NO. 13-198

In the

# Supreme Court of the United States

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

v.

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

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

## JOINT MOTION TO DISMISS OR AFFIRM


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## QUESTIONS PRESENTED

1. Whether this Court has jurisdiction over a direct appeal from orders of a three-judge district court, even though none of the orders grants or denies an injunction, as required by 28 U.S.C. § 1253.

2. Whether the three-judge district court applied the correct legal standard governing vacatur or modification of injunctive relief under Federal Rules of Civil Procedure 60(b)(5), consistent with this Court's decision in *Brown v. Plata*, 131 S. Ct. 1910 (2011).

3. Whether the three-judge district court acted within its discretion under Rule 60(b)(5) when, based on its detailed and thorough evaluation of Appellants' evidence and the current record evidence as a whole, it found that Appellants failed to demonstrate that their partial compliance with an injunction this Court affirmed two years ago warranted the complete vacatur of that injunction.

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## MOTION TO DISMISS OR AFFIRM

Two years ago, this Court reviewed a three-judge district court order that capped overcrowding in the California prison system to address deeply entrenched Eighth Amendment violations. After a thorough consideration of the merits, this Court affirmed the injunction, holding that the cap is necessary and rejecting Appellants' arguments that compliance would endanger public safety.

Appellants now seek a second bite at the apple. Having refused to fully comply with the injunction this Court affirmed, and having failed to convince the lower court to vacate or modify it, Appellants once again seek direct appellate review in this Court, raising essentially the same arguments this Court previously rejected. The Court should dismiss for want of jurisdiction. This Court's mandatory appellate jurisdiction is reserved for a narrow set of particularly consequential decisions: A three-judge court's decision to grant or deny an injunction fits the bill under 28 U.S.C. § 1253; a failed effort to vacate or modify an injunction already affirmed by this Court does not.

Even if this Court had jurisdiction, the proper course would be to summarily affirm. The three-judge court correctly found that Appellants failed to identify the kind of substantially changed conditions that would merit vacating or modifying an injunction this Court affirmed. And Appellants' complaint about the effect of compliance on public safety has been heard and rejected before. Mass releases did not materialize after this Court affirmed two years ago.

Crucially, after this Court denied Appellants' stay request, Governor Brown announced that the state would comply with the overcrowding cap without releasing a single prisoner, by expanding prison capacity. In short, 2011 was the proper time for this Court's plenary review; it is now time for compliance with court orders and the Constitution.

## JURISDICTION

This Court lacks jurisdiction. Under 28 U.S.C. § 1253, this Court has appellate jurisdiction only over orders "granting or denying … an interlocutory or permanent injunction … required by any Act of Congress to be heard and determined by a district court of three judges." The orders here neither grant nor deny an injunction. Rather, they modify (or refuse to dissolve or modify) the injunction this Court already affirmed. Appeals from orders "modifying … or refusing to dissolve or modify injunctions" lie with the courts of appeals, not this Court. 28 U.S.C. § 1292(a)(1).

## STATEMENT OF THE CASE

These cases are about "serious constitutional violations in California's prison system" that "have persisted for years" and "remain uncorrected." *Brown v. Plata*, 131 S. Ct. 1910, 1922 (2011). As they did in the first appeal, Appellants speak as if the violations are a distant memory for which they are no longer responsible. JS 7–8. But the current record proves otherwise. The *Coleman* court recently found that Appellants continue to violate the Eighth Amendment, and Appellants have not even argued to the *Plata* court that their Eighth Amendment violations have ceased.

This appeal arises from the three-judge court's denial of Appellants' motion, under Federal Rule of Civil Procedure 60(b)(5), to vacate the injunction this Court recently affirmed. On remand, Appellants took initial steps to reduce overcrowding to approximately 147%, but since then have obstructed rather than implemented this Court's mandate that they reduce overcrowding to 137.5% within two years. In the face of Appellants' intransigence and exercising its broad discretion under Rule 60(b)(5), the three-judge court carefully reviewed Appellants' evidence and denied their motion.

### A. Prior Proceedings and This Court's Decision in *Plata*

1. For decades, "[t]he degree of overcrowding in California's prisons [has been] exceptional." 131 S. Ct. at 1923. This overcrowding has caused severe, unconstitutional deficiencies in California's ability to provide healthcare and mental healthcare to its prisoners. These constitutional harms gave rise to two federal lawsuits.

*Coleman v. Brown* "involves the class of seriously mentally ill persons in California prisons." *Id.* at 1926. Nearly two decades ago, the *Coleman* court found "overwhelming evidence of the systemic failure to deliver necessary care to mentally ill inmates." *Coleman v. Wilson*, 912 F. Supp. 1282, 1316 (E.D. Cal. 1995). A Special Master was appointed, and after years "of slow improvement," he found that "the state of mental health care in California's prisons was deteriorating" due to "increased overcrowding" that would inexorably impede any further remedial progress. 131 S. Ct. at 1926.

*Plata v. Brown* "involves the class of state prisoners with serious medical conditions." *Id.* The state has long "conceded that deficiencies in prison medical care violated prisoners' Eighth Amendment rights." *Id.* The record in *Plata* showed that "[m]edical facilities lacked necessary medical equipment and did not meet basic sanitation standards." *Id.* at 1927 (quotation marks omitted). And the *Plata* court made the shocking finding that, "'on average, an inmate in one of California's prisons needlessly dies every six to seven days due to constitutional deficiencies in the [California prisons'] medical delivery system.'" *Id.* (alterations in original). "[I]n 2005, the court appointed a Receiver to oversee remedial efforts." *Id.* at 1926. Eventually, the Receiver concluded that overcrowding hopelessly obstructed the delivery of adequate care. "Every day, the Receiver reported, California prison wardens and health care managers make the difficult decision as to which of the class actions, *Coleman* or *Plata* they will fail to comply with because of staff shortages and patient loads." *Id.* at 1927 (quotation and alteration marks omitted).

Once long experience made clear that there could be no effective remedy without reducing overcrowding, a three-judge court was convened with population-reduction authority under the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626. After a two-week trial, the court entered an injunction ordering the state to "reduce its prison population to 137.5% of the prisons' design capacity within two years." 131 S. Ct. at 1928. The order left the specifics to the state's discretion, but directed the state "to formulate a plan for compliance and submit

its plan for approval by the court." *Id.* The state instead appealed.

