No. 23-15036

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MANUEL DE JESUS ORTEGA MELENDRES, *et al*.,

Plaintiffs-Appellees

and

UNITED STATES OF AMERICA,

Intervenor-Plaintiff-Appellee

v.

PAUL PENZONE, in his official capacity as Sheriff of Maricopa County,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE UNITED STATES AS INTERVENOR-APPELLEE

KRISTEN CLARKE
Assistant Attorney General

ELIZABETH P. HECKER
NATASHA N. BABAZADEH
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 598-1008

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

STATUTES:

RULES:

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-15036

MANUEL DE JESUS ORTEGA MELENDRES, *et al.*,

Plaintiffs-Appellees

and

UNITED STATES OF AMERICA,

Intervenor-Plaintiff-Appellee

v.

PAUL PENZONE, in his official capacity as Sheriff of Maricopa County,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE UNITED STATES AS INTERVENOR-APPELLEE

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. 1331 and 1343. The court entered the injunctive order at issue in this appeal on November 30, 2022.

See 1-ER-2-16.[1] Sheriff Penzone filed a timely notice of appeal on January 9, 2023. 3-ER-308-312; Fed. R. App. P. 4(a)(1)(B). This court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

Over the past decade, the district court has issued a series of permanent injunctions seeking to cure a pattern and practice of unconstitutional conduct by the Maricopa County Sheriff's Office (MCSO).[2] This appeal concerns the most recent of these injunctions, the Amended Third Supplemental Permanent Injunction (Third Order), which establishes the creation of a Constitutional Policing Authority (CPA) to oversee MCSO's internal investigations of misconduct complaints. The questions presented are:

1. Whether the Third Order allows for judicial review of the CPA's decisions.

2. Whether the district court, given the history of MCSO's noncompliance with injunctive orders on conducting internal misconduct investigations, properly

---

[1] "ER" refers to appellant's Excerpts of Record. "Br. __" refers to appellant's opening brief. "SER" refers to the Supplemental Excerpts of Record submitted with the United States' brief.

[2] The nominal defendant-appellant in this appeal is MCSO Sheriff Paul Penzone, in his official capacity as Sheriff of Maricopa County. For ease of reference, this brief refers to defendant-appellant as "MCSO."

exercised its equitable power by giving the CPA decision-making authority over MCSO's complaint intake and routing processes and investigative training.

STATEMENT OF THE CASE

The district court has repeatedly found that MCSO has failed to comply with its orders. Although the scope of MCSO's violations has been broad, this appeal focuses only on its failure to investigate complaints of employee misconduct. After years of observing MCSO's noncompliance with its previous injunctions ordering MCSO to conduct such investigations fully, fairly, and efficiently, the district court found that MCSO continually has failed to investigate alleged officer misconduct in a timely manner and allowed the backlog of open misconduct cases to grow exponentially. The district court thus entered the Third Order, which imposed remedies closely tailored to MCSO's violations, including appointing the CPA to oversee MCSO's complaint intake and routing processes. MCSO now challenges the district court's authority to vest the CPA with certain decision-making power over these processes.

1. Early Litigation And The First Order

a. In 2008, private plaintiffs filed a class action against then Sheriff of Maricopa County Joseph M. Arpaio, MCSO, and Maricopa County, alleging that defendants engaged in a custom, policy, and practice of policing activities that violated the Constitution. See SER-256-266; *Melendres* v. *Arpaio*, 695 F.3d 990,

994-995 (9th Cir. 2012) (*Melendres I*). Plaintiffs alleged that defendants, under the guise of enforcing federal and state immigration laws, racially profiled Latino drivers and passengers, stopped them pretextually without individualized suspicion or cause, and then subjected them to burdensome, stigmatizing, and injurious treatment. See SER-266; *Melendres I*, 695 F.3d at 994. In December 2011, the district court issued a preliminary injunction against Sheriff Arpaio and MCSO, see *Ortega-Melendres* v. *Arpaio*, 836 F. Supp. 2d 959, 994 (D. Ariz. 2011), which this Court affirmed, see *Melendres I*, 695 F.3d at 1002.

In May 2013, following a bench trial, the district court found defendants liable for multiple violations of the Fourth and Fourteenth Amendments. See *Melendres* v. *Arpaio*, 989 F. Supp. 2d 822, 825-912 (D. Ariz. 2013). The court entered a permanent injunction, see *id.* at 827, which it later modified (collectively, the First Order), enjoining defendants from maintaining these unconstitutional practices, see *Melendres* v. *Arpaio*, 784 F.3d 1254, 1259 (9th Cir. 2015) (*Melendres II*), cert. denied, 577 U.S. 1062 (2016); see 2-ER-189-190.

b. Among other remedial measures, the First Order required the defendants to "conduct a comprehensive internal assessment of their * * * intake and investigation of civilian Complaints." 2-ER-192. The order defined "Complaint" as "any allegation of improper conduct made by a member of the public or MCSO personnel regarding MCSO services, policy or procedure, that alleges

dissatisfaction with or misconduct by MCSO personnel." 2-ER-184. And the order required MCSO to undergo training on how to "avoid Complaints due to perceived police bias or discrimination" and on the "process for investigating Complaints of possible misconduct." 2-ER-204-205.

The First Order also included the appointment of a "Monitor," defined as "a person or team of people who shall be selected to assess and report on the Defendants' implementation of this Order." 2-ER-188, 288. The order set forth the Monitor's duties and responsibilities for ensuring compliance with the Order, including, as relevant here, "evaluating the effectiveness of the MCSO's changes in the areas of supervision and oversight." 2-ER-230-231. The Monitor was also tasked with conducting outcome assessments, including on "the prevalence of civilian Complaints," "the number and rate of Complaints that are accepted, sustained and not sustained," and "whether any Deputies are the subject of repeated misconduct Complaints." 2-ER-234.

c. In April 2015, this Court largely affirmed the First Order. *Melendres II*, 784 F.3d at 1265-1267.

2. The Second Order And Relevant Proceedings

a. In January 2015, plaintiffs moved the district court to hold the defendants in civil contempt. SER-233-263. Plaintiffs alleged, among other things, that the

"limited evidence" at that point "reveal[ed] serious deficiencies in MCSO's procedures for handling civilian complaints and internal investigations." SER-260.

The district court held a 21-day evidentiary hearing to address the various charges of noncompliance and determine the appropriate remedy. SER-135. The court found, in relevant part, that defendants "deliberately violated court orders," "initiated internal investigations designed only to placate Plaintiffs' counsel [and] * * * did not make a good faith effort to fairly and impartially investigate and discipline misconduct." SER-135-136. The court elaborated, "[t]o escape accountability for their own misconduct, and the misconduct of those who had implemented their decisions, Defendants, or their proxies, named disciplinary officers who were biased in their favor and had conflicts." SER-136. Indeed, the court held, the defendants "remained in control of investigations in which they themselves had conflicts, * * * promulgated special inequitable disciplinary policies pertaining only to *Melendres*-related internal investigations, [and] delayed investigations so as to justify the imposition of lesser or no discipline." SER-136.

