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IN THE UNITED STATES DISTRICT COURTS  
FOR THE EASTERN DISTRICT OF CALIFORNIA  
AND THE NORTHERN DISTRICT OF CALIFORNIA  
UNITED STATES DISTRICT COURT COMPOSED OF THREE JUDGES  
PURSUANT TO SECTION 2284, TITLE 28 UNITED STATES CODE

RALPH COLEMAN, et al.,  
Plaintiffs,  
v.  
EDMUND G. BROWN JR., et al.,  
Defendants.

NO. 2:90-cv-0520 LKK JFM P  
**THREE-JUDGE COURT**

MARCIANO PLATA, et al.,  
Plaintiffs,  
v.  
EDMUND G. BROWN JR., et al.,  
Defendants.

NO. C01-1351 TEH  
**THREE-JUDGE COURT**  
**OPINION AND ORDER**  
**DENYING DEFENDANTS'**  
**MOTION TO VACATE OR**  
**MODIFY POPULATION**  
**REDUCTION ORDER**

On January 7, 2013, defendants filed a Motion to Vacate or Modify Population Reduction Order. Defs.’ Mot. to Vacate or Modify Population Reduction Order (ECF No. 2506/4280) (“Three-Judge Motion”).<sup>1</sup> Defendants contend that a significant and

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<sup>1</sup> All filings in this Three-Judge Court are included in the individual docket sheets of both *Plata v. Brown*, No. C01-1351 TEH (N.D. Cal.), and *Coleman v. Brown*, No. 90-cv-520-LKK (E.D. Cal.). In this Opinion, when we cite to such filings, we include the docket number in *Plata* first, then *Coleman*. When we cite to filings in the individual cases, we include the docket number and specify whether the filing is from *Plata* or *Coleman*.

1 unanticipated change in facts renders inequitable our June 30, 2011 Population Reduction  
2 Order (amended as of January 29, 2013) (“Order”). They request a complete vacatur of our  
3 Order under Federal Rule of Civil Procedure 60(b)(5). On January 29, 2013, this Court  
4 stayed consideration of the Three-Judge Motion. This Court now lifts that stay and DENIES  
5 defendants’ Three-Judge Motion. On February 12, 2013, plaintiffs filed a cross-motion  
6 requesting this Court to order defendants to develop institution-specific population caps.  
7 Pls.’ Opp’n to Three-Judge Mot. and Cross-Mot. for Additional Relief (ECF No. 2528/4331)  
8 (“Pls.’ Opp’n” and/or “Cross-Mot.”). This Court DENIES plaintiffs’ Cross-Motion.  
9 Defendants must immediately take all steps necessary to comply with this Court’s June 30,  
10 2011 Order, as amended by its January 29, 2013 Order, requiring defendants to reduce  
11 overall prison population to 137.5% design capacity by December 31, 2013. We issue a  
12 separate order to that effect concurrently herewith.<sup>2</sup>

#### 13 14 **I. PROCEDURAL HISTORY**

15 Given the lengthy history of this case, a brief (or not-so-brief) synopsis is in order.  
16 Defendants seek vacatur of a population reduction order that this Court issued in order to  
17 provide remedial relief for Eighth Amendment violations found in two independent legal  
18 proceedings. Aug. 4, 2009 Op. & Order at 54 (ECF No. 2197/3641). The first, *Coleman v.*  
19 *Brown*, began in 1990 and concerns California’s failure to provide constitutionally adequate  
20 mental health care to its mentally ill prison population. The second, *Plata v. Brown*, began in  
21 2001 and concerns the state’s failure to provide constitutionally adequate medical health care  
22 to its prison population. In both cases, the district courts found constitutional violations and  
23 ordered injunctive relief. As time passed, however, it became clear that no relief could be  
24 effective in either case absent a reduction in the prison population.<sup>3</sup>

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25 <sup>2</sup> Other pending matters are addressed in Part II of this Opinion & Order. Any matter  
26 not specifically mentioned is denied without prejudice.

27 <sup>3</sup> For those interested in the extensive (and unsuccessful) remedial efforts in both the  
28 *Plata* and *Coleman* cases, see our August 4, 2009 Opinion & Order at 10-36 (ECF No.  
2197/3641), which provides a detailed summary of those proceedings.

1 Congress restricted the ability of federal courts to enter a population reduction order in  
2 the Prison Litigation Reform Act of 1996 (“PLRA”), Pub. L. No. 104-134, 110 Stat. 1321  
3 (codified in relevant parts at 18 U.S.C. § 3626); Aug. 4, 2009 Op. & Order at 50-51 (ECF  
4 No. 2197/3641) (explaining why a population reduction order is a “prisoner release order,” as  
5 defined by the PLRA, 18 U.S.C. § 3626(g)(4)). Such relief can be provided only by a  
6 specially convened three-judge court after it has made specific findings. 18 U.S.C.  
7 § 3626(a).

8 In 2006, the plaintiffs in *Coleman* and *Plata* independently filed motions to convene a  
9 three-judge court to enter a population reduction order. Both courts granted plaintiffs’  
10 motions and recommended that the cases be assigned to the same three-judge court “[f]or  
11 purposes of judicial economy and avoiding the risk of inconsistent judgments.” July 23,  
12 2007 Order in *Plata*, 2007 WL 2122657, at \*6; July 23, 2007 Order in *Coleman*, 2007 WL  
13 2122636, at \*8; *see also Brown v. Plata*, 131 S. Ct. 1910, 1922 (2011) (“Because the two  
14 cases are interrelated, their limited consolidation for this purpose has a certain utility in  
15 avoiding conflicting decrees and aiding judicial consideration and enforcement.”). The Chief  
16 Judge of the United States Court of Appeals for the Ninth Circuit agreed and, on July 26,  
17 2007, convened the instant three-judge district court pursuant to 28 U.S.C. § 2284.<sup>4</sup>

18 **A. This Court’s August 2009 Opinion & Order**

19 In August 2009, after a fourteen-day trial, this Court issued an Opinion & Order  
20 designed to remedy the ongoing constitutional violations with respect to both medical and  
21 mental health care in the California prison system. The order directed defendants, including  
22 the Governor, then Arnold Schwarzenegger, and the Secretary of the California Department  
23 of Rehabilitation and Corrections (“CDCR”), then Matthew Cate, to reduce the institutional  
24 prison population to 137.5% design capacity within two years. This Court made extensive  
25 findings, as set forth in our 184-page opinion. We repeat here only those findings that are  
26 necessary or relevant to the determination of the motions pending before us.

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27 <sup>4</sup> In accordance with the circuit’s procedure for the assignment of circuit court judges,  
28 Judge Stephen Reinhardt was drawn as the third member of this Court.

1 First, based on the testimony of seven expert witnesses (including Jeffrey Beard<sup>5</sup>), the  
2 defendants' own admissions, and the extensive data on prison crowding in the record, this  
3 Court found that "crowding is the primary cause of the violation of a Federal right." 18  
4 U.S.C. § 3626(a)(3)(E)(i).<sup>6</sup> Indeed, we devoted approximately 25% of our Opinion – 46 out  
5 of 184 pages – to demonstrating how "crowding creates numerous barriers to the provision of  
6 medical and mental health care that result in the constitutional violations. . . ." Aug. 4, 2009  
7 Op. & Order at 57 (ECF No. 2197/3641); *see id.* at 55-101. Two barriers were particularly  
8 important. First, a lack of treatment space "prevent[ed] inmates from receiving the care they  
9 require." *Id.* at 57. Second, "[c]rowding also render[ed] the state incapable of maintaining  
10 an adequate staff." *Id.* In short, because California had too many prisoners, it lacked the  
11 staff and space to provide constitutionally adequate medical health care and mental health  
12 care.

13 Second, after finding that "no other relief will remedy the violation of the Federal  
14 right," 18 U.S.C. § 3626(a)(3)(E)(ii), Aug. 4, 2009 Op. & Order at 101-19 (ECF No.  
15 2197/3641), this Court faced the challenging question of designing an order that was  
16 "narrowly drawn, extends no further than necessary to correct the violation of the Federal  
17 right, and [was] the least intrusive means necessary to correct the violation of the Federal  
18 right." 18 U.S.C. § 3626(a)(1)(A). In this context, this meant determining the population  
19 level at which defendants could begin to provide constitutionally adequate medical and  
20 mental health care. It was a predictive judgment that, as we acknowledged, was "not an  
21 exact science." Aug. 4, 2009 Op. & Order at 124 (ECF No. 2197/3641) (quoting plaintiffs'  
22 expert, Dr. Craig Haney). Accordingly, this Court considered the testimony of various

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25 <sup>5</sup> Jeffrey Beard, who was then the Secretary of the Pennsylvania Department of  
26 Corrections and testified on behalf of plaintiffs, has been recently appointed as the new  
CDCR Secretary. He has since revised his position on the crowding issue, a point we discuss  
*infra*.

27 <sup>6</sup> As stated in our prior Opinion & Order, "the words crowding and overcrowding  
28 have the same meaning, and we use them interchangeably." Aug. 4, 2009 Op. & Order at 56  
(ECF No. 2197/3641).

1 experts. Many of these experts believed that a prison population at 100% design capacity<sup>7</sup>  
2 was required. Plaintiffs' experts, however, sought a population cap at 130% design capacity,  
3 believing that constitutional care could be provided at that population level. Defendants,  
4 meanwhile, suggested that if ordered, a population cap at 145% design capacity was the most  
5 acceptable, citing a single analysis by the Corrections Independent Review Panel in 2004.  
6 The Panel's analysis, however, suffered from a "potentially fatal flaw," *id.* at 128, in that it  
7 failed to account for the ability to provide medical and mental health care. As this was the  
8 critical question, this Court found that "the Panel's 145% estimate clearly exceeds the  
9 maximum level at which the state could provide constitutionally adequate medical and  
10 mental health care in its prisons." *Id.* at 129. Evaluating the expert evidence in light of the  
11 caution demanded by the PLRA, this Court decided to impose a population cap of 137.5%  
12 design capacity. *Id.* at 130.

13 Third, this Court gave "substantial weight to any adverse impact on public safety or  
14 the operation of a criminal justice system caused by the relief." 18 U.S.C. § 3626(a)(1)(A).  
15 In fact, we devoted 10 days out of the 14-day trial to the issue of public safety; we also  
16 devoted approximately 25% of our Opinion – 49 out of 184 pages – to it. We concluded that  
17 the evidence clearly established that "the state *could* comply with our population reduction  
18 order without a significant adverse impact upon public safety or the criminal justice system's  
19 operation." Aug. 4, 2009 Op. & Order at 133 (ECF No. 2197/3641). Specifically, we  
20 identified a variety of measures to reduce prison population: (1) early release through the  
21 expansion of good time credits; (2) diversion of technical parole violators; (3) diversion of  
22 low-risk offenders with short sentences; (4) expansion of evidence-based rehabilitative  
23 programming in prisons or communities; and (5) sentencing reform and other potential  
24 population reduction measures. *Id.* at 137-57. After evaluating the testimony and evidence –  
25 including the fact that many of the identified measures had been successfully implemented in  
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27 <sup>7</sup> "Design capacity" is based on one inmate per cell, single bunks in dormitories, and  
28 no beds in space not designed for housing. Aug. 4, 2009 Op. & Order at 39-42 (ECF No.  
2197/3641) (explaining various measures of prison capacity).

1 other jurisdictions without any meaningful harm – we found that all of these measures could  
2 be implemented without adversely affecting public safety or the operation of the criminal  
3 justice system. *Id.* at 157-81. Indeed, given the criminogenic nature of overcrowded prisons,  
4 *id.* at 133-37, substantial evidence supported the conclusion “that a less crowded prison  
5 system would in fact benefit public safety and the proper operation of the criminal justice  
6 system.” *Id.* at 178. Finally, but perhaps most important, expert testimony – specifically the  
7 report of the Expert Panel on Adult Offender Recidivism Reduction Programming –  
8 supported the conclusion that these measures could, if implemented in combination,  
9 sufficiently reduce prison population to within the range necessary to comply with a 137.5%  
10 population cap. *Id.* at 177-81. This Court did not, however, order defendants to adopt any  
11 one of these measures. This Court role’s was merely to determine that defendants *could*  
12 comply with the population reduction order. The question of *how* to do so was properly left  
13 to defendants.<sup>8</sup>

14 Defendants timely appealed to the Supreme Court.

15 **B. The Supreme Court’s June 2011 Opinion**

16 In June 2011, the Supreme Court affirmed this Court’s order in full. Again, we repeat  
17 here only those portions of the Supreme Court opinion that are relevant to the motions  
18 pending before us. First, with respect to the question of whether overcrowding was the  
19 primary cause of ongoing constitutional violations, the Supreme Court noted with approval  
20 the extensive evidence presented in our Opinion & Order – specifically, the high rates of  
21 vacancy for medical professions, the lack of physical space, and the testimony from experts  
22 who testified that crowding was the primary cause of the failure to provide constitutionally  
23 adequate medical and mental health care. *Plata*, 131 S. Ct. at 1932-34. In light of this

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25 <sup>8</sup> On January 12, 2010, this Court issued an order accepting defendants’ two-year plan  
26 for achieving a prison population of 137.5% design capacity without ordering  
27 implementation of any specific population reduction measures. Rather, this Court ordered  
28 defendants to reduce prison population to 167%, 155%, 147%, and 137.5% at six-month  
benchmarks. Jan. 12, 2010 Order to Reduce Prison Population at 4 (ECF No. 2287/3767).  
This Court stayed the effective date of that order while the appeal was pending before the  
Supreme Court. *Id.* at 6.

1 evidence, the Supreme Court deferred to this Court’s factual determination that  
2 overcrowding was the primary cause of ongoing constitutional violations. *Id.* at 1932 (“With  
3 respect to the three-judge court’s factual findings, this Court’s review is necessarily  
4 deferential. It is not this Court’s place to ‘duplicate the role’ of the trial court. The ultimate  
5 issue of primary cause presents a mixed question of law and fact; but there, too, ‘the mix  
6 weighs heavily on the fact side.’ Because the ‘district court is better positioned . . . to decide  
7 the issue,’ our review of the three-judge court’s primary cause determination is deferential.”  
8 (internal citations omitted)).

9         Second, with respect to this Court’s determination that a prison population of 137.5%  
10 design capacity was necessary in order to begin to solve the ongoing constitutional  
11 violations, the Supreme Court was even more solicitous. The Supreme Court began its  
12 discussion by stating:

13                 Establishing the population at which the State could begin to  
14                 provide constitutionally adequate medical and mental health care,  
15                 and the appropriate time frame within which to achieve the  
16                 necessary reduction, requires a degree of judgment. The inquiry  
17                 involves uncertain predictions regarding the effects of population  
18                 reductions, as well as difficult determinations regarding the  
19                 capacity of prison officials to provide adequate care at various  
20                 population levels. Courts have substantial flexibility when  
21                 making these judgments. “Once invoked, ‘the scope of a district  
22                 court’s equitable powers . . . is broad, for breadth and flexibility  
23                 are inherent in equitable remedies.” *Hutto [v. Finney]*, 437 U.S.  
24                 678, 687, n.9 (1978)] (quoting *Milliken v. Bradley*, 433 U.S. 267,  
25                 281, 97 S. Ct. 2749, 53 L. Ed. 2d 745 (1977), in turn quoting  
26                 *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15, 91  
27                 S. Ct. 1267, 28 L. Ed. 2d 554 (1971)).

21 *Id.* at 1944. The Supreme Court described the evidence before us, much of which supported  
22 “an even more drastic remedy,” *id.* at 1945, i.e., a population cap lower than 137.5% design  
23 capacity. Because our Court had closely considered all the evidence, the Supreme Court  
24 affirmed our determination that 137.5% was the correct figure, stating that “[t]here are also  
25 no scientific tools available to determine the precise population reduction necessary to  
26 remedy a constitutional violation of this sort. The three-judge court made the most precise  
27 determination it could in light of the record before it.” *Id.*

28

1 Third, the Supreme Court recognized that this Court had extensively considered the  
2 question of public safety. *Id.* at 1941 (“The court devoted nearly 10 days of trial to the issue  
3 of public safety, and it gave the question extensive attention in its opinion.”). It expressly  
4 noted the evidence cited in our Opinion & Order that other jurisdictions had reduced prison  
5 population without adversely affecting public safety. *Id.* at 1942-43. It also listed the  
6 measures identified in our Opinion & Order as “various available methods of reducing  
7 overcrowding [that] would have little or no impact on public safety.” *Id.* at 1943.  
8 Specifically, the Supreme Court stated that “[e]xpansion of good-time credits would allow  
9 the State to give early release to only those prisoners who pose the least risk of reoffending.”  
10 *Id.* Again, the Supreme Court deferred to our Court’s factual determination, especially as our  
11 finding was informed by many experts who “testified on the basis of empirical evidence and  
12 extensive experience in the field of prison administration.” *Id.* at 1942.

13 Throughout its opinion, the Supreme Court expressly and repeatedly noted the  
14 flexibility of our order, which did not “limit[] the State’s authority to run its prisons.” *Id.* at  
15 1941. By adopting a population percentage (not a strict number of prisoners to release), our  
16 order permits defendants to “choose whether to increase the prisons’ capacity through  
17 construction or reduce the population.” *Id.* at 1941; *see also id.* at 1937-38 (explaining that  
18 defendants can also comply through “new construction” and “out-of-state transfers”).  
19 Additionally, by identifying various measures by which defendants could reduce the prison  
20 population, our order “took account of public safety concerns by giving the State substantial  
21 flexibility to select among these and other means of reducing overcrowding.” *Id.* at 1943.  
22 Furthermore, our order, by not selecting particular classes of prisoners to be released, “g[ave]  
23 the State substantial flexibility to determine who should be released.” *Id.* at 1940. Finally,  
24 because our order is systemwide, “it affords the State flexibility to accommodate differences  
25 between institutions.” *Id.* at 1940-41. The Supreme Court stated – even more directly than  
26 our Court did – that if defendants fail to take advantage of the flexibility that our order  
27 permits, they will be required to release some prisoners:  
28



1           The order leaves the choice of means to reduce overcrowding to  
2           the discretion of state officials. But absent compliance through  
3           new construction, out-of-state transfers, or other means – or  
4           modification of the order upon a further showing by the State –  
          the State will be required to release some number of prisoners  
          before their full sentences have been served.

5   *Id.* at 1923. In such an instance, this Court is empowered to order defendants to develop a  
6   plan for the release of prisoners who pose the lowest risk for public safety:

7           The three-judge court, in its discretion, may also consider  
8           whether it is appropriate to order the State to begin without delay  
9           to develop a system to identify prisoners who are unlikely to  
10          reoffend or who might otherwise be candidates for early release.  
11          Even with an extension of time to construct new facilities and  
12          implement other reforms, it may become necessary to release  
          prisoners to comply with the court’s order. To do so safely, the  
          State should devise systems to select those prisoners least likely  
          to jeopardize public safety. An extension of time may provide  
          the State a greater opportunity to refine and elaborate those  
          systems.

13   *Id.* at 1947. In short, our order – and the Supreme Court’s affirmance of our order – left the  
14   question of *how* to comply in the discretion of defendants, but not the question of *whether* to  
15   comply.

16          In the final section of its opinion, the Supreme Court discussed the possibility of  
17   defendants seeking modification of our order. The Supreme Court was specifically  
18   addressing defendants’ challenge to the portion of this Court’s order requiring them to  
19   achieve a prison population of 137.5% design capacity *within two years*. *Id.* at 1945. The  
20   Supreme Court affirmed this aspect of our order principally because defendants had not  
21   requested – either at trial or on appeal – an extension of the two-year timeline. *Id.* at 1945  
22   (“At trial and closing argument before the three-judge court, the State did not argue that  
23   reductions should occur over a longer period of time.”); *id.* at 1946 (“Notably, the State has  
24   not asked this Court to extend the 2-year deadline at this time.”). The Supreme Court also  
25   noted that, because our order was stayed pending appeal, defendants effectively will have  
26   had four years in which to comply. *Id.* at 1946 (“The 2-year deadline, however, will not  
27   begin to run until this Court issues its judgment. When that happens, the State will have  
28   already had over two years to begin complying with the order of the three-judge court.”).

1 Immediately after affirming this Court’s two-year timeline, the Supreme Court discussed the  
2 possibility of modification:

3           The three-judge court, however, retains the authority, and the  
4 responsibility, to make further amendments to the existing order  
5 or any modified decree it may enter as warranted by the exercise  
6 of its sound discretion. “The power of a court of equity to  
7 modify a decree of injunctive relief is long-established, broad,  
8 and flexible.” *New York State Assn. for Retarded Children, Inc.*  
9 *v. Carey*, 706 F.2d 956, 967 (C.A.2 1983) (Friendly, J.). A court  
10 that invokes equity’s power to remedy a constitutional violation  
11 by an injunction mandating systemic changes to an institution has  
the continuing duty and responsibility to assess the efficacy and  
consequences of its order. *Id.*, at 969-971. Experience may teach  
the necessity for modification or amendment of an earlier decree.  
To that end, the three-judge court must remain open to a showing  
or demonstration by either party that the injunction should be  
altered to ensure that the rights and interests of the parties are  
given all due and necessary protection.

