17-16080

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RALPH COLEMAN, et al.,

Plaintiffs-Appellees,

v.

EDMUND G. BROWN JR., et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of California

No. 2:90-cv-00520 KJM-DB (PC)
The Honorable Kimberly J. Mueller, Judge

DEFENDANTS-APPELLANTS' OPENING BRIEF

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INTRODUCTION

The focus of this decades-old class action has shifted from remedying systemic shortfalls in California's prison mental healthcare system that broadly fell below constitutional requirements, to regulating the day-to-day operations of the current robust system, down to the most minute details. In its April 19, 2017 order, the district court directed state officials to attain, on pain of contempt and monetary sanctions, 100-percent compliance with transfer timelines for inmates referred to inpatient hospital units. Under the order's terms, any departure from the 10- or 30-day transfer timelines constitutes a *per se* violation of the Eighth Amendment, regardless of the absence of actual harm to inmates, Defendants' substantial and successful remedial efforts, or their subjective intent to minimize transfer wait times.

That was error, and this Court has jurisdiction to correct it. The Eighth Amendment does not require perfect adherence to inpatient transfer timelines to satisfy the prohibition against cruel and unusual punishment. The court's perfect-compliance standard imposes an unattainable obligation on the State that is untethered to a systemic constitutional violation and is sure to prolong federal-court oversight, rather than move it towards closure.

The court compounded its error by holding that the subjective intent of state officials was irrelevant in the remedial phase of this case. Far from

acting with deliberate indifference, Defendants have worked tirelessly to reduce inpatient transfer wait times by investing hundreds of millions of dollars in additional bed capacity, updating technology systems, initiating large-scale organizational restructuring, and launching innovative programs.

Finally, the district court violated the Prison Litigation Reform Act's (PLRA) directive that prisoner relief be narrowly drawn and extend no further than necessary to correct a systemic Eighth Amendment violation. The court made no findings that inmates waiting a few days beyond transfer timelines were subjected to unconstitutionally deficient care. In fact, the only evidence submitted shows that such inmates continue to receive continuous, appropriate care while awaiting transfer, including in licensed crisis-bed facilities.

The State long ago implemented a comprehensive system for identifying, referring, and transferring inmates with serious mental illness to higher levels of care. Three decades ago, California's prisons lacked an adequate system to deliver mental-health care to prisoners. Today, the State provides prisoners with a complete continuum of mental-health treatment through a complex and innovative delivery system, serving over 38,000 inmate-patients, including over 2,200 inmates receiving inpatient care annually. And the State continues to monitor and improve the system's

performance. But no health care system, certainly not one as immense and complex as this one, can perfectly and permanently comply with inpatient transfer guidelines. Because the district court exceeded its equitable authority and violated the PLRA's restrictions on prospective relief, the Court should reverse the April 19 order.

ISSUES PRESENTED

1. Whether this Court has jurisdiction to review the district court's order mandating, for the first time and on threat of contempt, perfect compliance with 10- and 30-day inmate transfer timelines for inpatient mental-health care.

2. Whether the district court erred by concluding that state officials must attain perfect compliance with transfer timelines for inpatient care to satisfy the Eighth Amendment's prohibition against cruel and unusual punishment.

3. Whether the district court erred by holding that the subjective intent component of the Eighth Amendment analysis was no longer relevant in the remedial phase of the litigation.

4. Whether the district court's order mandating perfect and permanent compliance with inmate-patient transfer timelines violated the PLRA's directive that prisoner relief be narrowly drawn and extend no

further than necessary to correct a systemic Eighth Amendment violation, and therefore was an abuse of discretion.

STANDARD OF REVIEW

In the context of injunctive relief, the Court reviews de novo the district court's legal conclusions, and reviews factual findings for clear error. *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 653 (9th Cir. 2002). The Court reviews the scope of an injunction for abuse of discretion. *Id.* By definition, a district court abuses its discretion when it makes an error of law. *Koon v. United States*, 518 U.S. 81, 100 (1996); *United States v. Hinkson*, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc). Further, a district court abuses its discretion if its application of the correct legal standard is illogical, implausible, or without support from inferences that may be drawn from the record. *Hinkson*, 585 F.3d at 1262.

STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction over Plaintiffs' Eighth Amendment claims. 28 U.S.C. §§ 1331, 1343. The case was filed in 1990 (CR 1), and a judgment on the merits was entered on September 13, 1995. (CR 612 (reported at *Coleman v. Wilson (Coleman I)*, 912 F. Supp. 1282 (E.D. Cal. 1995).) Since then, the case has been in the remedial phase of litigation.

On April 19, 2017, the district court entered an injunction against Defendants. (CR 5610, ER 1-15.) Defendants timely appealed on May 19, 2017. (CR 5621, ER 42); Fed. R. App. P. 4(a)(4). As explained *infra*, Argument I, this Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1) because the April 19 Order grants injunctive relief or modifies an existing injunction. *See Gon v. First State Ins. Co.*, 871 F.2d 863, 865-66 (9th Cir. 1989). Alternatively, this Court may exercise jurisdiction under 28 U.S.C. § 1291 because the April 19 Order is a final post-judgment order. *See Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1064-65 (9th Cir. 2010).

STATEMENT OF THE CASE

I. OVERVIEW OF THE *COLEMAN* CLASS ACTION REGARDING CALIFORNIA'S SYSTEM FOR PRISON MENTAL-HEALTH CARE.

This § 1983 prisoner case was filed in 1990. A year later, a class covering all CDCR prisoners with serious mental disorders (CR 1, 103, 109) was certified on an action maintaining that prisoners were receiving unconstitutional mental-health care (CR 60).

A. 1995 Remedial Order and Appointment of the Special Master.

Following a bench trial in 1994, the district court found that class members were not receiving adequate care because of six structural deficiencies in the mental healthcare system, including the lack of a system

that adequately identifies seriously ill inmates and refers them to the appropriate level of mental-health care. *Coleman I*, 912 F. Supp. at 1298, n.10 (citing *Balla v. Idaho State Bd. Corr.*, 595 F. Supp. 1558, 1577 (D. Idaho 1984)). The district court concluded that Defendants were deliberately indifferent to Plaintiffs' serious mental-health needs because they knew, but failed to correct, these deficiencies. *Id.*

In December 1995, the court appointed a special master to help Defendants develop a constitutionally adequate mental healthcare system. (CR 640, ER 621.) Defendants were ordered to provide the Special Master with remedial plans. (CR 659, ER 613-17.) The Special Master reviewed and compiled those plans into a comprehensive set of policies, procedures, and protocols that later became known as the State's Mental Health Services Delivery System Program Guide ("Program Guide"). (CR 850, ER 588; *see* Defs.' Req. Jud. Notice Supp. Opp'n Mot. Dismiss (Defs.' 1st RJN), Ex. 1 (2009 Revised Program Guide), ECF No. 15.) Over the next 20 years, the Special Master issued 27 monitoring reports, usually two a year, in which he assessed Program Guide compliance and proposed further remedial orders.

B. Development of the Program Guide for Mental-Health Services.

The Program Guide was intended to be flexible and subject to modification in response to changes, improvements, and unforeseen events in the delivery of mental-health care. At its inception, the parties recognized that the Program Guide was a "work in progress." (CR 1749, ER 577-78.) Over the years, the parties and the Special Master have engaged in a "ceaselessly dynamic process," negotiating revisions to the Program Guide to account for "new and evolving issues," including a rapidly expanding patient population. (*Id.*, ER 577-78, 584-85.) Eventually the guide developed into a "compendium of 195 pages of standards and benchmarks for mental-health-care delivery, plus 110 pages of attachments." (CR 4205, ER 505.)

In 2006, the Program Guide was revised into a ten chapter "blueprint" for providing mental-health services. (CR 1749, ER 584; CR 1753.) The guide contains hundreds of specific procedures regarding every aspect of running a prison-mental-health system, ranging from the frequency and content of clinician meetings to paperwork processing. (CR 1753; *see, e.g.*, Program Guide 12-7-5, 12-8-6.) The district court approved the Program Guide and ordered Defendants to "immediately implement" the undisputed

provisions.[1] (CR 1773, ER 571-72.) The Program Guide's own terms contemplate annual revisions. (Program Guide at 12-1-17; CR 1749, ER 585 (discussing need for a process to modify Program Guide provisions).)

The Program Guide was last formally revised in 2009. (*See* Defs.' 1st RJN, Ex. 1.) At the district court's direction, the parties are in the process of updating the Program Guide to incorporate policy modifications required by court orders issued since March 2006. (CR 5610, ER 6 n.3.)

C. Overview of California's Mental Health Services Delivery System.

The California Department of Corrections and Rehabilitation (CDCR) provides a broad range of high-quality outpatient and inpatient mental-health services to over 38,000 inmate-patients. (CR 5544-2, ER 280.) Initially, CDCR maintained a contract with the California Department of State Hospitals (DSH)[2] to provide acute and intermediate long-term inpatient mental-health care for over 2,200 inmates annually. (CR 5544-1, ER 276-77.) On July 1, 2017, CDCR assumed operation of most inpatient facilities

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[1] At that time, although the Program Guide was "95 percent" complete, a few disputes remained regarding some terms, such as minimum qualifications for psychiatrists and staff-to-patient ratios. (CR 1749, ER 577-78.)

