers to compliance is *per se* an irreparable harm. Stay Appl. 34–36. But unlike the cases Appellants rely upon, the court below did not invalidate a state law on its face pursuant to an as-yet unreviewed finding of a constitutional violation. *See Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers); *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). This Court has already held that Appellants have been violating Plaintiffs' constitutional rights for years. Consistent with the Supremacy Clause, the PLRA allows a three-judge court to empower state officials to "exceed [their] authority under State or local law" in order to comply with the U.S. Constitution. 18 U.S.C. § 3626(a)(1)(B).

Eliminating state-law barriers to complying with this Court's mandate cannot be the basis for awarding Appellants extraordinary injunctive relief from that very mandate. In affirming, this Court "c[ould] not ignore" that "California's Legislature has not been willing or able to allocate the resources necessary to meet this crisis absent a reduction in overcrowding." 131 S. Ct. at 1939; *id.* at 1936 ("a lack of political will in favor of reform" contributed to the crisis). "The State first had notice that it would be required to reduce its prison population in February

2009," *id*. at 1946, and the two-year deadline was stayed during this Court's review, effectively extending it to June 27, 2013. The three-judge court further extended the deadline to December 27, 2013, giving Appellants nearly five years total to comply. *See* Stay Order 15.

In this time, Appellants could have enacted laws implementing any number of options to reduce overcrowding, including with zero impact on public safety. For example, they could have expanded prison capacity or at least taken substantial steps towards doing so. Appellants have squandered this opportunity. They chose to implement "realignment"—and nothing more—knowing it would be insufficient, and have since "fr[ozen] and ossif[ied] improvement efforts in the field" or actively made matters worse. Receiver's 23rd Report at 35. Appellants thus cannot complain about the "harms" of setting aside state-law barriers to compliance. The fact that state laws still impede compliance underscores that Appellants have disobeyed this Court's command to comply "without further delay." 131 S. Ct. at 1947.

III. Granting a Stay Would Substantially Harm Plaintiffs.

The three-judge court also correctly held that a stay "will substantially injure plaintiffs." Stay Order at 22. This Court "weigh[s] heavily" the judgment of the court closest to the facts. *Graves*, 405 U.S. at 1203. And the lower court's judgment should not be surprising or open to serious debate, since this Court already affirmed the necessity of reducing overcrowding to remedy persistent constitutional violations of the highest order. If this Court denies the stay, Appellants have stated

that they will finally obey court orders and comply with the 137.5% cap. Defs.' Motion for Stay at 2. But if this Court grants the stay, they will not comply, further protracting the already-protracted violations in California's prison system.

The harm here is grave indeed. As set forth in the three-judge court's orders and above, unconstitutional conditions brought on primarily by the overcrowding endemic in California's prisons cause ongoing suffering and death. "[I]nmate suicides are occurring at virtually the same rate and with virtually the same degree of inadequacies in assessment, treatment and intervention" today as when this Court affirmed. *Coleman* Order at 33–34. The *Plata* district court similarly found, less than a month ago, that California has "clearly demonstrated [its] unwillingness to respond adequately to the health care needs of California's inmate population." Valley Fever Order at 23–24. "[O]vercrowding continues to interfere with the ability to deliver constitutionally acceptable medical and mental health care." Receiver's 23rd Report at 30. In short, a stay would "creat[e] a certain and unacceptable risk of continuing violations of the rights of sick and mentally ill prisoners, with the result that many more will die or needlessly suffer. The Constitution does not permit this wrong." *Plata*, 131 S. Ct. at 1941.

IV. The Equities Weigh Heavily Against a Stay.

This Court has already affirmed the three-judge court's determination that the ongoing violation of thousands of prisoners' constitutional rights outweighs the uncertain and low risk to public safety that compliance requires. "[P]rison populations [have] been lowered without adversely affecting public safety in a

number of jurisdictions," and "various available methods of reducing overcrowding"—including the methods the June Order identifies—"would have little or no impact on public safety." *Plata*, 131 S. Ct. at 1942, 1943. "Some evidence indicate[s] that reducing overcrowding in California's prisons could even improve public safety." *Id.* at 1942. Indeed, compliance poses an obviously lower risk to public safety today than when this Court affirmed in 2011. At most, Appellants would release a subset of the tens of thousands of prisoners that could have been released when this Court affirmed. *See id.* at 1923.

Because compliance is unlikely to pose a serious safety risk, the paramount public concern is eliminating the established harm that Plaintiffs have suffered for decades. "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." Stay Order at 22 (quotation marks omitted). And "[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.