12 *Id.* at 1946. If defendants believe that a change has occurred “regarding the time in which a  
13 reduction in the prison population can be achieved consistent with public safety,” “[a]n  
14 extension of time may allow the State to consider changing political, economic, and other  
15 circumstances and to take advantage of opportunities for more effective remedies that arise  
16 as the Special Master, the Receiver, the prison system, and the three-judge court itself  
17 evaluate the progress being made to correct unconstitutional conditions.” *Id.*; *see also id.* at  
18 1947 (“An extension of time may provide the State a greater opportunity to refine and  
19 elaborate those [systems to select those prisoners least likely to jeopardize public safety].”).  
20 Public safety was not the only rationale mentioned by the Supreme Court as a basis for  
21 modification. The Supreme Court also stated:

22           If significant progress is made toward remedying the underlying  
23 constitutional violations, that progress may demonstrate that  
24 further population reductions are not necessary or are less urgent  
25 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.*

26 *Id.* at 1947 (emphasis added). The Supreme Court concluded by reminding this Court that, if  
27 defendants request modification, we “should give any such requests serious consideration.”

28 *Id.*

1           **C.     Three-Judge Court Proceedings since June 2011**

2           Having been affirmed, our Court issued an order setting the following schedule by  
3 which defendants must reduce the prison population to 137.5% design capacity within two  
4 years:

5                     Defendants must reduce the population of California’s  
6 thirty-three adult prisons as follows:

- 7                     a.     To no more than 167% of design capacity by  
8                             December 27, 2011.
- 9                     b.     To no more than 155% of design capacity by June 27,  
10                            2012.
- 11                    c.     To no more than 147% of design capacity by  
12                            December 27, 2012.
- d.     To no more than 137.5% of design capacity by June 27,  
                              2013.

13 June 30, 2011 Order Requiring Interim Reports at 1-2 (ECF No. 2374/4032). Defendants  
14 were also ordered to file detailed reports at the end of each of the six-month intervals,  
15 advising this Court whether they were able to achieve the required population reduction and,  
16 if not, why this was the case and what measures they have taken or propose to take to remedy  
17 the failure. *Id.* at 2. Defendants were also ordered to file monthly reports with “a discussion  
18 on whether defendants expect to meet the next six-month benchmark and, if not, what further  
19 actions are contemplated and the specific persons responsible for executing those actions.”  
20 *Id.* at 3.

21           Defendants informed this Court that they would accomplish the population reduction  
22 primarily through Assembly Bill 109, often referred to as “Realignment.” Defs.’ Resp. to  
23 Jan. 12, 2010 Court Order (ECF No. 2365/4016).<sup>9</sup> Realignment would shift responsibility  
24 for criminals who commit “non-serious, non-violent, and non-registerable sex crimes” from  
25 the state prison system to county jails. This would apply both to incarceration and parole  
26 supervision and revocation, and to current and future inmates convicted of such crimes.

27           <sup>9</sup> California had also enacted Senate Bill 18, which made various reforms to its good-  
28 time credits, parole policy, community rehabilitation programs, and sentences. Defs.’ Resp.  
to Jan. 12, 2010 Court Order at 4-5 (ECF No. 2365/4016).

1 Defs.' Resp. to June 30, 2011 Court Order (ECF No. 2387/4043). Realignment came into  
2 effect in October 2011, and its immediate effects were highly productive, as thousands of  
3 inmates either serving prison terms or parole revocation terms for "non-serious, non-violent,  
4 and non-registerable sex crimes" were shifted to county jails. Defendants were thus able to  
5 comply with the first benchmark, albeit shortly after the deadline. Defs.' Jan. 6, 2012 Status  
6 Report (ECF No. 2411/4141). It also appeared that Defendants would easily meet the second  
7 benchmark and would likely meet the third benchmark. *Id.*

8         It soon became equally apparent, however, that Realignment was not sufficient on its  
9 own to achieve the 137.5% benchmark by June 2013 or to meet the ultimate population cap  
10 at any time thereafter, in the absence of additional actions by defendants. In February 2012,  
11 plaintiffs filed a motion requesting this Court to order defendants to demonstrate how they  
12 intended to meet the 137.5% figure by June 2013. Pls.' Mot. for an Order Requiring Defs. to  
13 Demonstrate How They Will Achieve the Required Population Reduction by June 2013  
14 (ECF No. 2420/4152). Plaintiffs argued that, based on CDCR's own population projections  
15 (as of Fall 2011), defendants would not achieve a prison population of 137.5% by June 2013.  
16 *Id.* at 2-3. Defendants responded that, because the Fall 2011 projections predated the  
17 implementation of Realignment, they were not reliable. Defs.' Opp'n to Pls.' Mot. for  
18 Increased Reporting in Excess of the Court's June 30, 2011 Order at 2-3 (ECF No.  
19 2423/4162). They stated that the forthcoming Spring 2012 population projections would  
20 give a more accurate indication of whether defendants would meet the 137.5% figure by June  
21 2013. *Id.* at 4. This Court accepted defendants' representations and denied plaintiffs' motion  
22 without prejudice to the filing of a new motion after CDCR published the Spring 2012  
23 population projections. Mar. 22, 2012 Order Denying Pls.' Feb. 7, 2012 Mot. (ECF No.  
24 2428/4169).

25         In May 2012, plaintiffs renewed their objection. Pls.' Renewed Mot. for an Order  
26 Requiring Defs. to Demonstrate How They Will Achieve the Required Population Reduction  
27 by June 2013 (ECF No. 2435/4180). Plaintiffs correctly observed that, despite defendants'  
28 assurances that the Fall 2011 projections were outdated and unreliable, the Spring 2012

1 population projections were not substantively different. *Id.* at 3-4.<sup>10</sup> Plaintiffs also pointed to  
2 a new public report issued in the intervening months, titled “The Future of California  
3 Corrections” (known as “The Blueprint”), in which defendants stated that they would not  
4 meet the 137.5% figure by June 2013 and announced their intention to seek modification of  
5 this Court’s Order. *See CDCR, The Future of California Corrections: A Blueprint to Save*  
6 *Billions of Dollars, End Federal Court Oversight, and Improve the Prison System*, Apr. 2012  
7 (“CDCR Blueprint”).<sup>11</sup> Based on this evidence, plaintiffs repeated their request that this  
8 Court order defendants to demonstrate how they would comply with this Court’s June 30,  
9 2011 Order. Pls.’ Renewed Mot. for an Order Requiring Defs. to Demonstrate How They  
10 Will Achieve the Required Population Reduction by June 2013 at 5-6 (ECF No. 2435/4180).  
11 They further contended that defendants’ delaying tactics and “failure to take reasonable steps  
12 to avert a violation of this Court’s Order would amount to contempt of court.” *Id.* at 6.

13 Defendants’ responsive filing confirmed their intent to seek modification of the  
14 Court’s Order from 137.5% design capacity to 145% design capacity. Defs.’ Opp’n to Pls.’  
15 Renewed Mot. for an Order Requiring Defs. to Demonstrate How They Will Achieve the  
16 Required Population Reduction by June 2013 at 2 (ECF No. 2442/4191). Defendants also  
17 stated that they did not believe it was appropriate for them to demonstrate how they will  
18 achieve 137.5% if they intended to seek modification of that requirement. *Id.* at 7-8.  
19 Defendants responded to the contempt allegation by stating that there is “no doctrine of  
20 ‘anticipatory contempt.’” *Id.* at 7 (quoting *United States v. Bryan*, 339 U.S. 323, 341 (1950)).

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22  
23 <sup>10</sup> Moreover, plaintiffs submitted a declaration from James Austin, an expert in  
24 criminology, who explained why defendants’ projections for the decline in prison population  
were overly optimistic. *Id.* at 5-6.

25 <sup>11</sup> The Blueprint represents defendants’ current plan for the California prison system.  
26 It, however, makes no attempt to reduce prison crowding further than Realignment. To the  
27 contrary, it calls for the elimination of California’s program that houses approximately 9,500  
28 inmates in out-of-state prisons, which – as explained *infra* – will have the result of increasing  
prison crowding. The Blueprint is therefore, in all ways relevant, merely the updated version  
of the Realignment program, and we use the terms Realignment and Blueprint  
interchangeably. The Blueprint can be found at  
<http://www.cdcr.ca.gov/2012plan/docs/plan/complete.pdf>.

1 This Court ordered supplemental briefing on defendants' anticipated motion to  
2 modify. June 7, 2012 Order Requiring Further Briefing (ECF No. 2445/4193); Aug. 3, 2012  
3 2d Order Requiring Further Briefing (ECF No. 2460/4220).<sup>12</sup> We asked defendants<sup>13</sup> to  
4 identify the legal basis for the intended modification, to set forth the factual basis for their  
5 modification request, and to answer additional factual questions. Aug. 3, 2012 Order at 3-4  
6 (ECF No. 2460/4220). Additionally, because defendants had suggested that they were not  
7 currently on track to reduce prison population to 137.5% design capacity, this Court asked  
8 the following:

9 [I]f the Court ordered defendants "to begin without delay to  
10 develop a system to identify prisoners who are unlikely to  
11 reoffend or who might otherwise be candidates for early release,"  
12 *Plata*, 131 S. Ct. at 1947, by what date would they be able to do  
13 so and, if implemented, how long would it take before the prison  
population could be reduced to 137.5%? By what other means  
could the prison population be reduced to 137.5% by June 27,  
2013? Alternatively, what is the earliest time after that date that  
defendants contend they could comply with that deadline?

14 *Id.* at 4. This Court further stated that, until such time as this Court declares otherwise,  
15 "defendants shall take all steps necessary to comply with the Court's June 30, 2011 order,  
16 including the requirement that the prison population be reduced to 137.5% by June 27,  
17 2013." *Id.*

18 Defendants' responsive briefing identified Federal Rule of Civil Procedure 60(b)(5) as  
19 the legal basis for their intended modification request. Defs.' Resp. to Aug. 3, 2012 2d Order

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21 <sup>12</sup> Defendants' initial briefing was unclear and did not satisfactorily respond to this  
22 Court's question as to what the legal and factual basis for the motion to modify would be.  
23 Additionally, their answer raised further factual questions. For example, defendants assured  
24 this Court that they would not use modification as a delaying tactic because they would seek  
25 modification promptly after the prison population fell to 145%, which they projected would  
26 happen in December 2012. Defs.' Resp. to June 7, 2012 Order Requiring Further Briefing at  
27 1, 2 (ECF No. 2447/4203). Their projection, however, appeared to be outdated. The then-  
28 current prison population was higher than defendants estimated, as the rate of prison  
population decline was already slowing considerably. If defendants failed to take additional  
measures until after they filed a motion to modify and would not file the motion until the  
prison population fell to 145%, it was unclear whether, if ever, a motion would be filed.  
Accordingly, this Court ordered a second round of briefing.

<sup>13</sup> Our order was directed at both parties, but the answers we sought were from  
defendants only.

1 Requiring Further Briefing at 1-3 (ECF No. 2463/4226). As their factual basis, defendants  
2 stated that they would seek to prove that Eighth Amendment compliance could be achieved  
3 with a prison population higher than 137.5% design capacity. *Id.* at 6 (“Defendants’ motion  
4 will demonstrate that a population density of 145% does not prohibit Defendants from  
5 providing constitutionally adequate care.”). Defendants defiantly refused to answer the final  
6 question as to when they would be able to comply with our June 30, 2011 Order,<sup>14</sup>  
7 contending that our inquiry – in which we quoted the Supreme Court opinion – was not  
8 authorized by the Supreme Court and that it was not necessary to respond because they  
9 believed our Order should be dissolved. *Id.* at 11-12. Defendants did appear to state,  
10 however, that, if the motion to modify were to be denied, they could comply with a six-  
11 month extension. *Id.* at 12 (“If the Court for some reason disagrees and insists that the final  
12 benchmark cannot be modified, Defendants’ only method of achieving the 137.5% target,  
13 without the early release of prisoners or further legislative action to shorten prison time,  
14 would be to maintain the out-of-state program. If the Court were to order that the current  
15 out-of-state capacity be maintained and waived the associated state laws, the prison  
16 population should reach 137.5% by December 31, 2013.”). Defendants offered no  
17 explanation, however, why they could not release low-risk prisoners early or obtain any  
18 necessary legislative action for other measures identified in our June 2011 Order. Plaintiffs  
19 again asked this Court to find defendants in contempt, because defendants refused to answer  
20 a material question we asked of them and because “Defendants have all but stated that they  
21 have no intention of complying with this part of the Court’s Orders.” Pls.’ Request for Disc.  
22 & Order to Show Cause Re: Contempt at 1 (ECF No. 2467/4230).

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23  
24 <sup>14</sup> Defendants did answer our other questions. First, defendants believed it premature  
25 to begin modification proceedings before the prison population reached 145%. Defs.’ Resp.  
26 to Aug. 3, 2012 2d Order Requiring Further Briefing at 9-10 (ECF No. 2463/4226). Second,  
27 they conceded that their population projections were flawed and now stated that they  
28 believed the prison population would reach 145% by February or March 2013, at which point  
they would seek modification. *Id.* at 10-11. As of this date, the prison population is close to  
150%. See CDCR, *Weekly Rpt. of Population*, Apr. 3, 2013, available at  
[http://www.cdcr.ca.gov/reports\\_research/offender\\_information\\_services\\_branch/WeeklyWed/TPOP1A/TPOP1Ad130403.pdf](http://www.cdcr.ca.gov/reports_research/offender_information_services_branch/WeeklyWed/TPOP1A/TPOP1Ad130403.pdf).

1 In September 2012, this Court ruled on the pending motions. Sept. 7, 2012 Order  
2 Granting in Part & Denying in Part Pls.’ May 9 and Aug. 22, 2012 Mots. (ECF No.  
3 2473/4235). We stated that the question whether Eighth Amendment compliance could be  
4 achieved with a prison population higher than 137.5% design capacity “has already been  
5 litigated and decided by this Court and affirmed by the Supreme Court, and this Court is not  
6 inclined to permit relitigation of the proper population cap at this time.” *Id.* at 2-3.  
7 Accordingly, this Court stated that we were “not inclined to entertain a motion to modify the  
8 137.5% population cap based on the factual circumstances identified by defendants.” *Id.*  
9 at 2. This Court further stated that we will, “however, entertain a motion to extend the  
10 deadline for compliance with the June 30, 2011 order.” *Id.* at 3. We also ordered defendants  
11 to answer the question to which they had failed to respond, *id.* at 3, and we further asked  
12 whether “the Governor has the authority . . . under the existing emergency proclamation  
13 concerning prison overcrowding” to implement the methods identified in our prior opinion  
14 for reducing the prison population to 137.5% design capacity. *Id.* at 3-4.<sup>15</sup>

15 Defendants filed a response in which they answered the aforementioned questions.  
16 Specifically, they stated that they would need six months to develop a program for releasing  
17 low-risk offenders. Defs.’ Resp. to Sept. 7, 2012 Order at 5 (ECF No. 2479/4243).  
18 Additionally, they contended that the available options to achieve 137.5% prison population  
19 were limited, partly because they had implemented many of the methods identified in our  
20 prior opinion through Realignment<sup>16</sup> and partly because the remaining methods – sentencing  
21 reform and further expansion of good time credits – required legislative approval. *Id.* at 3-5;  
22 *see also id.* at 4-5 (“[I]t appears unlikely that the existing emergency proclamation confers  
23 the Governor with unilateral authority to implement expansion of good time credits or

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24 <sup>15</sup> By this time, Edmund G. Brown Jr. had succeeded Arnold Schwarzenegger as  
25 Governor.

26 <sup>16</sup> This contention is inaccurate, for reasons explained in detail *infra*. In short,  
27 Realignment diverted only those who had committed “non-serious, non-violent, and non-  
28 registerable sex crimes.” Additionally, the scope of defendants’ current good time credits  
program is very limited, compared to those other jurisdictions – discussed in our prior  
Opinion & Order – that have safely reduced prison population through good time credits.



1 sentencing reform.”). Nevertheless, defendants advised us that they could comply with a six-  
2 month extension, largely by maintaining the out-of-state program. *Id.* at 6 (“Based on the  
3 Spring 2012 population projections, by increasing capacity when the California Health Care  
4 Facility in Stockton opens and maintaining the out-of-state program, the prison population  
5 will reach 137.5% by December 31, 2013.”).

6 Plaintiffs filed a response in which they contended that compliance was far easier than  
7 defendants suggested. Pls.’ Resp. to Defs.’ Resp. to Sept. 7, 2012 Order (ECF No.  
8 2481/4247). According to plaintiffs, it would not take six months “to identify low risk  
9 prisoners and develop a good-time credit program.” *Id.* at 3. Plaintiffs contended that  
10 defendants already had risk instruments by which they could identify low risk prisoners for  
11 release and that implementing a good time credit program was quite straightforward. *Id.*  
12 Moreover, plaintiffs noted that defendants “made no effort to seek the needed legislation” on  
13 good time credits or sentencing reform. *Id.* at 2.<sup>17</sup>

14 Nevertheless, it appeared, from the parties’ filings, that resolution was not far off.  
15 Even defendants acknowledged that they could comply by December 2013. The parties  
16 disagreed, but perhaps not irreconcilably, over whether defendants could comply by the  
17 original date for compliance, June 2013. Accordingly, in October 2012, this Court ordered  
18 both parties to meet and confer, to develop, and to submit (preferably jointly) “plans to  
19 achieve the required population reduction to 137.5% design capacity by (a) June 27, 2013,  
20 and (b) December 27, 2013.” Oct. 11, 2012 Order to Develop Plans to Achieve Required  
21 Prison Population Reduction at 1 (ECF No. 2485/4251). We asked the parties to include in  
22 their plans a discussion of “all of the alternatives that this Court, affirmed by the Supreme  
23 Court, found could be implemented without an adverse impact on public safety or the  
24 operation of the criminal justice system.” *Id.* at 1-2. We asked how compliance could be

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25  
26 <sup>17</sup> Additionally, Proposition 36 – the retroactive elimination of three-strikes for non-  
27 serious, non-violent offenses – should result in a substantial reduction in the prisoner  
28 population. Defendants stated that approximately 2,800 prisoners “could be eligible for  
resentencing.” Defs.’ Resp. to Sept. 7, 2012 Order at 6 (ECF No. 2479/4243). Thus, the  
enactment of Proposition 36 may by itself reduce the prison population by several percentage  
points.

1 achieved if defendants returned out-of-state prisoners. *Id.* at 2. We further inquired whether  
2 any of these alternatives required the waiving of state law or whether they could be achieved  
3 by the Governor under his emergency powers. *Id.* (“Defendants shall identify in their filing,  
4 whether joint or separate, which, if any, state laws would have to be waived for the  
5 provisions proposed jointly or by either party. Defendants shall also specify which of these  
6 laws may be waived by the Governor and which, if any, it contends that this Court is without  
7 authority to waive. Defendants shall provide justifications for their assertions, and plaintiffs  
8 may state their objections to defendants’ contentions.”). Finally, we informed the parties  
9 “that the Honorable Peter Siggins remains available to assist the parties during the  
10 meet-and-confer process.” *Id.* at 3.<sup>18</sup> The plans were due on January 7, 2013.

11 In mid-November 2012, defendants advised this Court that they would miss the third  
12 benchmark, i.e., they would not achieve a prison population of 147% by December 2012.  
13 Accordingly, they sought modification of our June 30, 2011 Order by extending the 147%  
14 and the 137.5% requirement by six months each. Defs.’ Nov. 2012 Status Report & Mot. to  
15 Modify June 30, 2011 Order (ECF No. 2494/4259). Plaintiffs opposed the modification,  
16 stating that “Defendants’ defiant position is only the latest in a long string of filings in which  
17 they announce that they will maintain the prison population above the court-ordered cap.”  
18 Pls.’ Opp’n to Mot. to Modify & Order to Show Cause Re: Contempt at 1 (ECF No.  
19 2497/4264). Plaintiffs again requested this Court to issue an order to show cause regarding  
20 contempt. *Id.* at 1-3.