2. This Court affirmed, holding that (1) overcrowding was the "primary cause" of "the severe and unlawful mistreatment" of Plaintiffs; and (2) the order was "narrowly drawn" and gave "substantial weight" to public safety considerations. *Id.* at 1923, 1939, 1944–45. This Court emphasized that the injunction "left the choice of how best to comply with its population limit to state prison officials." *Id.* at 1943. Among other options, California could build new facilities, transfer prisoners out-of-state, reform parole or sentencing, or expand "good-time credits" to give "early release to only those prisoners who pose the least risk of reoffending." *Id.* at 1923, 1943. At that point, Appellants already had "over two years to begin complying," and so the Court ordered Appellants to "implement the order without further delay." *Id.* at 1946–47.

The Court explained that, as with any injunction, the three-judge court could exercise its "sound discretion" to modify the decree as appropriate. *Id.* at 1946. "If significant progress is made toward remedying the underlying constitutional violations, that progress may demonstrate that further population reductions are not necessary or are less urgent than previously believed. Were the State to make this showing, the three-judge court in the exercise of its discretion could consider whether it is appropriate to extend or modify this timeline." *Id.* at 1947. But this Court also anticipated that, "[e]ven with an extension of

time to construct new facilities and implement other reforms, it may become necessary to release prisoners to comply with the court's order." *Id*. Again, this was a question left to the lower court: "The three-judge court, in its discretion, may also consider whether it is appropriate to order the State to begin without delay to develop a system to identify prisoners who are unlikely to reoffend or who might otherwise be candidates for early release." *Id*.

### B. Proceedings and Factual Developments on Remand

#### 1. Realignment and Appellants' Subsequent Intransigence

On remand, Appellants took some initial steps towards compliance. In particular, "realignment" required parole revocation sentences and certain felony sentences to be served in county jails. *Plata* DE 2671/*Coleman* DE 4679 ("Stay Order") at 5. The state granted parole to some individuals, albeit only to a fraction of the thousands of low-risk prisoners who are already eligible. JS 12; JS.App. 166a–67a; *Plata* DE 2509-1/*Coleman* DE 4283-1 at 10. And Appellants expanded prison and treatment capacity, though less than previously promised. The new facility in Stockton, California, for example, has capacity for 1,818 patients, rather than the 10,000 patients previously planned. *See Coleman v. Schwarzenegger*, 922 F. Supp.2d 882, 953 (E.D. Cal./N.D. Cal. 2009) (discussing construction planned to be completed by July 2013 and detailed in the Receiver's Ninth Quarterly Report); *Plata* DE 1472 at 64–65 (Receiver's 9th Quarterly Report (Sept. 15,

2008)) (plan for construction of 10,000 prison medical beds).

These steps reduced overcrowding, but "[i]t soon became apparent" that they "would not be sufficient to meet the 137.5% design capacity benchmark" by the June 2013 deadline. Stay Order at 5. The three-judge court nonetheless *sua sponte* granted Appellants a six-month extension based on earlier representations that they could comply by the end of 2013. *See* JS.App. 97a, 102a–03a.

Appellants instead refused to take any additional steps to comply. In their January, February, and March 2013 status reports, Appellants declared that they "would take no further action to comply with the Order." Stay Order at 7. As the *Plata* Receiver, J. Clark Kelso, put it, "the substance and tone of leadership set by State officials has changed from acquiescence bordering on support for the Receiver's work, to opposition bordering on contempt for the Receiver's work and for implementation of court orders." *Plata* DE 2636/*Coleman* DE 4628 ("Receiver's 23rd Report") at 35.

On January 8, 2013, California's Governor unilaterally "declar[ed] that the crisis in the prisons was resolved" and "terminated his emergency powers." Stay Order at 7; *see* Governor of the State of California, Edmund G. Brown, Jr., Proclamation (Jan. 8, 2013), http://bit.ly/VOb1jV. This ended the State's ability "to contract to house approximately 9,500 prisoners in out-of-state prisons," threatening "a scheduled partial return of these prisoners during 2013, and a consequent increase in the prison population." *Id.*

### 2. Proceedings in the *Coleman* and *Plata* District Courts

Appellants simultaneously moved in the *Coleman* district court to terminate all injunctive relief, arguing that, although they had failed to comply with this Court's order, mental health care now complies with the Eighth Amendment. The district court denied the motion, finding Appellants' evidence "woefully inadequate." *Coleman* DE 4539 ("*Coleman* Order") at 27. It found that the State still holds mentally ill prisoners in administrative segregation for prolonged periods because of bed shortages, despite contrary recommendations by Appellants' own experts. *Compare Plata*, 131 S. Ct. at 1924, *with Coleman* Order at 43–44. The state is also still using "totally inappropriate" facilities, including stand-up cages without toilets, due to bed shortages. *Compare Plata,* 131 S. Ct. at 1924 & App. C, *with Coleman* Order at 51–52, *and* Appellees' Stay Opp. 24–25, Ex. B-2. *See also Coleman* DE 4381 ¶ 199 (2,429 "alternative" crisis care placements from May through December 2012, 729 of which lasted more than 24 hours).

The *Coleman* court also found that inmate suicides "are occurring at virtually the same rate and with virtually the same degree of inadequacies in assessment, treatment and intervention" found in the 2008 overcrowding trial. *Coleman* Order at 33–34 (footnote omitted). For example, the state's own experts have long recommended using suicide-resistant intake cells for new arrivals to administrative segregation, to combat the high suicide risk during that time. *See Coleman* DE 1990-

1 at 3–4. Population pressures, however, mean that intake cells are often full. *See Coleman* DE 4298 at 63–64. In one tragic case in June 2012, an inmate was put in segregation for protection from gang violence in the prison. But he was put into a non-intake cell because the intake cells were full, and prison clinicians overlooked his history of suicide attempts. He committed suicide the next day. *Coleman* DE 4376, App. H at 81–84 (Report on Suicides Completed in the California Department of Corrections & Rehabilitation January 1, 2012 – June 30, 2012 (Mar. 13, 2013)). Another inmate committed suicide in March 2011 after waiting six weeks in a segregation unit for a scarce special needs placement. *Coleman* DE 4308 at 119 (Report on Suicides Completed in the California Department of Corrections & Rehabilitation in Calendar Year 2011 (Jan. 25, 2013)).

