

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

**ORDER DENYING
 DEFENDANTS' MOTION TO
 STAY JUNE 20, 2013 ORDER**

On June 20, 2013, this Court issued an Opinion and Order once again directing defendants to comply with our August 2009 Population Reduction Order by reducing the prison population to 137.5% design capacity by December 31, 2013. June 20, 2013 Op. & Order (ECF No. 2659/4662).¹ The Population Reduction Order, although almost four years old, has still not been complied with by defendants. On June 28, 2013, defendants requested a stay of the June 20 Order pending appeal to the United States Supreme Court. Defs.' Mot.

¹ All filings in this Three-Judge Court are included in the individual docket sheets of both *Plata v. Brown*, No. C01-1351 TEH (N.D. Cal.), and *Coleman v. Brown*, No. 90-cv-520-LKK (E.D. Cal.). In this Order, when we cite to these filings, we list 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 to Stay (ECF No. 2665/4673). For the reasons set forth below, we DENY defendants'
2 motion for a stay.

3 It is worth stating at the outset that by its underlying appeal defendants (sometimes
4 referred to as "the State") seek to relitigate a thoroughly reasoned decision of the Supreme
5 Court, *Brown v. Plata*, issued two years ago. That decision holds that within two years the
6 State must reduce its prison population to 137.5% of design capacity because, when a higher
7 number of prisoners is confined in the prisons, the prison conditions result in medical and
8 mental health care that violates the Eighth Amendment. 131 S. Ct. 1910 (2011). Because of
9 the State's resistance to complying with that decision, and in order to avoid the necessity of
10 contempt proceedings against the Governor and other state officials, this Three-Judge Court
11 has repeatedly declined to initiate such proceedings and has even sua sponte extended the
12 time for defendants to comply with the Population Reduction Order issued in conformity
13 with *Brown v. Plata*. This Court has repeatedly directed defendants to adopt specific plans
14 that will serve to reduce the prison population to the designated figure by the specified date.
15 Until now, the State has insisted that it is unable (read unwilling) to comply with the
16 Population Reduction Order. In the present motion, however, it has finally acknowledged
17 that it will comply if the Supreme Court denies the stay it will request from that Court.
18 Defs.' Mot. to Stay at 2 (ECF No. 2665/4673). Accordingly, with anticipation that the
19 Supreme Court's denial of the stay will finally bring defendants into compliance with the
20 Population Reduction Order and the Eighth Amendment (subject to the durability of its
21 compliance), we further explain our reasons for denying defendants' motion.

22 23 **I. PROCEDURAL HISTORY**

24 The history of this litigation is of defendants' repeated failure to take the necessary
25 steps to remedy the constitutional violations in its prison system, violations that have still not
26 been remedied after 23 years. The litigation began with two separate class actions. The first,
27 *Coleman v. Brown*, began in 1990 and concerns California's failure to provide
28 constitutionally adequate mental health care to its prison population. The second, *Plata v.*

1 *Brown*, began in 2001 and concerns California's failure to provide constitutionally adequate
2 medical care to its prison population. The district courts in both cases found constitutional
3 violations and ordered injunctive relief. In 1995, in *Coleman*, the district court found that
4 defendants were violating the Eighth Amendment rights of mentally ill prisoners. *Coleman*
5 *v. Wilson*, 912 F. Supp. 1282 (E.D. Cal. 1995). The court appointed a Special Master to
6 supervise defendants' efforts to remedy the constitutional violations. *Id.* at 1323-24. In
7 2005, in *Plata*, after a stipulated injunction failed to remedy the Eighth Amendment
8 violations, the district court placed defendants' prison medical care system in a receivership.
9 Oct. 3, 2005 FF&CL, 2005 WL 2932253, at *31. Now, 23 years later in one case and 12
10 years later in the other, despite the extensive efforts we have made to bring about compliance
11 with our Population Reduction Order, which has been approved by the Supreme Court,
12 defendants remain delinquent.

13 "After years of litigation, it became apparent that a remedy for the constitutional
14 violations would not be effective absent a reduction in the prison system population." *Plata*,
15 131 S. Ct. at 1922. In 2006, the *Coleman* and *Plata* plaintiffs independently filed motions to
16 convene a three-judge court capable of issuing a population reduction order under the PLRA.
17 Both motions were granted, and on July 26, 2007, the cases were assigned to the same Three-
18 Judge Court, made up of the district judges overseeing *Plata* and *Coleman* and one circuit
19 judge appointed in conformance with Court Rules by the Chief Judge of the Circuit. After a
20 fourteen-day trial, this Three-Judge Court issued a 184-page opinion ordering defendants to
21 reduce the institutional prison population to 137.5% design capacity within two years.
22 Aug. 4, 2009 Op. & Order (ECF No. 2197/3641) ("Population Reduction Order").

23 In issuing the Population Reduction Order, this Court found that "no relief other than
24 a prisoner release order is capable of remedying the constitutional deficiencies at the heart of
25 these two cases," *id.* at 119, and that "there was overwhelming agreement among experts for
26 plaintiffs, defendants, and defendant-intervenors that it is 'absolutely' possible to reduce the
27 prison population in California safely and effectively," *id.* at 137. We did not instruct
28 defendants *how* to reduce the prison population. We left this question to defendants but

1 ordered them to submit a plan for compliance within 45 days of our Population Reduction
 2 Order. *Id.* at 183. Defendants did not comply; they submitted a plan for reducing the
 3 population to 137.5% within five years, not two. Defs.’ Population Reduction Plan (ECF No.
 4 2237/3678). This Court ordered defendants to comply by providing a two-year plan.
 5 Oct. 21, 2009 Order Rejecting Defs.’ Proposed Population Plan (ECF No. 2269/3711).
 6 Defendants responded with a plan for compliance by which they would reduce the prison
 7 population to 167%, 155%, 147%, and 137.5% at six-month benchmarks. Defs.’ Response
 8 to Three-Judge Court’s Oct. 21, 2009 Order (ECF No. 2274/3726). On January 12, 2010,
 9 this Court issued an order accepting defendants’ two-year timeline, but stayed the date of the
 10 order while defendants appealed to the Supreme Court. Jan. 12, 2010 Order to Reduce
 11 Prison Population (ECF No. 2287/3767).