21 This Court, being more interested in the January 7 filings, denied most of both parties’  
22 requests. Dec. 6, 2012 Order Denying Defs.’ Mot. for Six-Month Extension & Pls.’ Mot. for  
23 Order to Show Cause Re: Contempt (ECF No. 2499/4269). With regard to defendants’  
24 request for a six-month extension of the 137.5% benchmark, we denied the request as

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25  
26 <sup>18</sup> The Honorable Peter Siggins is presently a state Court of Appeal Justice who  
27 previously worked as the lead lawyer for the defense of correctional law cases in the  
28 Attorney General’s Office of the California Department of Justice and as the Legal Affairs  
Secretary to Governor Schwarzenegger, the original Defendant-Governor in this case.  
Earlier in the proceedings, he served in a role as a settlement consultant with the consent of  
all parties. Aug. 4, 2009 Op. & Order at 48-49 (ECF No. 2197/3641).

1 premature because the issue was to be addressed in the January 7 filings. *Id.* at 2. With  
2 regard to defendants' request for a six-month extension of the 147% benchmark, we granted  
3 defendants' request to be relieved of their obligation to file a report. As we stated:

4           While the Court is concerned that defendants have not done  
5 everything in their power to achieve the 147% benchmark, the  
6 Court is more interested at this time in the additional steps that  
7 defendants will take to achieve the final 137.5% benchmark.

7 *Id.* We then denied plaintiffs' contempt motion as premature. *Id.* In concluding, we stated:

8           Defendants correctly observe that substantial progress has been  
9 made as a result of this Court's orders and the Supreme Court's  
10 affirmance of the population reduction order. However, much  
11 work remains to be done, and defendants must take further steps  
12 to achieve full compliance. The Court expects the parties'  
13 proposed plans to provide a specific means for doing so, while  
14 providing all the specific information called for in this Order as  
15 well as in the October 11, 2012 Order, including without  
16 limitation paragraph four of the October Order [in which we  
17 inquired whether any of the population reduction measures could  
18 be achieved by the Governor under his emergency powers].

14 *Id.* at 2-3.

15           On January 7, 2013, both parties filed plans to meet the 137.5% population cap.  
16 Defendants' plan suggested that, although compliance by June 2013 would require the  
17 outright release of thousands of prisoners, compliance by December 2013 would require  
18 virtually no release of prisoners. Defs.' Resp. to Oct. 11, 2012 Order (ECF No.  
19 2511/4284).<sup>19</sup> Plaintiffs disputed this and contended that defendants could easily comply by  
20 June 2013. Pls.' Statement in Resp. to Oct. 11, 2012 Order Re: Population Reduction (ECF  
21 No. 2509/4283). Defendants further contended that virtually every measure identified in  
22 their plans required the waiver of state laws, some of which – they asserted – this Court was

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24           <sup>19</sup> In September 2012, Defendants stated that they could achieve compliance by  
25 December 2013 based on new construction and maintaining the out-of-state program alone,  
26 Defs.' Resp. to Sept. 7, 2012 Order at 6 (ECF No. 2479/4243) ("Based on the Spring 2012  
27 population projections, by increasing capacity when the California Health Care Facility in  
28 Stockton opens and maintaining the out-of-state program, the prison population will reach  
137.5% by December 31, 2013."). However, in their January 7 filings, defendants advised  
this Court that compliance by December 2013, although still feasible, would require the  
combination of approximately ten other measures. App. A to Grealish Decl. in Supp. of  
Defs.' Resp. to Oct. 11, 2012 Order (ECF No. 2512/4285).

1 without power to waive.<sup>20</sup> Furthermore, despite our explicit reminder that defendants were  
2 obligated to advise this Court which, if any, of the potential measures could be implemented  
3 under the Governor's emergency powers, defendants made no answer, although they had  
4 previously stated that the current out-of-state prisoner placement program was the only  
5 method of meeting the 137.5% goal "without the early release of prisoners or further  
6 legislative action to shorten prison time." Defs.' Resp. to Aug. 3, 2012 2d Order Requiring  
7 Further Briefing at 12 (ECF No. 2463/4226). The Governor had the authority to continue the  
8 out-of-state program under his then-existing emergency powers. Instead of answering our  
9 question, the Governor terminated his emergency powers, arrogating unto himself the  
10 authority to declare, notwithstanding the orders of this Court, that the crisis in the prisons  
11 was resolved. Gov. Edmund G. Brown Jr., *A Proclamation by the Governor of the State of*  
12 *California*, Jan. 8, 2013 ("[P]rison crowding no longer poses safety risks to prison staff or  
13 inmates, nor does it inhibit the delivery of timely and effective health care services to  
14 inmates.") ("Gov. Brown, Jan. 8, 2013 Proclamation").<sup>21</sup>

15 Equally significant for our purposes, defendants also filed on January 7, 2013,  
16 motions to terminate the ongoing proceedings. In this Court, defendants filed the Three-  
17 Judge Motion, which did not seek modification of the Order to 145% or renew their request  
18 to extend the deadline by six months. Rather, defendants requested complete vacatur of our  
19 Order. *Id.* at 3. In the *Coleman* court, defendants also filed a motion to terminate all  
20 injunctive relief in that case. Mot. to Terminate & to Vacate J. & Orders (*Coleman* ECF No.  
21 4275). Notably, defendants did not file a similar motion in the *Plata* court.

22 This Court ordered supplemental briefing and amended our June 2011 Order. Jan. 29,  
23 2013 Order Re: Three-Judge Mot. (ECF No. 2527/4317). Defendants were ordered to advise  
24 the Court whether they intended to file a motion to terminate in *Plata*. *Id.* at 1-2. In the

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25  
26 <sup>20</sup> Despite their assertions that complying with the 137.5% population cap might, in  
27 some circumstances, require waiving or modifying state laws, defendants have not sought  
such change or modification from the Legislature (aside from the 2011 Realignment  
legislation), nor have they requested this Court to take such action.

28 <sup>21</sup> Available at <http://gov.ca.gov/news.php?id=17885>.

1 meantime, this Court stayed consideration of the Three-Judge Motion. *Id.* at 2. Plaintiffs,  
2 who had failed to respond to the Three-Judge Motion, were ordered to file a response and  
3 provide good cause for their failure to do so by the applicable deadline. *Id.* Finally,  
4 defendants – who had stated in their January status report that, despite not being in  
5 compliance with this Court’s order, they would take no further action to comply with it,  
6 Defs.’ Jan. 2013 Status Report at 1 (ECF No. 2518/4292) (“Based on the evidence submitted  
7 in support of the State’s motions, further population reductions are not needed . . . .”) – were  
8 specifically ordered once again to comply with their continuing obligation to follow this  
9 Court’s Order. Jan. 29, 2013 Order at 2 (ECF No. 2527/4317) (“Neither defendants’ filings  
10 of the papers filed thus far nor any motions, declarations, affidavits, or other papers filed  
11 subsequently shall serve as a justification for their failure to file and report or take any other  
12 actions required by this Court’s Order.”). This Court then granted defendants a six-month  
13 extension so that they could more easily comply with this Court’s Order. *Id.* at 2-3. In both  
14 of defendants’ subsequent status reports, however, they have repeated verbatim the statement  
15 from their January status report that they would not make any further attempts to comply  
16 with the Order. Defs.’ Feb. 2013 Status Report at 1 (ECF No. 2538/4342) (“Based on the  
17 evidence submitted in support of the State’s motions, further population reductions are not  
18 needed . . . .”); Defs.’ March 2013 Status Report at 1 (ECF No. 2569/4402) (same). Despite  
19 our specific reminders, at no point over the past several months have defendants indicated  
20 any willingness to comply, or made any attempt to comply, with the orders of this Court. In  
21 fact, they have blatantly defied them.

22 On February 12, 2013, plaintiffs filed a response to the Three-Judge Motion and  
23 requested additional relief, which we discuss in greater detail below. Pls.’ Opp’n & Cross-  
24 Mot. (ECF No. 2528/4331). On the same day, defendants filed a response to our January 29,  
25 2013 order, requesting this Court to lift the stay. Def’s Resp. to Jan 29, 2013 Order (ECF  
26 No. 2529/4332) (“Defs.’ Resp.”). On February 14, 2013, plaintiffs filed a motion opposing  
27 defendants’ request to lift the stay. Pls.’ Opp’n to Defs.’ Mot. to Lift Stay (ECF No.  
28 2535/4338). On February 19, 2013, defendants filed a reply, in which they moved to strike

1 various portions of plaintiffs' February 12, 2013 response and plaintiffs' February 14, 2013  
2 opposition. Defs.' Reply Br. in Supp. of Three-Judge Mot. (ECF No. 2543/4345) ("Defs.'  
3 Reply"). On February 26, 2013, plaintiffs filed a reply. Pls.' Reply Br. in Supp. of Counter-  
4 Mot. (ECF No. 2551/4355).

5 On March 11, 2013, plaintiffs filed a request for leave to file a supplemental brief in  
6 opposition to defendants' Three-Judge Motion and in support of their Cross-Motion. Pls.'  
7 Supp. Br. Re: Mot. to Vacate or Modify (ECF No. 2562/4373). On March 18, 2013,  
8 defendants filed a response opposing this request. Defs.' Opp'n to Pls.' Supp. Br. Re: Mot.  
9 to Vacate or Modify (ECF No. 2573/4415). On March 20, 2013, plaintiffs requested that  
10 some of their filings in the *Coleman* termination proceedings be included as part of the  
11 record in this Court. Req. for Pls.' *Coleman* Filings to Be Deemed & Considered as Supp.  
12 Pleadings in Opp'n to Defs.' Three-Judge Mot. & in Supp. of Pls.' Counter-Mot. (ECF No.  
13 2577/4426). Defendants filed an opposition to this request. Defs.' Opp'n to Pls.' Req. (ECF  
14 No. 2588/4533).

15 The pending matters before this Court are as follows:

- 16 • Defendants' Three-Judge Motion, filed on January 7, 2013;
- 17 • Order to Show Cause against Plaintiffs, filed on January 29, 2013;
- 18 • Defendants' Request to Lift Stay, filed on February 12, 2013;
- 19 • Plaintiffs' Cross-Motion, filed on February 12, 2013;
- 20 • Defendants' Motion to Strike Plaintiffs' Opposition to Defendants'  
21 Request to Lift Stay, filed on February 19, 2013;
- 22 • Defendants' Motions to Strike Portions of Plaintiffs' Opposition to  
23 Three-Judge Motion, filed on February 19, 2013;
- 24 • Plaintiffs' Request for Leave to File a Supplemental Brief in Opposition  
25 to Defendants' Three-Judge Motion and in support of their Counter-  
26 Motion, filed on March 11, 2013; and
- 27 • Plaintiffs' Request for *Coleman* Filings to Supplement their Opposition  
28 to Defendants' Three-Judge Motion and in support of their Counter-  
Motion, filed on March 20, 2013.

27 We decide each of these matters in this Opinion, but withhold for now any order that may be  
28 warranted by defendants' contumacious conduct.

1 **II. PRELIMINARY MATTERS**

2 Defendants' Three-Judge Motion and plaintiffs' Cross-Motion are critical to the  
3 outcome of this litigation and we give special consideration to each below. Before doing so,  
4 this Court addresses the other pending matters. For the reasons discussed below, this Court  
5 first DISCHARGES the order to show cause against plaintiffs. Second, this Court GRANTS  
6 defendants' request to lift the stay on consideration of the Three-Judge Motion. Accordingly,  
7 this Court VACATES as moot defendants' motion to strike plaintiffs' opposition to  
8 defendants' request to lift the stay and DENIES both of plaintiffs' requests to supplement  
9 their opposition to defendants' Three-Judge Motion and in support of their Cross-Motion.  
10 Third, this Court DENIES defendants' motions to strike portions of Plaintiffs' Opposition.

11 **A. Order to Show Cause**

12 On January 29, 2013, this Court ordered plaintiffs to show cause for their failure to  
13 file a timely reply to the Three-Judge Motion. Jan. 29, 2013 Order at 2 (ECF No.  
14 2527/4317). Under our April 25, 2008 Order, plaintiffs were required to file a reply by  
15 January 21, 2013 but failed to do so. On February 12, 2013, plaintiffs explained their failure  
16 as follows:

17 Plaintiffs incorrectly relied on this Court's October 10, 2007  
18 Order (*Plata* Dkt. No. 880) regarding briefing schedules, which  
19 [cites to Local Rule 78-230, stating that the court will issue an  
20 order establishing a briefing schedule after a motion has been  
superseded by this Court April 25, 2008 Order. Plaintiffs regret  
the inconvenience to this Court and to defendants.

21 Pls.' Opp'n at 27-28 (ECF No. 2528/4331). Defendants respond that this excuse is  
22 insufficient, and that we should deem the Three-Judge Motion unopposed and submitted.  
23 Defs.' Reply at 1 n.1 (ECF No. 2543/4345).

24 Reviewing the matter, this Court elects not to exercise its discretion to find plaintiffs  
25 in contempt and DISCHARGES the January 29, 2013 order to show cause. Plaintiffs are  
26 reminded, however, to follow this Court's deadlines in the future.

27 //

28 //

1           **B.     Lifting the Stay and Related Matters**

2           On January 29, 2013, this Court issued an order staying consideration of the Three-  
3 Judge Motion. As we stated in that order, “one of defendants’ principal contentions in the  
4 Three-Judge Motion is that there are no ongoing systemwide constitutional violations in  
5 medical and mental health care.” Jan. 29, 2013 Order at 1 (ECF No. 2527/4317).  
6 Defendants made that same argument with respect to mental health care in the motion to  
7 terminate in *Coleman*. However, defendants had not made the same argument with respect to  
8 medical health care in *Plata*. As we stated in that order, “[i]t would be a waste of judicial  
9 resources for this Court to begin to determine any issue until it is made aware of defendants’  
10 filing plans regarding the constitutional question [in *Plata*.]” *Id.* at 2. This Court ordered  
11 defendants to advise us whether they intended to file a motion to terminate in *Plata* and, if  
12 so, when. Accordingly, we stayed our consideration of the Three-Judge Motion pending an  
13 answer as to defendants’ intentions regarding the constitutional question in *Plata*.

14           On February 12, 2013, defendants requested that this Court lift the stay on the Three-  
15 Judge Motion. Defs.’ Resp. at 1 (ECF No. 2529/4332). Specifically, defendants modified  
16 their Three-Judge Motion such that it is no longer based on the constitutional question but  
17 solely on the claim that “the greatly reduced prison population is [no longer] the primary  
18 barrier prohibiting the State from providing constitutionally adequate medical and mental  
19 health care.” *Id.* at 4. Defendants also contend that they have provided sufficient evidence in  
20 the Three-Judge Motion to prevail on this claim. *Id.* at 1 (“It is unnecessary for the State to  
21 bring a motion to terminate *Plata* for this Court to decide the pending motion because more  
22 than enough evidence has already been presented.”); *id.* at 5 (“[T]he State must show – as it  
23 has in the motion to vacate – that the greatly reduced current population levels do not prevent  
24 the State from providing constitutionally adequate medical and mental health care.”); *see*  
25 *generally* Defs.’ Reply at 2-10 (ECF No. 2543/4345) (contending that Defendants have  
26 “carried their burden” in the “motion to vacate and accompanying evidence”). In short,  
27 defendants assert that, regardless of the state of the health care that is currently being  
28 provided, the primary cause of any failure to provide better care is no longer overcrowding.



1 Thus, defendants urge this Court not to delay our adjudication of the Three-Judge Motion  
2 and, on the record before us, to vacate the Population Reduction Order of June 30, 2011.  
3 Defs.' Resp. at 4, 6 (ECF No. 2529/4332); Defs.' Reply at 18-19 (ECF No. 2543/4345)  
4 (opposing plaintiffs' request for discovery as "futile" and urging this Court not to delay).  
5 Plaintiffs filed an opposition to lifting the stay on February 14, 2013, Pls.' Opp'n to Defs.'  
6 Mot. to Lift Stay (ECF No. 2535/4338), and defendants moved to strike this filing on  
7 February 19, 2013. Defs.' Reply at 18-19 (ECF No. 2543/4345). Additionally, defendants  
8 have opposed both attempts by plaintiffs to supplement their briefing. Pls.' Supp. Br. Re:  
9 Mot. to Vacate or Modify (ECF No. 2562/4373); Defs.' Opp'n to Pls.' Supp. Br. Re: Mot. to  
10 Vacate or Modify (ECF No. 2573/4415); Req. for Pls.' *Coleman* Filings to Be Deemed and  
11 Considered as Supp. Pleadings in Opp'n to Defs.' Three-Judge Mot. & in Supp. of Pls.'  
12 Counter-Mot. (ECF No. 2577/4426); Defs.' Opp'n to Pls.' Req. (ECF No. 2588/4533).

13 This Court agrees with defendants with regard to the procedural status of these  
14 matters. Defendants have modified the Three-Judge Motion such that it is based not on the  
15 constitutional question but solely on the crowding question. The substantive effect of this  
16 modification is discussed *infra*. The procedural effect is to provide a sufficient basis for  
17 lifting the stay of the Three-Judge Motion. This Court therefore GRANTS defendants'  
18 request to lift this Court's stay of our consideration of the Three-Judge Motion. Accordingly,  
19 this Court VACATES as moot defendants' motion to strike plaintiffs' opposition to lifting  
20 the stay. Additionally, because the burden of proof in justifying vacatur lies with defendants  
21 and because defendants have repeatedly contended that they have met that burden based on  
22 the evidence filed in conjunction with the Three-Judge Motion, this Court finds that there is  
23 no need for discovery. Any pending discovery requests are therefore dismissed, and this  
24 Court DENIES both of plaintiffs' requests to supplement their briefing.<sup>22</sup>

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25  
26 <sup>22</sup> To the extent that specific filings in *Coleman* are particularly relevant to the  
27 crowding question, and to the extent that defendants have not presented a specific objection  
28 to those portions of those filings, this Court takes judicial notice of those filings as  
appropriate. *Harris v. Cnty. of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012) (taking judicial  
notice of declarations filed in a related case).

1           **C.     Motions To Strike**

2           Defendants also move to strike two portions of Plaintiffs' Opposition to the Three-  
3 Judge Motion. The first is the section of Plaintiffs' Opposition relying on the declaration by  
4 Steven Fama, who describes recent reports that defendants had filed with the Receiver in  
5 which defendants explain the need for further improvements to treatment space in the  
6 California prison system. Pls.' Opp'n at 12-14 (ECF No. 2528/4331); Exs. B to I to Fama  
7 Decl. in Supp. of Pls.' Opp'n (ECF No. 2528-2/4331-2). Defendants move to strike this  
8 evidence as "inadmissible hearsay and irrelevant." Defs.' Reply at 2, 5 n.2 (ECF No.  
9 2543/4345). The second is the section of Plaintiffs' Opposition in which plaintiffs argue that  
10 the declarations of Robert Barton and Jeffrey Beard are entitled to little weight. Pls.' Opp'n  
11 at 17-18 (ECF No. 2528/4331). Defendants moved to strike these arguments as "scurrilous  
12 attacks . . . which are unsupported by any evidence." Defs.' Reply at 2, 6-7 (ECF No.  
13 2543/4345).

14           Defendants' motions border on the frivolous. With regard to evidence in the Fama  
15 declaration, these reports consist of defendants' requests for additional funding to increase  
16 healthcare infrastructure. Any suggestion that these reports – which demonstrate that  
17 defendants themselves represented to other agencies that there is insufficient treatment space  
18 in the California prison system – are "irrelevant" to assessing the Three-Judge Motion is  
19 clearly meritless.

20           Nor is their admissibility controversial. To begin, defendants relegated this argument  
21 to a mere footnote and failed to provide any legal analysis in support of their contention  
22 regarding hearsay. It is thereby waived. *See Hilao v. Estate of Marcos*, 103 F.3d 767, 778  
23 n.4 (9th Cir.1996) ("The summary mention of an issue in a footnote, without reasoning in  
24 support of the appellant's argument, is insufficient to raise the issue on appeal."). Moreover,  
25 these CDCR records would appear to fall under an exception to the rule against hearsay –  
26 either as the admission of a party opponent under Federal Rule of Evidence 801(d)(2) or as a  
27 public record under Federal Rule of Evidence 803(8). Finally, any attempt to exclude such  
28 evidence from this Court's consideration is meaningless in the context of this case.

1 Defendants have *already* provided these reports to the Receiver. Because the Receiver is an  
2 arm of the Court, not only is this Court entitled to consider such evidence, it is prudent for us  
3 to do so.

4 With regard to the Barton and Beard declarations, plaintiffs have presented reasoned  
5 arguments why some of the statements in these declarations go beyond the expertise and the  
6 information available to Barton and Beard – and therefore why this Court should give little  
7 weight to those statements. These arguments require no evidence, just logic. We thus find  
8 unpersuasive defendants’ contention that these arguments must be struck because they  
9 “present no competent evidence to rebut the factual statements in those declarations.” Defs.’  
10 Reply at 7 (ECF No. 2543/4345).