On July 11, 2013, the *Coleman* court found "significant and troubling evidence" of current shortcomings of care, including "severe staffing shortages," policies that "delay the start of necessary inpatient care and may in fact cause additional harm to class members," and "denial of basic necessities including clean underwear." *Coleman* DE 4688 at 10–11.

Appellants have not even moved the *Plata* court to reconsider its finding that health care violates the Eighth Amendment. Ongoing proceedings in the *Plata* court reflect persistent constitutional violations due to overcrowding.

On May 22, 2013, the Receiver found that "California's prisons remain significantly

overcrowded" and that "overcrowding continues to interfere with the ability to deliver constitutionally acceptable medical and mental health care." Receiver's 23rd Report at 30. "Simply put, we do not have appropriate and adequate healthcare space at the current population levels. We need population levels to reduce to 137.5% of design capacity as ordered by the Three Judge Panel, *and* we need the State to complete its promised construction." *Id.* at 31.

On June 24, 2013, the *Plata* court found that the State has been unable to effectively manage the risks of Valley Fever, a disease endemic to the Central Valley. *See Plata* DE 2661 at 3. Despite knowing for years that Valley Fever is "'a public health emergency'" in two prisons, the State did not remove the prisoners who were at risk. *Id.* at 11, 20. As the California Department of Public Health concluded, "'[t]he reality that the state prisons are already crowded means that moving all at-risk inmates out of these prisons is difficult and may not be feasible….'" *Id.* at 11. This has contributed to hundreds of inmates "suffer[ing] unnecessary and unreasonable harm." *Id.* at 24.

In 2013, court-appointed medical experts have issued reports finding "systemic" failures in prisons that the Office of the Inspector General ("OIG") rated above 87%. *Plata* DE 2704 ("Salinas Valley Report") at 5; *Plata* DE 2572 ("Donovan Report") at 5; *Plata* DE 2678 ("Corcoran Report") at 5. One prisoner died after a diagnosed life-threatening infection of his heart valve went untreated for four months. Salinas Valley Report at 99. Another patient had surgery on

his scrotum and was discharged with sutures that needed to be removed at the prison, but he was not seen by prison doctors for twelve days, at which point the sutures had become infected and the patient had to be rehospitalized. Donovan Report at 40. The systemic failures to provide adequate healthcare create "an ongoing serious risk of harm to patients and result[s] in preventable morbidity and mortality." Salinas Valley Report at 5.

### 3. The April Order Denying Appellants' Motion To Vacate or Modify

In January 2013, at the same time the Governor declared the emergency over and Appellants moved to terminate in *Coleman* (but not *Plata*), Appellants moved in the three-judge district court to "vacate or modify" the population reduction order this Court had affirmed only eighteen months earlier. JS.App. 75a. Despite its caption, Appellants asked only for "complete vacatur" of the recently-affirmed injunction. JS.App. 102a. Appellants initially argued that they had "'remed[ied] the underlying constitutional violations,'" but they later chose "*not* [to] seek vacatur on [this] basis." JS.App. 116a, 119a. Instead, they argued that "overcrowding is no longer 'the primary barrier prohibiting the State from providing constitutionally adequate medical and mental health care.'" JS.App. 111a.

On April 11, 2013, the three-judge court issued a 71-page order ("April Order") denying Appellants' motion to vacate. First, the court held that, without evidence of a significant change in facts beyond the mere passage of time, Appellants would simply be re-

litigating the merits of the 137.5% overcrowding cap—which they had already litigated and lost in this Court. JS.App. 123a–24a. Subjecting predictive judgments to vacatur "based solely on a contention that some time has passed" would permit "unbounded relitigation." JS.App. 125a. Second, the three-judge court held that, although Appellants could move to vacate based on a significant change in facts rendering prospective enforcement inequitable, Appellants had not carried their burden of showing that such a change had occurred. JS.App. 130a ("Were such credible evidence presented to this Court, we would, of course, consider modifying the Order.").

The court carefully considered Appellants' evidence and the record as a whole, finding that Appellants fell "far short" of justifying the relief they sought. JS.App. 130a–59a. Among other things, Appellants had not shown a change in the barriers to adequate treatment—"inadequate treatment space" and "severe staff shortages"—that were the focus of its order and this Court's analysis in *Plata*. JS.App. 133a; *see also Plata*, 131 S. Ct. at 1933–34. Instead, "'demand for care … continues to overwhelm the resources available.'" JS.App. 134a (quoting *Plata*, 131 S. Ct. at 1933). "For mentally ill patients, defendants lack sufficient bed space." *Id*. Appellants' own evidence confirms that "there is insufficient (and in some instances, no) facility space and infrastructure in CDCR institutions to appropriately perform medical distribution activities." JS.App. 136a (quotation marks omitted). And Appellants' "plan to construct the necessary

treatment space … is in its early stages and thus continues to be at risk of non-completion." *Id.*

Weighing the evidence, the three-judge court credited the *Plata* Receiver, the *Coleman* Special Master, and Appellees' experts, finding that Appellants failed to show that overcrowding is no longer the primary cause of the violations. JS.App. 144a–59a. The partial reductions in crowding and improvements in care demonstrated that the cap "has been successful thus far"—and that success was a reason to *keep* the injunction, not to vacate it. JS.App. 133a. The three-judge court also warned Appellants that their "openly contumacious conduct" risked a finding of contempt of court. JS.App. 161a; *see also* JS.App. 164a.

#### 4. Subsequent Orders and Appellants' Reluctant Plan for Compliance

Also on April 11, 2013, in response to Appellants' refusal to take further steps to comply with the 137.5% cap, the three-judge court issued a separate order directing Appellants to list, "in the order that defendants would prefer to implement them," all possible population reduction measures and a plan for compliance. *Plata* DE 2591/*Coleman* DE 4542 ("Plan Order") at 1–4. The three-judge court again reiterated that Appellants must take the steps necessary to comply. *Id.* at 3; *see also* JS.App. 161a–64a (collecting earlier examples).

Appellants directly disobeyed the Plan Order. Appellants' "plan for non-compliance" exceeded the overcrowding cap by 4,170 prisoners, falling 43% short of the needed reduction. JS.App. 40a. It also

listed measures "'in no particular order of preference.'" JS.App. 48a.

