

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHN ARMSTRONG, et al., on behalf
of themselves and as
representatives of the class,

Plaintiffs,

v.

EDMUND G. BROWN, JR., Governor of
the State of California;
CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION;
MICHAEL MINOR, Acting Director of
the Division of Juvenile Justice;
MATTHEW CATE, Secretary of the
California Department of
Corrections and Rehabilitation;
JENNIFER SHAFFER, the Executive
Officer of the Board of Parole
Hearings; DIANA TOCHE, Acting
Director of the Division of
Correctional Health Care
Services; CHRIS MEYER, Director
of the Division of Facility
Planning, Construction and
Management; KATHLEEN DICKINSON,
Acting Director of Adult
Institutions; and ROBERT
AMBROSELLI, Acting Director of
Division of Adult Parole
Operations,

Defendants.

No. C 94-2307 CW

OPINION IN SUPPORT
OF ORDER
DISTRIBUTING AND
ENFORCING THE
AMENDED COUNTY
JAIL ORDER AND
PLAN (Docket No.
2161)

United States District Court
For the Northern District of California

Plaintiffs move to enforce the Court's April 11, 2012 Amended
Order Granting Plaintiffs' Renewed Motion to Require Defendants to
Track and Accommodate the Needs of Armstrong Class Members Housed
in County Jails, Ensure Access to a Grievance Procedure and to
Enforce 2001 Permanent Injunction (the Amended Order). Defendants
oppose the motion. In their opposition, Defendants ask that the
Court find the Amended Order unenforceable based on a recent

1 amendment to California Penal Code section 3056 or stay the
2 Amended Order pending resolution of their appeal of it. For the
3 reasons set forth below, the Court GRANTS Plaintiffs' motion and
4 declines to stay the Amended Order or find it unenforceable.

5 BACKGROUND

6 As explained in detail in the Court's prior orders, this
7 lawsuit was originally filed seventeen years ago by disabled
8 prisoners and parolees against the California officials with
9 responsibility over the corrections and parole systems. The Court
10 sets forth here only the background necessary to this motion.

11 On May 28, 2009, Plaintiffs filed a Motion to Require
12 Defendants to Track and Accommodate Needs of Armstrong Class
13 Members Housed in County Jails and Ensure Access to a Workable
14 Grievance Procedure.

15 On September 16, 2009, this Court held that Defendants are
16 responsible for ensuring that Armstrong class members receive
17 reasonable accommodations when Defendants elect to house them in
18 county jails. Order Granting Plaintiffs' Motion to Require
19 Defendants to Track and Accommodate Needs of Armstrong Class
20 Members Housed in County Jails and Ensure Access to a Workable
21 Grievance Procedure, September 16, 2009, Docket No. 1587, at 7-9.
22 The Court stated that Plaintiffs had submitted evidence
23 demonstrating that, pursuant to their authority, Defendants were
24 housing a significant number of persons in county jails, including
25 an average of 480 parolees a day in the San Mateo County Jail, an
26 average of 1,000 parolees a day in the Sacramento County Jail, and
27 770 individuals in In-Custody Drug Treatment Program (ICDTP)
28 placements in county jails. Id. at 4-5. Although the Court did

1 not rely on the substantial amount of hearsay evidence submitted
2 by Plaintiffs, the Court held that Plaintiffs nonetheless had
3 submitted sufficient evidence that class members being housed in
4 county jails were not receiving accommodations to which they were
5 entitled. Id. at 9-10. Accordingly, the Court entered an order
6 requiring that Defendants, within thirty days, submit a plan "for
7 ensuring timely and appropriate accommodations for Armstrong class
8 members in county jails[.]" Id. at 11. The September 16 Order
9 provided Defendants with flexibility to devise the specifics of
10 the plan, but required that the plan contain certain elements.
11 Id. at 11-14. The Court also found, pursuant to requirements of
12 the Prison Litigation Reform Act, 18 U.S.C. § 3626(a)(1)(A), that
13 the relief it ordered was "narrowly drawn, extend[ed] no further
14 than necessary to correct the violation of federal rights, and
15 [was] the least intrusive means necessary to correct the violation
16 of the federal rights[.]" Id. at 11.

17 Defendants appealed this Court's September 16 Order.
18 Nonetheless, on October 15, 2009, as required by the September 16
19 Order, Defendants provided "written notification to all county
20 jail facilities of the counties' duty to comply with the Americans
21 with Disabilities Act (ADA) in housing inmates with disabilities"
22 and "that CDCR will enforce this duty." Grunfeld Decl. ¶ 5,
23 Docket No. 1915, Ex. B.

24 On April 1, 2010, after negotiations between the parties,
25 Defendants issued their first county jail plan, entitled the
26 "County Jail Accommodation Process," in a further effort to comply
27 with the September 16 Order.
28

On September 7, 2010, the Ninth Circuit affirmed in part and vacated in part the September 16 Order, and remanded the case to this Court for further proceedings. The Ninth Circuit affirmed this Court's holdings that "defendants are responsible for providing reasonable accommodations to the disabled prisoners and parolees that they house in county jails." Armstrong v. Schwarzenegger, 622 F.3d 1058, 1063 (9th Cir. 2010). The Ninth Circuit held that: (1) the validly enacted ADA Title II regulations provide that "a public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, discriminate against individuals with disabilities," id. at 1065 (quoting 28 C.F.R. § 35.130(b)(1)); (2) the ADA requires that when Defendants house state prisoners and parolees in county jails, the state is responsible to ensure that the state prisoners and parolees with disabilities can access the county jails' benefits and services "to the same extent that they are provided to all other detainees and prisoners," id. at 1068; and (3) neither principles of federalism nor deference to correctional authorities nor the Prison Litigation Reform Act prohibited this Court's order requiring that when Defendants "become aware of a class member housed in a county jail who is not being accommodated, they either see to it that that jail accommodates the class member, or they move the class member to a facility . . . which can accommodate his needs," id. at 1069, or that when Defendants "become aware of a 'pattern' of ADA noncompliance, they are to notify county jail officials and take steps to remedy the pattern of noncompliance[.]" Id. at 1069-1070.