11 Plaintiffs make arguments with which defendants may disagree, but there is simply no  
12 legal basis for striking any portion of Plaintiffs’ Opposition. This Court therefore DENIES  
13 defendants’ motions to strike, and defendants are advised not to again unnecessarily  
14 complicate an already complex case of the utmost public interest with arguments that are  
15 patently of little merit. Such arguments serve no purpose other than to consume the Court’s  
16 time and further delay the ultimate resolution of the legitimate issues raised by the parties.

### 17 18 **III. DEFENDANTS’ THREE-JUDGE MOTION**

19 This Court now turns to defendants’ Three-Judge Motion. In that motion, defendants  
20 move, under Federal Rule of Civil Procedure 60(b)(5), for vacatur of our Order. They  
21 contend that, due to “the greatly reduced prison population,” overcrowding is no longer “the  
22 primary barrier prohibiting the State from providing constitutionally adequate medical and  
23 mental health care.” Defs.’ Resp. at 4 (ECF No. 2529/4332); *see also* Defs.’ Reply at 11  
24 (ECF No. 2543/4345). Moreover, Defendants contend that this Court can rely solely on the  
25 evidence filed in conjunction with the Three-Judge Motion. Defs.’ Resp. at 1, 5 (ECF No.  
26 2529/4332); *see generally* Defs.’ Reply (ECF No. 2543/4345). Having reviewed the relevant  
27 evidence in support of the Three-Judge Motion, this Court DENIES that motion for the  
28 reasons discussed below.

1           **A.     Legal Standard**

2           The legal basis that defendants rely on for their Three-Judge Motion is Federal Rule of  
3 Civil Procedure 60(b)(5).<sup>23</sup> Three-Judge Mot. at 5-6 (ECF No. 2506/4280). In relevant part,  
4 Rule 60(b)(5) permits a party to be relieved from a final judgment or order if “applying it  
5 prospectively is no longer equitable.” Fed. R. Civ. P. 60(b)(5). In *Rufo v. Inmates of Suffolk*  
6 *Cnty. Jail*, 502 U.S. 367 (1992), the Supreme Court set forth a two-pronged inquiry for Rule  
7 60(b)(5) motions. First, as a threshold matter, the party seeking modification “bears the  
8 burden of establishing that a significant change in circumstances warrants revision of the  
9 decree.” *Id.* at 383. Second, “[i]f the moving party meets this standard, the court should

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11           <sup>23</sup> Defendants cite two provisions of the PLRA, 18 U.S.C. § 3626(a)(1)(A) &  
12 § 3626(a)(3)(E), Three-Judge Mot. at 6-7 (ECF No. 2506/4280), but these provisions do not  
13 provide a legal basis for modification or vacatur. Section 3626(a) of the PLRA relates to the  
14 initial grant of prospective relief. By contrast, § 3626(b) of the PLRA relates to the  
15 termination of prospective relief. Defendants are fully aware of the distinction. Mot. to  
16 Terminate & to Vacate J. & Orders (*Coleman* ECF No. 4275) (seeking termination under 18  
17 U.S.C. § 3626(b)). Accordingly, the sections of the PLRA cited by defendants provide no  
18 legal basis for their motion to vacate the relief ordered by this Court.

19           Moreover, even if defendants had invoked 18 U.S.C. § 3626(b), this would have had  
20 no bearing on our analysis of the Three-Judge Motion for two reasons. First, the operative  
21 provision of § 3626(b) comes into effect “2 years after the date the court granted or approved  
22 the prospective relief.” 18 U.S.C. § 3626(b)(1)(A)(i). Because this Court’s Order was issued  
23 in June 2011, those two years have not yet transpired. Moreover, even were that not the case,  
24 the circumstances in this case would not justify termination under 18 U.S.C. § 3626(b)(1).  
25 This provision was intended by Congress to enable defendants who have dutifully complied  
26 with a court order to obtain relief and thus “guard against court-ordered caps dragging on and  
27 on, with nothing but the whims of federal judges sustaining them.” H.R. Rep. No. 104–21, at  
28 8 (1995). Here, however, defendants are not in compliance and actually refuse to take  
appropriate action, as explained further *infra*. Permitting Defendants to seek termination  
when they have not achieved compliance would reward intransigence by Defendants, not  
police against overly intrusive federal courts. In sum, applying the termination provision in  
this case would contravene clear congressional intent.

22           Second, this Opinion would constitute the “written findings based on the record that  
23 prospective relief remains necessary” under 18 U.S.C. § 3626(b)(3). In *Gilmore v.*  
24 *California*, 220 F.3d 987 (9th Cir. 2000), the Ninth Circuit held that, under 18 U.S.C.  
25 § 3626(b), a district court is “bound to maintain or modify any form of relief necessary to  
26 correct a current and ongoing violation of a federal right, so long as that relief is limited to  
27 enforcing the constitutional minimum,” *id.* at 1000, and that “nothing in the termination  
28 provisions can be said to shift the burden of proof from the party seeking to terminate the  
prospective relief,” *id.* at 1007. Accordingly, for the reasons explained *infra*, this Court finds  
that defendants have failed to demonstrate that our population reduction order to 137.5%  
design capacity no longer “remains necessary to correct a current and ongoing violation of  
the Federal right,” “extends [] further than necessary to correct the violation of the Federal  
right,” or “the prospective relief is [not] narrowly drawn [or is no longer] the least intrusive  
means to correct the violation.” 18 U.S.C. § 3626(b)(3).

1 consider whether the proposed modification is suitably tailored to the changed  
2 circumstances.” *Id.* “The party seeking relief bears the burden of establishing that changed  
3 circumstances warrant relief, but once a party carries this burden, a court abuses its discretion  
4 ‘when it refuses to modify an injunction or consent decree in light of such changes.’” *Horne*  
5 *v. Flores*, 557 U.S. 433, 447 (2009) (quoting *Agostini v. Felton*, 521 U.S. 203, 215 (1997))  
6 (other internal citations omitted).

7 In meeting the threshold inquiry, the moving party “may not . . . challenge the legal  
8 conclusions on which a prior judgment or order rests.” *Id.* Rather, it must point to “a  
9 significant change either in factual conditions or in law” that renders continued enforcement  
10 of a final judgment inequitable. *Id.* (quoting *Rufo*, 502 U.S. at 384). For a change in law, the  
11 moving party must generally demonstrate that “the statutory or decisional law has changed to  
12 make legal what the decree was designed to prevent.” *Rufo*, 502 U.S. at 388.<sup>24</sup> For a change  
13 in facts, the moving party must demonstrate (1) that “changed factual conditions make  
14 compliance with the decree substantially more onerous”; (2) that “a decree proves to be  
15 unworkable because of unforeseen obstacles”; or (3) that “enforcement of the decree without  
16 modification would be detrimental to the public interest.” *Id.* at 384.

17 A moving party alleging a “significant change in facts” faces an additional burden.  
18 Ordinarily, the party may not rely on “events that actually were anticipated at the time it  
19 entered into a decree.” *Id.* at 385. Indeed, in *Rufo*, the Supreme Court remanded for the  
20 district court to “consider whether the [changed circumstance] was foreseen by petitioners.”  
21 *Id.*; *see also id.* at 385-87 (explaining why, under the facts of the case, it was unlikely that  
22 petitioners anticipated the changed circumstances). Similarly, in *Agostini v. Felton*, the  
23 Supreme Court rejected a claim of changed factual circumstances based on the “exorbitant  
24 costs of complying,” because both parties were “aware that additional costs would be  
25 incurred” due to the court’s judgment. 521 U.S. at 215-16. “That these predictions of

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26  
27 <sup>24</sup> The Supreme Court also stated that, “[w]hile a decision that clarifies the law will  
28 not, in and of itself, provide a basis for modifying a decree, it could constitute a change in  
circumstances that would support modification if the parties had based their agreement on a  
misunderstanding of the governing law.” *Rufo*, 502 U.S. at 390.

1 additional costs turned out to be accurate does not constitute a change in factual conditions  
 2 warranting relief under Rule 60(b)(5).” *Id.* at 216. In short, the moving party must  
 3 demonstrate a significant and unanticipated change in facts.

4 The touchstone of Rule 60(b)(5) analysis is that “a district court should exercise  
 5 flexibility in considering requests for modification of an institutional reform consent decree.”  
 6 *Rufo*, 502 U.S. at 383. “A flexible approach allows courts to ensure that ‘responsibility for  
 7 discharging the State’s obligations is returned promptly to the State and its officials’ when  
 8 the circumstances warrant.” *Horne*, 557 U.S. at 450 (quoting *Frew v. Hawkins*, 540 U.S.  
 9 431, 442 (2004)). However, “it does not follow that a modification will be warranted in all  
 10 circumstances. Rule 60(b)(5) provides that a party may obtain relief from a court order when  
 11 ‘it is no longer equitable that the judgment should have prospective application,’ not when it  
 12 is no longer convenient to live with the terms of a consent decree.” *Rufo*, 502 U.S. at 383.<sup>25</sup>

13 **B. Defendants’ Argument, Evidence, and Choice of Forum**

14 Since the filing of the Three-Judge Motion, defendants have modified their argument.  
 15 As explained above, one of defendants’ principal contentions in the Three-Judge Motion as  
 16 filed was the lack of ongoing constitutional violations. Jan. 29, 2013 Order at 1 (ECF No.  
 17 2527/4317) (“One of defendants’ principal contentions in the Three-Judge Motion is that  
 18 there are no ongoing systemwide constitutional violations in medical and mental health  
 19 care.”). Defendants have now represented to this Court that they do *not* seek vacatur on the  
 20 basis that there are no longer ongoing constitutional violations. Defs.’ Resp. at 4 (ECF No.  
 21 2529/4332) (“The issue to be decided by this Court is not constitutional compliance. . . .”).  
 22 As they now assert, the constitutional question is for the individual *Plata* and *Coleman*

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23  
 24 <sup>25</sup> This Court observes that much of the Supreme Court’s case law regarding  
 25 modification or vacatur under Rule 60(b)(5) has arisen in the context of consent decrees.  
 26 *E.g.*, *Rufo*, 502 U.S. at 383. Here, we deal not with a consent decree, but with a decree that  
 27 defendants vigorously resisted. It may well be the case that defendants bear a higher burden  
 28 in the latter case. It matters not in this case as defendants fail under either scenario. Here,  
 defendants fall short of meeting the conditions warranting modification or vacatur of a  
 consent decree, and fall even shorter of meeting the conditions’ application to a contested  
 decree, as many of defendants’ arguments are simply restatements of the positions they  
 adopted in opposing the decree in the first instance and none involves conditions that were  
 not fully anticipated at the time of the issuance of the decree. *See* discussion *infra*.

1 courts. *Id.* (stating that “constitutional compliance . . . is for the underlying district courts to  
2 decide”); *see also* Defs.’ Reply at 11 (ECF No. 2543/4345) (“The constitutionality of the  
3 mental health and medical care provided in prison will be decided by the *Coleman* and *Plata*  
4 courts respectively and individually.”). The question before this Court is purely remedial,  
5 specifically whether a population reduction order is justified – or, to put it in terms  
6 defendants might employ, the question is whether a population reduction order is no longer  
7 justified. Defendants now state that the sole basis for their vacatur request is that “the greatly  
8 reduced prison population is [no longer] the primary barrier prohibiting the State from  
9 providing constitutionally adequate medical and mental health care.” Defs.’ Resp. at 4 (ECF  
10 No. 2529/4332); *see also* Defs.’ Reply at 11 (ECF No. 2543/4345) (“Here, the relevant  
11 inquiry is whether overcrowding is no longer the primary barrier to the provision of  
12 constitutional care.”). In short, defendants have drastically modified their position and are  
13 now, in this motion, challenging only the determination that overcrowding is the primary  
14 cause of the unconstitutional prison conditions, not that prison conditions are no longer  
15 unconstitutional.

16 This modification is significant, in that defendants have effectively abandoned (at  
17 least for purposes of this proceeding) a significant portion of their Three-Judge Motion. For  
18 example, Part III of defendants’ Three-Judge Motion was devoted to presenting evidence that  
19 “California’s Prison Health Care System Exceeds the Level of Care Required By the  
20 Constitution.” Three-Judge Mot. at 15-19 (ECF No. 2506/4280). As would be expected, the  
21 argument presented in Part III was that defendants have achieved constitutional compliance.  
22 *Id.* at 16 (contending that “the State is already providing” “effective mental health care”); *id.*  
23 at 17 (arguing that “the State provides quality prison medical care that ‘far exceeds’  
24 constitutional minima”); *id.* at 18 (citing the most recent statistics on “likely preventable  
25 deaths”); *id.* (citing a statement by Dr. Steven Tharratt as “[f]urther evidence of  
26 constitutionality”). Nor was this focus on constitutional compliance limited to Part III. In  
27 the introductory section, defendants authoritatively stated that California prisons have  
28 achieved constitutional compliance. *E.g., id.* at 1 (“California’s vastly improved prison

1 health care system now provides inmates with superior care that far exceeds the minimum  
2 requirements of the Constitution.”). In Part IV, defendants contended that, because  
3 “adequate medical and mental health care is being provided to California’s inmates,” they  
4 have achieved a durable remedy with respect to the provision of care that complies with the  
5 Eighth Amendment. *Id.* at 19. Defendants concluded by stating:

6           The evidence proves that there are no systemic, current, and  
7           ongoing federal law violations. All evidence indicates that at the  
8           current population density, inmates are receiving health care that  
          exceeds constitutional standards.

9 *Id.* at 21. Defendants have abandoned these arguments before this Court, and this Court is  
10 not required to consider any evidence related solely to the constitutional question, i.e.,  
11 whether prison conditions continue to remain unconstitutional.

12           The modification also renders inapplicable case law on which defendants relied in the  
13 Three-Judge Motion. Specifically, defendants repeatedly cited *Horne v. Flores*, 557 U.S.  
14 433. Three-Judge Mot. at 3, 5-6, 19-20 (ECF No. 2506/4280); *see also* Defs.’ Reply at 2  
15 (ECF No. 2543/4345) (criticizing plaintiffs for failing to cite *Horne*). At issue in *Horne* was  
16 a consent decree that was more protective than what federal law required. The question in  
17 *Horne* was whether, although the defendants had not complied with the terms of a consent  
18 decree, they were permitted to seek modification under Rule 60(b)(5) on the basis that the  
19 underlying “violation of federal law ha[d] been remedied” and thus “the objects of the decree  
20 ha[d] been attained.” *Horne*, 557 U.S. at 451, 452 (internal citations omitted). The Supreme  
21 Court held that modification was permissible because, in the context of institutional reform  
22 litigation, district courts must flexibly analyze changed circumstances. *Id.* at 455-56. *Horne*  
23 is inapplicable here. Most obviously, we do not deal with a consent decree that was more  
24 protective than what federal law required. More fundamental, the *Horne*-type argument for  
25 modification – that defendants have remedied the underlying constitutional violation – is no  
26 longer before this Court, as per defendants’ modification of the motion.

27           Additionally, in the Three-Judge Motion, defendants relied on a particular passage  
28 from the Supreme Court opinion in this case:



1 As the State makes further progress, the three-judge court should  
2 evaluate whether its order remains appropriate. If significant  
3 progress is made toward *remedying the underlying constitutional*  
4 *violations*, that progress may demonstrate that further population  
5 reductions are not necessary or are less urgent than previously  
6 believed. *Were the State to make this showing, the three-judge*  
7 *court in the exercise of its discretion could consider whether it is*  
8 *appropriate to extend or modify this timeline.*

9 *Plata*, 131 S. Ct. at 1947 (emphasis added); Three-Judge Mot. at 3 (ECF No. 2506/4280); *see*  
10 *also* Defs.’ Reply at 3 (ECF No. 2543/4345). In this passage, the Supreme Court suggested  
11 that defendants could seek modification if they had “remed[ie]d the underlying constitutional  
12 violations.” That contention, however, is no longer the basis for defendants’ Three-Judge  
13 Motion, as per their own modification.<sup>26</sup>

14 Plaintiffs object to defendants’ modification of their motion. Plaintiffs devoted a  
15 substantial portion of their February 12, 2013 response to the question of constitutional  
16 compliance. Pls.’ Opp’n at 1-2, 4-8, 15-17, 20-21 (ECF No. 2528/4331). After defendants  
17 modified their argument and disavowed any reliance on constitutional compliance in their  
18 February 12, 2013 filing, plaintiffs filed papers objecting to defendants’ revised position.  
19 Pls.’ Opp’n to Defs.’ Mot. to Lift Stay (ECF No. 2535/4338). Specifically, plaintiffs assert  
20 that defendants are “attempt[ing] to shift the basis for their motion to vacate the Population  
21 Reduction Order.” *Id.* at 2. They state that defendants’ contention – that crowding is no  
22 longer the primary cause of any ongoing violations – “was not raised in the motion, nor did  
23 Defendants submit evidence to support it.” *Id.* Accordingly, plaintiffs ask this Court to deny  
24 the Three-Judge Motion.

25 Although this Court is sympathetic to plaintiffs’ objection, it does not establish a  
26 sufficient basis for denying the Three-Judge Motion for two reasons. First, defendants’  
27 contention regarding crowding was, in fact, raised in the Three-Judge Motion. Specifically,  
28 Part II of the motion is devoted to the question of crowding. Plaintiffs are therefore incorrect

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<sup>26</sup> Even if this passage were applicable to the crowding issue, the proper conclusion to draw would be that, if defendants can prove crowding is a “less urgent” problem, this Court should “extend or modify” the two-year timeline – which this Court has already done – not vacate the population reduction order.

1 to state that defendants are “shifting the basis for their motion.” Rather, as explained above,  
2 defendants are abandoning a principal argument. Second, plaintiffs are not prejudiced by  
3 defendants’ modification. In fact, as explained above, the Three-Judge Motion is now more  
4 limited in its evidentiary and legal support. Moreover, defendants simultaneously contend  
5 that they have provided sufficient evidence in their Three-Judge Motion to prevail. Defs.’  
6 Resp. at 1, 5 (ECF No. 2529/4332); *see generally* Defs.’ Reply (ECF No. 2543/4345). By  
7 abandoning a significant portion of the Three-Judge Motion *and* simultaneously advising this  
8 Court that it need look no further than the Three-Judge Motion, defendants have adopted a  
9 position that benefits plaintiffs.

10       Before considering defendants’ Three-Judge Motion, as modified, we make clear that  
11 we do not decide here whether the question of the continuing unconstitutionality of prison  
12 conditions should be presented to this Three-Judge Court, or to the underlying one-judge  
13 courts – in this case, the *Plata* and *Coleman* courts respectively – or whether it may be  
14 presented to either. Nor do we determine whether the Three-Judge Court may decide, within  
15 its discretion, on the basis of the particular circumstances of the litigation involved, which  
16 forum or fora are appropriate for making the determination of such claim or claims. Here,  
17 after vacillating between this Three-Judge Court and the respective *Plata* and *Coleman* one-  
18 judge courts, defendants decided to withdraw the question from this Three-Judge Court and  
19 have presented it thus far only to the *Coleman* court, which held on the merits that “ongoing  
20 constitutional violations remain” “in the delivery of adequate mental health care.” Apr. 5,  
21 2013 Order at 67 (ECF No. 4539 *Coleman*). Plaintiffs protested the withdrawal of the  
22 question from the Three-Judge Court only on the ground that defendants were changing the  
23 basis of their motion, an argument that we reject *supra*. In this case, under all of the  
24 circumstances, this Court offers no objection to the withdrawal of the question whether

25 //  
26 //  
27 //  
28 //

1 medical and mental health care services are still provided at an unconstitutional level or the  
2 timely presentation of that question to the *Coleman* court.<sup>27</sup>

3 **C. Analysis of Three-Judge Motion, as Modified**

4 In light of defendants' modification, this Court now turns to the only relevant portion  
5 of the Three-Judge Motion: Part II, in which defendants contend that "the Prison Population  
6 Does Not Prevent the State From Providing Constitutionally Adequate Care." Three-Judge  
7 Mot. at 7-15 (ECF No. 2506/4280). Having closely reviewed the arguments and evidence  
8 contained therein, this Court DENIES the Three-Judge Motion for three reasons. First,  
9 defendants have not identified a proper basis for modification or vacatur under Rule 60(b)(5)  
10 and are instead seeking to relitigate the 137.5% population cap. Second, defendants'  
11 evidence in support of their request for modification or vacatur fails to demonstrate a  
12 significant and unanticipated change in circumstances, as required under Rule 60(b)(5).  
13 Third, even if defendants had demonstrated that *current* conditions warranted modification,  
14 they have failed to demonstrate a "durable remedy" as they intend to increase the prison  
15 population by approximately 9,500 prisoners by eliminating the out-of-state prisoner  
16 program. We address these points in turn.