[2] Before July 1, 2012, DSH was known as the Department of Mental Health (DMH).

providing mental-health care for state prisoners. (CR 5663 at 2; CR 5664 at 3.)

To evaluate the system's capacity, CDCR uses a court-approved consultant to study and forecast mental-health bed needs based on biannual population projections. (CR 5544-2, ER 283 ¶ 11.) CDCR monitors bed use daily through its Health Care Placement Oversight Program. (*Id*. ¶ 12.) The program reports on daily census and bed availability for all mental-health beds within the system. (*Id*.) This reporting allows CDCR to identify pressures in the system and move patients to available beds. (*Id*.)

1. Levels of Mental-Health Care.

The system has four levels of care, including Mental Health Crisis Bed (MHCB) programs and inpatient hospital care. (Program Guide 12-1-7—12-1-9 (describing all four levels of care).) Mental Health Crisis Beds are for inmates who are suicidal or markedly impaired and/or dangerous to others because of mental illness, and who require 24-hour nursing care. (*Id.* at 12-1-8, 12-1-9.) These crisis beds are also typically used for inmates "awaiting transfer to a hospital program." (*Id*.) Inpatient care is "available for inmate-patients whose conditions cannot be successfully treated in the outpatient setting or in short-term MHCB placements." (*Id*.) Intermediate and acute levels of inpatient care are provided in an inpatient setting. (*Id*.)

The MHCB programs are facilities licensed for crisis care and provide continuous mental-health and inpatient care 24 hours a day, seven days a week. (*Id*. at 12-5-1.) These facilities provide crisis care under the same state licensing standards as inpatient hospital beds and require equivalent clinical staffing levels. (*Id*.); *see* Cal. Code Regs., tit. 22, §§ 79739-79749. Thus, patients in MHCBs receive the same level of care they would in an intermediate- or acute-care unit. (*Id*.; *see also* CR 5707 at 112-13.)

Inpatient care, both acute and intermediate, is provided at state hospitals and programs located within the secure perimeter of CDCR prisons. (CR 5544-1, ER 276.) Inpatient programs are divided into high- and low-custody settings. (CR 5335, ER 431.) Because the standalone DSH hospitals are not prisons, they are equipped only for low-custody, intermediate care and accept only patients who may safely reside in the unlocked housing that exists in the state hospital treatment setting. (*Id*., ER 432.)

2. Transfers to Inpatient Programs and Interim Care.

Under the Program Guide, inmates referred to an inpatient acute-care program must be transferred within 10 days of referral. (Program Guide 12-1-15.) Transfers to intermediate-care programs must be completed within 30 days of referral. (*Id*.) As soon as a referral is made, the patient is placed on

a "waitlist" for inpatient programs. (CR 5521, ER 314.) Most inmates waiting for admission to an acute-care inpatient bed are placed in an MHCB. (CR 5560, ER 254-55.)

Inmates waiting for an inpatient bed continue to receive round-the-clock mental-health treatment commensurate with their current level-of-care placement, plus additional oversight and supplemental treatment. (CR 5544-2, ER 282 ¶ 10; CR 3962-1, ER 545-46; Program Guide 12-5-3.) MHCB patients also receive daily clinical contacts with a psychiatrist or psychologist, medication evaluation and management, and individualized treatment plans that include rehabilitative therapy, weekly meetings with their Interdisciplinary Treatment Team, and 24-hour nursing care. (*Id.*; CR 5707 at 112-13.)

D. Defendants' Implementation of Plans Addressing Inpatient Waitlists and Timelines.

Early in the remedial phase of the litigation, Defendants implemented new screening procedures to identify inmates needing mental-health treatment. *Coleman*, 922 F. Supp. 2d at 902 n.17. This implementation led to a rapidly increasing patient population and corresponding demand for services. *Id.* (CR 1749, ER 577.) Between 1997 and 2005, the patient population more than doubled to over 30,000. (*Id.*) In 2005, 2009, and

2011, Defendants performed additional assessments that identified hundreds more inmates who needed inpatient treatment, resulting in increased referrals and, concomitantly, longer wait times for inpatient placements. (CR 1607, ER 586; CR 3831, ER 567; CR 4069, ER 513.) At its height, the waitlist expanded to 574 inmates awaiting intermediate care and 64 inmates awaiting acute care. (CR 3831, ER 568-69.)

In 2010 and 2011, Defendants implemented plans, as ordered by the court, to "reduce or eliminate" inpatient waitlists. (CR 3962-1, ER 525.) These plans included expansion of treatment programs, new policies for better managing bed use, and new technology for sharing inmate-patient information in real-time. (*Id.*, ER 526.) Defendants also invested hundreds of millions of dollars in additional bed capacity, including such projects as:

- the California Health Care Facility—an $840 million, 1,722-bed prison hospital, designed to house inmates needing intensive, long-term medical and mental-health care;
- at the California Medical Facility, a $33.7 million 64-bed intermediate-care unit and a $23.8 million addition of treatment and office space for the EOP program;

- at the Correctional Institution for Women, a $36.3 million, 45-bed psychiatric inpatient facility, and a $7.2 million, 20-bed Psychiatric Services Unit;
- at California State Prison–Sacramento, new office and treatment space for EOP inmates at a cost of $12.2 million.

(CR 4278, ER 462-66.)

Defendants' efforts substantially reduced inpatient waitlists. As the district court recognized in December 2011, Defendants' "significant and diligent efforts" had yielded "considerable progress reducing the inpatient wait list." (CR 4131, ER 511.) In July 2012, the district court commended the parties for their "remarkable accomplishments to date in addressing the problems in access to inpatient care." (CR 4214, ER 470.) In January 2013, the Special Master acknowledged that the inpatient waitlists were reduced to single digits. (*See* CR 4539 (reported at *Coleman v. Brown (Coleman II)*, 938 F. Supp. 2d 955, 982 (E.D. Cal. 2013)).)

In early 2013, Defendants moved to terminate the injunction under 18 U.S.C. § 3626(b), but the district court denied the motion. (CR 4275; *Coleman II*, 938 F. Supp. 2d at 989-90.) Regarding access to inpatient beds, the district court found that Defendants' referral and transfer of inmates had "vastly improved," but pointed to uneven performance at a few institutions

and noted that "work remains." *Coleman*, 938 F. Supp. 2d at 981. The court held that Defendants' improvements, although "significant," did not justify "termination of all relief in the action." *Id.* at 982.

II. RECENT LITIGATION OVER INPATIENT WAITLISTS, LEADING TO THE COURT'S REMEDIAL ORDER.

A. Unexpected Spikes in Demand Increased Waitlists for Inpatient Transfers in 2015 and 2016; Defendants' Response Successfully Ended Those Waitlists by September 2017.

Defendants have a comprehensive system for identifying inmates with serious mental illness and appropriately placing them in treatment programs. (*See* CR 5522-1, ER 298 ¶¶ 6-7; CR 5544-1, ER 277; CR 5544-2, ER 280; *see generally* Program Guide.) In 2012, for example, no patients were waiting for an inpatient bed but, like any large system, demand for inpatient care has at times exceeded capacity. In August 2015, the district court expressed concern about "the apparent re-emergence of waitlists." (CR 5333, ER 447.)

In response, Defendants took steps to ameliorate wait times for inpatient transfers, working tirelessly to ensure prompt access to inpatient beds. For example:

- Defendants obtained funding and activated a 30-bed intermediate inpatient unit for high-custody inmates. (CR 5335, ER 437.)

- DSH implemented a formalized Housing Review process to streamline and accelerate the transfer of patients to their least restrictive settings in order to open up high-custody beds. (*Id.*, ER 438; CR 5374-1, ER 357-58.)
- CDCR and DSH renegotiated a new Memorandum of Understanding (MOU) regarding how the agencies work together to develop more efficient patient-management processes designed to increase bed placements and reduce wait times. (CR 5342, ER 373; CR 5374-1, ER 358.)
- Defendants provided enhanced training to clinicians to increase efficient bed use by improving case formulation and treatment plans. (CR 5544, ER 267.)
- Defendants implemented a Dialectical Therapy Program, which has been shown to be effective in reducing demand for inpatient services by improving functioning of patients who repeatedly need inpatient care. (*Id.*, ER 272.)