On June 20, 2013, the three-judge court issued an order ("June Order") refining its preexisting injunction. Appellants still must reach the same preexisting goals of 137.5% population by December 27, 2013. But Appellants now must adopt specific steps to get there through methods this Court previously endorsed: They must adopt their non-compliant plan and also expand "good time" credits prospectively for certain prisoners (as proposed), as well as retroactively for all prisoners. JS.App. 3a, 51a–57a. Still, Appellants retain flexibility to substitute other measures that would reduce the population as effectively. JS.App. 3a, 68a–69a. The three-judge court also waived the state and local laws that Appellants identified as barriers to compliance. JS.App. 3a, 59a–62a. The court again warned Appellants that it would "be within its rights to … institute contempt proceedings immediately," but it deferred any such proceedings. JS.App. 70a.

Appellants moved for a stay. On July 3, 2013, the three-judge court denied the motion. Appellants then sought a stay in this Court, which was denied on August 2, 2013. Less than a week later, Governor Brown announced that the state would comply with the overcrowding cap by sending inmates to private prisons and local jails. *See* Paige St. John, *California seeks private prison deals*, L.A. Times (Aug. 8, 2013), http://lat.ms/17vokJZ.

## ARGUMENT

This Court lacks jurisdiction to hear this appeal. This Court's direct appellate review is limited to three-judge court orders "granting or denying" an injunction. 28 U.S.C. § 1253. The orders below do neither. The April 11, 2013 order denies Appellants' motion to vacate or modify the injunction this Court affirmed. The other orders at most make minor modifications to that previously-affirmed injunction. The courts of appeals—not this Court—have jurisdiction over orders "modifying … or refusing to dissolve or modify" injunctions that have already been affirmed. 28 U.S.C. § 1292(a)(1). That rule ensures that this Court has direct review over the principal decision of a three-judge court to grant or deny an injunction, but avoids the prospect of multiple and repetitive claims on this Court's mandatory docket. For motions to modify or refusals to vacate, certiorari jurisdiction after court-of-appeals review more than suffices.

Even if this Court had jurisdiction, it should summarily affirm. Appellants claim that the three-judge court abused its discretion in refusing, when faced with their intransigence, to vacate entirely the injunction this Court affirmed two years ago. Appellants fundamentally misunderstand this Court's mandate. This Court *affirmed* the 137.5% cap. Appellants also assert that the court below, "*without reviewing* Appellants' progress or pertinent changed conditions, *refused to consider* whether capping the population of California's prisons at 137.5% of their design capacity" remains equitable. JS 2 (emphases added). That rhetoric is completely

divorced from reality. More than 20 pages of the April Order are devoted to analyzing the evidence Appellants claim it ignored. *See* JS.App. 128a–59a; *Plata* DE 2590/*Coleman* DE 4541 at 39–60.

Based on its thorough analysis of Appellants' evidence and the record as a whole, the three-judge court found that Appellants had not carried their burden of showing a change in fact significant enough to render continued enforcement of the injunction inequitable. This ruling is faithful to this Court's decision, factbound, subject to highly deferential review, and correct. There is no substantial question here warranting plenary review.

As they did in their prior appeal to this Court, Appellants invoke the specter that the three-judge court's orders require release of violent felons. *E.g.*, JS 4, 19, 32. This is demonstrably untrue, as it was two years ago. After this Court denied their request for a stay, Appellants announced they plan to comply without releasing a single prisoner, by sending inmates to private prisons and jails. Granting plenary review would chill Appellants' reluctant compliance and perpetuate the indignity of Appellees' significant, ongoing constitutional injuries, without a corresponding benefit to public safety. If this Court reaches the merits, it should summarily affirm.

## I. This Court Lacks Jurisdiction Because None Of The Orders Below Grants A New Injunction.

This Court lacks jurisdiction because no appealed order grants a new injunction. The April Order refuses to vacate or modify the injunction this Court previously affirmed; the Plan Order requires

Appellants to propose a plan for complying with that order; and the June Order merely modifies the old injunction, being more specific about how Appellants must comply with the preexisting 137.5% cap.

1. Congress has limited this Court's mandatory appellate jurisdiction to decisions of three-judge courts "granting or denying" injunctions. 28 U.S.C. § 1253. This authority is markedly narrower than the courts of appeals' parallel jurisdiction, which encompasses orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court." 28 U.S.C. § 1292(a)(1). Congress thus knows how to grant jurisdiction over orders "modifying … or refusing to dissolve or modify" a preexisting injunction: Congress gave that authority to the courts of appeals. *See Gerstein v. Coe*, 417 U.S. 279, 279 (1974) (per curiam) (three-judge court orders that fall outside § 1253 are "appealable to the Court of Appeals"). The narrow language of § 1253, particularly in light of § 1292(a)(1)'s broader language, expresses Congress' intent *not* to give parties a right to invoke this Court's jurisdiction over orders modifying (or refusing to dissolve or modify) injunctions.

History further supports this conclusion. Congress first expanded the courts of appeals' jurisdiction over decisions "modifying … or refusing to dissolve or modify injunctions" in the Judges Bill of 1925, Pub. L. No. 68-415, ch. 229, § 129, 43 Stat. 936, 937. At the same time, Congress left the narrower language governing this Court's review of orders "granting or denying" injunctions undisturbed.

*Id.* § 238, 43 Stat. at 938. The Judges Bill otherwise "sharply restricted the Court's obligatory jurisdiction" and replaced it with certiorari review. *Dick v. N.Y. Life Ins. Co.*, 359 U.S. 437, 451–52 (1959) (Frankfurter, J., dissenting). Congress thus chose, while expanding the courts of appeals' jurisdiction over injunctions, *not* to expand this Court's review of injunctions and otherwise to curtail substantially other aspects of this Court's appellate jurisdiction. That choice must be given effect. *Cf. Russello v. United States*, 464 U.S. 16, 23 (1983) (When "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quotation marks and alterations omitted)).

This plain reading of § 1253 is also practical. It reserves this Court's appellate jurisdiction for the initial and consequential decision of a three-judge court to grant or deny an injunction, while barring multiple successive claims on this Court's valuable time and limited resources. It thus avoids an endless loop of relitigation based on an unsuccessful litigant's obstinacy and a three-judge court's understandable disinclination to vacate an injunction that this Court already approved. Under Appellants' contrary reading, a party subject to an injunction that this Court already affirmed would be able again to obtain mandatory appellate review in this Court—any time it wished—simply by filing a new motion to vacate or modify. That makes no sense. Once this Court has approved an injunction, review via certiorari of subsequent motions to modify or vacate is sufficient.