In July 2015, the United States filed a motion to intervene (SER-231-232), which the district court granted (SER-228-230).

b. To address these violations, in July 2016, the district court entered the Second Amended Second Supplemental Permanent Injunction/Judgement Order (Second Order), mandating, among other things, reforms to MCSO's internal

investigation procedures. See 2-ER-109-175. The Second Order required the Sheriff to ensure that "all allegations of employee misconduct, whether internally discovered or based on a civilian complaint, are fully, fairly, and efficiently investigated." 2-ER-126. The order further required MCSO to "conduct objective, comprehensive and timely administrative investigations of all allegations of employee misconduct." 2-ER-132. Paragraph 204 of the order obliged defendants to complete administrative investigations within 85 calendar days from the initiation of the investigation. 2-ER-137. Any extension beyond that timetable required approval by MCSO's Professional Standards Bureau (PSB), the office within MCSO tasked with investigating misconduct by MCSO personnel, and only if reasonable. 2-ER-137.

Also in the Second Order, the district court appointed an independent investigator to work with MCSO to ensure that it performed and concluded certain misconduct investigations in an efficient and satisfactory manner. See 2-ER-162-170. The court gave the investigator authority to "reopen investigations, pursue new investigations, make preliminary findings of fact, [and] bring charges against an employee." 2-ER-169. It also made clear that the independent investigator's decisions were not subject to MCSO's review. See 2-ER-166, 170, 173.

c. In September 2016, Maricopa County appealed the Second Order, arguing that the district court failed to tailor the terms of the order to remedy

defendants' violations of the Constitution and court orders. *Melendres* v. *Maricopa Cnty.*, 897 F.3d 1217, 1220 (9th Cir. 2018) (*Melendres IV*). Among other things, the County challenged the provisions of the Second Order granting the Monitor "full access to all MCSO internal affairs investigations" and providing that the district court would decide on new policies and procedures to govern misconduct investigations if the parties failed to agree. *Id.* at 1221-1222; see also 2-ER-126-127, 161.

This Court rejected Maricopa County's arguments and affirmed. See *Melendres IV*, 897 F.3d at 1221-1224. It found that each "challenged provision addresses the internal affairs and employee discipline process, which the district court found based on ample evidence MCSO had 'manipulated' to 'minimize or entirely avoid imposing discipline on MCSO deputies and command staff.'" *Id.* at 1222. The Court concluded that "MCSO's repeated bad-faith violations of court orders and Judge Snow's seven years of experience with this case at the time he issued the challenged orders lead us to believe that the district court chose the remedy best suited to cure MCSO's violations of court orders and to supplement prior orders that had proven inadequate to protect the Plaintiff class." *Ibid.*[3]

[3] In January 2017, under Federal Rule of Civil Procedure 25(d), the district court substituted newly elected Sheriff Penzone, in his official capacity, as a defendant in place of former Sheriff Arpaio. 2-ER-108.

d. Beginning in 2017 and consistently after, the Monitor's reports raised concerns about MCSO's inability to complete investigations in a timely manner.[4] In November 2020, the Monitor found that MCSO's PSB had violated paragraph 204 of the Second Order by granting extensions in administrative investigations that were not reasonable. SER-100, 112-113; see also 2-ER-137. MCSO filed a motion for relief (SER-104-110) from the Monitor's determination, which the district court denied (SER-101). The court pointed out that since it entered the Second Order, the number of investigative complaints had "consistently" gone up. SER-101.

The district court elaborated that "MCSO currently has a backlog of 1,954 open cases" and "the average time to close a case has risen to 501 days—approximately six times greater than the longest time period provided in the order." SER-101. The court emphasized that repeated extensions for completing such investigations "den[ied] justice both to the complainant and the subject of the complaint as the matter remains unresolved, memories fade, and witnesses become unavailable." SER-101.

[4] See, *e.g.*, SER-55-56, 112-113, 115-116, 118-119, 121-122, 124, 126, 128, 130, 132, 134.

3. The Third Order And Relevant Proceedings

a. Contempt Proceedings And Order To Show Cause

In March 2021, the United States and private plaintiffs filed a joint motion for an order to show cause, alleging that the defendants had violated the Second Order "by administering an internal investigation system that fails to conduct fair investigations in a timely fashion." SER-92. The United States pointed out that, based on the Monitor's quarterly reports, MCSO failed to meet its obligations by "allowing the backlog of open misconduct cases to grow exponentially over the last five years." SER-92. At the time of the Monitor's January 2021 site visit, "MCSO had a backlog of over 2,000 misconduct cases, with the average length of completion for a case being over 500 days, far in excess of both the [Second Order's] time limit and the state statutory timeline of 180 days." SER-94. And "there ha[d] been no upside gain in the quality of internal investigations [by the District] as a result of these delays[;] * * * MCSO still struggle[d] to improve the quality of its internal investigations." SER-94.

The district court held a hearing on the joint motion in June 2021. 4-ER-614; SER-65-73. In a joint report following the hearing, the defendants conceded liability for contempt and the parties agreed that further proceedings should focus on remedies. SER-75. Defendants also "propose[d] that a joint consultant be

retained to prepare a management study that would provide an evidence-based review of staffing and organizational efficiencies within the [PSB]." SER-76.

The district court granted the joint motion and issued an order to show cause to address defendants' longstanding violation of the court's injunction requiring that internal investigations be "fully, fairly, and efficiently investigated." SER-62 (citation omitted). The court emphasized that "Defendants have continually failed to complete their investigations in a timely manner." SER-63. It explained that "[t]he average closure of a case took 204 days in 2018, 499 days in 2019, and 552 days in 2020." SER-63. The court also accepted MCSO's recommendation to appoint "a management expert" to "identify the sources of MCSO's failure to comply with the deadline for investigations in the Second Order and recommend remedial actions." SER-64.

b. Management Expert Report And The CPA

a. In August 2021, the district court selected Michael Gennaco as a management expert to "determine the causes of [MCSO's] noncompliance with this Court's injunction and propose measures the Court could order to ensure future completion of internal investigations within the timeframe contemplated by the injunction and state law." SER-58. Gennaco filed his report (the Expert Report) in July 2022, finding "MCSO has lagged woefully behind regarding the Order's timeliness requirements" with the average number "of days to complete an

internal investigation [rising] to almost four times longer than state requirements and over eight times longer than requirements of the Court." SER-35. The Expert Report made several recommendations "designed to address the intolerable backlog." SER-36.