Defendants also substantially increased inpatient bed capacity. (CR 5544, ER 264-65.) The 2017-2018 State Budget allocates $18.7 million for 72 additional intermediate-care beds and 100 additional flexible-use

inpatient units that will primarily function as MHCBs. (CR 5544-2, ER 280 ¶¶ 4-5; Defs.' 1st RJN, Ex. 2 (2017-2018 State Budget Summary, at 32-33 (http://www.ebudget.ca.gov/ 2017-18/pdf/Enacted/ BudgetSummary/PublicSafety.pdf)).) Construction of the 100 flexible-use MHCBs will cost well over $100 million upon completion. (Defs.' Req. Jud. Not. Supp. Opening Br. (Defs.' 2d RJN), Ex. 1 at RJN 7, 11 (2017 Five-Year Infrastructure Plan (http://www.ebudget.ca.gov /2017-Infrastructure-Plan.pdf)).)[3] Since 2013, Defendants have increased inpatient bed capacity by 28 percent, from 1,282 to 1,647 beds. (CR 5522-1, ER 299.)

Further, Defendants obtained legislative approval to shift responsibility for inpatient services from DSH to CDCR for the programs operated within prison facilities, redirecting $254.4 million and nearly 2,000 staff positions for this purpose. (CR 5544-2 ¶ 4, ER 281; 2017-2018 State Budget Summary, at 32-33.) By centralizing management, CDCR projected that the plan, informally called "lift and shift," would yield 40 to 50 percent reductions in inpatient referral times. (CR 5544-2, ER 281.)

[3] Fifty-bed units will be built at both the California Institution for Men and the R.J. Donovan Correctional Facility. (2017 Five-Year Infrastructure Plan, at 70.)

And when fluctuations in inpatient demand and bed supply pushed patients beyond Program Guide timelines, CDCR and DSH staff moved aggressively to triage and manage care. (*See* CR 5522-1, ER 299.) For example, between October 2016 and February 2017, severe rainstorms flooded inpatient facilities at Salinas Valley State Prison, taking 58 of 246 inpatient beds offline for repairs. (CR 5560, ER 106; CR 5552-4, ER 261.)[4] In response to that unexpected loss of beds, Defendants immediately repurposed and staffed isolation rooms at another facility for use as temporary inpatient housing. (CR 5595, ER 47-48.) Although the flooding temporarily reduced inpatient-bed capacity, all *Coleman* patients on waitlists continued to receive clinically appropriate mental-health care within a licensed MHCB crisis unit. (CR 5560, ER 107-08, 254-55.)

Defendants' efforts paid off. Between January and May 2016, for example, 98 percent of patients referred to intermediate care were placed within Program Guide timeframes. (CR 5522-1, ER 299.) Despite the setbacks caused by flooding, by April 2017 there were only 20 inmates waiting over the transfer timeline for intermediate care, and 2 inmates

[4] During this time, California experienced catastrophic levels of rain that led to flooding throughout the state. (*See, e.g.*, https://www.mercurynews.com/2017/03/08/california-storms-wettest-water-year-so-far-in-122-years-of-records/ (last visited February 16, 2018).)

waiting beyond the timeline for acute care. (CR 5595, ER 47-48 & n.1; CR 5597, ER 45 ¶ 3.) And although inpatient demand subsequently increased between May and September 2017, Defendants successfully transferred 90 percent of inmate-patients (1,319 of 1,471 referrals) within the timelines. (Defs.' 2d RJN, Ex. 2 at RJN 14-15 (CR 5715).) Since September 13, 2017, Defendants have been compliant with the inpatient-transfer timelines. (*Id.* at RJN 14, 30, 53, 75, 95, 115 (CR 5715, 5731, 5751, 5757, 5789) (showing that between September 2017 and December 2017, Defendants were in compliance with inpatient-transfer timelines).)

B. The District Court's Order Requiring Defendants to Attain Perfect and Permanent Compliance with Program Guide Timelines for Inpatient Transfers.

In late 2016, the court issued orders setting status conferences and requiring Defendants to show cause why the list of patients waiting beyond Program Guide timelines could not be "reduced to zero" within one week, and "maintained at zero thereafter." (CR 5519, ER 341; *see* CR 5529, ER 294-95.) The court held a status conference on November 10, 2016 (CR

5512; CR 5521, ER 305), and an evidentiary hearing on January 23, 2017 (CR 5560, ER 88).

1. The Order to Show Cause.

On March 24, 2017, the district court issued an order to show cause regarding Defendants' satisfaction of Program Guide transfer timelines, including the 10- and 30-day timelines for inpatient transfer. (CR 5583, ER 16-17.) After summarizing Defendants' plans and programs to address wait times, the district court concluded that the State had had sufficient time to remedy wait times and must fully and permanently comply with Program Guide timelines. (*Id.*, ER 23, 28-36.)

The court ordered Defendants "to show cause in writing why they should not be required to come into full and permanent compliance with Program Guide timelines for transfer to acute and [intermediate-care facility] mental health care by May 15, 2017." (*Id.*, ER 40.) It also ordered the parties to brief "the question of appropriate remedies for any court order enforcing these Program Guide timelines." (*Id.*)

2. The April 19, 2017 Order Requiring Perfect Compliance Subject to Monetary Sanctions.

On April 19, 2017, after briefing and a hearing, the district court entered its order addressing the issues raised in the show-cause order. (CR

5610, ER 3-4.) The court held that "full and permanent compliance with Program Guide timelines for transfer to inpatient care is necessary to remedy constitutional violations identified in this action." (*Id.*) The court incorporated the show-cause order by reference and found that Defendants' compliance with the timelines was "feasible." (*Id.*) The order further provided that compliance would be enforceable through contempt proceedings and monetary sanctions. (*Id.*)

The court rejected Defendants' arguments that mandating perfect compliance with the Program Guide transfer timelines would exceed the requirements of the Eighth Amendment and contravene the limitations of the Prison Litigation Reform Act. (*Id.*, ER 3.) The court reasoned that the Eighth Amendment's subjective element, if it is relevant in the remedial phase of the litigation, is coextensive with proof of an ongoing objectively unconstitutional condition. (*Id.*) The court explained that the Program Guide timelines are designed to "reduce or eliminate" the waitlists, "reflect defendants' considered assessment of how to fulfill their constitutional obligation," and are "grounded in the requirements of the Eighth Amendment." (*Id.*)

The court further held that the order's mandate of 100-percent satisfaction of transfer timelines "will be enforceable by civil contempt

proceedings and, if necessary, imposition of monetary sanctions to coerce compliance." (CR 5610, ER 9-10.)[5] The court ordered Defendants to report monthly to the court the number of inmates whose transfers exceeded Program Guide timelines, and informed Defendants that, beginning on May 16, 2017, "[f]ines in the amount of $1,000 per inmate-patient per day will begin accumulating." (*Id*.) The court set a hearing for November 3, 2017, to consider contempt findings and the calculation of fines, subject to cancellation if no fines have accrued. (*Id*.)[6]

Defendants timely appealed. (CR 5621, ER 42.)

3. Plaintiffs' Motion to Dismiss the Appeal, and the District Court's Subsequent Order.

After Defendants noticed their appeal, Plaintiffs moved in this Court to dismiss the appeal for lack of jurisdiction. (ECF No. 10.) The Court denied

[5] The order provided that certain periods of time should be excluded from timeline compliance, such as when an inmate is appearing in court or receiving treatment for a more urgent medical need. (CR 5610, ER 7-8.) The court ordered the parties to develop an addendum to the Program Guide addressing excludable circumstances. (*Id*., ER 8.)

[6] The April 19 Order also set forth several other provisions separate from the portions requiring 100-percent attainment of Program Guide inpatient transfer timelines, subject to contempt sanctions. (CR 5610, ER 8-10 ¶¶ 2-4, 6-9.) These other terms include requirements for a further meet-and-confer process regarding exclusions to timeline calculations, updated reporting data, and a schedule for further proceedings regarding MHCBs. (*Id*.) Defendants do not challenge those aspects of the order in this appeal.

Plaintiffs' motion to dismiss without prejudice to renewing the arguments in their answering brief. (ECF No. 22.)

Meanwhile, the district court issued an order concerning further proceedings. (Pls.' RJN, Ex. A, ECF No. 21 (Order, Nov. 6, 2017, CR 5726).) In the order, the district court: (1) stated it would not proceed with contempt hearings because it was unclear whether this appeal divested the court of jurisdiction over the April 19 Order; (2) tallied the fines provided in the April 19 Order at $444,000, subject to a later show-cause hearing; and (3) gave its opinion that appellate jurisdiction is lacking because the April 19 Order, in the district court's view, did not impose a new injunction or modify an existing one, and it is not a final order because it merely reflects the law of the case. (*Id*.) The court also held that Defendants could not defend against contempt by proving that those inmates nevertheless received clinically appropriate care within a crisis bed setting and were not harmed by the delay. (*Id*. at 8-9.) The court stated that it was "not the court's role to evaluate the adequacy of care provided to individual class members who have waited beyond Program Guide timelines . . . ." (*Id*.)

SUMMARY OF ARGUMENT

This Court may review the district court's remedial order requiring, under penalty of contempt, perfect compliance with the Program Guide's 10-

and 30-day transfer timelines. The district court's order that full and permanent elimination of wait times through 100-percent compliance with the Program Guide fundamentally changed how it would measure the mental-health system's constitutional adequacy. This unprecedented relief represents a new injunction, or at a minimum, a modification of prior injunctive relief regarding Defendants' remedial obligations. Alternatively, the district court's order is appealable as a final post-judgment order because it effectively ended the litigation on the merits regarding Defendants' constitutional compliance with this Program Guide provision. Appellate jurisdiction is proper under either theory.