1 Although the Ninth Circuit affirmed this Court's rulings on
2 the requirements of the ADA, it determined that, although it was a
3 "close question," Plaintiffs had not presented sufficient evidence
4 to justify the system-wide scope of relief ordered. Id. at
5 1073-1074. The court remanded to allow the development of
6 "additional evidence as may be necessary concerning the nature and
7 extent of the violations of class members' rights taking place in
8 the county jails," and noted that "not much more evidence than
9 that already provided may be required to approve the current
10 order." Id. at 1073-1074.

11 On August 8, 2011, Plaintiffs filed a renewed Motion to
12 Require Defendants to Track and Accommodate Needs of Armstrong
13 Class Members Housed in County Jails and Ensure Access to a
14 Workable Grievance Procedure. Docket No. 1912. With that motion,
15 Plaintiffs submitted additional evidence of violations in county
16 jails and asked the Court to issue an injunction nearly identical
17 to that in the September 16, 2009 Order.

18 On October 1, 2011, state legislation commonly known as the
19 prison "realignment" law went into effect. In some cases,
20 realignment has transferred responsibility for post-release
21 supervision of former state inmates from Defendants to the
22 counties. Under realignment, parolees who were already placed on
23 state parole prior to October 1, 2011 remain under the parole
24 supervision of Defendants. Cal. Penal Code § 3000.09(b).
25 Further, persons paroled from state prison on or after October 1,
26 2011, who fall into certain categories, including having been
27 convicted of certain serious or violent felonies, continue to be
28 placed on state parole under the jurisdiction and supervision of

1 Defendants. Cal. Penal Code § 3000.08(a), (c). However,
2 lower-level offenders who are released from state prison on or
3 after October 1, 2011 and do not fall into the above-mentioned
4 categories are instead supervised on release by counties under the
5 newly created Post-Release Community Supervision (PRCS) program.
6 Cal. Penal Code §§ 3000.08(a), 3451.

7 In addition to changing in some cases whether counties or
8 Defendants were responsible for supervision of individuals after
9 release from state prison, realignment also mandated that state
10 parolees with pending revocation charges or serving revocation
11 terms could not be returned to state prison, with certain
12 exceptions. Specifically, Penal Code section 3056 was amended to
13 read as follows,

14 Prisoners on parole shall remain under the supervision
15 of the department but shall not be returned to prison
16 except as provided in subdivision (b) [which allows the
17 return to prison of certain individuals serving life
18 parole terms] or as provided by subdivision (c) of
19 Section 3000.09 [which allows the return to prison of
20 parolees who were pending final adjudication of a parole
21 revocation charge prior to October 1, 2011]. Except as
22 provided by subdivision (c) of Section 3000.09, upon
23 revocation of parole, a parolee may be housed in a
24 county jail for a maximum of 180 days. When housed in
25 county facilities, parolees shall be under the legal
26 custody and jurisdiction of local county facilities.
27 When released from custody, parolees shall be returned
28 to the parole supervision of the department for the
duration of parole.

Cal. Penal Code § 3056(a). Thus, although individuals who were
serving life parole terms or those already facing a revocation
charge before October 1, 2011 could be returned to state prison
for parole violations, other state parolees no longer could be and
instead were required by state law to serve such terms in county
jails. Realignment did not alter Defendants' ability to house

1 state prison inmates temporarily in county jails during the
2 pendency of state court proceedings, which they refer to as
3 sending inmates "out-to-court."

4 In opposition to Plaintiffs' renewed motion, Defendants
5 argued primarily that, under the realignment statute, state
6 parolees were no longer members of the Armstrong class when they
7 were housed in county jails. Defendants also made arguments
8 related to federalism and abstention. Defendants did not pursue
9 their prior claims that Plaintiffs could not prove that disabled
10 parolees were not being accommodated in county jails.

11 On January 13, 2012, the Court granted Plaintiffs' renewed
12 motion, Docket No. 1974, and issued an Amended Order granting the
13 motion on April 11, 2012, Docket No. 2034. On April 11, 2012, the
14 Court also denied Defendants' motion to stay. Docket No. 2035.
15 In so ruling, the Court rejected Defendants' argument that section
16 3056, as then phrased, relieved them of responsibility toward
17 parolees housed in county jails, and held that state parolees are
18 jointly in the custody and control of Defendants and the relevant
19 county during that time. The Court explained that it "declines to
20 read the words 'sole' or 'exclusive' into the text of California
21 Penal Code section 3056 before the words 'legal custody and
22 jurisdiction of local county facilities.'" Id. at 2. In
23 rejecting Defendants' argument that the language of section 3056
24 stating that parolees would be "returned to the parole supervision
25 of the department" after being released from a county jail meant
26 that parolees had left Defendants' "custody and jurisdiction" when
27 they entered the county jail, the Court stated in part,

1 Contrary to Defendants' characterization, the word
2 "supervision" does not have the same meaning as
3 "jurisdiction." The clear meaning of the statutory text
4 stating that "parolees shall be returned to the parole
5 supervision" of the state is simply that parolees are
6 not terminated from parole when they violate the terms
7 of their supervision and serve a revocation term in
8 county jail, but instead must continue on parole
9 supervision afterwards.

10 Id. at 2. Further, the Court noted,

11 Defendants point to no part of state law that restricts
12 their discretion in determining in which county jail
13 they may house that parolee. State law does not appear
14 to require Defendants to choose to house parolees with
15 disabilities in county jails that do not provide
16 adequate accommodations to them.

17 Id. at 3. The Court also pointed out that Defendants "do not
18 challenge the portion of the Court's order that addressed state
19 parolees and prisoners that are held in county jails for reasons
20 other than section 3056," that they "do not dispute that there are
21 currently class members still housed in county jails or that
22 Defendants' system-wide policies and practices have caused, and
23 continue to cause, substantial injury to class members," and that,
24 even if Defendants were to prevail on appeal, "they will
25 nevertheless be required to formulate a plan to carry out the
26 prescribed injunctive relief for the remaining individuals for
27 whom they are indisputably responsible." Id. at 5.