2. Although the lack of jurisdiction featured prominently in the stay papers, Appellants do not even address it in their Jurisdictional Statement. In their Stay Reply, Appellants had asserted that this Court applies a "flexible" approach to § 1253. Stay Reply 10. Quite the contrary. This Court has emphasized that "only a narrow construction" of § 1253 "is consonant with the overriding policy, historically encouraged by Congress, of minimizing the mandatory docket of this Court in the interests of sound judicial administration." *Gonzalez v. Automatic Emps. Credit Union*, 419 U.S. 90, 98 (1974); *see also In re Slagle*, 504 U.S. 952, 952 (1992) (opinion of White, J.) ("[W]e narrowly view our appellate jurisdiction in three-judge court cases pursuant to 28 U.S.C. § 1253."); Stern & Gressman, *Supreme Court Practice & Procedure* 100 (9th ed. 2007) (collecting cases).

Appellants invoked three cases to support jurisdiction, Stay Reply 10, but each is inapposite. Not one involves this Court's re-review of an injunction it previously affirmed. The first reviewed a newly-entered injunction as well as a declaratory judgment that accompanied it. *See White v. Regester*, 412 U.S. 755, 761 (1973). The second reviewed a newly-entered injunction as well as an order modifying it while the original appeal was still pending. *See Minn. State Bd. for Comty. Colleges v. Knight*, 465 U.S. 271, 278–79 (1984). These cases do not allow a litigant, simply by moving to vacate or modify, to re-invoke this Court's mandatory appellate jurisdiction after it has already affirmed. They avoid artificial limits on the scope of this Court's review when it already has jurisdiction over a newly-entered

and never-before-reviewed injunction.[1] The third case reviewed an order that did not merely "modify" an injunction within any ordinary conception of that term; it "changed course" and mandated completely new relief. *See Lopez v. Monterey County*, 519 U.S 9, 18–19 (1996). *Cf. Descamps v. United States*, 133 S. Ct. 2276, 2291 (2013) ("'[T]o modify' means to change moderately or in minor fashion." (quotation marks omitted)); *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 228 (1994) ("'Modify' … connotes moderate change."). Moreover, *Lopez* does not even discuss jurisdiction.

3. This Court lacks jurisdiction because the orders Appellants challenge do not grant new injunctions. First, Appellants' arguments for review are directed primarily at the April Order, but that order denied Appellants' "motion to vacate or modify" the injunction that this Court already affirmed. JS.App. 75a. Congress gave jurisdiction over orders "refusing to dissolve or modify injunctions" to the courts of appeals—not this Court. 28 U.S.C. § 1292(a)(1).

To the extent Appellants challenge other three-judge court orders, they are no more appealable here. The Plan Order required Appellants to submit a plan

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[1] *White* and *Knight* follow the longstanding rule that appellate review of a newly-entered injunction "is not limited to mere consideration of, and action upon, the order appealed from." *Deckert v. Indep. Shares Corp.*, 311 U.S. 282, 287 (1940). Review also extends to matters that are "inextricably bound up" with the injunction. 16 Wright & Miller, *Federal Practice & Procedure* § 3921.1 (2d ed. 2013). *See also Munaf v. Geren*, 553 U.S. 674, 691 (2008).

for compliance. But an order "that relates only to the conduct or progress of litigation before that court ordinarily is not considered an injunction" at all. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 279 (1988). And "[o]rders to prepare plans that when adopted will be injunctions are not themselves injunctions, even if the process of preparation is extended and expensive." *Mercer v. Magnant*, 40 F.3d 893, 896 (7th Cir. 1994) (Easterbrook, J.); *see also*, *e.g., Spates v. Manson*, 619 F.2d 204, 210 (2d Cir. 1980) (Friendly, J.).[2] The June Order also does not grant a new injunction; it modifies the injunction this Court affirmed. In light of Appellants' refusal to take any further steps towards compliance, the June Order specifies how Appellants should reach the preexisting 137.5% mandate. JS.App. 51a–62a. This order is no more (or less) onerous than the order this Court affirmed; it is simply more specific, and its specificity reflects Appellants' unwillingness to embrace any particular path to compliance with the previously-affirmed injunction. Section 1253 does not empower a litigant to force this Court to reconsider the validity of an injunction ad nauseum. Rather, § 1292(a)(1) expressly confers jurisdiction in the courts of appeals, with certiorari review by this Court as appropriate.

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[2] The Plan Order also did not grant a new injunction when it reiterated that Appellants must take steps to comply with the injunction *Plata* affirmed. Plan Order at 3. Repeating an old command does not make a new injunction. Indeed, a contrary rule would allow limitless appeals and hamstring court efforts at ensuring compliance. *Cf.* JS.App. 161a–64a (reiterating the same mandate in three earlier orders).

## II. Even If This Court Had Jurisdiction, The Proper Course Would Be To Summarily Affirm Because The Questions Presented Are Insubstantial And Properly Left To The Lower Courts' Discretion.

### A. This Court's Review Is Highly Deferential and the Three-Judge Court Applied the Correct Standard Under Rule 60(b)(5).

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

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[3] We are unaware of any Supreme Court case setting a standard for reviewing a three-judge court decision modifying (or refusing to vacate or modify) an injunction this Court previously affirmed. This, of course, is because this Court does not have jurisdiction over such an appeal. But if this Court possessed such jurisdiction, it would apply a standard at least

This Court's opinion in *Plata* itself establishes that the three-judge court's conclusions, even on an initial appeal, are reviewed deferentially. "It is not this Court's place to duplicate the role of the trial court." *Plata*, 131 S. Ct. at 1932. Findings of fact are reviewed for clear error; "review of the … primary cause determination is deferential"; and the lower court has "substantial flexibility" in crafting a remedy. *Id*. at 1932, 1944. "Once invoked, the scope of a district court's equitable powers is broad, for breadth and flexibility are inherent in equitable remedies." *Id*. at 1944 (quotation and alteration marks omitted).