The district court abused its discretion by ordering relief that goes well beyond what the Eighth Amendment requires and what federal law allows. The court's perfect-compliance standard imposes an unattainable obligation on the State that is untethered to a systemic constitutional violation and is sure to prolong federal-court oversight, rather than end it.

Relying solely on the Program Guide's terms and definitions as a proxy for establishing constitutional harm, the court held that the Eighth Amendment required perfect compliance with the Program Guide's inpatient transfer timeframes. In the court's view, any departure from those timelines constitutes a *per se* violation of the Eighth Amendment, regardless of the

absence of actual harm to inmates, Defendants' substantial remedial and mitigation efforts, or their subjective intent in seeking to minimize transfer wait times. Had the court addressed the subjective intent prong, as it was required to do, it could not have found that state officials were deliberately indifferent to a substantial risk of harm based on the record before it. But perfect compliance with the Program Guide—a flexible and evolving set of standards that was never intended to set a constitutional floor—is not a necessary means to achieve systemically constitutional access to care, let alone a narrowly tailored one. Instead of a remedy for the underlying Eighth Amendment violation, the April 19 Order provides prophylactic relief that is impossible for Defendants to meet, since it leaves no room for inevitable errors in arguably the largest prison-mental-healthcare system in the country.

Noncompliance with court orders and decrees does not justify imposing prospective relief under the PLRA. The correct analysis is whether prison officials' conduct amounts to a current and ongoing constitutional violation. The court failed to apply this analysis and made no findings that inmates waiting for transfer beyond Program Guide timelines were, by virtue of such variances, subjected to unconstitutionally deficient mental-health care. In fact, the only evidence submitted on this point showed that: (1) the vast majority of inmates continued to receive appropriate care on a continuous

basis in licensed crisis-bed facilities while awaiting transfer to a longer-term bed; and (2) state officials took extensive and increasingly effective measures to address inpatient wait times. The mere existence of deviations from the timelines does not demonstrate systemically or even individually unconstitutional care. Just as there will be instances where an inmate must be transferred more quickly than the Program Guide requires, so too there will be inmates briefly on the waitlist who continue to receive adequate care beyond the timelines; and further still, there are inmates who, in their clinical best interest, must stay in their current clinical setting, even if that means "violating" the transfer timelines. Thus, a proper Eighth Amendment analysis on this record could not support the district court's perfect-compliance order as a narrowly drawn remedy under the PLRA.

This Court should reverse the portion of the district court's April 19 Order requiring 100-percent compliance with the 10- and 30-day inpatient transfer timelines set forth in the Program Guide.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO REVIEW THE APRIL 19 ORDER BECAUSE IT IMPOSES NEW INJUNCTIVE RELIEF OR MODIFIES AN EXISTING ONE, OR BECAUSE IT IS AN APPEALABLE POST-JUDGMENT ORDER.

A. The April 19 Order Imposes New Injunctive Relief.

Appealable injunctions are orders that are (1) directed to a party, (2) enforceable by contempt, and (3) designed to accord or protect some or all of the substantive relief sought by a complaint in more than preliminary fashion. *Gon v. First State Ins. Co.*, 871 F.2d 863, 865-66 (9th Cir. 1989). The April 19 Order meets those requirements because it imposes a new prospective obligation on Defendants to meet the Program Guide's 10- and 30-day timeframes for transfers to inpatient care 100 percent of the time, regardless of whether constitutionally adequate care is provided in the interim. The order commands Defendants to take actions and exposes them to daily monetary sanctions for every tardy transport.

Neither the Program Guide nor any prior court order over the preceding 27 years required the State to flawlessly meet the transfer timelines for the thousands of inmate-patients referred for inpatient care each year. Although in 2006 the district court ordered Defendants to "immediately implement" the Program Guide's provisions, it did not hold that perfect compliance with the guide's protocols and procedures related to transferring inmate-patients to inpatient care was necessary to correct systemic Eighth Amendment violations. (*See* CR 1773, ER 572-73.) Nor could "immediately implement" be reasonably construed to indicate that implementation of these provisions must be flawless to satisfy the Constitution. Rather, the order

reflects the court's focus on creating a constitutionally adequate system, and not on micromanaging the day-to-day operations of the prison. That broad focus is confirmed by the court's previous acknowledgement that the Program Guide is not the constitutional baseline, but "describes a system that *comports* with the requirements of the court in this case" (CR 4361, ER 455), and that is "*adequate* . . . for the delivery of mental health care to prison inmates," *Coleman II*, 938 F. Supp. 2d at 973.

Indeed, the Program Guide's own text anticipates that there *will be delays* during the referral and transfer process, and provides for rules to govern those circumstances. (CR 5343, ER 362 n.1; Program Guide 12-1-15 ("some inmate-patients may be placed on a waitlist pending bed availability after acceptance" into an inpatient program), 12-6-5 (outlining criteria for assigning inmate-patients on inpatient waitlists, including "length of time the inmate-patient has been on the waiting list").) If 100-percent compliance has long been required to satisfy the Eighth Amendment, as the court has suggested, it would make no sense for the Program Guide itself to expressly contemplate departures from the constitutional standard and create a system for managing waitlists.

That the April 19 Order followed an order to show cause in which the court asked the parties *whether* it should require full and permanent

compliance confirms that it is a new injunction, and thus appealable. (CR 5583, ER.) If prior orders already required 100-percent compliance with the Program Guide timelines, the district court would not have needed to issue a new order asking whether such a requirement should be imposed. Plaintiffs also understood the proposed new order as requiring something new, as they responded by arguing that the new order will enable Defendants to "know what the court intends to require and what it means to forbid" and "puts Defendants on clear notice of what sanctions may issue from failure to comply with the Court's forthcoming enforcement order." (CR 5593, ER 76.)

For all of these reasons, the district court's order requiring perfect compliance with the Program Guide represents a new obligation that is injunctive in character and, thus, immediately appealable under 28 U.S.C. § 1292(a)(1). *See United States v. Gila Valley Irrigation Dist.*, 31 F.3d 1428, 1441 (9th Cir. 1994) (holding that an order commanding explicit action at the present time is immediately appealable under § 1292(a)(1)); *Smith v. Eggar*, 655 F.2d 181, 184 (9th Cir. 1981) (holding that an order commanding compliance with terms of an agreement is injunctive and appealable).

B. The April 19 Order Is Also Appealable as a Modification of Prior Injunctive Relief.

The April 19 Order is reviewable on the additional ground that it at least modified a prior injunction. An order modifies an injunction under 28 U.S.C. § 1292(a)(1) when it substantially changes the terms of an injunction or alters the legal relations between the parties. *Gon*, 871 F.2d at 865-66.

Here, at a minimum, the April 19 Order modified prior injunctive relief by requiring Defendants, for the first time ever, to permanently attain 100-percent compliance with a Program Guide timeline, and by establishing that failure to do so will result in substantial multi-thousand-dollar-per-day monetary sanctions. (CR 5610, ER 9-10.) Before then, no prior plans or orders mandated perfect compliance with the Program Guide's inpatient transfer timelines, or with any other provision of the Program Guide. Accordingly, the imposition of a 100-percent-compliance standard went well beyond "interpret[ing]" or "clarif[ying]" earlier orders. (Pls.' Mot. 12.) The order created a new obligation, independently enforceable through a contempt action. The order thus substantially altered Defendants' remedial obligations, rendering it appealable under § 1292(a)(1). *See Gon*, 871 F.2d at 865-66; *Motorola, Inc. v. Computer Displays Intern., Inc.*, 739 F.2d 1149,

1154-55 (7th Cir. 1984) (contempt order was reviewable under § 1292(a)(1) as modification of injunction).

Given these facts, no further analysis should be required, including the three-part test of *Carson v. American Brands, Inc.*, 450 U.S. 79, 83-84 (1981)[7], which addresses the *denial* of injunctive relief and not, as here, the *granting* injunctive relief. *See Gila Valley Irrigation Dist.*, 31 F.3d at 1441 (holding jurisdiction existed where order was "sufficiently injunctive" in character, without applying *Carson* requirements); *Gon*, 871 F.2d at 865-66 (after characterizing order as a modification of an injunction, holding that jurisdiction existed without applying *Carson* test). Like the orders in *Gila Valley* and *Gon*, the order under review is sufficiently injunctive in character, and no further showing is necessary to establish this Court's jurisdiction.