Appellants' intransigence also informs the balance of the equities and provides another overriding reason to deny their stay application. "It is beyond question that obedience to judicial orders is an important public policy." *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766 (1983). Parties cannot "by-pass orderly judicial review of [an] injunction before disobeying it." *Walker v. City of Birmingham*, 388 U.S. 307, 320 (1967); *see also United States v. United Mine Workers of America*, 330 U.S. 258, 293 (1947) ("[A]n order issued by a court with

jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings."). Furthermore, granting a stay is ultimately an act of equity, and the doors of equity are closed "to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief…." *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945).

"[F]or approximately a year, defendants have acted in open defiance" of the mandate to remedy ongoing constitutional violations, essentially taking no steps at all while knowing that the result is non-compliance. April Order at 65; *see also id.* at 63 (Appellants have "engaged in openly contumacious conduct by repeatedly ignoring" court orders). "The most recent, and perhaps clearest," example of their willful disobedience is their "failure to follow the clear terms of [the] April 11, 2013 order, requiring them to submit a Plan for compliance." June Order at 50. Instead, Appellants submitted "a Plan for non-compliance" that "does not come close to meeting" the required reduction, falling "43% short." *Id.* at 29, 50.

Most egregiously, Governor Brown unilaterally declared that the prison crisis is over, threatening to make the crisis significantly worse. Every court to consider the issue—this Court, the three-judge court, the *Coleman* court, and the *Plata* court—has found ongoing, grave violations. Governor Brown nonetheless proclaimed that the emergency "no longer exist[s]." Proclamation. As a direct result of that self-denial of emergency authority, Appellants lost the power "to contract to house approximately 9,500 prisoners in out-of-state prisons," triggering "a scheduled partial return of these prisoners during 2013, and a consequent

increase in the prison population." Stay Order at 7. Any consideration of Appellants' invocation of public safety concerns has to account for the fact that the Governor personally exacerbated the problem the three-judge court was forced to solve.

Granting a stay thus would undermine the compelling interest in the orderly administration of justice and due regard for court orders. It would also be manifestly inequitable, as it would reward Appellants' contumacious conduct and further perpetuate their "severe and unlawful mistreatment" of Plaintiffs. *Plata*, 131 S. Ct. at 1923.

CONCLUSION

This Court should deny the application for a stay.

Respectfully submitted,

DONALD SPECTER
Counsel of Record
STEVEN FAMA
ALISON HARDY
SARA NORMAN
REBEKAH EVENSON
PRISON LAW OFFICE
1917 Fifth Street
Berkeley, CA 94710
(510) 280-2621
dspecter@prisonlaw.com

Counsel for the *Plata* Appellees

PAUL D. CLEMENT
Counsel of Record
ZACHARY D. TRIPP
MICHAEL H. MCGINLEY
BANCROFT PLLC
1919 M Street NW
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

MICHAEL W. BIEN
JANE E. KAHN
ERNEST GALVAN
LISA ELLS
AARON J. FISCHER
KRISTA STONE-MANISTA
MARGOT MENDELSON
LORI RIFKIN
ROSEN BIEN GALVAN &
GRUNFELD LLP
315 Montgomery Street
Tenth Floor
San Francisco, CA 94104
(415) 433-6830

Counsel for the *Coleman* Appellees

July 19, 2013

No. 13A57

In the
Supreme Court of the United States

EDMUND G. BROWN JR., ET AL.,
Appellants,
v.
MARCIANO PLATA AND RALPH COLEMAN, ET AL.
Appellees.

CERTIFICATE OF SERVICE

I, Paul D. Clement, a member of the Supreme Court Bar, hereby certify that three copies of the attached Joint Memorandum in Opposition to Application for Stay were served on:

KAMALA HARRIS
Attorney General of California
JONATHAN L. WOLFF
Senior Assistant Attorney General
JAY C. RUSSELL
Supervising Deputy Attorney
DEBBIE VOROUS
PATRICK R. MCKINNEY
Deputy Attorneys General
455 Golden Gate Avenue
Suite 1100
San Francisco, CA 94102
(415) 703-5500

CARTER G. PHILLIPS
Counsel of Record
MARK E. HADDAD
EAMON P. JOYCE
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, DC 20005
(202) 736-8000
cphillips@sidley.com

JERROLD C. SCHAEFER
PAUL B. MELLO
HANSON BRIDGETT LLP
425 Market Street, 26th Floor
San Francisco, CA 94105

Service was made by first-class mail on July 19, 2013.

PAUL D. CLEMENT
Counsel of Record
BANCROFT PLLC
1919 M Street NW, Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com