12 In June 2011, the Supreme Court affirmed this Court’s Population Reduction Order,
 13 holding that “the court-mandated population limit is necessary to remedy the violation of
 14 prisoners’ constitutional rights.” *Plata*, 131 S. Ct. at 1923. Although the Population
 15 Reduction Order, the Supreme Court stated, was “of unprecedented sweep and extent,” and
 16 the release of prisoners a matter of “undoubted, grave concern,” so too “is the continuing
 17 injury and harm resulting from these serious constitutional violations.” *Id.* The Supreme
 18 Court rejected defendants’ argument that a population reduction order was not required
 19 because the overcrowding could be eliminated through construction and other efforts. The
 20 Supreme Court called such options “chimerical,” *id.* at 1938-39, and noted that defendants’
 21 troubled history in this litigation belied placing trust in them. The Supreme Court said:

22 Attempts to remedy the violations in *Plata* have been ongoing for
 23 9 years. In *Coleman*, remedial efforts have been ongoing for 16.
 24 At one time, it may have been possible to hope that these
 25 violations would be cured without a reduction in overcrowding.
 A long history of failed remedial orders, together with substantial
 evidence of overcrowding’s deleterious effects on the provision
 of care, compels a different conclusion today.

26 *Id.* at 1939. The Supreme Court also rejected defendants’ argument that population reduction
 27 would adversely affect public safety, citing this Court’s extensive factual findings to the
 28 contrary. *Id.* at 1942-43. The Supreme Court specifically endorsed expanding good time

1 credits, stating that “[e]xpansion of good time credits would allow the State to give early
2 release to only those prisoners who pose the least risk of reoffending,” *id.* at 1943, and cited
3 positive evidence from other jurisdictions that had successfully implemented good time
4 credits, *id.* at 1942-43. The Supreme Court concluded that “[t]he relief ordered by the three-
5 judge court is required by the Constitution and was authorized by Congress in the PLRA,”
6 and ordered defendants to “implement the order without further delay.” *Id.* at 1947.

7 Following the Supreme Court’s decision, this Court mandated a two-year schedule for
8 defendants to reduce the prison population to 137.5% design capacity: 167% design capacity
9 by December 27, 2011; 155% design capacity by June 27, 2012; 147% design capacity by
10 December 27, 2012; and 137.5% design capacity by June 27, 2013. June 30, 2011 Order
11 Requiring Interim Reports at 1-2 (ECF No. 2375/4032). Defendants responded by informing
12 this Court that they would reach these benchmarks primarily through “Realignment,” a
13 measure authorized by Assembly Bill 109 that shifted criminals who had committed “non-
14 serious, non-violent, and non-registerable sex crimes” from state prisons to county jails.
15 Defs.’ Resp. to Jan. 12, 2010 Court Order (ECF No. 2365/4016). Realignment went into
16 effect in October 2011 and enabled defendants to comply with the first benchmark shortly
17 after the December 27, 2011 deadline. Defs.’ Jan. 6, 2012 Status Report (ECF No.
18 2411/4141).

19 It soon became apparent, however, that Realignment alone would not be sufficient to
20 meet the 137.5% design capacity benchmark by June 2013. In February 2012, plaintiffs filed
21 a motion asking defendants to show cause as to how they would reach this benchmark. They
22 insisted that based on the California Department of Corrections and Rehabilitation’s
23 (“CDCR’s”) own Fall 2011 population projections, defendants would not meet the
24 benchmark. Pls.’ Mot. for an Order Requiring Defs. to Demonstrate How They Will
25 Achieve the Required Population Reduction by June 2013 at 2-3 (ECF No. 2420/4152).
26 Defendants responded that the CDCR’s Fall 2011 population projections were not reliable
27 and that the forthcoming Spring 2012 population projections would be more accurate. Defs.’
28 Opp’n to Pls.’ Mot. for Increased Reporting in Excess of the Court’s June 30, 2011 Order at

1 2-4 (ECF No. 2423/4162). This Court accepted defendants' argument and denied plaintiffs'
2 motion without prejudice. Mar. 22, 2012 Order Denying Pls.' Feb. 7, 2012 Mot. (ECF No.
3 2428/4162). Two months later, plaintiffs renewed their motion, correctly observing that the
4 Spring 2012 population projections were not significantly different from the Fall's. Pls.'
5 Renewed Mot. for an Order Requiring Defs. to Demonstrate How They Will Achieve the
6 Required Population Reduction by June 2013 (ECF No. 2435/4180). Plaintiffs also informed
7 this Court of a new public report, "The Future of California Corrections" ("The Blueprint"),
8 in which defendants stated that they would not meet the 137.5% June 2013 benchmark and
9 would seek modification of this Court's Population Reduction Order. *See CDCR, The*
10 *Future of California Corrections: A Blueprint to Save Billions of Dollars, End Federal*
11 *Oversight, and Improve the Prison System*, Apr. 2012, available at
12 <http://www.cdcr.ca.gov/2012plan/docs/plan/complete.pdf>. Plaintiffs asked that defendants
13 be held in contempt. Defendants responded, informing us that they intended to seek
14 modification of our Population Reduction Order to increase the final benchmark from
15 137.5% to 145% design capacity. Defs.' Opp'n to Pls.' Renewed Mot. for an Order
16 Requiring Defs. to Demonstrate How They Will Achieve the Required Population Reduction
17 by June 2013 at 2 (ECF No. 2442/4192).

18 This Court ordered two rounds of supplemental briefing regarding defendants'
19 anticipated motion to modify the Population Reduction Order. June 7, 2012 Order Requiring
20 Further Briefing (ECF No. 2445/4193); Aug. 3, 2012 2d Order Requiring Further Briefing
21 (ECF No. 2460/4220). In response, defendants retreated, stating that they believed it would
22 be premature to begin modification proceedings before the prison population reached 145%
23 design capacity, which they predicted would happen in February or March of 2013. Defs.'
24 Resp. to Aug. 3, 2012 2d Order Requiring Further Briefing at 9-10 (ECF No. 2463/4226). In
25 September 2012, we again denied without prejudice plaintiffs' request that defendants be
26 held in contempt. We also asked defendants to answer questions they had failed to respond
27 to in their supplemental briefing, namely how long it would take them to develop a system
28 for identifying low-risk offenders for early release ("Low-Risk List," a list recommended by

1 the Supreme Court in *Plata*, 131 S. Ct. at 1947), and whether they could comply with our
2 Population Reduction Order by June 2013, and if not, when the earliest time they could
3 comply by would be. Sept. 7, 2012 Order Granting in Part & Denying in Part Pls.' May 9
4 and Aug. 22, 2012 Mots. (ECF No. 2473/4235). Defendants responded that they needed six
5 months to develop the Low-Risk List and that they could comply with our Population
6 Reduction Order with a six-month extension, largely by maintaining the out-of-state
7 program. Defs.' Resp. to Sept. 7, 2012 Order at 5-6 (ECF No. 2479/4243). Believing that
8 resolution was close, this Court ordered both parties to meet and develop plans to reduce the
9 prison population to 137.5% design capacity by (a) June 27, 2013, and (b) December 27,
10 2013. Oct. 11, 2012 Order to Develop Plans to Achieve Required Prison Population
11 Reduction at 1 (ECF No. 2485/4251).