As relevant here, the Expert Report proposed an "[e]ffective internal accountability system[]" that would "invest more time and effort in the initial review of the allegations, the appropriate scoping of those allegations, and the development of an action plan to address them." SER-38. It emphasized that "[e]ffective intake work would identify the potential policy violations, potential subjects, and whether the case is assigned for investigation by PSB, the Districts, or handled another way." SER-38. The report specified that "[t]hose responsible for the intake and initial review" should be "imbued with sufficient discretion to direct each allegation down a path that will achieve * * * overarching objectives of accountability and agency improvement." SER-38.

The Expert Report recommended that the County "retain a Constitutional Policing *Advisor* to provide internal oversight to its case intake process." SER-53 (emphasis added). The report described the Advisor as "an individual who has experience in the oversight or management of internal investigations and is given the authority to participate and weigh in on critical initial decisions about a case: whether to open an investigation, whether the allegations can be best handled

another way, and what will be needed in order to ensure accountability and learning from each allegation." 2-ER-104-105.

The Expert Report proposed "a central intake process" through which the PSB Captain would classify and route the complaint. SER-41. The Report emphasized that the "work that is done on the front end" is "pivotal to the ultimate efficacy of the investigation and its results." SER-41. It thus proposed that the Advisor's role would be to provide "an objective independent voice on intake and routing decisions of allegations of misconduct." SER-40. Separately, for misconduct complaints that "suggest weaknesses in systemic issues such as training," the Report recommended a modified inquiry to identify and remedy those weaknesses. SER-45.

Though the Expert Report envisioned the Advisor as a separate entity from the Monitoring Team, it suggested in the alternative that the court could "increase the responsibility of the Monitoring Team to assume the duties of [the Advisor]." SER-52.

b. In its response to the Expert Report, MCSO acknowledged that the Expert's proposal to involve an independent third party "could help to engender trust in MCSO's investigatory process," and that MCSO did "not oppose the general concept of an independent [third party] that will work with the PSB Commander to make complaint intake decisions." 2-ER-88-89. MCSO expressed

concern, however, that hiring someone to fill that role "will take considerable time, thereby slowing the efforts to address the growing backlog of cases." 2-ER-89. To address this concern, MCSO stated that it was open to the "Monitoring team" fulfilling the new role, because doing so "could prove a more efficient means of achieving the goals" of the independent third party. 2-ER-90. But MCSO objected to that party having "authority to dictate intake classification decisions." 2-ER-90.

c. The United States and plaintiffs also responded to the Expert Report, recommending that the district court "create a Constitutional Policing *Authority* * * * [with] independent authority to make decisions about complaint intake and routing." 2-ER-65 (emphasis added). The United States and plaintiffs expressed concern that "the [Expert] Report does not recommend a system in which MCSO would be actually required to heed [the CPA's] advice" and objected "to any structure where the CPA's complaint intake authority would be subservient to the Sheriff." 2-ER-68. In urging the court to give the CPA independent authority, the United States and plaintiffs emphasized that "the CPA's authority should be *subject to the review of this Court*—not Sheriff Penzone." 2-ER-65 (emphasis added).

The United States and plaintiffs thus proposed that the district court "should structure the CPA's role to ensure that MCSO cannot unreasonably reject appropriate recommendations, including giving the CPA "appropriate authority to

make intake, classification, and routing decisions." 2-ER-68. The United States and plaintiffs explained that "[w]ithout this authority, MCSO could simply disregard the CPA's input, as it has previously disregarded other recommendations from the parties and the Monitor." 2-ER-68-69. The United States and plaintiffs stressed that "there is no reason to think that the CPA's public reports alone would influence MCSO's conduct when five years of public reports by the Monitor have not." 2-ER-68.

The United States and plaintiffs also proposed that, where any of the parties "disagree[s] with any decision made by the CPA, they will meet and confer and attempt to resolve disagreements in good faith." 2-ER-69. And "[w]here disagreements cannot be resolved, *a party may raise the issue for resolution with the Court*." 2-ER-69 (emphasis added). As a model for the CPA's role, the United States and plaintiffs pointed to the Second Order's appointment of the independent investigator to help MCSO resolve certain misconduct investigations. 2-ER-68. The United States and plaintiffs emphasized that, there, the independent investigator's "findings [had been] subject to the review of this Court, not Sheriff Penzone." 2-ER-68.

During a status conference to discuss the Expert Report, the district court emphasized the need for compliance and the challenge of having to spend "another year getting somebody else up to speed on this litigation and getting comfortable at

implementing a process." 2-ER-57. The court noted that "the [M]onitor has extensive experience negotiating with the parties and trying to come up with fair resolutions for all concerned," and suggested appointing the Monitor to take on the new role. 2-ER-57.

c. Injunctive Relief And The CPA's Limited Decision-Making Authority

On November 30, 2022, the district court entered the Third Order, finding MCSO in civil contempt and ordering remedial measures. See generally 1-ER-2-16. In its contempt findings, the court explained that since it entered the Second Order in 2016, MCSO "ha[d] continually failed to complete their investigations in a timely manner." 1-ER-3.

The district court observed that MCSO, "[r]ather than taking the necessary substantive steps to resolve the backlog and process the complaints within the time period specified by the Order," repeatedly had granted itself extensions as "the backlogs continued to increase." 1-ER-4. In the time since the management expert had been appointed, "the existing investigator vacancies in the PSB have remained unfilled, and the timeline to complete an investigation ha[d] grown to approximately 600 days per investigation." 1-ER-4; see SER-29. And "[f]or full administrative cases involving sworn personnel, the timeline to complete an investigation is now apparently in excess of 800 days." 1-ER-5; SER-24. The court concluded that "[t]he failure to complete investigations in a timely manner

has become so extreme as to render investigations completely ineffectual and render no service to either the complainant or MCSO personnel." 1-ER-5.

To remedy these contempt findings, the district court created the role of the CPA. 1-ER-9. Though the court chose the Monitor, Robert Warshaw, to fulfill this role, it vested him with "supplemental authorities," including "immediate authority to oversee all of MCSO's complaint intake and routing." 1-ER-9-10.

Paragraph 346 of the Third Order provided that "[i]n consultation with the PBS Commander, the Monitor shall make determinations and establish policy decisions pertaining to backlog reduction." 1-ER-10. The paragraph specified, "by way of example," that such decisions included "which complaints should be (a) investigated by PSB; (b) sent to the Districts for investigation or other interventions; or (c) handled through other methods, to include diversion and/or outsourcing cases." 1-ER-10. The paragraph provided that the CPA "must consult with the PSB Commander about these policy decisions but maintains independent authority to make the ultimate decision." 1-ER-10.

Paragraph 347 granted the CPA authority to "revise and/or formalize MCSO's intake and routing processes," including "audit[ing] and review[ing] decisions made with respect to individual cases and, if necessary, * * *

chang[ing] such designations." 1-ER-10.[5] The paragraph further specified that "[t]he Monitor must consult with the PSB Commander about these processes but maintains independent authority to make the ultimate decision." 1-ER-10 (emphasis added).