17 1. Defendants' Contention Is Not a Proper Basis for Modification or  
18 Vacatur Under Rule 60(b)(5)

19 Defendants' characterization of their argument as relating to "primary cause" obscures  
20 their true basis for seeking modification or vacatur of this Court's order. Defendants state  
21 that they seek vacatur because "the greatly reduced prison population is [no longer] the  
22 primary barrier prohibiting the State from providing constitutionally adequate medical and  
23 mental health care." Defs.' Resp. at 4 (ECF No. 2529/4332); *see also* Defs.' Reply at 11  
24 (ECF No. 2543/4345). In fact, however, defendants' challenge is to the 137.5% population  
25 cap. *See, e.g.*, Three-Judge Mot. at 7 (ECF No. 2506/4280) (stating that the "evidence relied  
26

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27 <sup>27</sup> Although we offer no objection to defendants' modification of the Three-Judge  
28 Motion and analyze it accordingly in Section III.C, we nevertheless briefly discuss the Three-  
Judge Motion without such modification in Section III.D.

1 upon by this Court in reaching its 137.5% finding was presented at a trial that began over  
2 four years ago”).<sup>28</sup> According to defendants, because constitutional care can be provided at  
3 the current level of overcrowding, this Court must have erred in concluding that the prison  
4 population must be reduced to 137.5% design capacity in order to resolve the underlying  
5 constitutional violations. Thus, defendants’ true basis for seeking vacatur is their contention  
6 that (1) this Court erred in choosing the 137.5% figure and (2) the passage of time constitutes  
7 a “changed circumstance” sufficient to justify a Rule 60(b)(5) motion.

8 Defendants cannot seek modification or vacatur on this basis. In 2009, when the  
9 population level in California prisons was at 190% design capacity, this Court made a  
10 *predictive judgment* based on the overwhelming weight of expert testimony that Eighth  
11 Amendment compliance could not be achieved with a prison population above 137.5%  
12 design capacity. This was not a factual assessment based on current circumstances. Rather,  
13 it was a determination of what population level *would be required in the future* to allow  
14 defendants to be able to provide constitutional care. As the Supreme Court recognized, there  
15 are “no scientific tools available to determine the precise population reduction necessary to  
16 remedy a constitutional violation of this sort.” *Plata*, 131 S. Ct. at 1944.

17 If defendants could challenge this Court’s predictive judgment on the basis they have  
18 identified here, it would undo fundamental principles of res judicata. A losing party who  
19 disagrees with a predictive judgment need only allow some time to pass – thus constituting a  
20 “changed circumstance” – and then file a motion alleging that the court’s judgment was  
21 proven to be wrong. In short, nothing would prevent continual relitigation of a court’s  
22 predictive judgments. For example, although defendants filed this motion after the prison  
23 population reached 150% design capacity, nothing in their argument would have prevented  
24 them from filing a motion at 160% or 165%. Indeed, defendants could have immediately  
25 requested vacatur a mere month after this Court’s Order became effective in June 2011.

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26  
27 <sup>28</sup> Defendants fail to note that, had they complied with our order when it was initially  
28 issued in August 2009, they would have arrived at the 137.5% population cap almost two  
years ago.

1 They could have argued then that “the evidence . . . was presented at a trial that began over”  
2 two years ago. *Cf.* Three-Judge Mot. at 7 (ECF No. 2506/4280). We would, of course, have  
3 rejected any such requests on the merits. That point notwithstanding, permitting unbounded  
4 relitigation, based solely on a contention that some time has passed, would fundamentally  
5 undermine the finality of predictive judgments. *Sys. Fed’n No. 91 Ry. Employees’ Dep’t v.*  
6 *Wright*, 364 U.S. 642, 647 (1961) (“Firmness and stability must no doubt be attributed to  
7 continuing injunctive relief based on adjudicated facts and law, and neither the plaintiff nor  
8 the court should be subjected to the unnecessary burden of re-establishing what has once  
9 been decided.”).<sup>29</sup>

10 This is not to say that parties may never seek modification of a court’s predictive  
11 judgments. They certainly may do so; they must, however, identify a “changed  
12 circumstance” that is more than the mere passage of time and must point to evidence that  
13 actually supports invoking this Court’s equitable power to modify final judgments. This  
14 would ordinarily involve defendants pointing to a change in *background* assumptions on  
15 which this Court relied in making its 137.5% determination. For example, if a new Supreme  
16 Court decision regarding the Eighth Amendment significantly changed the feasibility and  
17 implementation, or even the timeline, of Defendants’ intended measures to achieve the  
18 137.5% figure, a party could certainly seek modification on this basis. *See Rufo*, 502 U.S. at  
19 386-87 (holding that defendants had identified a legitimate basis for modification in pointing  
20 to an acceleration in the incarceration rate, which may not have been anticipated by the  
21 district court at the time of the consent decree). Alternatively, if defendants found *new*  
22 remedies to the overcrowding problem that would permit resolution of the constitutional  
23

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24  
25 <sup>29</sup> Defendants, citing *Gonzalez v. Crosby*, 545 U.S. 524, 529 (2004), contend that  
26 finality is not a relevant concern here because Rule 60(b)(5) is an exception to finality.  
27 Three-Judge Mot. at 6 (ECF No. 2506/4280). This is generally true, but the Supreme Court  
28 has also stated the Rule 60(b) exception to finality cannot be interpreted in such a way that  
“would swallow the rule.” *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367,  
1377 (2010). As explained above, in the context of a predictive judgment, it would  
fundamentally undermine finality if the losing party could seek modification because (1) time  
had passed and (2) the party simply alleged that the ultimate predictive judgment was wrong.

1 violations without reducing the prison population, that would justify modification as well.

2 As the Supreme Court stated:

3           As the State implements the order of the three-judge court, time  
4           and experience may reveal targeted and effective remedies that  
5           will end the constitutional violations even without a significant  
6           decrease in the general prison population. The State will be free  
7           to move the three-judge court for modification of its order on that  
8           basis, and these motions would be entitled to serious  
9           consideration.

10 *Plata*, 131 S. Ct. at 1941. Here, however, defendants point to no *new* remedies. Nor do they  
11 identify any change in background assumptions on which this Court relied. Rather, all they  
12 point to – as is explained in detail *infra* – is that prison crowding has been reduced. This,  
13 however, was the intended effect of our Order, which required defendants to reduce the  
14 prison population over a period of time. Nothing could be more “anticipated” than the  
15 consequent decline in crowding to which defendants point. In short, defendants have failed  
16 to cite any “changed circumstance,” as that term was intended to be understood in *Rufo* or,  
17 indeed, as it would be construed under any reasonable interpretation of the term.

18           Defendants are simply seeking to relitigate the 137.5% question. Defendants  
19 characterize their claim as one of “error,” but they merely disagree with this Court’s  
20 conclusion on a question that inherently involved uncertainty. *Plata*, 131 S. Ct. at 1944  
21 (“The inquiry involves uncertain predictions regarding the effects of population reductions,  
22 as well as difficult determinations regarding the capacity of prison officials to provide  
23 adequate care at various population levels.”). Defendants are, in effect, challenging a legal  
24 conclusion, which is not a permissible basis for modification. *Horne*, 557 U.S. at 447 (“Rule  
25 60(b)(5) may not be used to challenge the legal conclusions on which a prior judgment or  
26 order rests.”). Moreover, defendants have already exercised their right to challenge this  
27 Court’s conclusion. Defendants appealed the 137.5% figure to the Supreme Court, and the  
28 Court affirmed our conclusion. *Plata*, 131 S. Ct. at 1945 (“The three-judge court made the  
most precise determination it could in light of the record before it.”). Defendants have  
already lost this argument, and they should not be allowed to litigate it once again.

1 This Court's conclusion should come as no surprise to defendants. When defendants  
2 first advised this Court that they intended to file a motion to modify, this Court sought  
3 extensive briefing on the legal and factual basis for defendants' anticipated modification  
4 request. June 7, 2012 Order Requiring Further Briefing (ECF No. 2445/4193); Aug. 3, 2012  
5 2d Order Requiring Further Briefing (ECF No. 2460/4220). This Court advised defendants  
6 that, "based on the factual circumstances identified" by defendants, the Court was "not  
7 inclined to entertain a motion to modify the 137.5% population cap." Sept. 7, 2012 Order  
8 at 2 (ECF No. 2473/4235). We explained:

9 Defendants' initial briefing suggested that the only question that  
10 they would seek to litigate on a motion to modify is whether  
11 Eighth Amendment compliance could be achieved with a prison  
12 population higher than 137.5% design capacity. That question  
has already been litigated and decided by this Court and affirmed  
by the Supreme Court, and this Court is not inclined to permit  
relitigation of the proper population cap at this time.

13 *Id.* at 2-3. The Three-Judge Motion is, in all relevant ways, identical to what this Court has  
14 previously stated is not a proper basis for modification. If anything, defendants seek greater  
15 relief today, in that they seek complete vacatur of this Court's population reduction order, not  
16 a modification of the cap to 145%. Yet defendants have made no argument in their Three-  
17 Judge Motion to the effect that this Court erred in holding that defendants had failed to  
18 identify a proper basis for modification. This Court therefore finds that defendants are not  
19 permitted to seek modification or vacatur on the basis that they have identified in the Three-  
20 Judge Motion now before us.

21 2. Defendants' Evidence Fails To Demonstrate a Significant Change in  
22 Circumstances

23 Even if defendants were not seeking to relitigate the 137.5% figure or even if such a  
24 challenge would be permitted, this Court would nevertheless deny the Three-Judge Motion,  
25 as modified, because defendants have failed to meet their evidentiary burden in  
26 demonstrating that overcrowding is no longer the primary cause of ongoing constitutional  
27 violations in the provision of constitutionally adequate medical and mental health care.  
28

1 In the Three-Judge Motion, defendants offer the following six items of evidence in  
2 support of their contention that overcrowding is no longer the primary cause of ongoing  
3 constitutional violations: (1) that Realignment has reduced the prison population by  
4 approximately 24,000 inmates; (2) that California has increased capacity in the prison system  
5 through new construction; (3) that California no longer uses gymnasiums and dayrooms to  
6 house prisoners; (4) that the Inspector General, Robert Barton, has stated that crowding is no  
7 longer a factor in the provision of medical care; (5) that now-Secretary Jeffrey Beard has  
8 stated that overcrowding is no longer a barrier to the provision of care; and (6) that neither  
9 the Receiver nor Special Master stated, in their most recent report, that overcrowding is a  
10 problem. Three-Judge Mot. at 7-15 (ECF No. 2506/4280).

11 The burden falls on defendants to demonstrate a “significant and unanticipated change  
12 in factual conditions warranting modification.” *United States v. Asarco Inc.*, 430 F.3d 972,  
13 979 (9th Cir. 2005) (summarizing *Rufo*, 501 U.S. at 384-86). This standard imposes a high,  
14 but not impossible, bar for defendants to meet. Defendants must present persuasive evidence  
15 that the very aspects of overcrowding that this Court found pernicious in the past – the severe  
16 staff shortages, the complete lack of treatment space, etc. – have been remedied through  
17 measures that were not envisioned at the time of our Court’s order. Additionally, defendants  
18 could – as they have in one instance – supplement this evidence with testimony from the  
19 numerous experts in the initial case who, having reviewed the prison system, have concluded  
20 that overcrowding is no longer a barrier. Were such credible evidence presented to this  
21 Court, we would, of course, consider modifying the Order.

22 Defendants, however, have fallen far short of this requirement. In the Three-Judge  
23 Motion, they have presented very little evidence. Most of this evidence is irrelevant, as it  
24 points to partial compliance with this Court’s Order and not to a resolution of the problems of  
25 overcrowding. The remaining, relevant evidence is far too minimal to persuade this Court  
26 that overcrowding is no longer the primary cause of ongoing constitutional violations.

27 //

28 //



1 a. *Evidence of Reduced Crowding*

2 Defendants' first, second, and third items of evidence all suffer from the same fatal  
3 flaw: Defendants cannot simply point to a reduction in crowding that was contemplated to  
4 occur at the time it did and assert that this provides a sufficient basis for modification.  
5 Reduced crowding, after all, was the intended effect of our Order. The Supreme Court  
6 expressly stated that defendants "may choose whether to increase the prisons' capacity  
7 through construction or reduce the population." *Plata*, 131 S. Ct. at 1941. The evidence that  
8 defendants point to – the reduction in the prison population, the elimination of the use of  
9 gymnasiums and dayrooms as housing, and new prison construction – demonstrates that  
10 defendants have done both in their partial compliance thus far with our Order. Oddly,  
11 defendants appear to read the results of their partial compliance with the Order in a rather  
12 unusual manner. They argue that, because the Order thus far has been effective in making  
13 progress toward its ultimate objective, we should terminate it, call off the rest of the plan, and  
14 declare victory before defendants can meet the Order's most important objective – to reduce  
15 the population to 137.5% design capacity and eliminate overcrowding as the primary cause  
16 of unconstitutional medical and mental health conditions. That is not the way the judicial  
17 system, or any other national system, functions. Indeed, the effectiveness of the Order thus  
18 far is not an argument for vacating it, but rather an argument for keeping it in effect and  
19 continuing to make progress toward reaching its ultimate goal.

20 Of course, if defendants had demonstrated that the overcrowding problem has been  
21 solved, then vacatur might be appropriate. However, defendants' evidence merely  
22 demonstrates that defendants have eliminated, as one of the declarants represented, the "most  
23 egregious and obvious aspects of prison overcrowding." Haney Decl. ¶ 35 (*Coleman* ECF  
24 No. 4378). Indeed, the current prison population is approximately 150% design capacity, as  
25 of April 3, 2013. *See CDCR, Weekly Rpt. of Population, Apr. 3, 2013*. California still  
26 houses far more prisoners than its system is designed to house. Indeed, according to the most  
27 recent national statistics, California's prison system is the second most crowded in the  
28

1 country with respect to design capacity.<sup>30</sup> Furthermore, Clark Kelso, the Receiver in the  
2 *Plata* case, reported in January 2013 that “[o]vercrowding and its consequences *are and have*  
3 *been a chronic, widespread and continuing problem for almost twenty years.*” Receiver’s  
4 Twenty-Second Tri-Annual Report at 30 (*Plata* ECF No. 2525) (emphasis added)  
5 (“Receiver’s 22nd Report”).<sup>31</sup> The Receiver clearly is of the opinion that overcrowding  
6 persists, and this Court credits his expert opinion. *See Plata*, 131 S. Ct. at 1938-39 (stating  
7 that the Receiver’s reports on overcrowding were “persuasive evidence”).<sup>32</sup> Simply put, the  
8 evidence does not demonstrate that “the State has eliminated overcrowding.” Defs.’ Reply  
9 at 3 (ECF No. 2543/4345). It merely demonstrates that defendants have thus far generally  
10 taken actions in compliance with our Order to reduce the extent of overcrowding to 150%  
11 design capacity. That our Order has been successful thus far cannot constitute a “change in  
12 circumstances” that renders our Order inequitable.

13       Rather, in order to properly persuade this Court of a “change in circumstances,”  
14 defendants would have to present compelling evidence that there has been a significant

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16       <sup>30</sup> Bureau of Justice Statistics, U.S. Dep’t of Justice, *Prisoners in 2011*, Dec. 2012,  
17 App. 14 at page 31, *available at* <http://www.bjs.gov/content/pub/pdf/p11.pdf>.

18       <sup>31</sup> Defendants objected to these statements in the Receiver’s Report and moved to have  
19 them stricken. Defs.’ Objections to Receiver’s 22nd Report (*Plata* ECF No. 2532). These  
objections were rejected by the *Plata* court. Feb. 28, 2012 Order Overruling Defs.’  
Objections to Receiver’s 22nd Report (*Plata* ECF No. 2554).

20       <sup>32</sup> Although it should go without mention, it bears repeating that both the Receiver and  
21 Special Master are officers of the Court and thus deserve the same deference that the parties  
would provide to this Court directly. *Plata*, 131 S. Ct. at 1947 (referring to the Special  
22 Master and the Receiver in conjunction with this Court). Defendants have not always  
maintained appropriate propriety in their filings with regard to their statements regarding  
23 these officers. Feb. 13, 2012 Order to Show Cause at 2 (*Coleman* ECF No. 4335) (“As  
plaintiffs point out, defendants’ attack consists of a raw assertion of unethical conduct, with  
24 no supporting evidence nor even any hint that defendants actually believe the attack they  
make. This court takes very seriously any allegation of unethical conduct. It would not  
25 countenance any attempt by plaintiffs, or anyone, to prevent defendants from making any  
non-frivolous assertions having evidentiary support, and made for purposes other than  
26 harassment or other improper purpose. *See* Fed. R. Civ. P. 11(b). However, the court can  
only be dismayed by the cavalier manner in which defendants, in objections signed by their  
27 attorney of record, level a smear against the character and reputation of the Special Master,  
without any apparent regard for whether the attack is consistent with defense counsel’s  
28 obligations under Rule 11 (providing sanctions for presenting pleadings without an  
evidentiary basis, or made to harass, or for other improper purposes).”).

1 change *in the barriers* that prison crowding raised and that prevented the provision of  
2 constitutionally adequate medical and mental health care. As stated above, in our prior  
3 Opinion & Order, we focused on two particular barriers: inadequate treatment space and  
4 severe staff shortages. *See also Plata*, 131 S. Ct. at 1933-34 (focusing on staff and space).  
5 Here, we look to evidence of a change in circumstances, and we find none.

6 With regard to staffing, defendants' Three-Judge Motion is conspicuously silent.  
7 Defendants' failure to discuss staffing is glaring in light of the evidence that staff shortages  
8 continue to plague the California prison system, specifically with regard to mental health  
9 care. In its April 5, 2013 order, the *Coleman* court found that evidence tendered by  
10 defendants showed a 29 percent vacancy rate in mental health staffing at the end of  
11 November 2012, a rate "higher than that reported by the Special Master in his Twenty-Fifth  
12 Round Report." Apr. 5, 2013 Order at 57 (*Coleman* ECF No. 4539).<sup>33</sup> This is nearly as high  
13 as it was at the time of the trial. Aug. 4, 2009 Op. & Order at 76-77 (ECF No. 2197/3641).  
14 In fact, as the *Coleman* court found, according to the Special Master California appears to be  
15 regressing, as the staff shortages are far worse this year than in prior years. *Id.* (quoting  
16 Special Master's Twenty-Fifth Round Monitoring Report at 44 (*Coleman* ECF No. 4298)  
17 ("Special Master's 25th Report")). Psychiatrists at Salinas Valley State Prison (SVSP) are  
18 now writing directly to plaintiffs' counsel to inform them that, due to a patient/doctor ratio  
19 that is three to four times higher than the appropriate level, they are unable to provide care.  
20 Exs. A & B to Bien Decl. in Supp. of Pls.' Mot. to Take Dep. of Dr. John Brim (*Coleman*  
21 ECF No. 4354-1). Thus, it continues to be the case that "demand for care . . . continues to  
22 overwhelm the resources available." *Plata*, 131 S. Ct. at 1933 (quoting expert testimony  
23 from Opinion & Order).

24 With regard to space, the record supports the conclusion that it continues to be a  
25 significant problem. For mentally ill patients, defendants lack sufficient bed space. *See*  
26 Apr. 5, 2013 Order at 53 (*Coleman* ECF No. 4539); *see also* Special Master's 25th Report at

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27 <sup>33</sup> The *Coleman* Special Master's Twenty-Fifth Round Monitoring period ended in  
28 September 2012. *See* Apr. 5, 2013 Order at 6 (*Coleman* ECF No. 4539).

1 38-44 (*Coleman* ECF No. 4298). Much of this can be explained by the fact that, although the  
2 prison population has declined overall, the mentally ill population is largely unchanged. *Id.*  
3 Defendants have not, however, made sufficient investments to provide more beds for these  
4 mentally ill individuals. As a result, the conditions described in our prior Opinion & Order  
5 continue to persist. Mentally ill individuals face extended delays in receiving treatment. In  
6 some cases, they are left in containment cells for extended periods of time. *Id.*; *see also*  
7 Apr. 5, 2013 Order (*Coleman* ECF No. 4539).