12 On January 7, 2013, both parties filed plans to meet the 137.5% design capacity
13 benchmark. Defendants stated that they could comply by December 2013 without the release
14 of prisoners. Defs.' Resp. to Oct. 11, 2012 Order (ECF No. 2511/4284). But, despite this
15 promising report, not long after this filing defendants refused to take further action to comply
16 with our Population Reduction Order. First, in their January, February, and March status
17 reports, defendants stated that they would take no further action to comply with the Order.
18 See Defs.' Jan. 2013 Status Report at 1 (ECF No. 2518/4292); Defs.' Feb. 2013 Status
19 Report at 1 (ECF No. 2538/4342); Defs.' March 2013 Status Report at 1 (ECF No.
20 2569/4402). Second, the Governor terminated his emergency powers, declaring that the
21 crisis in the prisons was resolved. Gov. Edmund G. Brown Jr., *A Proclamation by the*
22 *Governor of the State of California*, Jan. 8, 2013, available at
23 <http://gov.ca.gov/news.php?id=17885>. As a result, defendants were no longer able to
24 contract to house approximately 9,500 prisoners in out-of-state prisons, forcing a scheduled
25 partial return of these prisoners during 2013, and a consequent increase in the prison
26 population. Third, defendants filed a motion in the *Coleman* court to terminate all injunctive
27 relief in that case. Mot. to Terminate & to Vacate J. & Orders (*Coleman* ECF No. 4275).
28 Fourth, defendants filed a motion to vacate or modify our Population Reduction Order.

1 Defs.’ Mot. to Vacate or Modify Population Reduction Order (ECF No. 2506/4280) (“Three-
 2 Judge Motion”). This motion did not await the prison population’s reaching a design
 3 capacity of 145%, as defendants had said they would, *see supra* p. 6. In fact, the prison
 4 population has still not reached that figure.

5 This Court stayed consideration of defendants’ Three-Judge Motion on January 29,
 6 2013. At the same time, we granted defendants a six-month extension to comply with our
 7 Population Reduction Order, extending the final 137.5% design capacity benchmark to
 8 December 31, 2013. Jan. 29, 2013 Order at 2-3 (ECF No. 2572/4317). On April 11, 2013,
 9 this Court denied defendants’ Three-Judge Motion, as modified,² and ordered that they take
 10 all steps to comply with the Population Reduction Order. Apr. 11, 2013 Op. & Order at 2
 11 (ECF No. 2590/4541). We gave three reasons for denying defendants’ Three-Judge Motion.
 12 First, it was barred by res judicata as an improper attempt to relitigate the 137.5% figure that
 13 we had determined in 2009 and that the Supreme Court had explicitly affirmed. *Id.* at 36-37.
 14 Second, defendants did not meet their burden under Federal Rule of Civil Procedure 60(b)(5)
 15 to prove a “significant and unanticipated change in factual conditions warranting
 16 modification.” *Id.* at 40 (citing *United States v. Asarco Inc.*, 430 F.3d 972, 979 (9th Cir.
 17 2005) (summarizing *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 384-86 (1999))).

19
 20 ² Contrary to defendants’ representation in their motion to stay this Court’s June 20,
 21 2013 Order, defendants’ Three-Judge Motion was not based on “evidence showing that
 22 underlying Eighth Amendment deficiencies in medical and mental health care had been
 23 remedied.” Defs.’ Mot. to Stay at 3 (ECF No. 2665/4673). Although defendants initially
 24 asked this Court to decide this constitutional question, they later modified their motion by
 25 withdrawing this request. Defs.’ Resp. to Jan 29, 2013 Order at 4 (ECF No. 2529/4332)
 (“The issue to be decided by this Court is not constitutional compliance.”); Defs.’ Reply Br.
 in Supp. of Three-Judge Mot. at 11 (ECF No. 2543/4345) (“Defendants’ motion did not seek
 a determination of constitutionality.”). With this request withdrawn, the only argument that
 defendants made for vacatur was that crowding was no longer the primary cause for any
 underlying constitutional violations. *Id.*

26 Defendants made a similar misrepresentation in their notice of appeal to the Supreme
 27 Court of our April 11, 2013 Order. In that notice, they stated that they would appeal in part
 28 because we “did not fully or fairly consider the evidence showing that the State’s prisoner
 health care now exceeds constitutional standards.” Defs.’ Notice of Appeal to the Supreme
 Court at 3 (ECF No. 2621/4605). We did not consider this evidence because, as stated
 above, defendants explicitly modified their motion so as to withdraw any constitutional
 questions from this Court’s consideration.

1 Third, defendants failed to demonstrate a “durable” solution that would justify this Court’s
2 vacating a prior order. *Id.* at 54-55.

3 To ensure compliance with our Population Reduction Order, this Court asked
4 defendants to submit a list of all population reduction measures discussed as possible
5 remedies during the course of the Three-Judge Court proceedings (“List”) and, from that
6 List, suggest a plan for compliance with the Population Reduction Order (“Plan”), without
7 regard to whether defendants had the authority to implement the measures designated. We
8 further ordered defendants to use their best efforts to implement the Plan, and to inform us of
9 their progress in their monthly reports. Finally, we ordered defendants to develop a “Low-
10 Risk List” that they might use, if necessary, to comply with the Population Reduction Order
11 by releasing low-risk offenders. Apr. 11, 2013 Order (ECF No. 2491/4542).