Paragraphs 348-353 described the CPA's responsibilities with respect to MCSO's investigative practices. See 1-ER-10-11. Paragraphs 349 and 353 provided that, in developing policies and procedures with respect to investigations, the CPA would "consider the input" of the parties "and determine, at his discretion, to adopt [the policies and procedures] or not." 1-ER-10, 12. Afterward, the CPA must "finalize and submit such policies to the Court." Paragraph 350 provided that "the Monitor [would] assess MCSO's compliance with the investigative requirements of this order and shall determine whether training on investigative planning and supervision is needed and implement such training." 1-ER-11.

MCSO timely appealed. 3-ER-308-312. On appeal, MCSO challenges the CPA's limited authority over MCSO's complaint intake and routing processes as set forth in paragraphs 346 and 347 of the Third Order, along with the CPA's

[5] In response to MCSO's concerns regarding the scope of paragraph 347 in a prior draft of the Third Order, the district court modified that paragraph to clarify that MCSO must implement only the Monitor's decisions "pertaining to backlog reduction and any other authority granted the Monitor under the Court's orders." 1-ER-10.

authority to implement training on investigative planning and supervision, as set forth in paragraph 350. MCSO argues that the authority conferred to the CPA in these paragraphs violates Article III of the U.S. Constitution and Federal Rules of Civil Procedure 53 and 65. See generally Br. 29-58.

SUMMARY OF ARGUMENT

As the district court found, MCSO's "failure to complete investigations in a timely manner has become so extreme as to render investigations completely ineffectual and render no service to either the complainant or MCSO personnel." 1-ER-5. The Expert Report recognized these failures and, to effectively reduce the complaint backlog, proposed a central intake process with an objective and independent third party overseeing that process. The district court properly relied on its equitable power to fashion necessary and appropriate relief, including appointing the CPA with decision-making authority over MCSO's complaint intake and routing processes and investigative training. 1-ER-9-10. This Court should affirm the Third Order.

1. MCSO complains that the parties are unable to appeal the CPA's decisions on complaint intake and routing and investigative training to the district court. MCSO is wrong: the parties may seek district court review of any of the CPA's decisions. The United States and private plaintiffs made clear in seeking the appointment of the CPA that the CPA's decisions would be reviewable by the

district court. MCSO has offered no explanation as to why the district court would have chosen to give the CPA an even greater degree of independence than the United States and plaintiffs themselves have proposed. Nor has MCSO identified any language in the Third Order that would preclude the parties from seeking judicial review. MCSO's reading of the Third Order is thus baseless. Further, even if MCSO's reading of the Third Order were plausible—and it is not—MCSO's concerns would not justify the vacatur it seeks. Rather, its concerns could be cured by a straightforward remand to allow the district court to add language to the Third Order explicitly stating what is already obvious from context: that the parties may seek judicial review of the CPA's decisions.

2. The district court also properly vested the CPA with limited decision-making authority. District courts have equitable power to appoint independent third parties with decision-making authority to implement their orders. And courts often have appointed such entities to oversee and make decisions on behalf of government entities, like MCSO. Here, given MCSO's history of noncompliance related to its massive complaint backlog, the district court properly exercised its inherent equitable authority to appoint the CPA with authority over MCSO's complaint intake and routing and investigative training.

MCSO's arguments to the contrary are unpersuasive. First, the CPA's limited decision-making authority is constitutionally permissible as it constitutes

neither an improper delegation nor abdication of the court's judicial power. Second, the limitations of Federal Rule of Civil Procedure 53 do not apply to the CPA, who was appointed under the court's equitable power, not Rule 53. And lastly, the challenged provisions do not violate Federal Rule of Civil Procedure 65 because the Third Order sufficiently delineates the CPA's limited role and responsibilities and clarifies what MCSO must do to comply with the injunction.

ARGUMENT

I

MCSO CAN APPEAL ANY DECISION OF THE CPA TO THE DISTRICT COURT

A. The Parties Can Seek Judicial Review Of The CPA's Decisions

MCSO complains that the Third Order "provides no express mechanism for judicial review" of the CPA's decisions regarding complaint intake and routing and investigative training. Br. 36-38, 43-44, 53-54. But as the United States and plaintiffs urged when arguing for the appointment of the CPA, the CPA's decisions are appealable to the district court. Nothing in the Third Order indicates otherwise.

1. The Proceedings Leading Up To The Third Order Support The Understanding That The District Court Can Review The CPA's Decisions

MCSO challenges paragraphs 346, 347, and 350 of the Third Order, which grant the CPA "independent authority to make the ultimate decision" on issues "pertaining to backlog reduction," "MCSO's intake and routing processes," and

"training on investigative planning and supervision." 1-ER-9-11. It argues that the phrase "ultimate decision" forecloses an opportunity for the parties to seek judicial review. See Br. 43 (citation omitted). MCSO is mistaken.

The CPA's authority is "ultimate" in that the CPA, not the Sheriff or PSB, has the authority to make decisions related to complaint intake and routing, and investigative training. The proceedings leading up to the Third Order support that understanding. The United States and private plaintiffs specifically urged below that the CPA should have "independent authority to make decisions about complaint intake and routing" and that "the CPA's authority should be subject to the review of [the district court]—not Sheriff Penzone." 2-ER-65. In fact, as a model for the CPA, the United States and plaintiffs pointed to the Second Order's appointment of the independent investigator and emphasized that, there, the investigator's "findings [had been] subject to the review of this Court, not Sheriff Penzone." 2-ER-68.

The United States and private plaintiffs explained that "[w]ithout this authority, MCSO could simply disregard the CPA's input, as it has previously disregarded other recommendations from the parties and the Monitor." 2-ER-68. The United States and plaintiffs also clarified that where any of the parties "disagree[s] with any decision made by the CPA, they will meet and confer and attempt to resolve disagreements in good faith," and "[w]here disagreements

cannot be resolved, a party may raise the issue for resolution with the Court." 2-ER-69.

2. The Third Order Neither Precludes Judicial Review Of The CPA's Decisions Nor Explicitly Needs To Provide For That Review

a. None of the paragraphs that defendants challenge—and no other provision in the Third Order—denies the parties the opportunity to seek judicial review of the CPA's decisions. MCSO nevertheless argues that the district court must *expressly* provide for such review in the Third Order. See Br. 36-38, 43-44, 47, 52. MCSO is wrong.

First, it is clear from context that the Third Order provides for judicial review of the CPA's decisions. The United States and private plaintiffs, in urging the district court to appoint a CPA with independent decision-making authority, expressed their understanding that the CPA's decisions would remain judicially reviewable. MCSO has not pointed to any language in the Third Order that contradicts that baseline understanding. And more to the point, MCSO has not explained why the district court would have sought to insulate the CPA's decisions from judicial review *against* the wishes of the very parties who were urging the appointment of an independent CPA in the first place.