28 The Amended Order required, among other things, that
29 Defendants "develop a revised plan for ensuring timely and
30 appropriate accommodations for Armstrong class members in county
31 jails" within thirty days and disseminate it in final form to the
32 counties and Defendants' personnel within forty-five days. Docket
33 No. 2034, 37, 41. The Amended Order further provided, "The Court
34 shall retain jurisdiction to enforce the terms of this
35 Injunction." Id. at 43.

1 On April 30, 2012, Defendants filed a notice of appeal from
2 the Court's April 11, 2012 Orders. Docket No. 2039.

3 On May 2, 2012, Defendants filed in the Ninth Circuit an
4 urgent motion to stay the April 11 Amended Order pending appeal.
5 Docket No. 3-1, CA9 Case No. 12-16018. In the motion to stay
6 before that court, Defendants stated that they "do not request a
7 stay of the injunction for state prison inmates temporarily housed
8 in county jails (i.e. 'out-to-court' inmates) or parolees
9 sentenced to life terms, because CDCR has the legal authority to
10 return these individuals to a state prison." Id. at 2.

11 On May 23, 2012, the Ninth Circuit denied Defendants' motion
12 to stay and sua sponte expedited the appeal, although it did not
13 change the briefing schedule previously set. Docket No. 6, CA9
14 Case No. 12-16018. No hearing date had been set at that time.

15 The parties engaged in a number of meet and confer sessions,
16 many of which were mediated by the Court's expert, to develop a
17 revised county jail plan to comply with the Court's orders.
18 Grunfeld Decl. ¶¶ 2-34. By June 26, 2012, the parties had agreed
19 in substance on a revised plan that was ready to be distributed to
20 Defendants' employees and the counties. Id. at ¶¶ 11-13, Exs. H,
21 I.

22 Under the agreed revised plan, among other things, CDCR would
23 send daily electronic notifications to the counties regarding any
24 newly booked parolees who are Armstrong class members, providing
25 information about their disability status and the accommodations
26 previously provided. Id. at ¶¶ 11-12, Ex. H, 2. Parole/Notice
27 Agents employed by Defendants, who already meet with parolees as
28 part of a notice of rights process, would ask class members to

1 self-identify any disability needs related to housing and
2 programming, would provide class members with a Reasonable
3 Modification or Accommodation Request CDCR form 1824 and a self-
4 addressed, postage-paid envelope, and inform class members that
5 they could use the form to file a grievance if they are not
6 receiving a housing or programming accommodation in the county
7 jail. Id. at 3. They would assist class members in completing
8 the form 1824 if those inmates were unable to do so on their own
9 due to a disability. Id. Parole/Notice Agents would also inform
10 class members of and encourage them to use the county jail's
11 grievance process as well if they needed disability
12 accommodations. Id. They would tell county jail staff, within
13 four business days after a disabled inmate's arrival at the county
14 jail, of his or her need for an accommodation or a medical or
15 mental health examination and document this communication. Id. at
16 4. A similar process would be implemented for "out-to-court"
17 inmates. Id. at 4-5. When Defendants received a CDCR form 1824,
18 they would enter it into a tracking system and respond to it
19 within a certain timeframe, depending on whether or not the issue
20 was deemed to be an emergency. Id. at 4. Defendants would notify
21 the involved county of the grievance as soon as possible and no
22 later than three business days after receipt. Id. Defendants
23 would also review all grievances to identify patterns of denials
24 of disability accommodations, would notify the involved county's
25 legal counsel within five days of discovery of such a pattern,
26 would investigate the situation to the extent possible, and would
27 determine what steps, if any, could be taken to remedy the
28 situation. Id. at 7.

1 By late June 2012, Defendants had also developed a schedule
2 to begin implementing the plan by September 1, 2012. Grunfeld
3 Decl. ¶¶ 19-20, Ex. O. The parties discussed how to disseminate
4 the final plan to the counties. On June 28, 2012, Plaintiffs
5 emailed a draft of a proposed joint letter, to be signed by both
6 sides, that would accompany the revised plan when it was
7 disseminated to the counties. Id. at ¶ 26, Ex. O. Plaintiffs
8 asked for a conference call with the Court's expert and Defendants
9 to discuss the letter. Id. Plaintiffs wrote follow up emails to
10 Defendants on July 2 and 4, 2012 but received no response. Id. at
11 ¶ 27, Ex. R.

12 Meanwhile, on June 27, 2012, the Defendant Governor approved
13 Senate Bill 1023, which further amended Penal Code section 3056 to
14 read as follows,

15 Prisoners on parole shall remain under the supervision
16 of the department but shall not be returned to prison
17 except as provided in subdivision (b) or as provided by
18 subdivision (c) of Section 3000.09. A parolee awaiting
19 a parole revocation hearing may be housed in a county
20 jail while awaiting revocation proceedings. If a parolee
21 is housed in a county jail, he or she shall be housed in
22 the county in which he or she was arrested or the county
23 in which a petition to revoke parole has been filed or,
24 if there is no county jail in that county, in the
25 housing facility with which that county has contracted
26 to house jail inmates. Additionally, except as provided
27 by subdivision (c) of Section 3000.09, upon revocation
28 of parole, a parolee may be housed in a county jail for
a maximum of 180 days per revocation. When housed in
county facilities, parolees shall be under the sole
legal custody and jurisdiction of local county
facilities. A parolee shall remain under the sole legal
custody and jurisdiction of the local county or local
correctional administrator, even if placed in an
alternative custody program in lieu of incarceration,
including, but not limited to, work furlough and
electronic home detention. When a parolee is under the
legal custody and jurisdiction of a county facility
awaiting parole revocation proceedings or upon
revocation, he or she shall not be under the parole
supervision or jurisdiction of the department. When

1 released from the county facility or county alternative
2 custody program following a period of custody for
3 revocation of parole or because no violation of parole
4 is found, the parolee shall be returned to the parole
5 supervision of the department for the duration of
6 parole.

7 Cal. Penal Code § 3056(a) (substantive additions to prior version
8 underlined).

9 On July 6, 2012, Defendants filed a motion before the Ninth
10 Circuit seeking reconsideration of its denial of their motion to
11 stay and arguing that the June 27, 2012 amendment to Penal Code
12 section 3056 had "unequivocally" established that parolees in
13 county jails are no longer Armstrong class members. Docket No. 7,
14 CA9 Case No. 12-16018.