12 On May 2, 2013, defendants submitted their List and Plan. Defs.’ Resp. to April 11,
13 2013 Order (ECF No. 2609/4572). Defendants’ response did not comply with our April 11
14 Order, as they did not provide a Plan that would reach the 137.5% population benchmark by
15 December 31, 2013. Defendants conceded as much, *id.* at 5 n.3, 37 (acknowledging that
16 their latest Plan will not achieve the 137.5% figure by December 31, 2013), although they
17 underestimated the scope of their noncompliance. They estimated that their Plan would
18 result in a prison population of 140.7% design capacity by December 31, 2013; in fact, their
19 Plan might at best achieve a prison population of 142.6% design capacity by December 31,
20 2013 – 4,170 prisoners short of the 137.5% benchmark. *See* June 20, 2013 Op. & Order at
21 28-31 (ECF No. 2659/4662) (explaining this discrepancy). Thus, well into the third decade of
22 litigation, it was clear that defendants remained unwilling to implement a plan that would
23 comply with the Population Reduction Order and the Supreme Court’s 2011 decision.

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II. JUNE 20, 2013 OPINION & ORDER

On June 20, 2013, in response to defendants' proposed Plan that would not in any event achieve compliance, and facing a "long and unhappy history of litigation," this Court entered a "comprehensive order to insure against the risk of inadequate compliance." June 20, 2013 Op. & Order at 36 (ECF No. 2659/4662) (quoting *Hutto v. Finney*, 437 U.S. 678, 687 (1978)). We ordered defendants to implement an "Amended Plan" consisting of the measures in their proposed Plan plus an additional measure consisting of the expansion of good time credits, prospective and retroactive, to all prisoners, as set forth in defendants' List, but not in their Plan. This additional measure would provide the 4,170 prisoners needed to bring defendants' Plan into compliance, assuming that the compliance would be durable. We carefully explained our reason for choosing this particular measure. First, extensive testimony at the 2009 trial revealed that good time credits were the most promising measure for reducing overcrowding. *Id.* at 38. The measure would in many cases reduce the prison population by allowing prisoners to shorten their lengths of stay in prison by as little as a few months. At trial, plaintiffs' experts – Doctors Austin and Krisberg, and Secretaries Woodford, Lehman, and Beard – were unanimous in their agreement that "such moderate reductions in prison sentences do not adversely affect either recidivism rates or the deterrence value of imprisonment." Aug. 4, 2009 Op. & Order at 140 (ECF No. 2197/3641). Defendants' one expert in opposition, Dr. Marquart, did not in fact oppose good time credits. *Id.* at 139-40. His only criticism – that good time credits expansion might reduce the opportunity for prisoners to complete rehabilitative programming – was, in our final determination, "a note about the factors that should be considered in designing an effective expanded good time credits system. It is entitled to little, if any, weight as an observation about the possible negative effect on public safety of such a system." *Id.* at 141. Based on this and other testimony, we concluded following trial that early release through good time credits does not increase the crime rate but rather "affects only the timing and circumstances of the crime, if any, committed by a released inmate." *Id.* at 143. We further "credit[ed] the opinions of the numerous correctional experts that the expansion of good time credits would

1 not adversely affect but rather would benefit the public safety and the operation of the
2 criminal justice system.” *Id.* at 145.

3 Second, we rejected defendants’ arguments against expanding the good time credits
4 measure by applying it retroactively and to all offenders. June 20, 2013 Op. & Order at 39-
5 40 (ECF No. 2659/4662). Defendants first argued that, although prospective application of
6 good time credits for prisoners convicted of non-violent offenses is safe, retroactive
7 application of these credits to these same prisoners is not safe. Defendants provided no
8 support for this proposition. Moreover, both the *Plata* Receiver and the State’s own CDCR
9 Expert Panel had recommended making the good time credits changes retroactive. *See*
10 Receiver’s 23rd Report at 33 (ECF No. 2636/4628); CDCR Expert Panel, *A Roadmap for*
11 *Effective Offender Programming in California: A Report to the California Legislature*, June
12 2007, at 95.³ Defendants further argued that good time credits should not be afforded to
13 prisoners convicted of violent offenses. Yet not a single expert at trial distinguished between
14 inmates convicted of violent and non-violent crimes for the purposes of good time credits,
15 and the CDCR Expert Panel specifically recommended expanding good time credits for all
16 prisoners, “including all sentenced felons regardless of their offense or strike levels.” *Id.* at
17 92. Based on these observations, we concluded that defendants’ arguments against
18 expanding the good time credit measure were without merit.

19 Third, we noted the success other jurisdictions experienced in safely expanding their
20 good time credits programs. June 20, 2013 Op. & Order at 9-10, 41 & n.26 (ECF No.
21 2659/4662). California has instituted good time credit programs in 21 counties between
22 1996 and 2006, resulting in approximately 1.7 million inmates having been released by court
23 order without an increase in the crime rate. *Id.* at 9 (citing testimony by Dr. Krisberg,
24 Aug. 4, 2009 Op. & Order at 144 (ECF No. 2197/3641)). Washington expanded its good
25 time credits program and Secretary Lehman, the former head of corrections for Washington,

26 ³ The members of the CDCR Expert Panel included various leading experts in crime
27 and incarceration, such as Doctors Petersilia, Krisberg, and Austin; current CDCR Secretary
28 Jeffrey Beard; and many other senior officials of correctional programs throughout the
country.

1 testified at trial that “these measures did not have any ‘deleterious effect on crime’ or public
2 safety.” *Id.* (citing Aug. 4, 2009 Op. & Order at 147 (ECF No. 2197/3641)). Illinois,
3 Nevada, Maryland, Indiana, and New York all successfully implemented good time credits
4 expansion without adversely affecting public safety. *Id.* In New York, the prison population
5 decreased due in part to the expansion of programs awarding good time credits, and the
6 crime rate *declined* substantially. *Id.*

7 Finally, we pointed out that the Supreme Court had expressly endorsed the good time
8 credits measure: “Expansion of good-time credits would allow the State to give early release
9 to only those prisoners who pose the least risk of reoffending.” *Plata*, 131 S. Ct. at 1943.
10 The Supreme Court also approvingly discussed the empirical and statistical evidence from
11 other jurisdictions that had successfully implemented good time credits. *Id.* at 1942-43
12 (listing the experience in certain California counties, Washington, etc.). In endorsing the
13 good time credits measure, the Supreme Court stated that this Court’s factual findings on
14 public safety were to be credited over the contrary views of defendants. *Id.* at 1942. The
15 Supreme Court was in clear agreement with this Court that defendants could reduce the
16 prison population to 137.5% design capacity without adversely affecting public safety,
17 specifically through the expansion of good time credits. For these reasons, we ordered
18 defendants to implement an “Amended Plan” consisting of their Plan and the expanded good
19 time credits measure.