MCSO's reading of the Third Order is even more implausible when read against the backdrop of this Court's precedents. Indeed, where a district court has not explicitly provided for judicial review of the decisions of a court-appointed

third-party decision-maker, this Court has inferred that such review is available. In *Plata* v. *Schwarzenegger*, the district court appointed a receiver with authority "to control, oversee, supervise, and direct all administrative, personnel, financial, accounting, contractual, legal, and other operational functions of the medical delivery component" of the California Department of Corrections and Rehabilitation. No. C01-1351 (N.D. Cal. Feb. 14, 2006) (Doc. 473); see also *Plata* v. *Schwarzenegger*, 603 F.3d 1088, 1090 (9th Cir. 2020). The court's order did not explicitly provide for judicial review of the receiver's decisions. See *Plata* v. *Schwarzenegger*, No. C01-1351 (N.D. Cal. Feb. 14, 2006) (Doc. 473). The State moved to vacate the receivership, arguing that receivership was not the least intrusive remedy and challenging the receiver's plan to construct prison facilities. See *Plata*, 603 F.3d at 1090. This Court rejected the State's argument and held that the receivership was a proper remedy. *Ibid.* While declining to review the receiver's plan in the first instance, this Court clarified that "[w]hether the [r]eceiver has violated instructions or gone beyond his mandate in any given instance * * * is a matter that must be addressed to the district court." *Id.* at 1090, 1098.[6]

[6] Other courts have appointed independent third parties with decision-making authority like the CPA without explicitly providing for judicial review in their orders. See *Dixon* v. *Barry*, 967 F. Supp. 535, 555-556 (D.D.C. 1997) (attaching order appointing receiver that contains no express provision for judicial review of receiver's decisions); *Shaw* v. *Allen*, 771 F. Supp. 760, 764-766 (S.D.

b. The cases MCSO relies on to argue that an explicit provision for judicial review is required are distinguishable. In *Armstrong* v. *Brown*, this Court vacated, in part, the district court's injunction for impermissibly delegating decision-making authority to an expert appointed under Federal Rule of Evidence 706. See 768 F.3d 975, 987-989 (9th Cir. 2014). The injunction granted the expert broad power to "resolve disputes * * * about whether non-compliance has occurred, the production of information, and the institution of corrective action," as well as to "make findings that go to the very heart of this litigation," including "making findings of fact and conclusions of law, as necessary to assess noncompliance." *Id.* at 987. In vacating portions of the injunction, this Court emphasized that Rule 706 limits experts to "act[ing] as * * * advisor[s] to the court on complex, scientific, medical, or technical matters" and explained that it has "never approved a Rule 706 expert to act in an adjudicative capacity with such finality." *Ibid.* Nothing in *Armstrong*, however, suggests that Rule 706's constraints should apply to the CPA, who was not appointed under the Rule.

Nor does *United States* v. *Microsoft Corp.* support MCSO's argument that the opportunity for district court review must be explicit. 147 F.3d 935 (D.C. Cir. 1998). In that case, the government brought a contempt action based on alleged

---

W.Va. 1990) (same); *United States* v. *Government of Guam*, No. 02-00022, 2008 WL 732796, at *10-15 (D. Guam Mar. 17, 2008) (same).

noncompliance with a previous consent decree in an antitrust case. See *id.* at 938-940. The district court found that the decree was ambiguous, and without the defendant's consent, referred the proceedings to a special master to propose findings of fact and conclusions of law. *Id.* at 940. The government argued that the defendant's lack of consent was inconsequential because the defendant's ability to seek *de novo* review of the special master's decisions was implicit. *Id.* at 955. But the then-current version of Federal Rule of Civil Procedure 53 provided that in non-jury trials, the district court was *required* to accept a special master's findings of fact unless clearly erroneous. *Ibid.* Because an implicit reservation of *de novo* review conflicted with the applicable federal rule, the D.C. Circuit refused to infer one. Here, there is no conflicting federal rule governing the CPA and thus no similar barrier to obtaining *de novo* review of the CPA's decisions.

B. In The Alternative, The Government Does Not Oppose Remand To The District Court To Add Language To The Third Order Providing For Judicial Review Of The CPA's Decisions

For the reasons set forth above, MCSO's assertion that the parties are unable to appeal the CPA's decisions to the district court is incorrect. And so, too, is MCSO's suggestion that a district court, in appointing an independent third party with limited and proper decision-making authority, must explicitly provide for judicial review. But even if MCSO's arguments had merit—and they do not—the proper course would not be for this Court to vacate the challenged paragraphs of

the Third Order; rather the proper course would be to remand this case so that the district court could amend the Third Order to make more explicit that the CPA's decisions are judicially reviewable.

II

THE DISTRICT COURT PROPERLY GRANTED THE CPA LIMITED DECISION-MAKING AUTHORITY OVER MCSO'S COMPLAINT INTAKE AND ROUTING PROCESSES AND INVESTIGATIVE TRAINING

MCSO argues that the district court's delegation of limited decision-making authority to the CPA constituted an abuse of discretion because it violated the Constitution and Federal Rules of Civil Procedure 53 and 65. See generally Br. 30-56. Again, MCSO premises its arguments on the erroneous assumption that the CPA's decisions are not subject to judicial review. But as explained, MCSO's assumption is wrong; the parties can seek judicial review of any of the CPA's decisions. See pp. 21-26, *supra*.

To the extent MCSO challenges the CPA's ability to have *any* decision-making authority, that argument also fails. The district court's delegation of limited decision-making authority to the CPA over MCSO's complaint intake and routing processes and investigative training is lawful and consistent with this Court's precedent. Courts routinely exercise their equitable authority to appoint third parties with limited decision-making power to assist in administering court-ordered remedial relief.

A. Standard Of Review

This Court "review[s] the district court's factual findings for clear error and its legal conclusions *de novo*." *Melendres* v. *Maricopa Cnty.*, 897 F.3d 1217, 1220 (9th Cir. 2018) (*Melendres IV*). It "review[s] the scope and terms of [the] injunction for an abuse of discretion." *Ibid.*

"[T]he scope of a district court's equitable powers … is broad, for breadth and flexibility are inherent in equitable remedies." *Brown* v. *Plata*, 563 U.S. 493, 538 (2011) (quoting *Hutto* v. *Finney*, 437 U.S. 678, 687 & n.9 (1978)). A district court abuses its discretion "only if the [injunctive relief] is 'aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation.'" *Melendres* v. *Arpaio*, 784 F.3d 1254, 1265 (9th Cir. 2015) (*Melendres II*) (quoting *Milliken* v. *Bradley*, 433 U.S. 267, 282 (1977)), cert. denied, 577 U.S. 1062 (2016). And "where the enjoined party has a 'history of noncompliance with prior orders,' and particularly where the trial judge has 'years of experience with the case at hand,' [this Court] give[s] the [district] court a 'great deal of flexibility and discretion in choosing the remedy best suited to curing the violation.'" *Melendres IV*, 897 F.3d at 1221 (quoting *Melendres II*, 784 F.3d at 1265).