C. Alternatively, the April 19 Order Is Appealable as a Final Post-Judgment Order.

Under § 1291, the April 19 Order is appealable as a final post-judgment order. In the context of post-judgment orders, "finality is to be given a

[7] Under *Carson*'s three-part test, the Court asks: (1) does the order have the practical effect of the grant or denial of an injunction? (2) does the order have serious, perhaps irreparable consequences? and (3) is the order one that can be effectively challenged only by immediate appeal? *See Thompson v. Enomoto*, 815 F.2d 1323, 1326-27 (9th Cir. 1987).

practical rather than a technical construction." *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1064 (9th Cir. 2010). A "final decision" generally is one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. *Id*. The finality requirement is not intended "to vindicate some purely technical definition of finality" but rather to avoid "piecemeal litigation." *Id.* (internal quotation marks omitted).

In the post-judgment context, "appeals courts have jurisdiction over post-judgment orders, such as a district court might enter pursuant to the jurisdiction it has retained to enforce a prior order." *Armstrong*, 622 F.3d at 1064. Concerns regarding piecemeal appellate review are less relevant after a judgment because the underlying dispute is settled. *United States v. Washington*, 761 F.2d 1404 (9th Cir. 1985). Of greater concern in the post-judgment context is ensuring "some opportunity for review, because unless such post-judgment orders are found final, there is often little prospect that further proceedings will occur to make them final." *Armstrong*, 622 F.3d at 1064 (internal quotation marks and alterations omitted); *see also United States v. Ray*, 375 F.3d 980, 984 (9th Cir. 2004) (similar). Thus, post-judgment orders are generally deemed final and appealable under 28 U.S.C. § 1291 when entered pursuant to a district court's continuing jurisdiction. *Armstrong*, 622 F.3d at 1064; *In re Am. Preferred Prescription, Inc.*, 255

F.3d 87, 92-93 (2d Cir. 2001) ("substantive" post-judgment orders in cases with a protracted remedial phase are generally appealable).

Under these standards, the April 19 Order is final because it conclusively determined that "full and permanent compliance with Program Guide timelines for transfer to inpatient care is necessary to remedy constitutional violations identified in this action." (CR 5610, ER 4-5.) The district court concluded that any departure from Program Guide timeframes automatically reflects deliberate indifference by state officials. (*Id*.) Further, having adjudicated these issues, the court established the sanctions to be imposed. Thus, after the April 19 Order, all that remains is execution of the judgment by calculating the fines for each alleged violation.

Indeed, later that year, the district court confirmed that the compliance issue is settled. (CR 5726.) The court found that Defendants had accumulated $444,000 in sanctions based on 154 inmates who waited at least one day beyond Program Guide timelines since May 15, 2017. (*Id*. at 5.) The court further held that Defendants could not defend against contempt by proving that those inmates nevertheless received clinically appropriate care within a crisis bed setting and were not harmed by the delay. (*Id*. at 8-9.) The court stated that it was "not the court's role to

evaluate the adequacy of care provided to individual class members who have waited beyond Program Guide timelines . . . ." (*Id.*)

The April 19 Order represents more than a mere "interim step toward further proceedings." *See Plata*, 560 F.3d at 980 (contempt order was non-final where it provided for further proceedings "in which more [was] at issue than whether or not the State" complied with the order). It reflects the culmination of distinct post-judgment proceedings, following a show-cause order and an evidentiary hearing. Because the order effectively decided the issue of Defendants' constitutional obligations on the merits, and further proceedings will not substantively change that determination, the order should be given a "practical" construction of finality. *See Armstrong*, 622 F.3d at 1065.

Accordingly, this Court has jurisdiction.[8]

[8] The district court's November 6, 2017 post-appeal pronouncement that its prior rulings are law of the case (CR 5726 at 6-7) "cannot insulate [the April 19 Order] from appellate review," *see Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988), and the district court lacks jurisdiction to alter the status of Defendants' appeal, *see also Natural Resources Defense Council, Inc. v. Southwest Marine Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001). Besides, as explained *infra*, law-of-the-case doctrine does not "limit [this] court's power" to review the appeal. *See United States v. Smith*, 389 F.3d 944, 948 (9th Cir. 2004).

II. THE DISTRICT COURT ABUSED ITS DISCRETION BECAUSE PERFECT COMPLIANCE WITH THE PROGRAM GUIDE IS NOT RELIEF THAT IS NECESSARY TO CORRECT A SYSTEMIC EIGHTH AMENDMENT VIOLATION.

"[F]ederal courts must be cognizant of the limitations of federalism and narrowness of the Eighth Amendment." *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir. 1982). The Eighth Amendment prohibits cruel and unusual punishments; it "is not a basis for broad prison reform." *Id*. The function of a court is limited to determining whether a constitutional violation has occurred, and to fashioning a remedy that does no more and no less than correct that particular constitutional violation. *Id*. When a government agency is involved, courts must grant the government the "widest latitude in the dispatch of its own internal affairs." *Rizzo v. Goode*, 423 U.S. 362, 378-79 (1976). While the Eighth Amendment bans cruel and unusual punishment, it certainly does not require perfect adherence to transfer timelines for inpatient care to satisfy that ban—and for good reason. In a system serving over 38,000 inmate-patients, such a standard is untenable and, thus, unreasonable. And, contrary to the court's finding, the subjective-intent of state officials *is* relevant in the remedial phase of the case, because that is what the case law requires. Without evidence of deliberate indifference, there can be no Eighth Amendment violation.

Moreover, Congress enacted the PLRA, 18 U.S.C. § 3626(a)(1)(A), to limit the role and powers of federal courts in prisoner litigation. *Miller v. French*, 530 U.S. 327, 347 (2000) ("curbing the equitable discretion of district courts was one of the PLRA's principal objectives"); *Gomez v. Vernon*, 255 F.3d 1118, 1128-29 (9th Cir. 2001). Under the statute, any prospective relief must not only be necessary to correct a constitutional violation, but also must be the least intrusive and narrowly drawn means to correct that violation. 18 U.S.C. § 3626(a)(1)(A). The PLRA broadly defines "prospective relief" as "all relief other than compensatory monetary damages." 18 U.S.C. § 3626(g)(7). The statute further defines "relief" as "all relief in any form that may be granted or approved by the court." *Id.* § 3626(g)(9).

The court below abused its discretion by issuing an unprecedented injunction that, besides being impossible to meet, is not narrowly tailored or necessary to remedy an identified Eighth Amendment violation, as required under the PLRA. Given the rigorous requirements of the Eighth Amendment and PLRA, the court had to do more than simply point to a failure of 100-percent compliance with the Program Guide to justify the injunction. The record does not establish any harm to inmate-patients waiting beyond Program Guide timeframes, or any Eighth Amendment

violation that could support a remedy of perfect compliance with the Program Guide's 10- and 30-day transfer timelines under the PLRA's narrow-tailoring requirement.

A. The Eighth Amendment Does Not Require Perfect Compliance with the Program Guide.

The Eighth Amendment proscribes the "unnecessary and wanton infliction of pain." *Hoptowit*, 682 F.2d at 1246. In the healthcare context, this means an inmate must prove "deliberate indifference to serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). The Eighth Amendment analysis requires both objective proof that inmates face a substantial risk of serious harm, and evidence of the defendant's state of mind about that substantial deprivation. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). A prison official acts with deliberate indifference when he is "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id*. This rigorous standard requires a showing that state officials acted with criminal recklessness. *Id*. at 838-39.

When officials respond reasonably to a risk of harm, there is no Eighth Amendment violation even if the harm is not averted. *Id*. at 844. In cases involving delays in medical treatment, there must be a showing that the

delay caused further injury. *Hallett v. Morgan*, 296 F.3d 732, 743-45 (9th Cir. 2002). Cruel and unusual punishment cannot be presumed by mere reference to expert guidelines and standards. *Rhodes v. Chapman*, 452 U.S. 337, 348 n.13 (1981).

The district court departed from these well-established principles when it ordered Defendants to attain an impossible standard—permanent and perfect compliance with the Program Guide's timelines for inpatient movement. The State cannot guarantee perfection in the execution of systemwide policies and procedures. Indeed, no healthcare system could, much less one as large and as complex as CDCR's. The State continues to expend considerable resources and hundreds of millions of dollars to increase capacity and improve systemwide delivery of care. Yet, to permanently comply with the district court's standard requires massive systemic changes, effectively guaranteeing perpetual court oversight and intrusion into the minutiae of prison administration. And, as explained below, the district court's strict-compliance approach completely ignores the Eighth Amendment requirement of both objective harm and subjective intent.

Furthermore, the district court's 100-percent-compliance standard conflicts with how courts evaluate compliance with court decrees. As other

courts have recognized, "it would be impractical, and thus unreasonable, to expect 100% compliance 100% of the time" with respect to the requirements of a complex injunction. *Wyatt by & Through Rawlins v. Rogers*, 985 F. Supp. 1356, 1388 (M.D. Ala. 1997); *Berry v. Sch. Dist.*, 195 F. Supp. 2d 971, 991 (W.D. Mich. 2002) ("perfect compliance with the court's remedial orders is not required for a constitutional violator to be released from judicial oversight"). If 100-percent compliance with the Program Guide is necessary to establish constitutional mental-health care, then it is unclear how Defendants will ever be able to emerge from federal court control. Neither the Eighth Amendment nor the PLRA countenance this type of extraordinary relief. Accordingly, the district court abused its discretion by ordering it.