20 Although this Court ordered defendants to implement the Amended Plan, including
21 good time credits, we emphasized that we desired to “continue to afford a reasonable
22 measure of flexibility to defendants, notwithstanding their failure to cooperate with this
23 Court or to comply with our orders during the course of these proceedings.” June 20, 2013
24 Op. & Order at 51 (ECF No. 2659/4662). To this end, this Court offered defendants three
25 methods of making substitutions to the measures in the Amended Plan. First, defendants
26 may, if they prefer, revise the good time credit measure currently proposed such that it does
27 not result in the release of violent offenders, so long as the revision results in the release of at
28

1 least the same number of prisoners as would the current good time credit measure.⁴ This
 2 may be accomplished in part by adjusting the credits to levels awarded by other states or
 3 counties. Second, defendants may substitute for any group of prisoners who are eligible for
 4 release under the Amended Plan a different group of prisoners consisting of no less than the
 5 same number of prisoners selected pursuant to the Low-Risk List, with the substitution being
 6 in the order in which the prisoners are listed, individually or by category on that list. Third,
 7 defendants may substitute any group of prisoners from the List of all population reduction
 8 measures identified in this litigation, submitted by defendants on May 2, 2013, for any
 9 groups contained in a measure listed in the Amended Plan, should defendants conclude by
 10 objective standards that they are no greater risk than the prisoners for whom they are to be
 11 substituted. *Id.* We provided examples of such substitutions: “Lifers,” who, due to age or
 12 infirmity, are adjudged to be “low risk” by CDCR’s risk instrument; prisoners who have nine
 13 months or less to serve of their sentence who could serve the duration of their sentences in
 14 county jails rather than in state prisons; or prisoners who could be reassigned from state
 15 prisons to leased jail space. *Id.* at 51-52.⁵ By “Lifers,” we refer to the category of prisoners
 16 who are serving sentences of a fixed number of years to life and are eligible for parole. As of
 17 2011, there were 32,000 Lifers in California state prisons. Lifers made up 20% of the
 18 California prison population, an increase from 8% in 1990. A 2011 study by the Stanford
 19 Criminal Justice Center reported that “the incidence of commission of serious crimes by the
 20 recently released lifers has been minuscule.” Robert Weisberg, Debbie A. Mukamal &

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 22 ⁴ These modifications to the proposed good time credit program would not affect the
 23 inclusion of retroactivity. They would only affect aspects such as the amount of good time
 24 credit to be received by various categories of offenders, all non-violent, and the amount of
 25 credit to be received for the various activities for which good time credit is rewarded. For
 26 example, defendants could extend 2-for-1 credit earning to prisoners other than those held in
 fire camps and minimum custody facilities (their current proposal), increase the credit
 earning limit for milestone completion credits, or increase the credit earning capacity of non-
 violent offenders above 34 percent. Other states have taken similar measures to expand their
 good time credit programs for non-violent offenders without a subsequent increase in
 recidivism. June 20, 2013 Op. & Order at 40 & n.26 (ECF No. 2659/4662).

27 ⁵ The prisoners now housed out of state who were due to be returned this year are
 28 already accounted for in the Plan. No other prisoners housed out of state will be considered
 as part of any substitute measure.

1 Jordan D. Segall, *Life in Limbo: An Examination of Parole Release for Prisoners Serving*
2 *Life Sentences with the Possibility of Parole in California* at 3-4 (Stanford Criminal Justice
3 Center, Sept. 2011).

4 Our June 20, 2013 Order was not the first time we have given defendants a broad
5 choice in determining how to comply with our Population Reduction Order. Over the past
6 four years, this Court has done everything possible to ensure that defendants have flexibility
7 in adopting measures that will attain compliance. We have never ordered defendants to
8 select any particular measures; rather, we have consistently offered defendants the choice as
9 to how they will reach the 137.5% design capacity benchmark. Our Population Reduction
10 Order merely asked for a plan for compliance. Aug. 4, 2009 Op. & Order at 183 (ECF No.
11 2197/3641). Our January 2010 Order accepted defendants' two-year timeline for compliance
12 without ordering them to implement any specific measures. Jan. 12, 2010 Order to Reduce
13 Prison Population at 4 (ECF No. 2287/3767). Our April 11, 2013 Order deferred to
14 defendants for a Plan for reaching the 137.5% design capacity benchmark that *they* found
15 most acceptable. Finally, and as described in detail above, although our most recent order,
16 issued on June 20, 2013, makes suggestions as to how defendants could reduce the prison
17 population to 137.5% by December 31, 2013, it leaves defendants significant flexibility in
18 deciding how to reach this cap. *See* June 20, 2013 Op. & Order at 33 (ECF No. 2659/4662)
19 ("We are willing to defer to [defendants'] choice for *how* to comply with our Order, not
20 *whether* to comply with it.").

21 Further, this Court has twice extended deadlines for compliance for defendants, even
22 without their formally requesting that we do so. In January 2010, when this Court ordered
23 defendants to reduce the prison population to certain benchmarks every six months, we sua
24 sponte stayed this order pending appeal to the Supreme Court. Jan. 12, 2010 Order to
25 Reduce Prison Population at 6 (ECF No. 2287/3767). Because the Supreme Court's decision
26 was not issued until June 2011, defendants gained an additional two years with which to
27 comply with this Court's Population Reduction Order – an additional two years that the
28 Supreme Court recognized in endorsing our two-year timeline. *Plata*, 131 S. Ct. at 1946

1 (noting that “defendants will have already had over two years to begin complying with the
2 order of the three-judge court”). Then, on January 29, 2013, again without any formal
3 request by defendants, this Court once more extended the deadline, giving defendants six
4 additional months to comply with our Population Reduction Order. Jan. 29, 2013 Order at
5 2-3 (ECF No. 2527/4317). As a result, defendants will have had well over four years to
6 comply with our Population Reduction Order – more than twice the amount of time
7 contemplated in that Order.