B. The District Court Acted Within Its Discretion To Grant The CPA Limited Decision-Making Authority

Over the course of the past decade, the district court has observed and documented MCSO's repeated failures to comply with the court's injunctive

orders, conduct proper internal investigations, and address its massive—and growing—backlog of misconduct complaints. Given this history, it was entirely proper for the court to invoke its inherent equitable power to appoint a CPA with limited decision-making authority over MCSO's complaint intake and routing processes and investigative training.

1. District Courts Have Equitable Powers To Appoint Third Parties With Decision-Making Authority Over Government Entities

The use of third parties with limited decision-making power is a "recognized equitable tool[] available to the courts to remedy otherwise uncorrectable violations of the Constitution or laws." *Plata* v. *Schwarzenegger*, 603 F.3d 1088, 1093-1094 (9th Cir. 2010); *Morgan* v. *McDonough*, 540 F.2d 527, 533 (1st Cir. 1976) (citing Fed. R. Civ. P. 66), cert. denied, 429 U.S. 1042 (1977). "This broad power to fashion appropriate remedies extends from the power to issue injunctions against individual offenders and to appoint observers and special masters, to the power, in extreme cases, to appoint receivers." *Lewis* v. *Kugler*, 446 F.2d 1343, 1351 n.18 (3d Cir. 1971) (citing cases).

And, contrary to MCSO's arguments (see Br. 35-38, 42, 46-48, 52), this tool is no less available where the constitutional violations are committed by a government entity. "Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion in the realm of [government] administration." *Brown*, 563 U.S. at 511. Rather, a district court may "displace

local enforcement * * * if necessary to remedy the violations of federal law found by the court." *Washington* v. *Washington State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 695-696, modified *Washington* v. *United States*, 444 U.S. 616 (1979). When necessary, courts have appointed independent parties to "tak[e] over * * * governmental agencies that [can] not or [will] not comply with the law," *Plata*, 603 F.3d at 1093-1094, or "to coerce public officials to comply with legal mandates," *Dixon* v. *Barry*, 967 F. Supp. 535, 550 (D.D.C. 1997).

This Court has upheld the appointment of third parties with far more decision-making power over a government entity than the CPA's authority at issue here. In *Plata*, prisoners brought a class action against the State of California, alleging deficiencies in prison medical care in violation of the Constitution and federal law. 603 F.3d at 1090. When the State failed to comply with the parties' consent decree, the district court appointed a receiver and granted it "all of the powers of the Secretary of the [California Department of Corrections and Rehabilitation] with respect to the delivery of medical care" and simultaneously "suspend[ed] the Secretary's exercise" of those same powers. *Id.* at 1092. This Court affirmed the court's refusal to terminate the receiver and emphasized that "[t]he State to this day has not pointed to any evidence that it could remedy its constitutional violations in the absence of the receivership." *Id.* at 1098.

Other circuit courts have similarly recognized that district courts have power to appoint third parties with decision-making authority over government entities. See, *e.g.*, *Morgan*, 540 F.2d at 529, 532-533 (affirming appointment of a receiver with authority "to effectuate as soon as possible * * * the student desegregation plan," including arranging the "transfer and replacement of whomever he [saw] fit for the purposes of desegregation").[7]

2. The District Court Properly Appointed The CPA With Limited Decision-Making Authority Over MCSO's Complaint Intake And Routing Processes And Investigative Training

Given MCSO's history of noncompliance related to its massive complaint backlog and the Expert Report's recommendation for a central intake process to address this backlog, the district court properly exercised its equitable power to

[7] District courts routinely have appointed third parties like the CPA to oversee or manage government entities alleged to have violated constitutional and statutory rights. See *Dixon*, 967 F. Supp. at 548-549, 555 (appointing receiver with authority to "develop within the District of Columbia an integrated and comprehensive community-based mental health system" and to "oversee, supervise, and direct all financial, contractual, legal, administrative, and personnel functions of the" government component responsible for mental health services); *Turner* v. *Goolsby*, 255 F. Supp. 724, 730 (S.D. Ga. 1996) (county school system); *Shaw* v. *Allen*, 771 F. Supp. 760, 763-764 (S.D. W.Va. 1990) (county jail); *Gary W.* v. *Louisiana*, No. 74-2412, 1990 WL 17537, at *30-33 (E.D. La. Feb. 26, 1990) (children's services agencies); *Wayne Cnty. Jail Inmates* v. *Wayne Cnty. Chief Exec. Officer*, 444 N.W.2d 549, 560-561 (1989) (county jail); *Newman* v. *Alabama*, 466 F. Supp. 628, 635-636 (M.D. Ala. 1979) (prison); *United States* v. *City of Detroit*, 476 F. Supp. 512, 521 (E.D. Mich. 1979) (city's waste-water treatment plant).

appoint a CPA with decision-making authority over MCSO's complaint intake and routing processes and investigative training.

a. The district court repeatedly has found that MCSO violated its orders with respect to processing and handling misconduct complaints. As described (see p. 6, *supra*), the court found in 2015 that MCSO "intentionally failed to implement the Court's preliminary injunction" in several respects. SER-135-136. As relevant here, the court found that defendants "initiated internal investigations designed only to placate Plaintiffs' counsel" and "did not make a good faith effort to fairly and impartially investigate and discipline misconduct." SER-136. And the court emphasized that, because of defendants' "multiple acts of misconduct, dishonesty, and bad faith," "few persons were investigated; even fewer were disciplined" and "[t]he discipline imposed was inadequate." SER-136-137. The court thus entered the Second Order in 2016, necessitating reforms to MCSO's internal investigation procedures, including requiring MCSO to complete administrative investigations within 85 calendar days from the start of the investigation. 2-ER-137.

Five years later, in August 2021, the district court found defendants still had "continually failed to complete their investigations in a timely manner." SER-63. The court emphasized that "[t]he average closure of a case took 204 days in 2018, 499 days in 2019, and 552 days in 2020." SER-63. The court thus entered an

order to show cause, at which time MCSO had a backlog of 2133 cases, with an average of 655 days for the PSB to complete an investigation. SER-33-34.

To address this "intolerable backlog," the Expert Report recommended an "[e]ffective internal accountability system[]" that would "invest more time and effort in the initial review of the allegations, the appropriate scoping of those allegations, and the development of an action plan to address them." SER-38. The report "envison[ed] a central intake process" "[w]ith input from the CPA" and emphasized that the "work that is done on the front end" is "pivotal to the ultimate efficacy of the investigation and its results." SER-41. It also recognized that for misconduct complaints "in which the allegations suggest weaknesses in * * * training," the CPA would assist in designing a "modified inquiry" to identify and remedy those weaknesses. SER-45.