15 On July 9, 2012, Defendants sent Plaintiffs and the Court's
16 expert a letter stating that they "have no discretion to ignore"
17 amended section 3056 or to "monitor county jail inmates over whom
18 they have no custody, control, or jurisdiction," and that they
19 "believe that the courts would not want the parties to undertake a
20 plan regarding county jail inmates before the Ninth Circuit has
21 the opportunity to review the new law." Grunfeld Decl. ¶ 30, Ex.
22 V. Defendants also stated that they would "shortly complete a new
23 plan concerning out-to-court state prison inmates and the
24 life-term parolees who can be returned to state prison." Id.

25 On July 10, 2012, the parties conducted their regularly
26 scheduled meet and confer session. Grunfeld Decl. ¶ 31. At that
27 meeting, Defendants stated that they would not be issuing the
28 revised county jail plan to the counties or to CDCR staff in light
29 of revised Penal Code section 3056. Id.

30 On July 12, 2012, Defendants sent an email to all fifty-eight
31 California counties, attaching the revised plan, labeled on each

1 page with the word "draft," and summarizing the status of the
2 appeal. Grunfeld Decl. ¶ 32, Ex. X. In the email, Defendants
3 stated in part,

4 While I send you the draft plan, it will not be
5 implemented at this time until we hear whether the
6 renewed request for a stay is granted. If it is
7 granted, we will send out a revised plan which addresses
8 only the population over whom CDCR has continuing
9 authority. CDCR is currently working to develop such a
10 plan.

11 Id. Defendants did not explain what they would do if the stay
12 were denied, as soon happened.

13 On July 16, 2012, Plaintiffs filed the instant motion, asking
14 this Court to issue an order enforcing the April 11, 2012 Amended
15 Order by requiring Defendants to disseminate to the counties and
16 Defendants' employees the agreed revised plan without a "draft"
17 label, to train their employees in accordance therewith, to
18 implement the plan by September 15, 2012 according to the parties'
19 agreed schedule with minor modifications, and to hire and train
20 sufficient staff to do so. Docket No. 2161.

21 On July 19, 2012, the Ninth Circuit denied Defendants' motion
22 for reconsideration of the denial of their motion to stay, without
23 prejudice to Defendants raising in their merits briefs any issue
24 raised in the motion for reconsideration. Docket No. 8, CA9 Case
25 No. 12-16018. The Ninth Circuit also shortened the briefing
26 schedule and set a hearing for September 5, 2012.

27 On July 30, 2012, Defendants responded in this Court to
28 Plaintiffs' motion to enforce. Docket No. 2170. In their
opposition, Defendants did not argue that they were in compliance
with the Amended Order or indicate that they intended to comply
with it. Instead, as noted above, they asked the Court to find

1 that the change in section 3056 had rendered the Amended Order
2 unenforceable. They alternatively asked that the Court stay the
3 Amended Order.

4 On August 22, 2012, the parties filed a joint case status
5 statement. In the joint statement, Defendants indicated in part,

6 Defendants plan to conduct employee training in August
7 2012, and Plaintiffs' counsel have agreed to attend an
8 August 30, 2012 training session. Defendants also plan
9 to implement an e-mail notification system to the
counties by September 1, 2012 of disability related
information pertaining to purported class members as of
the date they were released from prison.

10 Docket No. 2181, 21. This indicated that Defendants were prepared
11 to comply in part with the Court's Amended Order.

12 On August 23, 2012, the Court held a hearing on the instant
13 motion. At the hearing, Defendants affirmed that they intended to
14 comply in part with the Amended Order and to carry out the agreed
15 revised plan in part. Defendants stated that, as of September 1,
16 2012, they would begin providing email notices to county jails
17 setting forth the disability status and previously provided
18 accommodations for all of the individuals covered in the Amended
19 Order, including parolees subject to section 3056, with copies to
20 Plaintiffs' counsel. They further represented that, as of that
21 date, they would implement the remaining provisions of the plan,
22 but as to the "out-to-court" prisoners and life parolees only.
23 Thus, they would give only the "out-to-court" prisoners and life
24 parolees a grievance form and means to return it and they would
25 act upon such forms that they received. Defendants also stated
26 that they would go forward with training their Notice Agents
27 regarding all of the provisions of the revised plan, using
28 training material agreed upon with Plaintiffs on June 13, 2012.

1 Defendants clarified that this training would cover all provisions
2 that pertained to the parolees subject to section 3056 and would
3 not be limited to "out-to-court" prisoners and life parolees.

4 DISCUSSION

5 Defendants must obey the Amended Order unless and until this
6 or another court has relieved them of that responsibility, through
7 a stay, reversal or modification of the order. The "established
8 doctrine" is that "persons subject to an injunctive order issued
9 by a court with jurisdiction are expected to obey that decree
10 until it is modified or reversed, even if they have proper grounds
11 to object to the order." Gte Sylvania v. Consumers Union of
12 United States, 445 U.S. 375, 386 (1980); see also Wedbush, Noble,
13 Cooke, Inc. v. SEC, 714 F.2d 923, 924 (9th Cir. 1983) ("the mere
14 pendency of the appeal does not, in itself, disturb the finality
15 of the judgment").

16 This Court does not have jurisdiction to decide whether the
17 amendment to section 3056 has rendered the Amended Order
18 unenforceable. "Once a notice of appeal is filed, the district
19 court is divested of jurisdiction over the matters being
20 appealed." Natural Res. Def. Council v. Southwest Marine, Inc.,
21 242 F.3d 1163, 1166 (9th Cir. 2001) (citing Griggs v. Provident
22 Consumer Discount Co., 459 U.S. 56, 58 (1982) (per curiam);
23 McClatchy Newspapers v. Central Valley Typographical Union No. 46,
24 686 F.2d 731, 734 (9th Cir. 1982)). The purpose of this rule "is
25 to promote judicial economy and avoid the confusion that would
26 ensue from having the same issues before two courts
27 simultaneously." Id. (citing Masalosalo v. Stonewall Ins. Co.,
28 718 F.2d 955, 956 (9th Cir. 1983); Moore's Federal Practice,

1 § 303.32[1] (3d ed. 2000)). This rule "is a creature of judicial
2 prudence, however, and is not absolute." Masalosaló, 718 F.2d at
3 956.