8 Despite our repeated efforts to assist defendants to comply with our Population
9 Reduction Order, they have consistently engaged in conduct designed to frustrate those
10 efforts. They have continually sought to delay implementation of the Order. At the time of
11 the Population Reduction Order, defendants asked this Court to wait for “chimerical”
12 possibilities. *Plata*, 131 S. Ct. at 1938. As the Order was appealed to the Supreme Court,
13 defendants insisted that this Court had been convened prematurely and that alternative
14 remedies to a prisoner release order existed. The Supreme Court rejected these arguments,
15 ordering defendants to “implement the order without further delay.” *Id.* at 1947. Defendants
16 have done no such thing. They have refused to follow the Supreme Court’s order. They took
17 one action, Realignment, and when it became apparent that this action would be insufficient
18 to comply with the Population Reduction Order, defendants refused to take any further steps
19 to reduce the prison population to 137.5% design capacity. Instead, they moved to terminate
20 all prospective relief granted by the *Coleman* court under the PLRA’s termination provision,
21 moved to vacate the Population Reduction Order issued by this Court under Federal Rule of
22 Civil Procedure 60(b)(5), voluntarily terminated their own emergency powers to house
23 prisoners out of state, and reported in their monthly status reports that they would no longer
24 take actions to comply with the Population Reduction Order. Governor Brown declared,
25 notwithstanding the orders of this Court, that the crisis in the prisons was resolved. *See Gov.*
26 *Edmund G. Brown Jr., A Proclamation by the Governor of the State of California*, Jan. 8,
27 2013, <http://gov.ca.gov/news.php?id=17885>. Finally, when asked to submit a Plan for
28

1 compliance, defendants submitted, instead, a Plan for noncompliance – a Plan that fell far
2 short of the required figures.

3 In defense of their actions, defendants equivocate regarding the facts and the law. For
4 example, defendants have repeatedly asserted that they have reduced the prison population
5 by “more than 42,000 inmates since 2006.” Defs.’ Resp. to Pls.’ Resp. & Req. for Order to
6 Show Cause Regarding Defs.’ Resp. to Apr. 11, 2013 Order at 3 (ECF No. 2640/4365); *see*
7 *also* Defs.’ Resp. to Apr. 11, 2013 Order at 39 (ECF No. 2609/4572) (same). This statistic is
8 misleading, as it includes reductions made between 2006 and 2009, before we issued our
9 Population Reduction Order. Similarly, in defense of their May 2013 Plan for
10 noncompliance, defendants stated that they have “taken all actions in [their] power” to reach
11 the December 2013 population cap, arguing that they are either without authority to take
12 further measures or that such measures would threaten public safety. Defs.’ Resp. to Pls.’
13 Resp. & Req. for Order to Show Cause Regarding Defs.’ Resp. to Apr. 11, 2013 Order at 1
14 (ECF No. 2640/4365). In making this statement, defendants failed to recognize that they
15 could have met the 137.5% cap by increasing capacity, a measure that would have reduced
16 overcrowding without releasing any prisoners; asked the legislature to modify the restrictions
17 to which they adverted in submitting an insufficient Plan; requested changes to sentencing
18 policies that would have reduced the prison population substantially; or retained, instead of
19 surrendering, emergency authority regarding housing prisoners out of state. Given
20 defendants’ history of noncompliance, it comes as no surprise that they have requested a last-
21 minute stay of our June 20, 2013 Order, rather than making any effort to comply with the
22 2011 mandate of the Supreme Court. Of crucial importance, however, defendants now state
23 that absent a stay by this Court and the Supreme Court, they will comply with the Population
24 Reduction Order. Defs.’ Mot. to Stay at 2 (ECF No. 2665/4673). Such compliance, if
25 durable, will bring the California prison population into conformity with the Eighth
26 Amendment.

27 As to the timeliness of defendants’ request for a stay, as plaintiffs point out in their
28 thorough and thoroughly reasoned response, *see* Pls.’ Am. Resp. to Defs.’ Mot. to Stay (ECF

No. 2669/4677), defendants' sense of urgency appears to be as newly developed as their sense of urgency regarding the appeal of the Population Reduction Order, which is now over four years old. This Court's April 11, 2013 Order, the order immediately prior to the one at issue here, and one of a number of orders directing defendants to comply with the Population Reduction Order, was appealed by defendants to the Supreme Court on May 13, 2013, yet no stay was requested following that appeal. Defs.' Notice of Appeal to the Supreme Court at 3 (ECF No. 2621/4605). Moreover, despite the familiarity defendants' counsel undoubtedly have with this case after at least four years of uninterrupted litigation, they felt compelled to obtain a 45-day extension of time in which to file a jurisdictional statement before the Supreme Court, thus belying the need for urgency in resolving the appeal. *See Brown v. Plata*, Sup. Ct. Docket No. 13A5, available at <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/13a5.htm> (noting that, on July 1, 2013, Justice Kennedy granted defendants' June 25, 2013 application to extend the time to file a jurisdictional statement on appeal from July 12, 2013, to August 26, 2013).

III. DISCUSSION

In considering an application for a stay, this Court considers: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Nken v. Holder*, 556 U.S. 418, 434 (2009); *Humane Soc. of U.S. v. Gutierrez*, 558 F.3d 896, 896 (9th Cir. 2009). Applying these factors to this case, this Court has no difficulty in denying defendants' request for a stay.

First, defendants have not made a strong showing that they are likely to succeed on the merits. Defendants appear to make two arguments regarding this factor in their application for a stay: (1) there are no longer any underlying constitutional violations; and (2) even if constitutional violations remain, additional population reductions are not necessary to remedy these violations. Defs.' Mot. to Stay at 8-9 (ECF No. 2665/4673). The

1 first argument is not raised before this Three-Judge Court. As explained *supra* p.8 & n.2,
 2 although defendants initially posed this question in their January 7, 2013 Three-Judge
 3 Motion to Vacate the Population Reduction Order, they later modified the motion by
 4 removing any constitutional question from the purview of this Court. Defendants have also
 5 never made this argument before the *Plata* court. That is, they have not asked the *Plata* court
 6 or this Court to determine that defendants are no longer failing to provide constitutionally
 7 adequate medical health care to its prison population or to vacate injunctive relief on that
 8 ground. They have, in fact, made this argument only once. They did so before the *Coleman*
 9 court, on January 7, 2013. They asked that court to terminate all injunctive relief in *Coleman*
 10 on the ground that California's mental health care system for prisoners no longer violates the
 11 Eighth Amendment. *See* Mot. to Terminate & Vacate J. & Orders at 28 (*Coleman* ECF No.
 12 4275). The *Coleman* court denied defendants' motion to terminate on the ground that
 13 "ongoing constitutional violations remain" "in the delivery of adequate mental health care."
 14 Apr. 5, 2013 Order Denying Defs.' Mot. to Terminate at 67 (*Coleman* ECF No. 4539).
 15 Moreover, we have made clear that our Population Reduction Order relied on each of the two
 16 cases individually and collectively, and that if the constitutional violations exist in either
 17 case, they exist for the purposes of this Three-Judge Court.⁶ Thus, even if plaintiffs were to
 18 file a motion to dismiss in the *Plata* case on the ground that the medical health care system in
 19 California prisons no longer violates the Eighth Amendment, and even if they were to