B. The Subjective-Intent Element of the Eighth Amendment Standard Remains Relevant at the Remedial Stage, and the District Court Erred in Concluding Otherwise.

The district court also abused its discretion when it ordered prospective relief without finding an indispensable element of an Eighth Amendment violation: that Defendants acted with deliberate indifference. (CR 5610, ER 4.) The court held that, because the case was in the remedial phase of the litigation, the subjective-intent prong of the Eighth Amendment analysis was irrelevant. (*Id*.) The court stated that "[t]he relevant inquiry at this juncture

is what, objectively, is required to achieve complete remediation of the constitutional violation with respect to access to inpatient care." (*Id.*) In the district court's view, the subjective component collapsed into a purely objective inquiry regarding the conditions at issue. This mistaken view contradicts Supreme Court precedent.

In *Wilson v. Seiter*, 501 U.S. 294, 300 (1991), the Supreme Court expressly rejected the notion that in cases involving "continuing" or "systemic" constitutional deficiencies, courts may jettison the subjective-intent element of an Eighth Amendment violation. As the Court explained, the intent requirement flows from the Eighth Amendment itself, which forbids "punishment" and therefore mandates an inquiry into Defendants' state of mind. *Id.* Even where challenged conduct is objectively serious enough to implicate the Eighth Amendment, whether the conduct is "wanton depends on the constraints facing the *official*." *Id.* at 303 (emphasis in original; internal quotation marks omitted). On this point, there is "no significant distinction" between inadequate-medical-care claims and claims regarding other conditions of confinement. *Id.* at 300 n.1 & 303.

In *Helling v. McKinney*, 509 U.S. 25, 36 (1993), a case involving a prison smoking policy, the Supreme Court further explained that the subjective-intent element must be determined "in light of the prison

authorities' current attitudes and conduct." The Court observed that officials' attitudes and conduct may have changed considerably over the course of the litigation, and the deliberate-indifference analysis could depend on how they administer the relevant policy. *Id*.

It is true, as *Farmer* acknowledged, that if evidence establishes an objectively intolerable risk of harm, the defendants cannot then claim a lack of knowledge as a defense. 511 U.S. at 847 n.9. But Defendants are unaware of any court holding, before now, that anything short of flawless compliance with a benchmark amounts to an objectively unconstitutional condition.[9] And Defendants' mere awareness that CDCR's mental-health delivery system is not perfect and error-free cannot possibly suffice to establish that state officials have consciously disregarded a substantial risk of serious harm to the plaintiff-class.

Farmer made clear that an adverse finding under the objective prong does not end the analysis, because an official's mere knowledge of an objective risk is insufficient to show deliberate indifference—the official

[9] Even in the 2013 order denying Defendants' termination motion, the district court made no such finding, stating only that "work remains" and the improvements in access to inpatient care did not entitle Defendants to termination of "*all relief* in this action." 938 F. Supp. 2d at 981-82 (emphasis added).

must also consciously disregard that risk. *Id*. at 837-38. If prison officials respond reasonably to the risk, there is no Eighth Amendment violation even if the harm is not averted. *Id*. at 844. "In the context of injunctive relief, even prison officials who had a subjectively culpable state of mind when the lawsuit was filed could prevent issuance of an injunction by proving, during the litigation, that they were no longer unreasonably disregarding an objectively intolerable risk of harm and that they would not revert to their obduracy upon cessation of the litigation." *Id.* at 847 n.9.

As other courts have held, a current assessment of the defendants' state of mind remains necessary, even in the remedial, post-judgment context. *See Baker v. Haun*, 333 F. Supp. 2d 1162, 1165 (D. Utah 2004) (dissolving injunction based in part on the absence of evidence showing a "present unwillingness on the part of prison officials to comply with the injunction"); *United States v. Terr. of the Virgin Islands*, 884 F. Supp. 2d 399, 417 (D.V.I. 2012) (explaining that finding a "current and ongoing" Eighth Amendment violation required a determination of prison officials' subjective state of mind). The court here did not make that assessment, much less point to any supporting evidence.

C. The District Court Conflated the Program Guide's Flexible and Evolving Standards with the Eighth Amendment.

The April 19 Order misapplied the deliberate-indifference analysis by using the Program Guide as a proxy for objective harm. In so doing, the court obviated the need for Plaintiffs to demonstrate that inmate-patients awaiting inpatient transfer beyond the timelines were receiving objectively unconstitutional mental-health care and were harmed by any transfer delay, despite the fact that the great majority of those patients wait for transfer in a facility (MHCB) that provides round-the-clock inpatient care. This Court has never endorsed such an abbreviated approach to establishing Eighth Amendment liability.

The district court justified its 100-percent compliance standard on the ground that the Program Guide represents "*defendants'* considered assessment" of what the Eighth Amendment requires for the provision of mental-health care. (CR 5610, ER 5 (emphasis in original); CR 5583, ER 18.) But Defendants' formulation of policies and standards to establish the systemic components of a constitutional system of care does not mean that Defendants agreed that flawless compliance with these standards was a constitutional requirement. Indeed, such an understanding would hardly have made practical sense since the Program Guide deliberately takes a flexible approach to fixing California's inmate mental-healthcare system, and its terms have changed over the years based on a variety of factors

including newly emerging challenges, trial-and-error, and litigated disputes about particular provisions.

The provisions of the Program Guide, like other professional best practices and expert-based standards, are "helpful and relevant" to the Eighth Amendment analysis, but they do not set fixed constitutional benchmarks. *See Rhodes v. Chapman*, 452 U.S. 337, 348 n.13 (1981); *Graves v. Arpaio*, 48 F. Supp. 3d 1318, 1338 (D. Ariz. 2014) ("Nationally recognized best practices may exceed constitutional standards in some areas and fall short in others."). In *Rhodes*, for example, the Supreme Court reversed an injunction barring prison officials from double celling inmates as an Eighth Amendment remedy for overcrowding. 452 U.S. at 349-50. The district court had concluded that double celling was unconstitutional based largely on the fact that the prison population exceeded design capacity, and on expert recommendations regarding the appropriate amount of minimum living space per inmate. *Id.* The Supreme Court rejected that conclusion because there was no evidence that double celling actually caused inmates harm. *Id*. at 348. The Court faulted the district court for assuming that expert opinions about desirable prison conditions established the constitutional minima. *Id*. at 348 n.13.

Here, the district court abused its discretion by assuming that the Program Guide's "specific admission criteria" sufficed to show constitutional harm—*i.e.*, that, by definition, a patient referred to inpatient care "cannot be successfully treated" in an MHCB or lower level of care. (*See* CR 5583, ER 36-37; CR 5529, ER 291-92 (MHCB care is "at most . . . an unacceptable status quo" for waitlisted inmates).) The court's singular focus on strict compliance with the Program Guide and its implementing orders obscured the proper analysis: whether Defendants' mental-health services, "while potentially falling short of [court] compliance, were nonetheless sufficient to rise above the constitutional floor." *See United States v. Terr. of the Virgin Islands*, 884 F. Supp. 2d 399, 417 (D.V.I. 2012) (concluding the Special Master's focus on defendants' compliance with orders obscured the correct analysis—whether there were current and ongoing constitutional violations); *Hadix v. Johnson (Hadix II)*, 367 F.3d 513, 529 (6th Cir. 2004) (the district court erred where it failed to identify the point at which deviations from safety standards "ceased being mere deficiencies and, instead, became constitutional violations.").

The district court did not separately find that inmates awaiting inpatient transfer beyond the timelines were receiving objectively unconstitutional mental-health care that could only be remedied with perfect compliance with

the Program Guide's transfer guidelines. Neither Plaintiffs nor the district court pointed to any clinical evidence showing that waitlisted inmates received deficient care that resulted in harm. The court never found that an inmate's care categorically became unconstitutional, for example, on the 11th day of the acute-care waitlist. And the existence of wait times beyond the Program Guide's 10- and 30-day transfer timeframes does not *per se* establish unconstitutional delays in care. *See Hallett v. Morgan*, 296 F.3d 732, 743-45 (9th Cir. 2002) (holding that delays in medical treatment do not rise to the level of a constitutional violation absent proof that the delay caused further injury); *Shapley v. Nev. Bd. of State Prison Comm'rs*, 766 F.2d 404, 407 (9th Cir. 1985) (per curiam) (same). Instead of identifying a systemic Eighth Amendment violation for which 100-percent compliance with the Program Guide would be a narrowly tailored remedy (even if such an order were permissible), the court erroneously used the Program Guide as a proxy for objective harm. *See Rhodes*, 452 U.S. at 348 n.13 ("[T]he District Court erred in assuming that opinions of experts as to desirable prison conditions suffice to establish contemporary standards of decency."); *Westefer v. Neal*, 682 F.3d 679, 681, 684 (7th Cir. 2012) (reversing injunction that "effectively constitutionaliz[ed]" prison officials' own policies and procedures).