8 Defendants respond that “the State has invested in substantial construction and  
9 renovation projects to more than adequately meet both the present and future health care  
10 needs of the State’s inmate-patients.” Three-Judge Mot. at 8 (ECF No. 2506/4280); *see id.* at  
11 8-10 (listing individual construction projects). It is true that there is *more* treatment space  
12 today than in 2008. Defendants, however, fail to demonstrate that there is *enough* treatment  
13 space today. Indeed, this was the “fatal flaw” in defendants’ argument at trial. In our prior  
14 Opinion & Order, this Court rejected defendants’ preferred percentage – 145% design  
15 capacity – because the underlying analysis had a “potentially fatal flaw.” Aug. 4, 2009 Op.  
16 & Order at 128 (ECF No. 2197/3641). Based on the reports and testimony of at least three of  
17 plaintiffs’ experts, this Court concluded:

18 Plaintiffs’ experts convincingly demonstrated that, in light of the  
19 wardens’ failure to consider the provision of medical and mental  
20 health care to California’s inmates and in light of their reliance on  
21 maximum operable capacity, which does not consider the ability  
22 to provide such care, the Panel’s 145% estimate clearly exceeds  
the maximum level at which the state could provide  
constitutionally adequate medical and mental health care in its  
prisons.

23 *Id.* at 129. Defendants now point to renovation and upgrades, but offer *no expert testimony*  
24 that the renovations have overcome the previously identified “fatal flaw” or offer any  
25 conclusion as to the maximum population consistent with the provision of constitutional  
26 medical and mental health care. In the absence of such testimony, this Court will not simply  
27 credit defendants’ assertion that there is adequate treatment space today.

28

1           Moreover, defendants’ own reports contradict any conclusion that there is adequate  
2 treatment space today. In the Blueprint, defendants state that the prison infrastructure is  
3 “aging” and there is “inadequate treatment space” that “hinder[s] the department’s ability to  
4 deliver care.” CDCR Blueprint at 35. Moreover, the reports submitted by defendants,  
5 included in Steven Fama’s declaration, provide direct evidence that defendants have  
6 represented to other agencies that there is inadequate treatment space in the California prison  
7 system today:

8                       Currently there is insufficient (and in some instances, no) facility  
9 space and infrastructure in CDCR institutions to appropriately  
10 perform medication distribution activities. Lack of adequate  
11 medication distribution rooms and windows does not allow for  
timely, effective and secure medication distribution. . . .  
[E]xisting space is inadequately sized to accommodate proper  
distribution protocols and procedures.

12 Ex. I to Fama Decl. at 3 (ECF No. 2528-2/4331-2). The evidence in these reports  
13 overwhelmingly supports the conclusion that defendants themselves recognize the current  
14 inadequacy of treatment space in California’s prisons. *See* Exs. B to I to Fama Decl. (ECF  
15 No. 2528-2/4331-2).

16           Additionally, defendants’ plan to construct the necessary treatment space – the  
17 Healthcare Facility Improvement Program (“HCFIP”) – is in its early stages and thus  
18 continues to be at risk of non-completion. According to the Receiver, HCFIP “upgrade  
19 projects at several locations have now received *initial approval* from the Public Works Board  
20 (PWB).” Receiver’s 22nd Report at 23 (*Plata* ECF No. 2525) (emphasis added). “The  
21 remaining HCFIP projects are being sequenced by CDCR for submittal to the PWB upon  
22 completion and review of site-specific plans.” *Id.* Defendants state that the process for  
23 construction is streamlined, Three-Judge Mot. at 8 (ECF No. 2506/4280), but – even with  
24 such streamlining – the earliest and most optimistic estimate for completing HCFIP is 2017.

25                       With the streamlined PWB and legislative oversight processes  
26 approved through SB 1022, and with the recent progress that was  
27 made on seven of the HCFIP projects, it is possible for the  
28 HCFIP and medication distribution upgrades at existing prisons  
to be substantially completed by 2017, with the priority focus of  
the upgrades at the “intermediate level-of-care” facilities  
substantially completed by 2016. However, these projects require

1 two approvals by the PWB (one for project authorization and one  
2 for approval of preliminary plans) and interim funding by the  
3 PMIB. Thus, if these projects continue to experience delays as  
they have in the last two months, this program is at risk for  
completion.

4 Receiver's 22nd Report at 23 (*Plata* ECF No. 2525). As the Receiver correctly notes, such  
5 long-term plans are always at risk. Indeed, already "several projects were delayed in the  
6 submissions to the PWB." *Id.* Given the lack of completion and the inherent risk in  
7 defendants' construction plans, defendants cannot demonstrate that there is adequate  
8 treatment space *today*. Moreover, the continuation of this Court's population reduction order  
9 can serve only to motivate defendants to continue or redouble their efforts to meet the  
10 objectives set forth above.

11 Finally, even if defendants could demonstrate with surety that their long-term plans  
12 will come to fruition, it would still not support vacatur of the population reduction order. As  
13 plaintiffs correctly note, this evidence would at best tend only to support a conclusion that  
14 our Order should be modified to a higher design capacity. Pls.' Opp'n at 19 (ECF No.  
15 2528/4331). Defendants, however, no longer seek such a modification. They seek vacatur of  
16 the Order in its entirety, a conclusion that is not supported by the new construction and an  
17 action that would serve only to permit defendants to avoid any further obligation to complete  
18 the scheduled construction.

19 The burden falls on defendants to meet the threshold condition for modification or  
20 vacatur. The partial reduction in crowding and various renovations are, without a doubt,  
21 important. This Court will not, however, modify our Order in the absence of compelling  
22 evidence of a resolution to the barriers that overcrowding causes. Because defendants fail to  
23 present evidence on this critical issue, they have not presented evidence of a "*significant*  
24 change in circumstances." *Rufo*, 502 U.S. at 383 (emphasis added).

25 b. *Declaration of Robert Barton, Inspector General*

26 Turning to the fourth item of evidence, defendants state that, "according to Robert  
27 Barton, the Inspector General, population is no longer a factor affecting the State's ability to  
28 provide constitutionally adequate medical or mental health care in prison." Three-Judge

1 Mot. at 13 (ECF No. 2506/4280). Barton explains that the Office of Inspector General  
2 (“OIG”) has instituted a scoring system, by which it evaluates the provision of medical health  
3 care in California prisons. In his concluding paragraph, he states that “some high scoring  
4 prisons also have high population densities.” He concludes that “[o]vercrowding is no longer  
5 a factor affecting CDCR’s ability to provide effective medical care in its prisons.” Barton  
6 Decl. in Supp. of Three-Judge Mot. ¶ 15 (ECF No. 2507/4282).

7 There are many problems with this conclusion. First, Barton’s analysis relies  
8 exclusively on the OIG scores, which provide no statistical basis to draw inferences  
9 regarding constitutionally adequate care. In the Receiver’s most recent report, he explains  
10 that

11 the OIG scores cannot be used by themselves to establish the  
12 constitutional line. First, the scale for the OIG scores has never  
13 been validated for purposes of making constitutional  
14 measurements, and although the parties agreed to use the OIG  
15 audit as an indicator of improved performance over time, the  
16 parties never agreed to any particular scale. For management  
17 purposes and for convenience, the Receivership established  
18 cut-lines for “high adherence,” “medium adherence,” and “low  
19 adherence.” But these lines were never intended to have any  
20 constitutional significance at all. Second, the scores on  
21 individual items in the OIG audit frequently depend upon sample  
22 sizes so small (e.g., less than 5 items may be examined for a  
23 particular question) that the confidence intervals for the items are  
24 unusually large (e.g., a score of 70% on an item may have a  
25 confidence interval stretching from 50% to 90%). In short, the  
26 OIG audits are a statistically soft measure of performance.

27 Receiver’s 22nd Report at 30 (*Plata* ECF No. 2525). The Receiver’s concerns with the OIG  
28 scores may well prove prescient. The *Plata* court has begun conducting a rigorous review of  
all prisons with high OIG scores.<sup>34</sup> Of the four prisons reviewed thus far, Richard J.

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34 The *Plata* court’s ongoing review of the provision of medical care in the California  
prison system demonstrates two additional points of significance. First, contrary to  
defendants’ public representations otherwise, this Court and the individual *Plata* and  
*Coleman* courts have met our “continuing duty and responsibility,” as set forth by the  
Supreme Court, “to assess the efficacy and consequences” of our orders. *Plata*, 131 S. Ct. at  
1946. Second, defendants’ attempt to terminate these proceedings are wholly premature.  
Although the *Plata* court ordered the parties to meet and confer on post-Receivership  
planning over a year ago because it believed the “end of the Receivership appear[ed] to be in  
sight,” Jan. 27, 2012 Order to Meet & Confer re: Post-Receivership Planning at 2 (*Plata* ECF  
No. 2417), that does not justify defendants’ declaration of “mission accomplished.” To the

1 Donovan Correctional Facility (“RJD”) received a very high OIG score – 87.3% – but the  
 2 *Plata* experts concluded that RJD is “not providing adequate medical care, and that there are  
 3 systemic issues that present an ongoing serious risk of harm to patients and result in  
 4 preventable morbidity and mortality.” Health Care Evaluation of R.J. Donovan Correctional  
 5 Facility by Court Medical Experts at 5 (*Plata* ECF No. 2572). The striking gap between the  
 6 OIG scores and adequate care led the experts to state the following:

7           These report findings raise questions regarding the OIG Cycle 3  
 8           report that reflected a score of 87.3%. The question is whether  
 9           the score accurately reflected adequate care that has since  
 10           deteriorated, or whether the OIG review failed to capture  
 11           problems related to poorly functioning systems and quality of  
 12           care issues. . . .

13           A distinguishing characteristic between RJD and the other 3  
 14           facilities we have evaluated that scored >85% is that the  
 15           population at RJD was 160.9% of design capacity at the time of  
 16           our review, whereas the other 3 facilities ranged between 128 to  
 17           almost 134% of design capacity.

18 *Id.* at 6. Thus, not only is the OIG scoring system unreliable as a general matter, it may be  
 19 especially unreliable when the prison suffers from overcrowding. It is perforce not a reliable  
 20 basis for drawing any conclusions regarding the relationship between prison crowding and  
 21 constitutional care.

22 \_\_\_\_\_  
 23 contrary, the parties took several months to meet and confer, after which time the *Plata* court  
 24 proposed a transition plan and allowed the parties an opportunity to respond. On  
 25 September 5, 2012, the *Plata* court issued an order setting forth the framework for  
 26 transitioning away from the Receivership and determining when medical care would be  
 27 deemed constitutionally adequate. Sept. 5, 2012 Order re: Receivership Transition Plan &  
 28 Expert Evaluations (*Plata* ECF No. 2470). The court’s order was based in part on the  
 parties’ original stipulation that any institution found to be in substantial compliance by the  
 court experts – all of whom were appointed pursuant to the parties’ stipulation – would be  
 providing constitutionally adequate care. *Id.* at 4. As the Receiver has noted, “it will be the  
 experts’ reports that create the primary factual record from which the *Plata* court can make a  
 finding that medical care is being provided consistent with constitutional minimums.”  
 Receiver’s 22nd Report at 30 (*Plata* ECF No. 2525). To date, the experts have completed  
 evaluations of only four institutions. Also, as the record reveals, the confidence of  
 defendants in their ability to achieve the required 137.5% population figure by December  
 2013, let alone June 2013, lessened as the results of their Realignment program became  
 evident. At the same time, the willingness of defendants to comply with this Court’s Order  
 to reduce the number of prisoners being held in California’s prisons lessened  
 correspondingly.



1 Second, even if the OIG scoring system were reliable, Barton’s inference would not  
2 be. Barton’s claim is that the lack of a *perfect* correlation between prison crowding and OIG  
3 scores – because *some* prisons with high density have high scores – proves that overcrowding  
4 is no longer a factor in the provision of constitutional care. This conclusion in no way  
5 follows from the evidence. Were it so – i.e., were the lack of perfect correlation a barrier to  
6 drawing statistical inferences – all social science would be discredited. Moreover, the  
7 Receiver has explained why there will never be a perfect correlation:

8 [T]he key elements of timely access to care and proper  
9 distribution of medications are very much influenced by each  
10 institution’s total population level compared with its design  
11 capacity, the precise mix of inmates at different security levels,  
12 the precise mix of inmates belonging to various gang groups, the  
level of violence at a prison, the prevalence of lockdowns at an  
institution, and other operational factors that play out at both the  
institution and system-wide levels, all of which are influenced by  
overcrowding.

13 Receiver’s 22nd Report at 29 (*Plata* ECF No. 2525). For example, Avenal State Prison can  
14 achieve a high OIG score, despite a 184% population density, because:

15 it is easier to provide care even at higher population densities at a  
16 low-security level prison (such as Avenal State Prison) that does  
17 not have a gang population prone to violence, includes a  
18 significant number of inmates with reduced mobility or who are  
wheel-chair-bound, and has a very low level of modified program  
or lockdown.

19 *Id.* The Receiver concludes, “our experience at that type of prison does not mean that a  
20 constitutional level of care can be delivered system-wide at a higher system-wide population  
21 density given the differences among the prisons.” *Id.* In short, the lack of a *perfect*  
22 correlation proves nothing. In light of the Receiver’s most recent report, this Court finds  
23 defendants’ fourth item of evidence to be unpersuasive.

24 c. *Declaration of Jeffrey Beard, CDCR Secretary*

25 Turning to the fifth item of evidence, defendants rely on Jeffrey Beard, the newly  
26 appointed Secretary of CDCR. Beard now testifies via declaration that, having visited a  
27 majority of California’s 33 prisons, “prison population density is no longer a factor inhibiting  
28

1 California's ability to provide constitutionally adequate medical or mental health care in its  
2 prisons." Beard Decl. in Supp. of Three-Judge Mot. ¶¶ 9-10 (ECF No. 2508/4281).

3 Beard was one of seven experts for plaintiffs who testified that overcrowding was the  
4 primary cause of ongoing violations. Suffice it to say that Beard's position at the time of the  
5 trial was as an independent expert (who was uncompensated). Today, he is a party to the  
6 proceedings, and accordingly, his testimony must be regarded in that light. *See United States*  
7 *v. Abel*, 469 U.S. 45, 52 (1984) (stating that a "witness' self interest" "might lead the witness  
8 to slant, unconsciously or otherwise, his testimony in favor of or against a party").

9 Additionally, the substance of Secretary Beard's declaration is not persuasive in light  
10 of the record before this Court. Much of Beard's declaration repeats the points discussed  
11 above; he points to the numerical decline in prison population and the new construction.  
12 Beard Decl. ¶¶ 10-12. He makes no mention whatsoever of staff or treatment space, which –  
13 as explained above – are the two most important reasons that overcrowding was the primary  
14 cause of constitutional violations. Accordingly, Beard's declaration fails to rebut the  
15 overwhelming evidence before this Court that staff shortages and a lack of physical treatment  
16 space continue to plague the California prison system. Moreover, the evidence that Beard  
17 does mention – a safer prison system and reduced spread of disease – has no factual basis in  
18 the record. *Id.* ¶ 12. Beard cites no evidence of fewer lockdowns, although such information  
19 should be readily available. He makes an assertion about the spread of disease that, while  
20 appropriate for an expert declaration, should be made by a medical health professional, or at  
21 least supported by facts and figures. This leaves only one assertion of consequence: reduced  
22 crowding in reception areas. *Id.* ¶¶ 13-14. This Court credits the Receiver for working  
23 closely with defendants to remedy the 300% overcrowding in reception areas. That said, this  
24 singular improvement does not persuade the Court that overcrowding is no longer the  
25 primary cause of ongoing constitutional violations.

26 Finally, Beard's testimony is not the only expert testimony available to this Court.  
27 The Receiver stated, in his most recent report, that:  
28

1 Overcrowding and its consequences are and have been a chronic,  
2 widespread and continuing problem for almost twenty years. The  
3 overcrowding reduction order entered by the court recognizes that  
4 the connection between overcrowding in the prisons and the  
5 provision of constitutionally adequate medical and mental health  
6 care is complex, with *overcrowding creating a cascade of*  
7 *consequences that substantially interferes with the delivery of*  
8 *care.*

9 Receiver's 22nd Report at 30 (*Plata* ECF No. 2525) (emphasis added). Reviewing the  
10 evidence presented by defendants in the Three-Judge Motion, he concludes:

11 [A]t present, there is no persuasive evidence that a constitutional  
12 level of medical care has been achieved system-wide at an overall  
13 population density that is significantly higher than what the  
14 three-judge court has ordered.

15 *Id.* at 30-31. Moreover, in the *Coleman* termination proceedings, plaintiffs submitted  
16 declarations by four experts, all of whom contend that overcrowding continues to be a  
17 serious problem.<sup>35</sup> According to Dr. Craig Haney, the problems of overcrowding are no  
18 better than when he visited the prison system in 2008. He writes:

19 The CDCR's continuing inability to provide for the mental health  
20 needs of its prisoners is produced in large part by a nexus of  
21 persistent problems that my inspections made clear have hardly  
22 been faced at all, much less satisfactorily addressed. That nexus  
23 includes continuing and in some cases even more drastic  
24 shortages of mental health and correctional staff; lack of adequate  
25 clinical space; and widespread levels of inmate-patient idleness  
26 and lack of meaningful treatment opportunities that were as bad  
27 and often worse than those I observed at the time of my 2007 and  
28 2008 tours.

29 Haney Decl. ¶ 35 (*Coleman* ECF No. 4378). Dr. Edward Kaufman found severe staffing  
30 shortages, insufficient treatment space, and a lack of beds. Kaufman Decl. ¶¶ 22-23  
31 (*Coleman* ECF No. 4379). Dr. Pablo Stewart, describes these very problems as "endemic in  
32 overcrowded prison systems." Stewart Decl. ¶ 44 (*Coleman* ECF No. 4381). Stewart also  
33 explained why California's high rate of suicides (discussed in the recent *Coleman* order, *see*  
34 Apr. 5, 2013 Order at 32-43 (*Coleman* ECF No. 4539)) is related to current overcrowding.

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

1 *Id.* ¶ 174. Finally, with regard to condemned prisoners (death row), former CDCR Secretary  
2 Jeanne Woodford declared that “there is insufficient capacity to appropriately house the  
3 growing condemned population” and, with respect to mental health needs, “certainly  
4 insufficient staffing.” Woodford Decl ¶¶ 37, 43 (*Coleman* ECF No. 4380). The unanimous  
5 opinion of the Receiver and these four experts – each of whom is evaluating current  
6 conditions, and none of whom is employed by defendants – is that overcrowding remains a  
7 significant barrier to the provision of constitutional care. Even in the absence of the  
8 testimony of these other experts, Secretary Beard’s reversal – given his newly-acquired self-  
9 interest and the weakness of his arguments – is not persuasive to this Court.

10 d. *The Receiver and Special Master*

11 Turning to the sixth item of evidence, Defendants state that “[t]he *Plata* receiver and  
12 *Coleman* special master no longer cite crowding as a factor inhibiting the State’s ability to  
13 provide adequate medical and mental health care.” Three-Judge Mot. at 14 (ECF No.  
14 2506/4280). Defendants’ suggestion is that these court-appointed representatives, by failing  
15 to discuss crowding, must believe that crowding is no longer a barrier to the provision of  
16 care. In the words of the Receiver, this claim “distorts the content of our reports and  
17 misrepresents the Receiver’s position.” Receiver’s 22nd Report at 29 (*Plata* ECF No. 2525).  
18 In his most recent report, filed on January 25, 2013, the Receiver states:

19 Overcrowding and its consequences are and have been a chronic,  
20 widespread and continuing problem for almost twenty years. The  
21 overcrowding reduction order entered by the court recognizes that  
22 the connection between overcrowding in the prisons and the  
23 provision of constitutionally adequate medical and mental health  
24 care is complex, with overcrowding creating a cascade of  
25 consequences that substantially interferes with the delivery of  
26 care.

24 *Id.* The Special Master’s January 2013 report supports the same conclusion. Special  
25 Master’s 25th Report at 38-44 (*Coleman* ECF No. 4298). Thus, there is no merit to  
26 defendants’ sixth item of evidence.

27 //

28 //

1 e. *Public Safety*

2 Finally, although not explicitly listed as an item of evidence in their Three-Judge  
 3 Motion, defendants repeatedly state that complying with the Order would harm public safety.  
 4 Three-Judge Mot. at 2, 20 (ECF No. 2506/4280); Defs.’ Resp. at 6 (ECF No. 2529/4332);  
 5 Defs.’ Reply at 20-22 (ECF No. 2543/4345). Modification, however, is not appropriate  
 6 “where a party relies upon events that actually were anticipated at the time it entered into a  
 7 decree.” *Rufo*, 502 U.S. at 385. This Court anticipated the issue of public safety in our  
 8 original Opinion & Order and, after considering extensive evidence, concluded that releasing  
 9 comparatively low-risk inmates somewhat earlier than they would otherwise have been  
 10 released has no adverse effects on public safety. Aug. 4, 2009 Op. & Order at 131-81 (ECF  
 11 No. 2197/3641). The Supreme Court affirmed that determination and stated the following:

12 The three-judge court, in its discretion, may also consider  
 13 whether it is appropriate to order the State to begin without delay  
 14 to develop a system to identify prisoners who are unlikely to  
 15 reoffend or who might otherwise be candidates for early release.  
 16 Even with an extension of time to construct new facilities and  
 implement other reforms, it may become necessary to release  
 prisoners to comply with the court’s order. To do so safely, the  
 State should devise systems to select those prisoners least likely  
 to jeopardize public safety.