4 This Court does retain "jurisdiction during the pendency of
5 an appeal to act to preserve the status quo." Natural Res. Def.
6 Council, 242 F.3d at 1166. See also Newton v. Consolidated Gas
7 Co., 258 U.S. 165, 177 (1922) ("Undoubtedly, after appeal the
8 trial court may, if the purposes of justice require, preserve the
9 status quo until decision by the appellate court"). This
10 exception "has been codified in Rule 62(c) of the Federal Rules of
11 Civil Procedure, which allows a district court to 'suspend,
12 modify, restore, or grant an injunction during the pendency of the
13 appeal upon such terms as to bond or otherwise as it considers
14 proper for the security of the rights of the adverse party.'" Natural Res. Def. Council, 242 F.3d at 1166 (quoting Federal Rule
15 of Civil Procedure 62(c)). The Ninth Circuit has cautioned that
16 the Rule "does not restore jurisdiction to the district court to
17 adjudicate anew the merits of the case" and that any action taken
18 pursuant to it "may not materially alter the status of the case on
19 appeal." Id. (citations and quotation marks omitted). See also
20 McClatchy, 686 F.2d at 735 (after appeal is filed, the district
21 court "may not finally adjudicate substantial rights directly
22 involved in the appeal") (quotations omitted).

24 Further, although the Court does not have jurisdiction to
25 decide the merits of the issue that is currently on appeal, "a
26 district court has continuing jurisdiction in support of its
27 judgment, and 'until the judgment has been properly stayed or
28 superseded, the district court may enforce it . . .'" Resolution

1 Trust Corp. v. Smith, 53 F.3d 72, 76 (5th Cir. 1995) (quoting
2 Farmhand, Inc. v. Anel Engineering Industries, Inc., 693 F.2d
3 1140, 1146 (5th Cir. 1982)). See also Lara v. Secretary of
4 Interior, 820 F.2d 1535, 1543 (9th Cir. 1987) ("The district court
5 may issue orders pending appeal to enforce its judgment.");
6 Hoffman v. Beer Drivers & Salesmen's Local No. 888, 536 F.2d 1268
7 (9th Cir. 1976) ("Where the court supervises a continuing course
8 of conduct and where as new facts develop additional supervisory
9 action by the court is required, an appeal from the supervisory
10 order does not divest the district court of jurisdiction to
11 continue its supervision, even though in the course of that
12 supervision the court acts upon or modifies the order from which
13 the appeal is taken.").

14 As Plaintiffs point out, the cases that Defendants cite to
15 urge the Court to reexamine the validity of the Amended Order do
16 not compel a contrary conclusion. Two of the cases address the
17 "general rule" that "an appellate court must apply the law in
18 effect at the time it renders its decision," including in
19 situations when the relevant law changed after the trial court
20 rendered its judgment. Thorpe v. Housing Auth. of Durham, 393
21 U.S. 268, 281-282 (1969). See also Lambert v. Blodgett, 393 F.3d
22 943, 973 (9th Cir. 2004) ("it is well established . . . that if
23 the law changes while the case is on appeal the appellate court
24 applies the new rule"). In the other two cases, the district
25 court held that, when a higher court issued new controlling
26 authority while a motion was pending but after briefing was
27 completed, when rendering a decision, the court was required to
28 apply the law as it existed at the time of decision, including the

1 new appellate authority. Kwiatkowski v. Dickinson, 2012 U.S.
2 Dist. LEXIS 34531, at *12-13 (E.D. Cal.); DeVries v. Cate, 2011
3 U.S. Dist. LEXIS 76409, at *8-9 (E.D. Cal.). None of these cases
4 stands for the proposition that a trial court may revisit the
5 legal reasoning underlying an order that is currently on appeal in
6 order to apply new law to it.

7 Although the Court lacks the jurisdiction to reconsider the
8 Amended Order, the Federal Rules of Appellate Procedure provide a
9 procedure under which a district court could do so. Specifically,
10 Rule 12.1 provides, "If a timely motion is made in the district
11 court for relief that it lacks authority to grant because of an
12 appeal that has been docketed and is pending," the district court
13 may state "either that it would grant the motion or that the
14 motion raises a substantial issue," in which case "the court of
15 appeals may remand for further proceedings." Federal Rule of
16 Appellate Procedure 12.1(a), (b). Defendants did not make a motion
17 for an indicative ruling from this Court or seek such relief.

18 Finally, however, in considering a request for a stay, the
19 Court can consider the effect of a change in the law when
20 evaluating the likelihood of success on the merits of an appeal.
21 The Court does not find that revised section 3056 renders it
22 likely that Defendants will succeed on appeal. The changes in
23 section 3056 did not affect several of the bases for the Amended
24 Order. Class members are still placed into county jails by virtue
25 of their status as state parolees and they do not cease to be
26 state parolees when they are in county jails. Among other things,
27 Defendants continue to exercise control and authority over the
28 parole revocation process, including investigation and charging

1 parolees with violations, placing parole holds on them, arresting
2 and detaining them, determining how long their revocation term
3 will last and deciding whether they should be sent to a county
4 jail or subjected to an alternative sanction, such as placement in
5 a community-based program. The Court notes that it has not had
6 occasion to consider whether the amendments to section 3056 were
7 passed in order to evade the state's responsibility for compliance
8 with the ADA and, if so, whether such amendments would be void due
9 to the Supremacy Clause of the Constitution. U.S. Const. art.
10 VI., § 2. This issue has been briefed in the Ninth Circuit, which
11 may make this decision in the course of the pending appeal.

12 Accordingly, the Court will not find its order unenforceable
13 or stay it but will exercise its retained jurisdiction to enforce
14 its injunction, as Plaintiffs request.