Several courts have recognized this analytical error and held that noncompliance with court decrees does not justify imposing prospective relief under the PLRA. *See Hadix v. Johnson (Hadix I)*, 228 F.3d 662, 670-71 (6th Cir. 2000) ("The fundamental problem with the district court's order is that it focused not on the inquiry required by the PLRA, but rather on the question whether the consent decree had been substantially complied with."); *Glover v. Johnson*, 138 F.3d 229, 242 (6th Cir. 1998) (vacating termination denial because the district court misdirected its attention to "whether the state has complied with the details . . . of the requirements of the remedial plans"); *Imprisoned Citizens Union v. Ridge*, 169 F.3d 178, 190 (3d Cir. 1999) (rejecting argument that noncompliance with consent decree justified prospective relief under the PLRA as a contempt remedy).

The Seventh Circuit's decision in *Westefer* is also instructive. There, the inmates alleged that the procedures for transfers to a "supermax" prison violated due process. 682 F.3d at 681. While the case was pending, prison officials developed, but did not implement, a plan that substantially revised their transfer protocols. *Id*. at 682. The district court found the existing transfer system unconstitutional, used prison officials' proposed plan as the framework for a remedial order, and issued an injunction incorporating the plan's specific terms. *Id*. at 684-85. The Seventh Circuit held that the

injunction violated the PLRA's restriction on prospective relief because the district court, like the court below, conflated what is constitutionally adequate with what is required. *Id*. at 682. The prison officials' revised plans, like Defendants' Program Guide, reflected their assessment of a system that passed constitutional muster. *See id*. (noting that the revised plan may have been in response to earlier decision regarding due-process allegations). But the defendants' willingness to implement those procedures did not justify a court order mandating them. *Id*. at 684-85. The injunction improperly transformed those policies and procedures into the constitutional baseline. *Id.* The district court here made that same error.[10]

Like the order in *Westefer*, the court's remedial order here, untethered to a constitutional violation, exceeds the court's authority under the PLRA and amounts to an abuse of discretion. *See* 18 U.S.C. § 3626(a); *Hoptowit*, 682 F.2d at 1246 (a court's role is limited to determining whether a constitutional violation occurred, and to "fashioning a remedy that does no more and no less than correct that particular constitutional violation.").

[10] The district court's few categorical exclusions from waitlist-time calculations—e.g., time spent in court or receiving other necessary medical treatment—does not save the order. The order still effectively imposes strict liability and monetary sanctions for non-compliance with the Program Guide for the bulk of referrals, setting it as the new constitutional floor.

D. The Record Does Not Reveal Any Eighth Amendment Violation that Could Support the Court's 100-Percent-Compliance Order Under the PLRA.

Had the district court applied the correct Eighth Amendment standard, it could not have justified, under the PLRA, mandating 100-percent compliance with the Program Guide as a narrowly tailored remedy for a constitutional violation. The record does not show that Defendants are deliberately indifferent to inmates' mental-health needs in the absence of 100 percent compliance, and the court's own findings do not support a conclusion to the contrary.

The 1995 remedial order identified access to inpatient care as one of the core components of a minimally adequate mental-health system, and found that California's systemic delays in this respect were unconstitutional. *Coleman I*, 912 F. Supp. at 1308. Since that time, however, the district court's focus has shifted from looking at whether the core components of the system have been implemented, to whether the Program Guide's myriad provisions are strictly obeyed. The district court's March 24, 2017 order to show cause described Defendants' current efforts to provide inmates with timely access to inpatient care in the face of challenging circumstances. (CR 5583, ER 25-36.) The evidence shows that the system, while not perfect, provides timely access to inpatient care to the vast majority of *Coleman*

class members.[11] The court's own findings are inconsistent with deliberate indifference and instead show that Defendants respond reasonably to inmates' mental-health needs.

Critically, the district court made no findings that inmate-patients were receiving objectively inadequate care, even if waiting beyond the timelines. Most such inmates receive clinically appropriate interim care in MHCBs—a fact confirmed by testimony and the Program Guide's terms. (CR 5560, ER 254; Program Guide 12-5-1.) Those inmates receive the same care as in an intermediate or acute inpatient bed, including daily clinical contacts, psychiatric visits, individualized treatment plans, and 24-hour nursing care. (CR 5544, ER 269.) The district court nevertheless inferred a constitutional deprivation by examining whether there was strict adherence to the transfer timelines in every instance. But proof of actual harm is a necessary component of an Eighth Amendment violation, especially one premised on a delay in health care. *See Hallett*, 296 F.3d at 743-45. Cruel and unusual punishment cannot be presumed by mere reference to expert guidelines and standards. *Rhodes*, 452 U.S. at 348 n.13.

[11] As mentioned, since September 2017, Defendants have been in compliance with inpatient transfer timelines. (Defs.' 2d RJN, Ex. 2 (CR 5715, 5731, 5751, 5757, 5789).)

Defendants' evidence and the Program Guide's express provisions establish the requirements and procedures for inmates' interim care while waiting for inpatient transfer. Most inmates waiting past timelines are placed in MHCBs—licensed inpatient units—where they receive enhanced mental-health care 24 hours a day. (CR 5560, ER 254; Program Guide 12-5-1.) Although the full panoply of treatment services may not always be available in MHCBs, such as group or recreational therapy, the temporary absence of these supplemental treatment modalities does not transform the inmate-patient's round-the-clock inpatient care into an Eighth Amendment violation. Nor does the variance from the transfer timelines, without any showing of patient harm, evince unconstitutional care on either an individual or a systemic level.

Further, the court acknowledged that Defendants took reasonable actions to ameliorate wait times. For example:

- The court found that Defendants implemented projects to increase inpatient capacity by opening 72 high-custody intermediate-care beds, and taking steps to fund construction of 100 new flexible-use inpatient units. (CR 5583, ER 28-29.)
- The court found that Defendants were "committed" to using the "Least Restrictive Housing" review process to aid patient

movement to lower custody settings. (*Id.*, ER 30-31.) The court recognized that Defendants' efforts served both efficiency goals and clinical considerations. (*Id.*)

- The court remarked that Defendants' "lift-and-shift" plan was an "encouraging development" that promised substantial efficiency gains and, ultimately, reductions in inpatient-transfer times. (*Id.*, ER 35-36.) It found the plan "has much promise . . . toward achieving a lasting and durable remedy." (*Id.*, ER 36.)

The district court also recognized that Defendants reasonably considered other options that were ultimately not feasible. Regarding the DSH hospital beds, the court acknowledged safety issues that precluded increased admissions for *Coleman* patients to the state hospitals. (*Id.*, ER 33.) The court also credited CDCR's efforts to secure beds in community hospitals. (*Id.*, ER 34.) Although community placements did not appear to be a viable option, the court commended Defendants for "exploring all possible available resources to ensure that class members no longer wait for urgent mental health care." (*Id.*)

In short, the district court's findings do not reflect deliberate indifference. They instead show that state officials responded reasonably to increased demand for inpatient care under difficult, unanticipated

circumstances. *See Farmer*, 511 U.S. at 825 (officials who respond reasonably to the risk of harm do not act with deliberate indifference, even if the harm is not averted). Defendants' "commendable" and "encouraging" efforts to provide inmates with timely access to care (CR 5583, ER 34, 35), and adherence to the transfer timelines in the vast majority of instances, do not evince a conscious disregard for their mental-health needs.

Given Defendants' improvements under the daunting challenge of serving 38,000 inmate-patients, requiring perfect compliance and awarding monetary sanctions for contempt would not "serve any purpose." *See Essex County Jail Annex Inmates v. Treffinger*, 18 F. Supp. 2d 445, 452 (D.N.J. 1998); *see also Brown v. Plata*, 563 U.S. 493, 531 (2011) (narrow tailoring requires a "fit" between the remedy's ends and the means chosen to accomplish those ends). Indeed, as described above, Defendants implemented various less intrusive processes and procedures designed to improve performance under the Program Guide (CR 5544-2, ER 280-86), which the district court found would aid in compliance and were "feasible" (CR 5583, ER 27-36). Those efforts have been largely successful in reducing or eliminating wait times that exceed the transfer timelines. (*See* Defs.' 2d RJN, Ex. 2.) And inmates claiming substandard care are not precluded from relief. The order goes further than necessary because

inmates have a right of action for individualized (*i.e.*, non-systemic) injunctive relief and damages. *Pride v. Correa*, 719 F.3d 1130, 1138 (9th Cir. 2013); *see also In re Estevez*, 165 Cal. App. 4th 1445, 1461 (2008) (explaining that "alleged violations of the Eighth Amendment arising from inadequate medical care may be brought to courts' attention in California by means of a petition for writ of habeas corpus"); *In re Head*, 42 Cal. 3d 223, 226, 232 (1986) (describing the procedure of habeas corpus as more expeditious, simplified, and inexpensive than a civil action).