Given this backdrop, the district court in the Third Order properly heeded the Expert Report's recommendation for a central intake process and appointed a CPA to oversee that process and to assess and implement investigative training. Here, "[t]he more usual remedies[,] contempt proceedings[,] and further injunctions were plainly not very promising, as they invited further confrontation and delay." *Morgan*, 540 F.2d at 533 (citing cases). "[A]nd when the usual remedies are inadequate, a court of equity is justified, particularly in aid of an outstanding injunction, in turning to less common ones, such as a receivership to

get the job done." *Ibid.* As in this Court's decision in *Plata*, the CPA was appointed "only after [MSCO] admitted its inability to comply with consent orders intended to remedy the constitutional violations" the court previously had found. 603 F.3d at 1097; see SER-75 (including MCSO's concession of liability for contempt and agreement that future proceedings should focus on remedies).

b. The role and responsibility of the CPA are narrowly tailored to remedy the violations specified in the Third Order. Paragraph 346 permits the CPA to make "determinations and establish policy decisions pertaining to backlog reduction regarding, by way of example, which complaints should be" investigated by which components. 1-ER-10. And paragraph 347 allows the CPA to "revise and/or formalize MCSO's intake and routing processes," including "audit[ing] and review[ing] decisions made with respect to individual cases and, if necessary, * * * chang[ing] such designations." 1-ER-10. These administrative decisions are precisely the types of decisions that the district court wished to take out of MCSO's hands, after MCSO repeatedly demonstrated that it was incapable, or unwilling, to make them itself in a productive and efficient manner.

MCSO also challenges paragraph 350 (see Br. 30-58), which provides that the CPA must "assess MCSO's compliance with the investigative requirements of this order and shall determine whether training on investigative planning and supervision is needed and implement such training." 1-ER-11. Paragraphs 348-

353 describe how the CPA should go about developing policies and procedures for investigations in close coordination with MCSO, and specifically provide that the district court must approve those policies and procedures. 1-ER-10-13. Paragraph 350 merely permits the CPA to assess MCSO's compliance with court-ordered policies and to implement training on the same if it deems necessary. Again, this provision is squarely supported by the district court's findings related to MCSO's history of failing to properly investigate allegations of employee misconduct. See *Plata* v. *Brown*, 427 F. Supp. 3d 1211, 1230 (N.D. Cal. 2013) (granting request to modify receiver's responsibilities to develop "training in the recognition, diagnosis, and treatment of" of an infectious disease for medical and nursing staff); *Shaw* v. *Allen*, 771 F. Supp. 760, 764-765 (S.D. W.Va. 1990) (appointing receiver with authority to "ensure that the Jail Staff is adequate in * * * training" and to enter contracts to retain personnel "to provide training to Jail Staff").[8]

The CPA's limited decision-making authority is narrowly tailored to oversee MCSO's intake and routing processes and to ensure adequate investigative training, which MCSO has repeatedly shown itself to be unable to manage. See

[8] Separately, because MCSO declined to object to paragraph 350 prior to the district court entering the Third Order, MCSO forfeited its arguments as to that paragraph on appeal. See *Baccei* v. *United States*, 632 F.3d 1140, 1149 (9th Cir. 2011) (recognizing that, except in "exceptional circumstances," this Court "generally will not consider arguments raised for the first time on appeal").

Plata, 603 F.3d at 1098; see also *Morgan*, 540 F.2d at 533. The Third Order is "reasonably limited to matters of proper judicial concern, and, given the problems that have arisen, and the history, [it does] not exceed the court's powers." *Morgan*, 540 F.2d at 535; see also *Melendres IV*, 897 F.3d at 1220-1221.

C. MCSO's Arguments To The Contrary Fail

MCSO argues that the Third Order's provisions giving the CPA decision-making authority over MCSO's complaint intake and routing procedures and investigative training violate Article III of the Constitution and Federal Rules of Civil Procedure 53 and 65, which govern court-appointed "masters" and the appropriate content and scope of an injunction, respectively. See Br. 30-58. These arguments again appear to be based on the incorrect assumption that MCSO may not appeal the CPA's decisions to the district court. In any case, MCSO's arguments lack merit.

1. The CPA's Limited Decision-Making Authority Is Constitutional

Contrary to MCSO's argument (see Br. 31-32, 45), the district court's limited delegation of decision-making authority to the CPA does not violate the Constitution. As explained (see pp. 29-31, *supra*), district courts have equitable power to appoint entities with decision-making authority over government institutions to implement court orders.

The cases MCSO relies on to argue otherwise do not apply. Indeed, none of them hold that appointing an independent third party with decision-making authority is unconstitutional. As noted above, *Armstrong* v. *Brown*, concerned a district-court injunction that impermissibly delegated judicial decision-making authority—including resolving disputes between parties on noncompliance and instituting corrective action—to an expert appointed under Federal Rule of Evidence 706. See 768 F.3d 975, 987-989 (9th Cir. 2014). The decision did not discuss any constitutional questions, but rather expressed concern with the scope of power given to an expert appointed under Rule 706. See *id.* at 987 ("We have never approved a Rule 706 expert to act in an adjudicative capacity with such finality [as provided by the district court's injunction]."). The CPA's limited decision-making authority here neither compares to the broad-sweeping authority granted to the expert in *Armstrong* nor similarly encroaches on traditional judicial functions.

Nor did this Court in *Toussaint* v. *McCarthy* hold that "a district court's delegation of non-advisory power to a monitor" per se violates the Constitution. Br. 33 (citing 801 F.2d 1080, 1102 n.23 (9th Cir. 1986)). In *Toussaint*, the district court delegated unreviewable power to a monitor appointed under Rule 53 to release prisoners from administrative segregation. 801 F.2d at 1102 n.23. This Court stated—in dicta since no party had raised the issue—that the district court's

"broad delegation of power to a special master" raised constitutional concerns. *Ibid.* Such delegation was particularly concerning, the Court pointed out, because courts "must accord wide-ranging deference to prison administrators 'in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.'" *Id.* at 1104 (quoting *Bell* v. *Wolfish*, 441 U.S. 520, 547 (1979)). Here, in contrast, the district court's limited delegation to the CPA does not implicate the special deference owed in the prison context. See *Turney* v. *Safley*, 482 U.S. 78, 85 (1987). And the CPA's authority over MCSO's complaint intake and routing processes and investigative training is far narrower than the district court's "broad delegation" of authority in *Toussaint* allowing a special master to unilaterally decide whether to release prisoners from administrative segregation. 801 F.2d at 1102 n.23.