15 The Court notes that, in this motion, Plaintiffs do not seek
16 to enforce the Amended Order in full but rather only those
17 provisions contained in the agreed revised plan. Thus, Plaintiffs
18 do not seek enforcement of many of the provisions of which
19 Defendants complain. For example, Plaintiffs do not seek to
20 enforce the provision that, if Defendants become aware that a
21 class member is not receiving accommodations that he or she
22 requires, they "immediately take steps with county jail staff to
23 ensure that such accommodations are promptly provided or transfer
24 the class member to a facility that is able to provide
25 accommodations." Amended Order, 40. In this motion, Plaintiffs
26 also do not seek to enforce the provisions that would require
27 Defendants to permit them to conduct monitoring tours of county
28 jail facilities and interview county jail staff members.

1 Accordingly, Defendants' arguments regarding these provisions are
2 irrelevant to the present motion.

3 Instead, Plaintiffs seek to require Defendants to carry out
4 the revised plan to which Defendants had previously agreed. The
5 Court has found that such measures were narrowly drawn and were
6 the least intrusive means necessary to correct the ongoing
7 violations of federal rights, substantial evidence of which
8 Plaintiffs previously proffered in support of their earlier
9 motion. The Court further notes that, in conjunction with the
10 instant motion to enforce, Plaintiffs have submitted additional
11 evidence of ongoing harm to class members in county jails.¹

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17 ¹ Defendants object to Exhibits F through M, Q, R, T and V to
18 the Freedman declaration on the basis that these declarations and
19 letters were written by state parolees and "parolees are not
20 Armstrong class members when they are in county jail." Opp. at
21 16. The Court has already held that state parolees continue to be
class members during the time they are held in county jail for
parole revocation proceedings or terms. Accordingly, the Court
OVERRULES this objection.

22 Defendants also object to Exhibits E and L through P to the
23 Freedman declaration on the basis that these declarants are county
24 jail inmates who have not established that they are parolees or
25 class members or were not diagnosed with a disability by CDCR and
26 the declarations are therefore not relevant. Opp. at 16.
27 However, even if these specific examples "do not involve class
28 members, they support the inference that county jails do not
provide reasonable accommodations for prisoners with disabilities
who are class members." Order Granting Plaintiffs' Motion to
Require Defendants to Track and Accommodate Needs of Armstrong
Class Members Housed in County Jails and Ensure Access to a
Workable Grievance Procedure, Docket No. 1587, at 10 (citing
Federal Rule of Evidence 401). Accordingly, the Court OVERRULES
these objections.

1 Although Defendants may not have had a full opportunity to
2 investigate and respond to these declarations, they are
3 nonetheless prima facie evidence that class members continue to
4 suffer harm as Defendants delay their compliance with the Court's
5 order.

6 To the extent that, in their opposition, Defendants ask that
7 the Court stay the Amended Order pending the Ninth Circuit's
8 resolution of their appeal, the Court continues in its view that a
9 stay is not warranted considering the merits of the appeal and the
10 balance of hardship. As the Court previously determined, "class
11 members will continue to suffer substantial harm for each day that
12 their disabilities are not accommodated," and this outweighs "the
13 speculative administrative and monetary arguments and evidence"
14 that was previously presented by Defendants. Docket No. 2035, 6.
15 In the instant briefing, Defendants have not raised claims of
16 irreparable harm that they would suffer in the absence of relief.

17 Defendants do not dispute that they have not disseminated a
18 plan as required by the Amended Order and that they do not intend
19 to implement a plan with all of the elements contained therein.
20 Instead, although they will provide counties with initial
21 notifications of the disability accommodation needs of all of the
22 class members, including those whose status they dispute, they
23

24
25 Defendants further object to specific statements within
26 Exhibits F, G, I, J, K, L, N, O and Q, as well as the letters
27 submitted as Exhibits R, T and V, as inadmissible hearsay or
28 without foundation. Because the Court would reach the same
determination, that the evidence submitted constitutes prima facie
evidence of ongoing harm to class members in county jails,
regardless of these particular statements, the Court SUSTAINS
Defendants' objections.

1 intend to carry out the remainder of their agreed revised plan
2 with respect only to the life parole and "out-to-court" subsets of
3 the class members covered in the Amended Order. The Court also
4 notes that the deadlines contained in the Amended Order for
5 dissemination and implementation of a revised plan have long since
6 passed. Accordingly, the Court concludes that a further
7 enforcement order is necessary to ensure compliance with the terms
8 of the Amended Order and GRANTS Plaintiffs' motion to enforce it.
9 The Court further finds that the relief ordered herein is narrowly
10 drawn, extends no further than necessary to correct the violations
11 of federal rights, and is the least intrusive means necessary to
12 correct the violations of the federal rights found in the Amended
13 Order.

14 CONCLUSION

15 For the reasons set forth above, the Court GRANTS Plaintiffs'
16 motion to enforce the Amended Order (Docket No. 2161). The Court
17 ORDERS as follows:

18 1. Within three (3) business days of the issuance of this
19 Order, Defendants shall disseminate the plan to which the parties
20 agreed on June 26, 2012 (the "County Jail Plan"), a draft copy of
21 which is attached as Appendix A, to all of Defendants' personnel
22 who have responsibility for implementing any provisions of the
23 County Jail Plan. The County Jail Plan disseminated by Defendants
24 shall not indicate that the County Jail Plan is a draft or
25 non-final. Defendants must also inform their personnel with
26 responsibility for tasks described in the County Jail Plan that
27 they will receive training on the elements of the County Jail Plan
28 for which they will be responsible.

1 2. Within three (3) business days of the issuance of this
2 Order, Defendants shall disseminate the County Jail Plan, without
3 any indication that it is a draft or non-final, to the Sheriffs,
4 County Jail Administrators and County Counsel of each of the
5 fifty-eight counties. A copy of this Court's Order Distributing
6 and Enforcing the Amended County Jail Order and Plan, filed today,
7 shall be disseminated along with the County Jail Plan.

8 3. Training of all Parole/Notice Agents and interim ADA
9 coordinator(s) or designee(s), using the June 13, 2012 PowerPoint
10 presentation, shall be completed no later than September 15, 2012.
11 Plaintiffs' counsel may attend the training session.