17 *Plata*, 131 S. Ct. at 1947. The Supreme Court thus clearly agreed that the early release of  
 18 low-risk prisoners – if done in a systematic fashion – would be consistent with public safety.  
 19 Defendants therefore repeat arguments that both this Court and the Supreme Court rejected.<sup>36</sup>

20 \_\_\_\_\_  
 21 <sup>36</sup> Defendants assert, without evidence, that the public safety problem is different  
 22 today from that which our Court initially considered in the prior Opinion & Order, because  
 23 Realignment has resulted in the diversion of the low-risk prisoners, leaving only (as they  
 24 contend) serious or violent offenders in the California prison system. Three-Judge Mot. at  
 25 19-20 (ECF No. 2506/4280); Defs.’ Reply at 21-22 (ECF No. 2543/4345). Their assertion,  
 26 however, is contradicted by their own evidence. In our prior Opinion & Order, this Court  
 27 determined that a reduction of approximately 46,000 prisoners – enough to achieve the  
 28 137.5% reduction – was feasible without endangering public safety. Aug. 4, 2009 Op. &  
 Order at 177-81 (ECF No. 2197/3641). The Supreme Court agreed, in affirming this Court’s  
 order. *Plata*, 131 S. Ct. at 1923 (noting that our order might, as an upper limit, involve the  
 release of 38,000-46,000 prisoners). Realignment, however, has only resulted in the release  
 of 24,000 prisoners from the state prison system. Thus, as a matter of simple math,  
 Realignment could not have already resulted in the early release of all prisoners that this  
 Court previously determined could be released consistent with public safety. Defendants  
 should still be able to reduce the prison population by at least 10,000 prisoners – which would  
 be sufficient to achieve the 137.5% figure – without adversely affecting public safety.

1                   3.       Defendants Have Not Achieved a Durable Remedy

2                   Finally, even if defendants had demonstrated that overcrowding was not *currently* the  
3 primary cause of ongoing constitutional violations, their intention to eliminate the out-of-  
4 state prisoner program – and thus increase prison crowding by 9,500 prisoners or  
5 approximately 12% design capacity – demonstrates that this resolution would very quickly  
6 become outdated. In constitutionally relevant terms, it demonstrates that defendants have not  
7 achieved a “durable remedy” to the problem of overcrowding.

8                   The responsibility to modify is one of equity. When a party has achieved a “durable  
9 remedy” and seeks modification on that basis, equity supports granting relief from a final  
10 judgment. *Horne*, 557 U.S. at 447.<sup>37</sup> Here, however, defendants have achieved no such  
11 remedy. In the Blueprint (which, as explained *supra*, represents defendants’ plan for the  
12 future of California corrections), defendants state their intention to eliminate the program to  
13 house prisoners out-of-state. *See* CDCR Blueprint at 6-7. On January 8, 2013, roughly  
14 concurrently with filing this Three-Judge Motion, Governor Brown terminated the  
15 Emergency Proclamation that provided the legal basis for the out-of-state program. The  
16 unmistakable effect of defendants’ decision to eliminate the out-of-state program will be to  
17 increase the institutional prison population by approximately 9,500 prisoners. *Id.* at 6-7 &  
18 App. G. Because California’s prison population today is at 150% design capacity, this  
19 decision would, in the absence of other changes, increase California’s institutional prison  
20 population to approximately 162% design capacity. With such a significant increase in  
21 prison population in the near term, it is entirely premature for defendants to seek vacatur.  
22 Whatever resolution defendants contend that they have achieved, that resolution is, without a  
23 doubt, not a durable one.

24                   Moreover, defendants are fully responsible for the lack of durability. This is not a  
25 case in which the prison population is expected to increase for unanticipated or

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26                   <sup>37</sup> As stated *supra*, *Horne v. Flores* relates largely to the resolution of the underlying  
27 violation of federal law, here the constitutional question, which is not before this Court.  
28 However, to the extent that Defendants contend otherwise, this Court finds that Defendants  
have not met the conditions identified in that case.

1 uncontrollable reasons. Rather, defendants have chosen to eliminate the out-of-state program  
2 and thus to prevent themselves from achieving a long-term solution to the overcrowding  
3 problem without taking a number of steps that they could but are unwilling to take. Perhaps  
4 most disturbing is Governor Brown's unilateral termination of the Emergency Proclamation  
5 relating to Prison Overcrowding. On the day after he filed the Three-Judge Motion, he  
6 proclaimed that "prison crowding [is] no longer . . . inhibit[ing] the delivery of timely and  
7 effective health services to inmates." Gov. Brown, Jan. 8, 2013 Proclamation. No  
8 convincing evidence to that effect has been submitted to this Court or to the *Plata* or  
9 *Coleman* courts, and the Order that governs the actions that the Governor is required by law  
10 to take is directly contrary to the representations he has made in his official capacity, as well  
11 as to the official actions he has taken in this case. This raises serious doubts as to the  
12 Governor's good faith in this matter and in the prison litigation as a whole. For this reason as  
13 well, this Court will not exercise its equity power to grant defendants relief.

14 4. Conclusion as to Three-Judge Motion, as Modified

15 In sum, defendants' contention that the continued enforcement of the population  
16 reduction order would be inequitable fails on numerous levels. First, defendants' true claim  
17 – that the mere passage of time demonstrates the error in this Court's choice of a 137.5%  
18 figure for the population cap – does not provide a valid basis for modification or vacatur of a  
19 predictive judgment. The changes that have occurred thus far represent the intended effect of  
20 our Order, as contemplated by this Court and as affirmed by the Supreme Court. The success  
21 of our Order thus far therefore provides no basis whatsoever for its vacatur but rather  
22 constitutes a reason for its continuance until its goal is met.

23 Second, and more important, defendants have failed entirely to meet their evidentiary  
24 burden. There has, without a doubt, been no significant and unanticipated change in  
25 circumstances that warrants vacatur of our Order. Defendants have represented that we may  
26 rely solely on their written submissions to demonstrate that there has been a change in  
27 circumstances and that the overcrowding that constituted the primary cause of the  
28 unconstitutional medical and mental health care conditions no longer is responsible for those

1 conditions. Having carefully reviewed the evidence contained in those submissions  
2 individually and collectively, this Court finds that defendants failed completely to support  
3 their contentions. Defendants point to some changes they have made (e.g., upgrades), but no  
4 credible evidence supports a conclusion that these changes have removed the principal  
5 *barriers* that prison crowding has raised and that have prevented the provision of  
6 constitutionally adequate medical and mental health care: inadequate treatment space and  
7 severe staff shortages. The burden falls on defendants to demonstrate the inequity of our  
8 Order, and they have failed to meet that burden here.<sup>38</sup>

9 Third, and finally, defendants have failed to demonstrate that they have achieved a  
10 durable remedy. Even if crowding at its current level – at 150% design capacity – were not  
11 the primary cause of ongoing constitutional violations, defendants intend to increase the  
12 prison population by 9,500 prisoners, or to 162% design capacity, by eliminating the out-of-  
13 state prisoner program. With such a significant increase in prison crowding planned for the  
14 near term, this Court will not exercise its equity power to order vacatur on the basis that the  
15 crowding problem has been resolved.

#### 16 **D. Crowding vis-a-vis Constitutional Violation**

17 There are various interlocking relationships, including the elements of proof, between  
18 the issue whether crowding is still the primary cause of the constitutional violations in  
19 medical and mental health care and whether there are still constitutional violations regarding  
20 the failure to provide the requisite level of care. We have thus far bifurcated the Three-Judge  
21

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22 <sup>38</sup> The vast majority of Defendants' arguments are based on the inequitable-  
23 prospective-application provision of Rule 60(b)(5). Defendants, however, make stray  
24 mention of another provision in Rule 60(b)(5), which permits modification or vacatur if "the  
25 judgment has been satisfied." Three-Judge Mot. at 5 (ECF No. 2506/4280). Defendants  
26 further state, in a rather offhand way, that "[b]y any reasonable measure, the intent of the  
27 population reduction order has been achieved." *Id.* at 19.

28 Not only have Defendants entirely failed to present any factual argument based on the  
judgment-satisfied provision of Rule 60(b)(5), this provision is wholly inapplicable. In no  
way has this Court's judgment been satisfied. Defendants have failed to prove that (1) there  
are no longer ongoing constitutional violations; (2) overcrowding has been eliminated; (3)  
overcrowding is no longer the primary cause of ongoing constitutional violations; or (4)  
137.5% is not an appropriate population cap. For all the reasons explained herein, this Court  
finds that the judgment has not been satisfied under Rule 60(b)(5).



1 Motion, pursuant to defendants' request, and have attempted to resolve only the former  
2 question – i.e., whether, regardless of the existence or non-existence of ongoing  
3 constitutional violations, defendants have met their burden of proving that prison crowding is  
4 no longer the primary cause.

5 To some extent, however, these questions are inseparable. For example, crowding  
6 could not be the primary cause of continuing constitutional violations if there were no longer  
7 such violations, and much of the evidence and argument advanced by defendants in the  
8 Three-Judge Motion necessarily addresses the latter question, as well as the former. *See,*  
9 *e.g.*, Three-Judge Mot. at 21 (ECF No. 2506/4280) (“The evidence proves that there are no  
10 systemic, current, and ongoing federal law violations. All evidence indicates that at the  
11 current population density, inmates are receiving health care that exceeds constitutional  
12 standards.”). Had defendants presented the contention of constitutional compliance to this  
13 Court (or rather, had they not abandoned that contention), we would, of course, be required  
14 to consider whether they had demonstrated that there was no longer a constitutional violation  
15 that warranted the continued imposition of a remedy, i.e., the reduction in the size of the  
16 California prison population to 137.5% design capacity. *Horne*, 557 U.S. at 447.<sup>39</sup> Thus,  
17 while the evidence submitted by defendants does not support a vacatur of the population cap  
18 on the ground that overcrowding is no longer the primary cause of the current prison  
19 conditions, it could – in theory – support the vacatur of the population cap on the ground that  
20 the unconstitutional prison conditions on which our Order was based no longer exist.  
21 Because the existence of a constitutional violation is a condition precedent to continued  
22 enforcement of this Court's population reduction order, and because we believe it desirable  
23 that it be clear that there is a sound legal basis to our Order, we explain briefly the basis for  
24 our continuing authority to issue remedial orders and to enforce compliance with them by  
25 means of contempt or otherwise.

26 \_\_\_\_\_  
27 <sup>39</sup> We could alternatively have referred the issue to the *Plata* and *Coleman* courts  
28 separately or collectively, or determined that the question must be directed to them directly.  
As stated *supra*, we make no decision here as to the procedural issue in question.

1 It is necessary to first provide some context to this Court’s population reduction order.  
2 The existence of an ongoing constitutional violation is required for a prisoner release order.  
3 *Plata*, 131 S. Ct. at 1929 (“ Before a three-judge court may be convened, a district court first  
4 must have entered an order for less intrusive relief that failed to remedy the constitutional  
5 violation and must have given the defendant a reasonable time to comply with its prior  
6 orders.”). Here, there had been numerous orders in both *Plata* and *Coleman* for less intrusive  
7 relief over a period of many years prior to the convening of the three-judge court, and those  
8 orders had failed to remedy the constitutional violations with respect to medical *and* mental  
9 health care. Aug. 4, 2009 Op. & Order at 54 (ECF No. 2197/3641) (“The *Plata* and *Coleman*  
10 courts years ago identified the constitutional deficiencies underlying this proceeding.”). The  
11 three-judge court was thus convened to provide remedial relief for two distinct, separate, and  
12 independent constitutional violations in failing to provide essential care in the California  
13 prison system. Following fourteen days of hearings, this Court found that overcrowding was  
14 the primary cause of the ongoing constitutional violations with respect to both medical *and*  
15 mental health care. Most important, there was sufficient evidence in *each* case to support a  
16 population reduction order.<sup>40</sup> In other words, had there been only a medical health care case,  
17 this Court would have ordered defendants to achieve a maximum prison population of  
18 137.5% design capacity. Similarly, had there been only a mental health care case, this Court

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20  
21 <sup>40</sup> See Aug. 4, 2009 Op. & Order at 58-60 (ECF No. 2197/3641) (discussing how  
22 crowding causes “general problems in the delivery of medical and mental health care”); *id.* at  
23 61-63 (discussing how overcrowded reception centers result in insufficient medical care); *id.*  
24 at 63-65 (discussing the especially grave consequences of overcrowded reception centers for  
25 individuals with mental illness); *id.* at 65-68 (discussing the effect of insufficient treatment  
26 space and the inability to properly classify inmates on both medical and mental health care);  
27 *id.* at 68-70 (discussing lack of space for mental health beds); *id.* at 70-72 (discussing how  
28 conditions of confinement result in the spread of diseases); *id.* at 72-73 (discussing how  
conditions of confinement exacerbate mental illness); *id.* at 74-76 (discussing shortages in  
medical health care staff); *id.* at 76-77 (discussing shortages in mental health care staff); *id.*  
at 79-80 (discussing medication management issues in both *Plata* and *Coleman*); *id.* at 82  
(discussing the effect of lockdowns on the provision of medical health care); *id.* at 83  
(discussing the effect of lockdowns on the provision of mental health care); *id.* at 83-85  
(discussing the need for medical records in medical and mental health care); *id.* at 85-86  
(discussing the increasing acuity of mental illness); *id.* at 87-88 (discussing suicides); *id.* at  
87-88 (discussing preventable deaths).

1 would have ordered defendants to achieve that same population cap.<sup>41</sup> It follows that, even if  
2 defendants were able to achieve constitutional compliance in one case, so long as there were  
3 ongoing constitutional violations in the other, this Court's Order would be necessary and  
4 would remain in effect.

5 It has recently been determined that there are still ongoing constitutional violations  
6 with respect to the provision of mental health care in the California prison system. On  
7 April 5, 2013, the *Coleman* court found that "ongoing constitutional violations remain" "in  
8 the delivery of adequate mental health care." Apr. 5, 2013 Order at 67 (*Coleman* ECF No.  
9 4539). We accept that holding. Additionally, nothing presented by defendants here would  
10 cause us to question the result found by the *Coleman* court. The *Coleman* court holding  
11 alone is sufficient for this Court to find a continuing constitutional violation, and that holding  
12 – together with our holding regarding crowding – requires us to conclude that the primary  
13 cause of the continuing constitutional violations in *Coleman* continues to be overcrowding.<sup>42</sup>  
14 Moreover, because the *Coleman* case provides a distinct, separate, and independent basis for  
15 our Order, this conclusion compels the continuation in effect of our June 2011 Order and  
16 each of its terms and provisions.

17 The constitutional question is also resolved, at least for the purposes of this  
18 proceeding, with respect to the provision of medical health care in the California prison  
19 system. Defendants initially presented this Court with the contention that they have achieved  
20 Eighth Amendment compliance with respect to medical health care, Three-Judge Mot. at  
21 16-17 (ECF No. 2506/4280), but later withdrew that contention from this Court's

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22  
23 <sup>41</sup> That one three-judge court was convened, instead of two, was for practical reasons  
24 only. The individual district courts recommended consolidation "[f]or purposes of judicial  
25 economy and avoiding the risk of inconsistent judgments." July 23, 2007 Order in *Plata*,  
26 2007 WL 2122657, at \*6; July 23, 2007 Order in *Coleman*, 2007 WL 2122636, at \*8. The  
Supreme Court agreed, stating that there was a "certain utility in avoiding conflicting decrees  
and aiding judicial consideration and enforcement." *Plata*, 131 S. Ct. at 1922. It was a  
"limited consolidation" only and, most important, "[t]he order of the three-judge District  
Court is applicable to both cases." *Id.*

27 <sup>42</sup> We recognize that, for purposes of the denial of this motion to vacate, we need only  
28 determine, as we have *supra*, that defendants failed to show a significant and unanticipated  
change in circumstances that renders continued enforcement of our Order inequitable.

1 consideration. Defs.’ Resp. at 1 (ECF No. 2529/4332). Unlike in *Coleman*, however, they  
2 have not filed a motion in *Plata* to terminate on the ground that there are no longer  
3 continuing constitutional violations with respect to medical health care.<sup>43</sup> At the same time,  
4 defendants have urged this Court to rule promptly on the Three-Judge Motion. *Id.* at 4. We  
5 do so here and must presume, as the evidence indicates, *see* Receiver’s 22nd Report at 30-31  
6 (*Plata* ECF No. 2525), that the unconstitutional provision of medical health care continues  
7 unabated,<sup>44</sup> and thus *Plata*, like *Coleman*, provides a distinct, separate, and independent basis  
8 for our June 2011 Order and each of its terms and provisions.

9 On the basis of the above, we hold that not only must the Three-Judge Motion be  
10 dismissed because defendants have failed to carry their burden with respect to the “primary  
11 cause” question, but that the constitutional violations with respect to the provision of medical  
12 and mental health care are still ongoing. This Court therefore DENIES the Three-Judge  
13 Motion.

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21 <sup>43</sup> Recently, following our unsuccessful efforts to obtain any answer to our inquiries as  
22 to whether or when a motion to terminate might be filed, Defs.’ Resp. at 1 (ECF No.  
23 2529/4332) (stating that they might file a motion to terminate “in a few months”), the *Plata*  
24 court issued an order in that case requiring 120-day notice before the filing of a motion to  
25 terminate. Feb. 21, 2013 Order Granting in Part & Denying in Part Pls.’ Mot. for Disc. at 5  
(*Plata* ECF No. 2546). Although defendants have filed an interlocutory appeal of that order,  
the appeal has no effect on our decision here or on defendants’ obligation to comply with our  
Order.

26 <sup>44</sup> The determination that medical care in the California prison system does not meet  
27 constitutional standards is set forth in the *Plata* court’s 2005 ruling appointing a receiver to  
28 manage the delivery of medical care for CDCR. Oct. 3, 2005 FF&CL, 2005 WL 2932253, at  
\*1 (“The Court has given defendants every reasonable opportunity to bring its prison medical  
system up to constitutional standards, and it is beyond reasonable dispute that the State has  
failed.”). That determination remains in effect.

1 **IV. PLAINTIFFS' CROSS-MOTION**

2 On February 12, 2013, plaintiffs filed a cross-motion for additional relief. Plaintiffs  
3 contend that, even while overcrowding in the California prison system overall has lessened,  
4 overcrowding in certain California prisons has persisted or increased. Because the severe  
5 overcrowding at these prisons prevents compliance with the Eighth Amendment, plaintiffs  
6 request that this Court supplement the systemwide population cap and “order defendants to  
7 propose a plan for institution-specific population caps, based on the ability of each institution  
8 to provide constitutionally adequate care.” Cross-Mot. at 23 (ECF No. 2528/4331).

9 There is some merit to plaintiffs’ argument. As a preliminary matter, this Court  
10 observes that plaintiffs are *not* seeking a 137.5% population cap for each prison. Plaintiffs’  
11 requested order would require defendants to “develop a plan for prison-specific caps . . . that  
12 includes a discussion of each prison’s clinical and custody staffing levels, staffing vacancies,  
13 physical plant limitations, prisoner custody level and available programs.” Cross-Mot. at 24  
14 (ECF No. 2528/4331). This request finds some support in the Receiver’s most recent report.  
15 He describes the differences among various prison institutions and writes that “care at some  
16 institutions may require a lower population density while care at other institutions may be  
17 constitutional even at higher population densities.” Receiver’s 22nd Report at 29 (*Plata* ECF  
18 No. 2525).

19 This Court, however, rejects plaintiffs’ Cross-Motion for two reasons. First,  
20 plaintiffs’ request is premature. This Court has previously stated, “[u]nless and until it is  
21 demonstrated that a single systemwide cap provides inadequate relief, we will limit the relief  
22 we order to that form of order.” Aug. 4, 2009 Op. & Order at 121 (ECF No. 2197/3641).  
23 Because defendants have not yet met the systemwide cap of 137.5%, it is difficult to  
24 determine whether that cap provides inadequate relief. Indeed, as defendants reduce the  
25 prison population from 150% to 137.5% design capacity at a systemwide level, the  
26 population levels at specific institutions may decline in unexpected ways. Accordingly, it is  
27 best to wait and reassess the need for institution-specific caps, if they are needed, when  
28

1 defendants reduce the systemwide prison population to 137.5% design capacity, or at some  
2 other time deemed appropriate by the Receiver and Special Master.