2. Attempting to avoid this highly deferential standard, Appellants argue that the three-judge court applied the wrong legal standard in considering their motion. JS 4, 23. This argument is insubstantial and meritless. The three-judge court's opinion shows that it applied the correct standard under Rule 60(b)(5), consistent with this Court's expectations. Any claims of error here actually involve the application of this standard to the facts or plain old fact-finding, which are respectively reviewed for abuse of discretion and clear error.

First, contrary to Appellants' suggestions, this Court's opinion does not compel the three-judge court to modify or vacate the injunction as soon as Appellants reduced crowding. This Court *affirmed* the 137.5% cap and emphasized the three-judge court's discretion when considering potential

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as protective of its own orders (and discouraging of relitigation) as that applied by the courts of appeals.

modifications. 131 S. Ct. at 1946–47. Echoing Rule 60(b)(5), this Court noted that, if the state shows "significant progress … made toward remedying the underlying constitutional violations," the lower court "in the exercise of its discretion could consider whether it is appropriate to extend or modify [the] timeline." *Id*. at 1947. The three-judge court did just that, *sua sponte* giving Appellants an additional six months to come into compliance. *See supra* n.1. Moreover, this Court contemplated that, "[e]ven with an extension of time to construct new facilities and implement other reforms, it may become necessary to release prisoners to comply with the court's order." *Id*.

Second, the three-judge court correctly stated the Rule 60(b)(5) standard. It is the movant's burden to prove that "'applying [a judgment] prospectively is no longer equitable.'" JS.App. 113a (quoting Rule 60(b)(5)). The movant may not "'challenge the legal conclusions'" undergirding the prior judgment, but instead bears the burden of showing "a 'significant change in facts'" warranting the relief sought. JS.App. 114a (quoting *Horne*, 557 U.S. at 447; *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 385, 393 (1992)). While courts adopt a "flexible approach" in institutional reform litigation to ensure injunctions remain "equitable," relief will not be granted simply because the defendant finds compliance "is no longer convenient." JS.App. 115a. And "[o]rdinarily, the party may not rely on 'events that actually were anticipated at the time it entered into a decree.'" JS.App. 114a (quoting *Rufo*, 502 U.S. at 385). Appellants do not challenge any of this.

Appellants instead take out of context a single word from elsewhere in the April Order and argue that the three-judge court believed it could not grant any relief until the violations have been "remed[ied]," when this Court stated that modification may be appropriate in light of "significant progress toward remedying" them. JS 24 ("the three-judge court re-wrote the central passage of this Court's mandate"); JS.App. 119a. The three-judge court made no such error. The sentence Appellants attack addresses abandonment, not the Rule 60(b) standard. It states that Appellants no longer argued that they had "remed[ied] the underlying constitutional violations." JS.App. 119a; *see also* JS.App. 119a–20a ("That contention … is no longer the basis for defendants' Three-Judge Motion…."). Directly above this sentence, the three-judge court correctly quoted the relevant passage from this Court's opinion—and emphasized the language Appellants contend it overlooked. JS.App. 119a.

If the three-judge court had actually believed it could not vacate or modify the injunction without a complete remedy, as Appellants argue, the April Order would have stopped after finding that Appellants abandoned the argument that they had remedied the violations. The opinion instead goes on to address Appellants' arguments and evidence for over 20 additional pages, closely examining Appellants' evidence of progress—or lack thereof—towards remedying the violations. *See infra* Part II.B

(discussing the three-judge court's assessment of the current evidence as a whole).[4]

Elsewhere, Appellants distort the lower court's opinion to argue that it "misread *Rufo* … to require in all cases that 'the moving party must demonstrate a significant and unanticipated change in facts.'" JS 28 (quoting JS.App. 115a). But this quotation is from a summary sentence introduced by "[i]n short …." JS.App. 115a. The three-judge court correctly stated the full standard of review earlier in the very same paragraph: "Ordinarily, the [movant] may not rely on 'events that actually were anticipated at the time it entered into a decree.'" JS.App. 114a (quoting *Rufo*, 502 U.S. at 367); *accord Rufo*, 502 U.S. at 367 ("Ordinarily, … modification should not be granted where a party relies upon events that actually were anticipated at the time it entered into a decree.").

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[4] Appellants also employ ellipses and take other passages out of context to suggest that the court required "a completed remedy" of the constitutional violations, when it did not. *See* JS 25. For example, they selectively quote portions of one passage that responds to Appellants' evidence that, because of their partial compliance, "overcrowding is no longer the primary cause of ongoing constitutional violations." JS.App. 129a. The passage actually states that, to make such a showing, "[d]efendants must present persuasive evidence that the very aspects of overcrowding that this Court found pernicious in the past—the severe staff shortages, the complete lack of treatment space, etc.—have been remedied through measures that were not envisioned at the time of our Court's order." *Id.* In other words, to warrant complete vacatur of the injunction based on partial compliance, Appellants must show that their partial compliance has broken the link between crowding and unconstitutional care, consistent with the PLRA and this Court's precedents. This standard is correct, not "irreconcilable" with *Plata*.

Appellants do not argue that the three-judge court should have departed from *Rufo*'s ordinary rule here.

The simple reality is that the three-judge court applied the correct legal standard. Appellants' real beef is with fact-finding or matters well within the three-judge court's sound discretion.

### B. The Three-Judge Court's Thorough Application of the Rule 60(b)(5) Standard to the Current Evidence as a Whole Is Discretionary, Factbound, and Correct.

Based on its close review of current conditions in California's prisons, including the evidence Appellants suggest it "refused to consider," JS 2, the three-judge court found that Appellants failed to demonstrate a factual change sufficient to render inequitable the injunction this Court affirmed only two years ago. JS.App. 122a–59a. Plenary review of this factbound, discretionary determination is unwarranted, and in any event the three-judge court's decision is correct.

Notably, Appellants' motion did not ask for an extension or other measured relief this Court envisioned (and the three-judge court granted previously). Nor did Appellants press the argument that the injunction was now unnecessary because the constitutional violations were fully remedied. *See* JS.App. 117a–20a. Such an argument was soundly rejected by the *Coleman* court and not even raised in the *Plata* court. *See* JS.App. 157a–58a. Instead, Appellants swung for the proverbial fences, asking the lower court to vacate the injunction, even though

they have only partially complied with the order this Court affirmed.