20
 21 ⁶ *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 succeed on that motion, which appears to be highly unlikely, our Population Reduction Order
2 would still be necessary to remedy the constitutional violations that remain in *Coleman*.⁷

3 Defendants' second argument, that even if constitutional violations remain, additional
4 population reductions are not necessary to remedy these violations, has been raised properly,
5 *see* Three-Judge Mot. (ECF No. 2506/4280), but is without merit. In 2011, the Supreme
6 Court affirmed in full this Court's finding that the only way to remedy the ongoing
7 constitutional violations in California prisons is to reduce the prison population to 137.5% of
8 design capacity. *Plata*, 131 S. Ct. at 1945 ("There are also no scientific tools available to
9 determine the precise population reduction necessary to remedy a constitutional violation of
10 this sort. The three-judge court made the most precise determination it could in light of the
11 record before it."). In fact, describing the evidence before the Three-Judge Court, the
12 Supreme Court said that the evidence supported "an even more drastic remedy," i.e., a
13 population cap lower than 137.5% design capacity. *Id.* at 1945. Defendants have not met the
14 137.5% design capacity benchmark. The current California prison population is at 149.2%
15 design capacity. CDCR, *Weekly Rpt. of Population*, July 1, 2013, available at
16 [http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Weekly](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Weekly_Wed/TPOP1A/TPOP1Ad130626.pdf)
17 [Wed/TPOP1A/TPOP1Ad130626.pdf](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Weekly_Wed/TPOP1A/TPOP1Ad130626.pdf).

18 When defendants first made this argument before this Court in January 2013, we
19 rejected it on the ground that they had not provided evidence of any significant and
20 unanticipated change in circumstances to rebut the Supreme Court's determination that only
21 a population reduction to 137.5% design capacity would remedy the underlying
22 constitutional violations. Apr. 11, 2013 Op. & Order Denying Defs.' Mot. to Vacate or
23 Modify Population Reduction Order at 55-56 (ECF No. 2590/4541). Defendants provide no

24 ⁷ One three-judge court was convened, instead of two, for practical reasons only. The
25 individual district courts recommended consolidation "[f]or purposes of judicial economy
26 and avoiding the risk of inconsistent judgments." July 23, 2007 Order in *Plata*, 2007 WL
27 2122657, at *6; July 23, 2007 Order in *Coleman*, 2007 WL 2122636, at *8. The Supreme
28 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.*

1 further support for such a contention, and therefore are unlikely to succeed on the merits.
2 Defs.' Mot. to Stay at 9 (ECF No. 2665/4673) (stating only that "additional population
3 reductions are unnecessary to prevent death or needless suffering or to ensure that the quality
4 of medical and mental health care does not pose a substantial risk of serious harm to the two
5 certified classes of inmates").

6 Second, defendants will not be irreparably injured absent a stay. The Amended Plan
7 that we have ordered defendants to implement consists largely of measures in their proposed
8 Plan. *See* Defs.' Resp. to Apr. 11, 2013 Order at 28-33 (ECF No. 2609/4572). Further, we
9 have already determined that the one additional measure we have suggested they implement,
10 the full expansion of good time credits, will not cause irreparable injury. As explained in
11 detail *supra* pp. 10-12, this Court carefully considered the question of whether the expansion
12 of good time credits was consistent with public safety in our August 2009 Opinion & Order.
13 We heard extensive testimony from the leading experts in the country, all of whom –
14 including the now Secretary of CDCR Dr. Beard – testified that the expansion of good time
15 credits could be implemented safely. The Supreme Court affirmed this conclusion, crediting
16 our factual findings, *Plata*, 131 S. Ct. at 1942, and endorsing our determination that
17 expansion of good time credits would reduce overcrowding "with little or no impact on
18 public safety" by allowing the State "to give early release to only those prisoners who pose
19 the least risk of reoffending," *id.* at 1943.

20 Defendants' "new evidence" in their request for a stay is not to the contrary.
21 Defendants cite an article by two Stanford Law School professors for the proposition that
22 "even inmates that CDCR has considered 'low risk' recidivate such that 41% are returned to
23 California prisons within three years, and that 11% of such 'low risk' offenders have been
24 'rearrested for a violent felony within 3 years of release.'" Defs.' Mot. to Stay at 6-7 (ECF
25 No. 2665/4673) (citing Joan Petersilia & Jessica Greenlick Snyder, *Looking Past the Hype:
26 10 Questions Everyone Should Ask About California's Prison Realignment*, 5(2) Cal. J.
27 Politics Policy 266, 295 (2013)). This sole law journal article, not subject to cross-
28 examination, of course, is not sufficient to rebut the extensive testimony this Court

1 considered after fourteen days of trial in 2009. This aside, the professors’ statistics, even if
2 correct, are irrelevant to the question of whether releasing prisoners *early* will have a
3 different effect on their behavior than releasing them *later*. The statistics that defendants cite
4 indicate the percentage of prisoners who are likely to recidivate, but they do not suggest that
5 there is a difference in the percentage of low-risk prisoners who recidivate when they are
6 released early compared to when they are released at the time originally scheduled. At trial,
7 after considering extensive testimony on the question of whether early release through good
8 time credits increases the crime rate, the evidence showed overwhelmingly that it does not,
9 and that it “affects only the timing and circumstances of the crime, if any, committed by a
10 released inmate.” Aug. 4, 2009 Op. & Order at 143 (ECF No. 2197/3641). In fact, an
11 argument can be made that the early release of prisoners may even *decrease* the crime rate.
12 The State could well use the funds it saves by caring for fewer prisoners to fund reentry
13 programs such as drug rehabilitation, job training, housing assistance, education, and other
14 programs that reduce recidivism. The absence of such reentry assistance is far more likely to
15 increase recidivism than release on a date earlier than initially scheduled.