3         Second, it undermines state flexibility at a time when the need for such flexibility is  
4 paramount. As this Court stated previously, “an institution-by-institution approach to  
5 population reduction would interfere with the state’s management of its prisons more than a  
6 single systemwide cap, which permits the state to continue determining the proper population  
7 of individual institutions.” Aug. 4, 2009 Op. & Order at 121 (ECF No. 2197/3641). The  
8 Supreme Court agreed, stating that our systemwide relief order leaves discretion to state  
9 officials to “to shift prisoners to facilities that are better able to accommodate overcrowding,  
10 or out of facilities where retaining sufficient medical staff has been difficult.” *Plata*, 131  
11 S. Ct. at 1941. The need for such flexibility has not abated. Defendants must reduce the  
12 institutional prison population by approximately 9,000 more prisoners to comply with this  
13 Court’s order to reduce the prison population to 137.5% design capacity. Such a reduction,  
14 although certainly feasible (for reasons we discuss *infra*) will involve significant effort. This  
15 Court will not add to those efforts unnecessarily.<sup>45</sup>

16         Accordingly, this Court DENIES plaintiffs’ Cross-Motion without prejudice to  
17 refiling when defendants reduce the systemwide prison population to 137.5% design  
18 capacity, or at such other time as this Court may deem appropriate.

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25         <sup>45</sup> Contrary to defendants’ suggestion, the Supreme Court did not “unambiguously  
26 reject[] institution-specific caps.” Defs.’ Reply at 19 (ECF No. 2543/4345). To the contrary,  
27 the Supreme Court’s discussion was limited to rejecting defendants’ argument that our order  
28 was overbroad because our order was flexible. Recognizing the flexibility of our order does  
not compel, or even imply, the conclusion that institution-specific caps could not  
subsequently be appropriate.

1 **V. COMPLIANCE**

2 Having denied the Three-Judge Motion to vacate this Court's population reduction  
3 order, we advise defendants once again that they must take all steps necessary to comply with  
4 this Court's June 30, 2011 Order, as amended by the January 29, 2013 Order, requiring  
5 defendants to reduce the overall prison population to 137.5% design capacity by  
6 December 31, 2013.

7 **A. Defendants' Contumacious Conduct**

8 Defendants have thus far engaged in openly contumacious conduct by repeatedly  
9 ignoring both this Court's Order and at least three explicit admonitions to take all steps  
10 necessary to comply with that Order. Although our Order was delayed for two years pending  
11 review by the Supreme Court, and thus defendants were effectively afforded four years in  
12 which to achieve the reduction in prison population, defendants developed only one solution:  
13 Realignment, which became effective in October 2011. While Realignment was, to  
14 defendants' credit, a significant step forward in reducing the prison population, it became  
15 clear by early 2012 at the latest, on the basis of defendants' own Blueprint, that Realignment  
16 alone could not achieve the necessary reduction to 137.5% design capacity. Yet defendants  
17 took no further steps to achieve compliance. Defendants did subsequently report to this  
18 Court regarding various measures that could reduce the prison population to 137.5% design  
19 capacity by June 2013 or December 2013 but explicitly stated that these measures "do not  
20 comprise the State's plan because the State has already issued its plan for the future of the  
21 State's prison system, the Blueprint." Defs.' Resp. to Oct. 11, 2012 Order at 8 (ECF No.  
22 2511/4284). Because the Blueprint will not reduce the prison population to 137.5% design  
23 capacity by June 2013, or December 2013, the Blueprint is not a plan for compliance; it is a  
24 plan for non-compliance. In other words, the Blueprint describes what defendants have done  
25 and what they will do with respect to complying with our Order. What they have done is  
26 make various changes to the state prison system with the expected outcome that California  
27 prisons will house 9,000 more inmates than our Order permits at the extended deadline of  
28 December 2013. What further steps they will take in order to comply is equally clear: None.

1 In August 2012, this Court advised defendants that their intention to file a  
2 modification motion provided no excuse for their failure to take steps to comply with this  
3 Court's Order in the meantime:

4 Pending further order of the Court, defendants shall take all steps  
5 necessary to comply with the Court's June 30, 2011 order,  
6 including the requirement that the prison population be reduced  
to 137.5% by June 27, 2013.

7 Aug. 3, 2012 Order at 4 (ECF No. 2460/4220). Defendants, however, took no such steps. As  
8 plaintiffs correctly observed, despite defendants' own acknowledgment that further steps to  
9 achieve the necessary population reduction – such as good time credits or sentencing reform  
10 – required legislative authorization, they “made no effort to seek the needed legislation.”  
11 Pls.' Resp. to Defs.' Resp. to Sept. 7, 2012 Order at 2 (ECF No. 2481/4247). In December  
12 2012, this Court again reminded defendants that they “must take further steps to achieve full  
13 compliance.” Dec. 6, 2012 Order at 2-3 (ECF No. 2499/4269). Instead of doing so,  
14 defendants filed a motion to vacate our Order altogether and took no further action. Three-  
15 Judge Mot. (ECF No. 2506/4280). That same month, defendants filed a status report, in  
16 which they admitted non-compliance and made it clear that they had no intention of taking  
17 further steps to comply. Defs.' Jan. 2013 Status Report at 1 (ECF No. 2518/4292) (“Based  
18 on the evidence submitted in support of the State's motions, further population reductions are  
19 not needed . . .”). This Court then reiterated, for the third time, that such filings do not  
20 excuse defendants from taking steps toward compliance with our Order:

21 Neither defendants' filings of the papers filed thus far nor any  
22 motions, declarations, affidavits, or other papers filed  
23 subsequently shall serve as a justification for their failure to file  
and report or take any other actions required by this Court's  
Order.

24 Jan. 29, 2013 Order at 2 (ECF No. 2527/4317). Defendants, instead of taking further steps to  
25 comply with our Order, submitted status reports for February and March 2013 that repeated  
26 the language of non-compliance verbatim from the January 2013 order. Defs.' Feb. 2013  
27 Status Report at 1 (ECF No. 2538/4342); Defs.' March 2013 Status Report at 1 (ECF No.  
28



1 2569/4402). In short, for approximately a year, defendants have acted in open defiance of  
2 this Court's Order.

3 Being more interested in achieving compliance with our Order than in holding  
4 contempt hearings, this Court has exercised exceptional restraint. Reserving its right to take  
5 whatever action may be appropriate with respect to defendants' past conduct, this Court now  
6 orders defendants once more to take steps *beyond* that of Realignment and to do so forthwith.  
7 Realignment has been a constructive measure, but its effects have reached their maximum,  
8 and it will not reduce the prison population to 137.5% design capacity. Defendants have  
9 been granted a six-month extension, and this Court expects them to use that time to institute  
10 additional measures that will serve to reduce the prison population by an additional 9,000  
11 inmates by December 2013.<sup>46</sup>

12 **B. Defendants' January 7, 2013 Filings**

13 In a recent filing, defendants identified various measures by which they could achieve  
14 the necessary population reduction by December 2013. Defs.' Resp. to Oct. 11, 2012 Order  
15 (ECF No. 2511/4284). They state in that filing, however, that (1) they have "taken major  
16 action in all five of the[] areas" listed in our prior Opinion & Order and that therefore any  
17 "further actions in these areas could not be implemented without adversely impacting public  
18 safety," *id.* at 3, and (2) "[e]ach of the prison population reduction measures described below  
19 would require rewriting or waiving state statutes and constitutional provisions," *id.* at 6. The  
20 first statement is inaccurate, and the second is misleading. What is evident, however, is that  
21 defendants do not intend to adopt those measures.

22 Although defendants may have taken *some* action in the five areas identified in our  
23 prior Opinion & Order, they have not taken the *degree* of action in any of them that this  
24 Court determined was necessary, and that could be taken without adversely impacting public  
25 safety. For example, with respect to the second and third areas – the diversion of technical

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26  
27 <sup>46</sup> We assume, for practical reasons, that defendants will not be able to institute and  
28 complete any new construction projects between now and December 2013 that would  
increase capacity. Accordingly, we assume that, at this stage, compliance with the 137.5%  
population cap could be achieved only by reducing the prison population by 9,000 inmates.

1 parole violators and the diversion of low-risk offenders with short sentences – Realignment  
2 diverts only a small subset of low-risk prisoners and parolees to county jails. Significant  
3 opportunity for further diversion thus remains. *See, e.g.*, Defs.’ Resp. to Oct. 11, 2012 Order  
4 at 11-12 (ECF No. 2511/4284) (identifying a possible population reduction measure  
5 involving the diversion to the county jail system of inmates with “nine months or less” time  
6 to serve remaining). With respect to the fifth category – other reforms including changes to  
7 sentencing law – defendants have not pursued “release or diversion of certain  
8 [s]ub-populations, such as women, the elderly and the sick from prison to community-based  
9 facilities.” Aug. 4, 2009 Op. & Order at 154 (ECF No. 2197/3641). In particular, despite the  
10 fact that 14% of California’s misnamed “Lifer”<sup>47</sup> population – which consists of over 30,000  
11 inmates – are over 55 years old, defendants have taken no meaningful action to release  
12 elderly low-risk prisoners in this category. *See* Robert Weisberg et al., Stanford Criminal  
13 Justice Center, *Life in Limbo: An Examination of Parole Release for Prisoners Serving Life*  
14 *Sentences with the Possibility of Parole*, Sept. 2011, at 16-17. It is more than likely that

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15 <sup>47</sup> “Lifer” refers principally to inmates serving a “term-to-life” sentence with the  
16 possibility of parole. The term “Lifer” incorrectly conveys the impression that any such  
17 inmate must have committed a horrendous crime in order to have received a life sentence.  
18 To the contrary, under California’s determinate sentencing scheme, most Lifers are given a  
19 minimum prison term (generally 15-20 years), after which they are eligible for parole unless  
20 they are deemed a threat to public safety. Lifers include, for example, individuals who  
21 committed vehicular homicide – individuals who were extremely reckless when younger but  
22 are far less so having reached middle age or more. *E.g.*, *Sass v. California Bd. of Prison*  
23 *Terms*, 461 F.3d 1123 (9th Cir. 2006), *overruled on other grounds by Hayward v. Marshall*,  
24 603 F.3d 546 (9th Cir. 2010) (en banc). Very few Lifers have been released, however,  
25 despite their low risk of recidivism. As a result, the Lifer population now constitutes 20% of  
26 the entire California prison system. *See generally* Robert Weisberg et al., Stanford Criminal  
27 Justice Center, *Life in Limbo: An Examination of Parole Release for Prisoners Serving Life*  
28 *Sentences with the Possibility of Parole*, Sept. 2011, available at  
[http://blogs.law.stanford.edu/newsfeed/files/2011/09/SCJC\\_report\\_Parole\\_Release\\_for\\_Lifers.pdf](http://blogs.law.stanford.edu/newsfeed/files/2011/09/SCJC_report_Parole_Release_for_Lifers.pdf).

Although defendants object to the release of elderly Lifers on the ground of public  
safety, Defs.’ Resp. to Oct. 11, 2012 Order at 19-20 (ECF No. 2511/4284), it appears that  
75% of these Lifers have been placed in CDCR’s lowest risk category, and the historical  
recidivism rate of Lifers is approximately 1% – in comparison to California’s overall  
recidivism rate of 48%. *See* Weisberg, *Life in Limbo*, at 16-17. Moreover, elderly  
individuals are much less likely to recidivate as they are generally less likely to commit  
crimes. *Id.* at 17 (“For most offenses – and in most societies – crime rates rise in the early  
teenage years, peak during the mid-to-late teens, and subsequently decline dramatically. Not  
only are most violent crimes committed by people under 30, but even the criminality that  
continues after that declines drastically after age 40 and even more so after age 50.”).

1 defendants could reduce the deficit with respect to the 137.5% population cap by  
2 approximately half, without risk to public safety, were it to make the appropriate assessments  
3 and take the appropriate actions with respect to these so-called “Lifers” alone. Clearly, much  
4 benefit could be obtained with respect to the second, third, and fifth categories identified in  
5 our prior Opinion & Order were defendants to take even moderate steps in those areas. Yet,  
6 as far as legislative action is required, defendants have not advised us of anything they have  
7 done to obtain waivers of legislative obstacles.

8       Perhaps defendants’ greatest failure to act, however, is with respect to the first  
9 category identified in our prior Opinion & Order: the expansion of good time credits.  
10 Although defendants have expanded the good time credits program somewhat under Senate  
11 Bill 18, the current system falls far short of what this Court described as being a feasible  
12 means of reducing the prison population without having any adverse impact on public safety.  
13 Aug. 4, 2009 Op. & Order at 139-45 (ECF No. 2197/3641).<sup>48</sup> California continues to limit  
14 excessively the length, and to restrict the availability, of good time credits, despite this  
15 Court’s determination that eliminating these restrictions would enable defendants to safely  
16 reduce the prison population. *Id.* at 177-81 (citing Expert Panel on Adult Offender  
17 Recidivism Reduction Programming at 95<sup>49</sup>). Accordingly, if defendants were to adopt the  
18 policies of other jurisdictions and increase the length of good time credits to 4-6 months and  
19 award credits to inmates regardless of their offense or strike level, these changes would, on  
20 their own, reduce the prison population by far more than the amount necessary to comply  
21 with the 137.5% population cap. Again, even a moderate change in policy would enable  
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23       <sup>48</sup> Dr. James Austin, plaintiffs’ primary expert on good time credits, submitted a  
24 declaration stating that, if California were to bring its good time credits program in line with  
25 other jurisdictions that have safely implemented such programs – i.e., permitting four to six  
26 months of credit – it would reduce the prison population by 7,000 inmates. Austin Decl.  
27 ¶¶ 12-15 (ECF No. 2420-1/4152-1).

28       <sup>49</sup> This report described various good time credit reforms that had the potential to  
reduce the prison population by 32,000 inmates. Very few of these reforms have been  
implemented, and thus the opportunity for further reduction in the prison population through  
expansion of good time credits remains significant. The report is available at  
<http://sentencing.nj.gov/downloads/pdf/articles/2007/July2007/document03.pdf>

1 defendants to comply with this Court's Order, and, again, defendants have not advised us that  
2 they have sought such a change.

3         Contrary to Defendants' representations, not all measures identified in defendants'  
4 filing require the waiver of state laws. For example, the out-of-state prisoner program was  
5 initially enacted under the Governor's emergency powers. It therefore follows that it could  
6 be continued or reinstated under those powers.<sup>50</sup> We note that continuance of the out-of-state  
7 prisoner program is not necessary to enable defendants to comply with our Order. It is, of  
8 course, defendants' choice how they will comply. As we have explained, among the many  
9 means for reducing the prison population, the expansion of good time credits would alone  
10 enable defendants to comply, and the early release of low-risk elderly "Lifers," in  
11 combination with other equally minor reforms, would do the same. Certainly some  
12 combination of some of these low-risk reforms would enable defendants to reduce the prison  
13 population to well below 137.5% design capacity even while terminating the out-of-state  
14 prisoner program, which defendants have advised us is extremely costly, and which has the  
15 further disadvantage of preventing prisoners from maintaining relationships with family  
16 members.

17         Although they have done little if anything to obtain various state waivers, defendants  
18 have advised this Court that such waivers will be necessary if defendants are to implement  
19 some of the measures in question. Defs.' Resp. to Oct. 11, 2012 Order (ECF No.  
20 2511/4284). This Court is empowered to override the applicable state provisions, if  
21 necessary, 18 U.S.C. § 3626(a)(1)(B),<sup>51</sup> but will do so only as a matter of last resort. It would  
22 be more in keeping with principles of federalism, however, were the Governor to use his best  
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24         <sup>50</sup> That the Governor has prematurely declared the overcrowding problem over is of no  
25 consequence, given the facts established in this case.

26         <sup>51</sup> This provision of the PLRA reads: "The court shall not order any prospective relief  
27 that requires or permits a government official to exceed his or her authority under State or  
28 local law or otherwise violates State or local law, unless – (i) Federal law requires such relief  
to be ordered in violation of State or local law; (ii) the relief is necessary to correct the  
violation of a Federal right; and (iii) no other relief will correct the violation of the Federal  
right." 18 U.S.C. § 3626(a)(1)(B).

1 efforts to obtain such waivers. Nothing in the record to date suggests that he has done so. In  
2 a concurrently filed order, we therefore order defendants to list, *in the order of their*  
3 *preference*, (1) all possible measures to reduce the prison population that have been  
4 suggested by this Court or identified as possible prison reduction measures by plaintiffs or  
5 defendants in the course of these proceedings; (2) the extent of population reduction that  
6 could be accomplished by each measure, including retroactive application where applicable;  
7 and (3) which measures require waivers of state law (and which specific laws). Additionally,  
8 because defendants' projections may prove inaccurate, as they have in the past, this Court  
9 orders defendants "to begin without delay to develop a system to identify prisoners who are  
10 unlikely to reoffend or who might otherwise be candidates for early release." *Plata*, 131  
11 S. Ct. at 1947. The details are available in the concurrently filed order.

12 We note that, although defendants have identified ten patchwork steps – steps that are  
13 neither retroactive nor sustained – that in combination would serve to reduce the prison  
14 population to the requisite number by December 31, 2013, some of the measures that we  
15 have discussed in this Section would be more effective and desirable if adopted as  
16 permanent, substantive changes in prison policy. In one case, the implementation of the  
17 measure in itself would enable defendants to achieve compliance; in another, the  
18 implementation of the measure, along with only one of a number of other measures, would  
19 enable defendants to reach that goal readily. *See* Pls.' Statement in Resp. to Oct. 11, 2012  
20 Order Re: Population Reduction (ECF No. 2509/4283). Furthermore, adopting a number of  
21 the measures discussed in this Section as substantive changes would benefit the  
22 administration of the prison system over the long run. It is that long-term obligation that  
23 defendants must bear in mind in achieving a "durable remedy" to the problem of prison  
24 crowding. Accordingly, in responding to our concurrently filed order that directs defendants  
25 to provide us with a plan for compliance with our Order, defendants must provide assurances  
26 that those measures will remain in effect for an indefinite future period, and that the prison  
27 population will be maintained at 137.5% design capacity pending further order of this Court.  
28

1           **C.     Compliance Going Forward**

2           Finally, this Court observes that the prison overcrowding crisis has plagued California  
3 for over twenty years and defied the efforts made in good faith by Governor Brown's  
4 predecessors, including Governor Deukmejian and Governor Schwarzenegger. Fully aware  
5 of this context, the Supreme Court affirmed this Court's determination that the prison  
6 population must be reduced to 137.5% design capacity within a two-year period.  
7 Accordingly, Governor Brown has a duty to exercise in good faith his full authority,  
8 including seeking any changes to or waivers of state law that may be necessary to ensure  
9 compliance with the Supreme Court's judgment. *See, e.g., Cooper v. Aaron*, 358 U.S. 1, 18  
10 (1958); *United States v. Barnett*, 376 U.S. 681 (1964).

11           This Court reminds defendants *yet again* that they continue to be subject to the terms  
12 of this Court's order. As the Supreme Court explained in *Maness v. Meyers*, 419 U.S. 449,  
13 458 (1975):

14                     We begin with the basic proposition that all orders and judgments  
15                     of courts must be complied with promptly. If a person to whom a  
16                     court directs an order believes that order is incorrect the remedy  
17                     is to appeal, but, absent a stay, he must comply promptly with the  
                      order pending appeal. Persons who make private determinations  
                      of the law and refuse to obey an order generally risk criminal  
                      contempt even if the order is ultimately ruled incorrect.


18 *Id.* at 458. The rule in *Maness* that parties must comply whether or not they believe a court's  
19 order is incorrect and must do so during any period that they may be contesting its validity is  
20 applicable to public and private parties alike. Specifically, the rule is applicable to Governor  
21 Brown, as well as the lowliest citizen. That Governor Brown may believe, contrary to the  
22 evidence before this Court, that "prison crowding [is] no longer . . . inhibit[ing] the delivery  
23 of timely and effective health services to inmates,"<sup>52</sup> will not constitute an excuse for his  
24 failure to comply with the orders of this Court. Having been granted a six-month extension,  
25 defendants have no further excuse for non-compliance. If defendants do not take all steps  
26 necessary to comply with this Court's June 30, 2011 Order, as amended by this Court's

27 \_\_\_\_\_  
28                     <sup>52</sup> Gov. Brown, Jan. 8, 2013 Proclamation.

1 January 29, 2013 Order, including complying with the order filed in conjunction with this  
2 opinion, they will without further delay be subject to findings of contempt, individually and  
3 collectively. We make this observation reluctantly, but with determination that defendants  
4 will not be allowed to continue to violate the requirements of the Constitution of the United  
5 States.

6  
7 **IT IS SO ORDERED.**


8  
9 Dated: 04/11/13

  
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STEPHEN REINHARDT  
UNITED STATES CIRCUIT JUDGE  
NINTH CIRCUIT COURT OF APPEALS

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13 Dated: 04/11/13

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

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17 Dated: 04/11/13

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

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