The three-judge court properly denied that extraordinary request. First, the three-judge court correctly concluded that Appellants could not seek vacatur simply on the grounds that the 137.5% figure was erroneous and "the passage of time constitutes a 'changed circumstance.'" JS.App. 123a. To the extent Appellants seek to relitigate the 137.5% number based solely on the passage of time, that request is barred by *res judicata* and law of the case principles. *Id.* "Defendants are, in effect, challenging a legal conclusion, which is not a permissible basis for modification" under Rule 60(b)(5), particularly where this Court has already affirmed. JS.App. 127a. Appellants "already lost this argument," and "should not be allowed to litigate it once again." *Id.*

The three-judge court next turned to Appellants' evidence that there has been a significant change in fact. Appellants claim, as they have unsuccessfully twice before (in *Plata* and in seeking a stay), that the court below refused to consider evidence of current conditions. Once again, "[t]his suggestion lacks a factual basis." *Plata*, 131 S. Ct. at 1935. More than 20 pages of the April Order—pages 39 to 60—are devoted to assessing the evidence Appellants contend the lower court felt "bound to ignore." JS 4; *Plata* DE 2590/*Coleman* DE 4541 at 39–60.

Specifically, Appellants presented "six items of evidence" in support of their motion: (1) that changes in state law reduced the prison population by approximately 24,000 inmates; (2) that California

increased capacity through new construction; (3) that California "no longer uses gymnasiums and dayrooms to house prisoners"; (4) that "the Inspector General … has stated that crowding is no longer a factor in the provision of medical care"; (5) that "now-Secretary Jeffrey Beard has stated that overcrowding is no longer a barrier to the provision of care"; and (6) that "neither the Receiver nor Special Master stated, in their most recent report, that overcrowding is a problem." JS.App. 129a. The three-judge court marched through each in turn, finding Appellants' evidence insufficient in light of the record as a whole. JS.App. 129a–59a.

1. The three-judge court considered and correctly found that the first three items—realignment, increased capacity, and reduced crowding—are evidence of partial compliance, but not sufficient reasons to vacate the injunction. "Nothing could be more 'anticipated' than the consequent decline in crowding to which defendants point." JS.App. 126a. And the fact that the cap has been partially effective is not a reason to "terminate it, call off the rest of the plan, and declare victory before defendants can meet the Order's most important objective—to reduce the population to 137.5% design capacity and eliminate overcrowding as the primary cause of unconstitutional medical and mental health conditions." JS.App. 131a. Rather, the Order's partial effectiveness is "an argument for keeping it in effect and continuing to make progress toward reaching its ultimate goal." *Id.* Indeed, notwithstanding this progress, overcrowding was still at 149.2%, far above the limit this Court affirmed.

Stay Order at 19; *see Plata*, 131 S. Ct. at 1945 (discussing evidence that even 145% is too high).[5]

Crucially, the three-judge court found that Appellants failed to identify a "significant change *in the barriers* that prison crowding raised and that prevented the provision of constitutionally adequate medical and mental health care." JS.App. 133a. These barriers include "inadequate treatment space and severe staff shortages." *Id.* "With regard to staffing, defendants' [motion] is conspicuously silent." *Id.* Indeed, "staff shortages are far worse this year than in prior years." JS.App. 134a; *see also Coleman* DE 4298 at 44.

The three-judge court also examined Appellants' evidence of expanded capacity and correctly found it insufficient. "It is true that there is *more* treatment space today than in 2008. Defendants, however, fail to demonstrate that there is *enough* treatment space today." JS.App. 135a. "For mentally ill patients, defendants lack sufficient bed space," and "the conditions described" in *Plata* "continue to persist." JS.App. 134a. Indeed, Appellants themselves have admitted that "'[c]urrently there is insufficient (and in some instances, no) facility space and infrastructure in [state prisons] to appropriately perform medication distribution activities.'" JS.App. 136a. And Appellants' "plan to construct the necessary treatment space … is in its early stages and thus continues to be at risk of non-completion." *Id.*

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[5] Overcrowding currently stands at 147.0%. Dep't of Corr. & Rehabilitation, Weekly Report of CDCR Population (Aug. 28, 2013), http://bit.ly/14rwjrv.

Additional record evidence further supports these findings. For example, the 1,818-bed Stockton facility that Appellants highlight is an improvement, but the three-judge court correctly recognized that it is not a panacea. It is a drastically reduced version of the 10,000-patient facility that was planned in 2009. *Coleman*, 922 F. Supp. 2d at 953; *Plata* DE 1472 at 64–65. The more than five-fold shrinkage of this building project confirms this Court's prediction that practical limitations would delay and limit any efforts by California to build its way out of the crisis. *See* 131 S. Ct. at 1938.

Further showing that there is not enough treatment space to break the link between overcrowding and unconstitutional levels of care, in 2013 prisoners with serious mental illness are still housed in overcrowded facilities. *See* Stay Opp. Ex. B-1 (dorm with mentally ill inmates mixed with general population); Ex. B-4 (small double-bunked cell with one inmate sleeping on floor). Remarkably, Appellants still use the same "telephone-booth sized cages without toilets" to hold suicidal inmates for extended periods of time because of a shortage of crisis beds. *Plata*, 131 S. Ct. at 1924 & App. C (photograph of cages); *see* JS.App. 135a. Indeed, they are still using these cages in the very same room pictured in *Plata*, with the only apparent "improvement" being a fresh coat of paint. *See* Appellees' Stay Opp. Ex. B-2.

2. The three-judge court also examined and correctly rejected Appellants' evidence regarding improved OIG scores. JS.App. 138a–43a. The court found that these scores are "not a reliable basis for

drawing any conclusions regarding the relationship between prison crowding and constitutional care." JS.App. 141a–42a. They relate only to *Plata*, not *Coleman*; they do not measure constitutional conditions; and they are based on sample sizes too small to be reliable. JS.App. 139a–43a. Appellants continue to insist that the OIG scores are reliable, JS 17, but they make no effort even to show that the three-judge court's findings are clear error. They are not.[6]

Indeed, further record evidence supports the three-judge court's finding. For example, the Salinas Valley State Prison has a high OIG score (87.7%), but the current expert review finds that it "is not providing adequate medical care to patients," and that "systemic issues … present an on-going serious risk of harm to patients and result in preventable morbidity and mortality." Salinas Valley Report at 5; *see also, e.g.*, *id.* at 35 (finding "serious problems related to the management of patients with chronic diseases," a finding which is "totally inconsistent" with the OIG's 79.5% score for chronic care); Donavan Report at 5 (finding serious systemic deficiencies in prison with OIG score over 87%); Corcoran Report at 5 (same).