16 Moreover, although this Court believes the expanded good time credits measure is the
17 simplest and best way for defendants to comply with our Population Reduction Order, we
18 have not *required* defendants to implement this measure. Rather, we have afforded them
19 flexibility, allowing them to modify the good time credits measure by, for example,
20 increasing the amount of such credits that can be awarded to particular sets of individuals and
21 limiting the number of prisoners who will be eligible to receive them. We have also allowed
22 defendants to substitute for measures on the Amended Plan (including the good time credits
23 measure) other measures from their List, or to substitute prisoners from the Low-Risk List.
24 For example, defendants might reassign prisoners to leased jail space – one of the measures
25 included on their List. June 20, 2013 Op. & Order at 50 (ECF No. 2659/4662). We also
26 suggested that defendants consider substituting, for prisoners who fall within the Amended
27 Plan, “Lifers” who, due to age or infirmity, are adjudged to be “low risk” by CDCR’s risk
28 assessment and a number of whom may be physically and mentally unable to commit future

1 crimes. *Id.* Our only requirement is that the substituted measures result in defendants'
2 reaching the 137.5% design capacity benchmark by December 31, 2013.

3 Third, issuance of a stay of our June 20, 2013 Order will substantially injure plaintiffs.
4 The *Plata* and *Coleman* courts have both determined that mental and medical health care
5 conditions in the California state prisons violate plaintiffs' constitutional rights, and this
6 Court and the Supreme Court have held that the only way to remedy these constitutional
7 violations is to reduce prison overcrowding to 137.5% design capacity. Recent reports by the
8 Receiver in *Plata*, Clark Kelso, confirm this finding. Kelso recently reported that "we do not
9 have appropriate and adequate healthcare space at the current population levels. We need
10 population levels to reduce to 137.5% of design capacity as ordered by the Three Judge
11 Panel." Receiver's 23rd Report at 31 (ECF No. 2636/4628). Granting a stay would result in
12 continuing injury to plaintiffs by maintaining the prison population at the current level of
13 149.2%, far above the constitutional level determined by this Court and affirmed by the
14 Supreme Court in 2011 to be necessary to the safety and welfare of those in the custody of
15 the State.⁸

16 Fourth, the public interest lies in denying defendants' request for a stay. "[I]t is
17 always in the public interest to prevent the violation of a party's constitutional rights."
18 *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (internal quotation marks and
19 citation omitted). Here, the public interest lies in obviating the ongoing constitutional
20 violations in the mental and medical health care systems in California's prisons – violations
21 that this Court and the Supreme Court have determined will be eliminated only when
22 defendants reduce the prison population from its current state of 149.2% design capacity to
23 137.5% design capacity. Finally, the public interest lies in denying the stay because
24 defendants have informed this Court that, absent a stay, they will comply with the Population

25 ⁸ In their motion for a stay, defendants state that "population reduction is just one of
26 many existing remedies directed at the alleged Eighth Amendment violations at issue; the
27 other remedies will remain in place irrespective of any stay here." Defs.' Mot. to Stay at 7
28 (ECF No. 2665/4673). This does not change our finding, affirmed by the Supreme Court,
that the only way to completely alleviate the ongoing constitutional violations is to reduce
the prison population to 137.5% design capacity.

Reduction Order. Defs.' Mot. to Stay at 2 (ECF No. 2665/4673). Conformity with the Order, if durable, will satisfy the requirements of the Eighth Amendment.⁹

IV. CONCLUSION

Granting defendants a stay of our June 20, 2013 Order would serve to resolve this litigation in defendants' favor. The stay, which would last through the Supreme Court's determination whether its previous 2011 decision was warranted, would last well past December 31, 2013, the date by which defendants have been ordered to reduce the prison population to 137.5% design capacity. Put differently, granting the stay would mean that at the end of the period by which defendants have been ordered to comply, defendants will have been excused from meeting the requirements of this Court's Population Reduction Order. Only denial of the stay by this Court and the Supreme Court will, defendants concede, cause them to comply with the Population Reduction Order issued in August 2009 and approved by the Supreme Court in June 2011. Specifically, only denial of the stay will cause defendants to implement the Plan it has selected along with an additional measure, whether the additional measure be the expansion of good time credits, a measure recommended by numerous experts at trial, which other states have had success in safely implementing, and which the Supreme Court endorsed in *Brown v. Plata*; use of the Low-Risk List; or any of a number of other measures of defendants' choice.

Coleman was initiated 23 years ago, and *Plata* 12 years ago. The district court in *Coleman* has issued over 100 substantive orders in an attempt to bring defendants into compliance with the Eighth Amendment of the Constitution. Apr. 5, 2013 Order Denying Defs.' Mot. to Terminate at 31 (*Coleman* ECF No. 4539). The district court in *Plata* has


⁹ It is not enough simply to meet a specific target number of prisoners on a specific date. Durability is necessary to ensure compliance with both the Order and the Constitution, and can be determined only after a period of time in which this Court can examine whether the ratio of prisoners to design capacity is stable. Changes in penological policies and procedures, as well as other matters, may have a significant effect on the prisoner to design capacity ratio. We maintain jurisdiction over the question for a reasonable period of time in order to resolve that issue.

1 issued over 50 such orders, *see* Docket Sheet, *Plata v. Brown*, No. C01-1351 TEH (N.D.
 2 Cal.), and undoubtedly would have issued many more had a Receiver not been appointed in
 3 2006. After this long history of defendants' noncompliance, this Court cannot in good
 4 conscience grant a stay that would allow defendants to both not satisfy the Population
 5 Reduction Order and relitigate the Supreme Court's emphatic decision in the very case
 6 before us. A denial of the stay by this Court and the Supreme Court will, however, at least
 7 result in the State's obeying the orders of the federal judiciary and bringing the prison system
 8 into compliance with the Eighth Amendment, should the measures it selects prove durable.

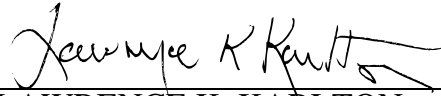
9 For the above reasons, defendants' motion to stay this Court's June 20, 2013 Order is
 10 DENIED.

11
 12 **IT IS SO ORDERED.**


13
 14 Dated: 07/03/13


 STEPHEN REINHARDT
 UNITED STATES CIRCUIT JUDGE
 NINTH CIRCUIT COURT OF APPEALS

15
 16
 17
 18 Dated: 07/03/13


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

19
 20
 21
 22 Dated: 07/03/13


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