Despite Defendants' reasonable and effective efforts in reducing transfer wait times, the April 19 Order provides intrusive prophylactic relief that is not narrowly tailored to remedy a systemwide deliberate-indifference violation. The order categorically requires transfers within Program Guide timelines regardless of clinical and custodial appropriateness, and it effectively requires continuous federal-court supervision over the conduct of prison officials—something the PLRA was designed to curtail. Absent evidence of a systemic constitutional violation, the court's April 19 Order impermissibly grants more relief than the Eighth Amendment requires and therefore violates the PLRA and amounts to an abuse of discretion.

E. Law-of-the-Case Doctrine Does Not Insulate the District Court's Rulings From Review.

In November 2017, the district court sua sponte offered its view that law-of-the-case doctrine barred appellate review of the April 19 Order because the district court had previously rejected Defendants' argument that, even during the remedial stage of litigation, constitutional violations turn on whether State officials are deliberately indifferent to serious mental-health needs. (CR 5726 at 6-7.) The district court's post-appeal invocation of law of the case cannot thwart this Court's review of the April 19 Order. *Natural Resources Defense Council, Inc. v. Southwest Marine Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001) (a district court lacks jurisdiction to enter an order that materially alters the status of an appeal). The case law makes clear that "a district court's adherence to law of the case cannot insulate an issue from appellate review." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988). Thus, this Court may properly review the district court's remedial order.

In any event, the district court did not rely on law of the case in rejecting Defendants' Eighth Amendment arguments. The court explicitly noted that its prior rulings arose in "different contexts." (CR 5610, ER 4.) The court then applied those rulings, and concluded that: (1) "at this

juncture" the relevant inquiry is solely "what, objectively, is required to achieve complete remediation . . . with respect to access to inpatient care" (*Id*., ER 3); and (2) "[i]n the present context," full compliance with the transfer timelines is necessary for constitutionally adequate care. (*Id*., ER 4-5.) Because the district court addressed these issues on the merits in the April 19 Order, law of the case does not preclude review.

Besides, law of the case is a discretionary doctrine that does not limit this Court's power to review an injunction, *United States v. Smith,* 389 F.3d 944, 949 (9th Cir. 2004), especially in a long-running complex class action involving institutional reforms. A prior decision by the same court, or a higher court, should be followed as law of the case unless: (1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial. *Jeffries v. Wood*, 114 F.3d 1484, 1489 (9th Cir. 1997) (en banc). But, as this Court noted in *Toussaint v. McCarthy*, 801 F.2d 1080, 1090 (9th Cir. 1986), courts must be "sensitive to the need for modification" when considering law of the case in structural-injunction cases. *See also Little Rock Sch. Dist. v. N. Little Rock Sch. Dist.*, 561 F.3d 746, 750-53 (8th Cir. 2009) (holding that law-of-the-case doctrine did not require adherence to a previous legal standard

where the district court had been overseeing "a complex, highly detailed settlement agreement" spanning a quarter century).

The district court cited a 2013 order rejecting Defendants' objection that the Special Master was not monitoring compliance against a constitutional standard. (CR 5610, ER 5; CR 4361, ER 451.) In that order, the court concluded that monitoring was appropriate because the Program Guide's requirements were "grounded in the Eighth Amendment." (CR 4361, ER 451-57.) But notably missing from that order is any explicit language giving Defendants fair notice that the inpatient transfer timelines, or any other Program Guide provision, amounted to the fixed constitutional floor. (*See id.*) If every discrete deviation from the 300-plus pages of standards and policies in the Program Guide shows a constitutional violation, it is questionable how the State could ever achieve compliance and obtain termination of court oversight. This does not serve the purpose of law of the case, which is to bring litigation to an end. *See Little Rock Sch. Dist.*, 561 F.3d at 750-53 (noting that, given the case's 25-year remedial supervision, the parties could not have had the same types of expectations regarding enforcement of past orders that might normally justify applying law of the case as in "ordinary litigation.").

The district court also cited the 2013 order denying termination and a 2014 order to support its conclusion that subjective intent is no longer a relevant component of the Eighth Amendment. (CR 5610, ER 4.) Neither order should be law of the case.

The 2013 order denying Defendants' termination motion involved substantially different evidence and legal conclusions. Critically, the district court did not completely jettison the subjective-intent element: it found that, in 2013, the evidence established objectively unconstitutional conditions, and therefore Defendants could not claim to be unaware of such deprivations. *Coleman II*, 938 F. Supp. 2d at 988-89. But the court did not find that noncompliance with inpatient-transfer timelines demonstrated *per se* objective violations. *Id*. at 981-82.

The 2014 order dealt with litigation involving completely different subject matter and evidence—namely, issues involving use of force, inmate discipline, and segregated housing. *Coleman v. Brown*, 28 F. Supp. 3d 1068, 1072 (E.D. Cal. 2014). In that order, the district court directly conflated the subjective and objective components of deliberate indifference, holding that proof of subjective intent "is coextensive with proof of ongoing objectively unconstitutional conditions." *Id.* at 1077. Second, the court clearly erred by disregarding the constitutional standard, *see*, *supra*,

Argument II, and binding all future proceedings to this flawed approach would work a manifest injustice. *See Little Rock Sch. Dist.*, 561 F.3d at 750-53.

Law-of-the-case doctrine is "founded upon the sound public policy that litigation must come to an end." *Smith*, 389 F.3d at 948. (internal citations omitted). Here, however, applying law of the case to the district court's untenable legal standards would have the perverse effect of prolonging the remedial litigation, not ending it. Neither the district court, nor this Court, is required to adhere to those erroneous constitutional holdings.

III. IF THE APRIL 19 ORDER ALSO MANDATED PERFECT COMPLIANCE WITH THE 24-HOUR MHCB TRANSFER TIMELINE, THEN SUCH A RULING ALSO FAILS TO COMPORT WITH THE EIGHTH AMENDMENT AND PLRA.

In the April 19 Order, the district court also stated that it was "persuaded" that the Eighth Amendment required 100-percent compliance with the Program Guide's 24-hour timeline for placement of inmates in a MHCB following referral. (CR 5610, ER 11:16-18.) The court, however, expressly refrained from ordering such compliance pending an evidentiary hearing regarding obstacles to compliance. (*Id.*, ER 11, 12-13, ER.) Because the court expressly contemplated further proceedings regarding compliance with the MHCB transfer timeline, Defendants believe that

portion of the April 19 Order was non-final. The district court's final decision applying the 100-percent-compliance standard to MHCB transfers was entered on October 10, 2017 (CR 5710),[12] and is the subject of Defendants' pending companion appeal, *Coleman v. Brown*, No. 17-17328.

But, because the scope of the district court's orders is somewhat unclear, in an abundance of caution, Defendants also contend here that requiring 100-percent compliance with the 24-hour MHCB timeline also runs afoul of the Eighth Amendment and PLRA. The district court's conclusion regarding the MHCB timeline is premised on the same flawed reasoning used to justify perfect compliance in the inpatient-transfer context and should be reversed for the same reasons.

As in the inpatient context, the district court erred because flawless compliance with the Program Guide timeline for MHCB transfers is not an Eighth Amendment requirement. The district court never found that inmates awaiting MHCB transfer—even if beyond the timeline—were being harmed. Instead, the court used the Program Guide as a proxy for constitutional harm. Furthermore, the district court reached its conclusion without any

[12] The district court's November 6 order appears to confirm that the October 10 order finalized the court's ruling as to the 24-hour MHCB transfer timeline, by ordering the parties to work in workgroups to achieve 100-percent compliance. (CR 5726 at 10.)

consideration of the subjective component of the Eighth Amendment analysis. Lastly, the court's perfect-compliance standard is not a narrowly drawn remedy for a systemic constitutional violation.

Accordingly, if this Court concludes that the April 19 Order was the final decision regarding the MHCB issue, rather than the October 10 Order, Defendants ask that the Court review the Opening Brief in Case No. 17-17328, or to order supplemental briefing in the alternative.

CONCLUSION

The portion of the district court's April 19 Order requiring perfect compliance with the 10- and 30-day transfer timelines set forth in the Program Guide should be reversed.

Dated: February 20, 2018 Respectfully submitted,

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17-16080

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RALPH COLEMAN, et al.,

Plaintiffs-Appellees,

v.

EDMUND G. BROWN JR., et al.,

Defendants-Appellants.

STATEMENT OF RELATED CASES

The following related case is pending: *Coleman v. Brown, et al.*, No. 17-17328 (9th Cir.).

Dated: February 20, 2018

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Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-16080

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Signature of Attorney or Unrepresented Litigant: s/ Kevin A. Voth

Date: Feb 20, 2018

("s/" plus typed name is acceptable for electronically-filed documents)

CERTIFICATE OF SERVICE

Case Name: **Ralph Coleman, et al v. Edmund Brown, Jr., et al.** No. **17-16080**

I hereby certify that on February 20, 2018, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

DEFENDANTS-APPELLANTS' OPENING BRIEF

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 20, 2018, at San Francisco, California.

L. Santos	*s/ L. Santos*
Declarant	Signature

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