3. The three-judge court also examined and correctly rejected Secretary Beard's testimony that overcrowding is "no longer a factor" inhibiting the quality of care. JS.App. 143a–46a. Secretary Beard

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[6] Appellants also claim that the Inspector General is "independent," JS 16, when the Governor's office in fact wrote the Inspector General's declaration in this matter. *See Plata* DE 2628, Ex. D.

had testified as an expert for Appellees that overcrowding is the primary cause of the constitutional violations, but reversed course after being hired by the State. The three-judge court found that his new testimony was not credible. "Today, he is a party to the proceedings and accordingly, his testimony must be regarded in that light." JS.App. 143a. The three-judge court also found Secretary Beard's declaration "not persuasive in light of the record before this Court." JS.App. 144a. He "fail[ed] to rebut the overwhelming evidence" that "staff shortages and a lack of physical treatment space continue to plague the California prison system." *Id.* Indeed, "[h]e makes no mention whatsoever" of these factors. *Id.* Other record evidence also contradicted him. The Receiver's current report found that "[o]vercrowding and its consequences are and have been a chronic, widespread and continuing problem for almost twenty years." JS.App. 144a–45a (quoting Receiver's 22nd Report at 30). And four *Coleman* experts—"each of whom is evaluating current conditions, and none of whom is employed by defendants"—agreed that overcrowding remains a significant barrier. JS.App. 146a. This is quintessential fact-finding that does not warrant this Court's review.

4. The three-judge court also examined and correctly rejected Appellants' arguments that, simply because the Receiver's and Special Master's latest reports did not discuss overcrowding, overcrowding was no longer a barrier. "In the words of the Receiver, this claim 'distorts the content of our reports and misrepresents the Receiver's position.'"

*Id.* (quoting *Plata* DE 2525 at 29). Appellants do not appear to renew this argument here.

In sum, the three-judge court examined the evidence of current conditions that Appellants claim it overlooked—as well as the extensive evidence Appellants prefer not to mention. Based on its thorough review, it found that Appellants had not carried their burden of showing that, less than two years after this Court affirmed, the facts on the ground had changed so significantly that overcrowding was no longer the primary cause of the ongoing constitutional violations and thus that the injunction is no longer equitable. Appellants' claims of error are insubstantial and factbound, and there was no abuse of discretion or clear error in the lower court's decision to leave undisturbed an injunction this Court already affirmed. Plenary review is unwarranted.

### C. Appellants' Arguments About Public Safety Are Factbound and Meritless.

Appellants argue that this Court should review these discretionary and factbound issues because the decisions below "directly threaten the release of inmates convicted of violent or serious felonies…." JS 4, 31–32. This Court's opinion in *Plata* largely forecloses this argument, by holding that the 137.5% cap gave "substantial weight" to public safety. 131 S. Ct. at 1944. Nothing has significantly changed on the public safety front. Notably, "[t]he order in this case" still "does not necessarily require the State to release any prisoners." 131 S. Ct. at 1929.

Appellants' out-of-court statements and conduct underscore the accuracy of that observation. After

this Court denied their stay request, the Governor announced that the state would comply with the overcrowding cap by sending inmates to private prisons and jails owned by cities and counties. *See* Paige St. John, *supra*. Last week, the Governor confirmed that "California will not release a single inmate early to meet [the] order." Chris Megerian, *Prison plan would avoid any releases, Brown says*, L.A. Times (Aug. 27, 2013), http://lat.ms/14rylYX; *see also* Press Release, Cal. Gov. Office, Governor, Speaker, Republican Leaders Announce Immediate Increase in Prison Capacity and Longer-Term Solutions (Aug. 28, 2013), http://bit.ly/1dQAxlU. The three-judge court's waiver of state-law obstacles to compliance ensures that Appellants can implement this or another similar plan.[7] Appellants' public safety threats are thus wholly unfounded.

More fundamentally, a state's decision to incarcerate more individuals than it can constitutionally house would not excuse compliance with the Constitution. At the root of the entrenched

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[7] Appellants have asserted that the three-judge court "will not permit the State to transfer additional inmates out-of-state." Stay Reply 36. If so, that is because Appellants never proposed to do so. The three-judge court authorized every measure Appellants proposed, including "reassign[ing] prisoners to leased jail space" and "slowing the return" of out-of-state prisoners. JS.App. 39a, 64a. Appellants also assert that, because of realignment, the prisoners remaining in state prison are higher-risk. But the population reduction this Court affirmed could have been far larger than any hypothetical release today, and it included prisoners who have been diverted to the counties as well as those who have not been. In any event, the risk profile is irrelevant because Appellants plan to comply without releasing any prisoners.

violations here is the reality that, for decades, a cash-strapped state passed tough-on-crime laws without making the attendant (but less politically popular) increases in prison resources. *See Plata*, 131 S. Ct. at 1939 (this Court "c[ould] not ignore" the California Legislature's role in the problem). If the only way to achieve constitutional compliance is to release some prisoners, then that is the result the Constitution compels. None of this was lost on this Court last time, which is why it affirmed while knowing that releases might occur. *See id.* at 1923, 1947. Indeed, although Appellants raised the specter of releasing tens of thousands of inmates, this Court found that the order could be implemented with "little or no impact on public safety." *Id.* at 1943.

* * *

When this Court affirmed the overcrowding cap, it ordered that Appellants implement it "without further delay." *Id.* at 1947. But only now, two years later and after this Court refused a stay pending this attempt at re-review, are Appellants finally taking steps towards full compliance—and those planned steps will not involve the release of a single prisoner. Granting plenary review would only serve to undermine Appellants' reluctant progress toward full compliance with this Court's mandate and extend the grave constitutional harms that this Court recognized have been ongoing for decades. As this Court has already held, those steps are necessary to remedy the severe constitutional harms visited on sick and mentally ill patients due to overcrowding in California's state prisons. Appellants have had more than four years to craft a plan for compliance, and they have shown that they can comply without

posing an undue risk to public safety. There is no reason to inject further delay in this process.

## CONCLUSION

For the reasons set forth above, this Court should dismiss the appeal or summarily affirm the decisions below.

Respectfully submitted,

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September 5, 2013