12 4. On or before September 1, 2012, Defendants shall send an
13 email notification to each county's legal counsel or designee
14 identifying each parolee with a disability, including those
15 subject to California Penal Code section 3056, being held in that
16 county's jail facilities on that date. Beginning on September 1,
17 2012, Defendants shall send email notifications once per day to
18 each county's legal counsel or designee identifying each parolee
19 with a disability booked in that county's jail facilities over the
20 past 24 hours. The notifications must include each parolee's
21 name, CDCR identification number, and last release date from
22 prison. The notification must also include a plain-language
23 description of each parolee's last-known disabilities and the
24 accommodations in housing or programming the parolee received as
25 of the date he or she was released from prison.

26 5. On or before September 15, 2012, Defendants shall send
27 an email notification to each county's legal counsel or designee
28 identifying each CDCR out-to-court prisoner with a disability

1 being held in that county's facilities on that date. Beginning on
2 September 15, 2012, Defendants shall send email notifications once
3 per day to each county's legal counsel or designee identifying
4 each CDCR out-to-court prisoner with a disability sent to that
5 county's facilities in the past 24 hours. The notification will
6 include each CDCR out-to-court prisoner's name and CDCR
7 identification number. The notification will also include a
8 plain-language description of the out-to-court prisoner's
9 last-known disabilities and the accommodations in housing or
10 programming the prisoner received as of the date he or she was
11 transferred from a prison.

12 6. Beginning on September 15, 2012, Defendants shall
13 provide CDCR grievance forms and stamped envelopes addressed to
14 CDCR to all parolees and out-to-court prisoners with disabilities
15 housed in county jails. CDCR personnel shall encourage parolees
16 and out-to-court prisoners also to use the county jail's grievance
17 process to request disability accommodations. Whenever Defendants
18 receive a completed grievance form from a parolee or out-to-court
19 prisoner in county jail, they shall forward the grievance form to
20 the county's legal counsel or designee as soon as possible and no
21 later than three business days after receipt. Defendants shall
22 respond to the grievances within the timeframes set forth in the
23 County Jail Plan.

24 7. Beginning no later than September 15, 2012, if CDCR
25 personnel become aware that an out-to-court prisoner or parolee
26 with a disability faces an urgent or emergency situation (for
27 example, if there is an allegation of a condition that is a threat
28 to the individual's health or safety or that would prevent his or

25

APPENDIX A

Armstrong v. Brown, et al.

U.S. District Court, Northern District of California,

Case No. C 94-2307 CW

California Department of Corrections and Rehabilitation's
County Jail plan for addressing *Armstrong* class members
housed in County Jails as ordered by the Federal District
Court on April 11, 2012.

The CDCR also does not intend for this document to provide any legal advice to Counties or their staff and reserves the right to make changes to this plan, based on future legislative actions or legal clarifications.

INTRODUCTION

This plan results from a finding by the Federal Court that state parolees and state inmates are under the jurisdiction of California Department of Corrections (CDCR) when housed in a County Jail and therefore are entitled to the same reasonable accommodations that CDCR provides within its institutions and facilities.

By complying with the Court's order of April 11, 2012, and developing this plan to track, and provide parolees and inmates with a grievance process, the CDCR does not concede or assent that it has control over the County Jails. County Jails are operated under the authority of the County Sheriffs.

DAILY JAIL LIST -

The CDCR will be responsible for sending an electronic message to the County's designee or legal counsel where a CDCR parolee has been newly booked.

CDCR will send notifications to impacted counties via a batch process to be disseminated daily at the same time each day, seven days a week.

The electronic notification will include, at minimum, for each Armstrong parolee:

- a. Full name.
- b. CDC number.
- c. The CDCR Disability Placement Program (DPP) code and definition of the DPP Code.
- d. Any housing accommodations as stated in DECS.
- e. Any programming accommodations as stated in DECS.
- f. Health Care Appliances.
- g. Last release date from prison.

The CDCR automated process will allow for counties to reply via email. This will also allow for CDCR to become aware of electronic messages that are returned undeliverable.

PAROLE HOLDS IN COUNTY JAILS

As part of the Notice of Rights (NOR) process:

1. Current operating procedures for the NOR will remain in place. Parole/Notice Agents shall check Disability and Effective Communication System (DECS), review field file and source documents and determine if any reasonable accommodations are needed. All information will be documented in Section I on the Notice and Request for Assistance at Parole Proceeding BPH form 1073.
2. The parole/notice agent will ask the parolee to self-identify any disability needs related to housing and programming and will document the information in the "Other" field in Section II of the BPH 1073.
3. Within three business days, while informing the parolee of his/her Notice of Rights/Notice of Charges, the parole/notice agent shall provide a parolee identified as an Armstrong class member with a Reasonable Modification or Accommodation Request CDCR form 1824 and explain to the parolee that they may use that form as a grievance process if they are a person with a disability and are not receiving a housing or programming accommodation that they need in the County Jail.

The parolee will also be provided a self-addressed/postage paid envelope (Business Reply Mail) to be used for sending a completed grievance form to the respective Regional ADA Unit.

Parolees will be informed of and encouraged to use the local facility's grievance process in addition to CDCR's grievance process.

4. DAPO staff shall assist parolees in completing a CDCR form 1824 when the parolee is unable to complete the form on his/her own due to a disability. The parole/notice agent will forward the completed grievance form to their Regional ADA Unit within one business day of receipt.

5. DAPO staff shall inform County Jail staff about a need for an accommodation or possible medical or mental health examination, no later than four business days after a parolee's date of arrival at the county jail. Any notification given to county jail staff shall be documented on the Notice and Request for Assistance at Parole Proceeding BPH form 1073 and recorded in the DECS.

GRIEVANCES and their COLLECTION (CDCR Form 1824)

Upon receipt of a CDCR 1824 grievance form, the notice/parole agent shall send the CDCR form 1824 to the Regional ADA Parole Unit within one business day.

The Regional ADA Parole Administrator shall ensure the grievance is entered into the DAPO tracking system and assigned to an ADA Unit staff member for a response. If the Administrator identifies the stated issue on the CDCR 1824 qualifies as an emergency, he/she shall ensure a response is completed within 5 calendar days. If the Administrator deems the CDCR 1824 is a non-emergency then he/she shall ensure a response is completed within 15 calendar days.

The Regional ADA Parole Administrator will ensure the grievance is forwarded as soon as possible and no later than three business days after receipt to the respective County's designee or legal counsel for subsequent notification to the County Jail housing the subject parolee.

1. For Armstrong class members who are scheduled to go "out to court" for more than three business days, the institutional Case Records staff will include a Request for Reasonable Modification or Accommodation Request CDCR form 1824 post card with the OTC packet at the prison facility where they are housed prior to be transferred out to court. The institution's Receiving and Release staff will give the post card to the inmate at the time of departure from the facility.

The post card will be self-addressed/postage paid, with the return address for DAPO HQ – Parole Litigation Compliance Unit (PLCU) in Sacramento, CA. The PLCU will verify the location of the inmate and notify the respective Regional ADA Unit, who will deploy a parole/notice agent to the jail to provide

the inmate with necessary forms within three business days of receipt of the post card.

2. The parole/notice agent shall provide an inmate identified as an Armstrong class member with a Reasonable Modification or Accommodation Request CDCR Form 1824 and explain to the inmate that they may use that form as a grievance process if they are a person with a disability and are not receiving a housing or programming accommodation that they need in the County Jail.
3. DAPO staff shall assist inmates in completing a CDCR form 1824 when the inmate is unable to complete the form on his/her own due to a disability. The parole/notice agent will forward the completed grievance form to their Regional ADA Unit within one business day of receipt.

The inmate will also be provided a self-addressed/postage paid envelope (Business Reply Mail) to be used for sending a completed grievance form to the respective Regional ADA Unit.

Parolees will be informed of and encouraged to use the local facility's grievance process in addition to CDCR's grievance process.

4. DAPO staff shall inform County Jail staff about a need for an accommodation or possible medical or mental health examination, no later than four business days after the date of arrival at the county jail. Any notification given to county jail staff shall be documented.
5. The Division of Adult Institutions (DAI), Americans with Disabilities Act (ADA) Associate Warden (AW) will notify the Regional ADA Unit of the Armstrong class member's name, number, county where inmate will be housed, and date of departure within three business days of departure from the CDCR institution.
6. The DAI ADA AW will be responsible for notifying the County's legal counsel (or designee) of the inmate's out-to-court status and ADA information that impacts the housing and programming of the inmate, within three business days

of departure from the CDCR institution. A copy of the notice sent to the County legal counsel (or designee) will then be forwarded to the Office of Legal Affairs, Class Actions Team– Attention: Armstrong Counsel, at CDCR Headquarters in Sacramento, and to the Plaintiff's counsel simultaneously.

CDCR form 1824's collected at the County Jail shall be sent to the Regional ADA Parole Unit for processing in accordance with this plan.

EMERGENCY APPEALS

If any CDCR staff person becomes aware, whether through a hearing, notice service, or otherwise, that an Armstrong class member being housed in a County Jail has an urgent or emergent situation (i.e., if it alleges a condition which is a threat to the parolee's health or safety, or is necessary for participation or effective communication in a parole revocation proceeding) that person shall immediately notify the Regional ADA Parole Administrator, as well as the County's designee or Legal Counsel using contact information provided by the County's Legal Counsel.

The Regional ADA Parole Administrator shall respond to such a grievance within five calendar days of receipt and make their best efforts to ensure that necessary and reasonable accommodations are provided on an interim basis, and shall document their efforts on the CDCR 1824 form.

PARAGRAPH 5 RESPONSES

If plaintiff's counsel raises concern regarding individual class members, those letters are to be sent simultaneously to the Office of Legal Affairs, Class Actions Team– Attention: Armstrong Counsel, at CDCR Headquarters in Sacramento, and to the respective county Legal Counsel.

With the assistance of the Regional ADA Parole Administrator, non-urgent issues will be addressed within 15 business days and urgent issues will be addressed within five business days.

PATTERNS OF ALLEGED MISCONDUCT OR DENIAL OF ADA ACCOMODATIONS

Each Regional ADA Parole Administrator shall review all CDCR 1824 grievances and determine if there is a pattern of denials of disability accommodations such as improper housing and/or denial of assistive devices to class members at a particular county jail facility.

If a pattern is discovered, the Regional ADA Parole Administrator must write to the County's Legal Counsel (or designee), within five days of discovery and provide the evidence alleged. The letter must be copied to plaintiff's counsel, care of the Office of Legal Affairs, Class Actions Team – Attention: Armstrong Counsel, at CDCR Headquarters in Sacramento.

The Regional ADA Parole Administrator shall assign one of their Parole Agent II, Supervisors to investigate the alleged deficiencies at the specific county jail. Such agent of CDCR shall audit and/or investigate the situation at the County Jail, to the extent possible, and determine what steps, if any, can be taken to remedy the situation. A written report shall be provided to the Office of Legal Affairs, Class Actions Team – Attention: Armstrong Counsel, at CDCR Headquarter in Sacramento.

ACCOUNTABILITY

Failure by CDCR staff to comply with any portion of this plan may result in employee referrals for accountability to a Supervisor and/or the Office of Internal Affairs for investigation. Parole Region and Institution employee accountability logs shall be used and maintained consistent with prior memorandums for documentation of employee accountability.

CDCR ADDRESSES

Office of Legal Affairs, Class Actions Team

– Attention: Armstrong Counsel

1515 S Street, Rm 314S

Sacramento, CA 95811

DAPO HQ – Litigation Compliance Unit

1515 S Street, Rm 212N

Sacramento, Ca 95811

Region 1

Regional ADA Unit

9825 Goethe Road, Ste 200

Sacramento, CA 95827-2572

Region 2

Regional ADA Unit

1515 Clay Street, 10th Floor

Oakland, CA 94612-1499

Region 3

Regional ADA Unit

320 W. 4th Street, Suite 1000

Los Angeles, CA 90013-2489

Region 4

Regional ADA Unit

21015 Pathfinder Road, Suite 200

Diamond Bar, CA 91765-4002