Lastly, this Court in *National Organization for the Reform of Marijuana Laws* v. *Mullen*, *rejected* the defendants' constitutional argument that "the duties assigned the master create an impermissible incursion upon the function of the executive." 828 F.2d 536, 542, 545 (9th Cir. 1987). To the extent MCSO relies on the Court's dicta that special masters "may not be placed in control of governmental defendants for the purpose of forcing them to comply with court orders," this observation is limited to the context of special masters appointed

under Federal Rule of Civil Procedure 53. *Id.* at 545. As explained further below, the CPA was not appointed under Rule 53; the Rule's limitations therefore do not apply here. See pp. 40-42, *infra*.[9]

The Third Order does not violate Article III of the Constitution.

2. The Limitations Imposed By Rule 53 Do Not Apply To The CPA, Who Was Appointed Under The District Court's Inherent Equitable Power

MCSO's argument that granting the CPA authority over complaint intake and routing and investigative training violates Federal Rule of Civil Procedure 53 also misses the mark. See Br. 44-48. Rule 53 governs the appointment of

[9] None of the other out-of-circuit cases MCSO cites help it. See *City of New York* v. *Mickalis Pawn Shop, LLC*, 645 F.3d 114, 145 (2d Cir. 2011) (citation omitted) (making the uncontroversial point that "serious constitutional questions arise when a master is delegated *broad power to determine the content of an injunction*" or makes "*significant* decisions without careful review by the trial judge," but ultimately declining to decide any constitutional questions) (emphasis added); *Cobell* v. *Norton*, 334 F.3d 1128, 1141-1143 (D.C. Cir. 2003) (finding impermissible reappointment of monitor vested "with wide-ranging extrajudicial duties," including "an investigative, quasi-inquisitorial, quasi-prosecutorial role that is unknown to [the] adversarial legal system"); *Ruiz* v. *Estelle*, 679 F.2d 1115, 1163 (5th Cir.), amended in part, vacated in part, 688 F.2d 266 (5th Cir. 1982) (affirming appointment of special master and monitors but clarifying that those entities do "not have the authority to hear matters that should appropriately be the subject of separate judicial proceedings, such as actions under § 1983"). The primary case the National Sheriffs' Association (NSA) relies on in its amicus brief is also distinguishable for similar reasons. See *Stauble* v. *Warrob, Inc.*, 977 F.2d 690, 695-697 (1st Cir. 1992) (clarifying that the "Constitution prohibits us from allowing the nonconsensual reference of a *fundamental issue of liability* to an adjudicator who does not possess the attributes that Article III demands") (emphasis added). Here, the district court gave the CPA power to determine policies and procedures regarding complaint intake and routing and to mandate certain training—not a fundamental issue of liability.

"[m]asters" and limits their authority to general fact-finding, investigations, and regulatory proceedings. Fed. R. Civ. P. 53. But this Court has explained that "[t]he role of a special master as envisaged by [FRCP] 53 * * * is sufficiently distinct from that of a receiver appointed under the pre-existing inherent authority of a court." *Plata*, 603 F.3d at 1095. "[R]ule 53 does not terminate or modify the district court's inherent equitable power to appoint a person, *whatever be his title*, to assist in administering a remedy." *Ruiz*, 679 F.2d at 1161 (emphasis added). The district court relied on its equitable power, not Rule 53, to appoint the CPA. See pp. 29-36, *supra*. MCSO's Rule 53 cases, limiting special masters to an advisory role (see Br. 45-54), are thus inapposite.

MCSO argues that Rule 53 applies because plaintiffs cited Rule 53 cases when requesting the appointment of the Monitor and because the Monitor's role and responsibilities were, prior to the Third Order, limited to those set forth in Rule 53. See Br. 48-50. But the powers of the CPA are distinct from those of the Monitor. The Expert Report, which first introduced the idea of an independent third party tasked with overseeing MCSO's complaint intake and routing processes, envisioned that entity as separate from the Monitor. SER-52. The Report suggested only in the alternative the court could "increase the responsibility of the Monitoring Team to assume the duties" of the new entity. SER-52. It was *MCSO* that urged that the Monitoring Team take on the additional responsibilities

in light of the Monitor's preexisting familiarity with the case. 2-ER-90; see also 1-ER-9 (explaining that the court shared "*MCSO's concern* about the length of time necessary to develop a new role, hire [someone,] and bring that individual up to speed in time to efficiently implement the curative reforms") (emphasis added). MCSO fails to explain why any prior proceedings related to the Monitor's appointment would also apply to the appointment of the CPA. Indeed, its position would essentially discourage courts from pursuing the very efficiencies that MCSO purportedly sought to achieve when it proposed that the Monitor could fulfill two distinct positions.

3. The Third Order Does Not Violate Rule 65

Finally, MCSO argues that the Third Order violates Federal Rule of Civil Procedure 65 because it vests the CPA "with discretion to determine the terms of the injunction." Br. 54. Not so.

Rule 65(d) provides that an injunction must "state its terms specifically" and "describe in reasonable detail * * * the act or acts restrained or required." Fed. R. Civ. P. 65(d)(1). "The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood." *Schmidt* v. *Lessard*, 414 U.S. 473, 476 (1974). "[T]here are no magic words that automatically run afoul of Rule 65(d), and the inquiry is context-specific." *Reno*

Air Racing Ass'n, Inc. v. *McCord*, 452 F.3d 1126, 1133 (9th Cir. 2006). Injunctions should not be set aside "unless they are so vague that they have no reasonably specific meaning." *A&M Recs., Inc.* v. *Napster, Inc.*, 284 F.3d 1091, 1097 (9th Cir. 2002) (citation omitted).

Here, the challenged provisions of the Third Order satisfy Rule 65(d)'s specificity requirement. Those provisions state that the CPA is vested with limited authority over MCSO's complaint intake and routing processes, including to "make determinations and establish policy decisions pertaining to backlog reduction." 1-ER-9-11. It provides examples of the types of decisions the CPA would make; paragraph 346, for instance, specifies that the CPA will decide "which complaints should be (a) investigated by PSB; (b) sent to the Districts for investigation or other interventions; or (c) handled through other methods, to include diversion and/or outsourcing cases." 1-ER-10. Paragraph 347 provides that the CPA can "audit and review decisions made with respect to individual cases and, if necessary, * * * change such designations." 1-ER-10. And paragraph 350 requires the CPA to "determine whether training on investigative planning and supervision is needed and implement such training." 1-ER-11. Paragraphs 346 and 347 also specify when the CPA's authority over such decisions will end—"when there is no backlog." See 1-ER-10. The foregoing provisions thus provide "fair and precisely drawn notice of *what* the injunction actually" requires. *Granny*

Goose Foods, Inc. v. *Brotherhood Of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S. 423, 444 (1974) (emphasis added); see also Fed. R. Civ. P. 65(d)(1)(C).

c. *City of New York* v. *Mickalis Pawn Shop, LLC*, 645 F.3d 114, 145 (2d Cir. 2011), an out-of-circuit case, is distinguishable. In *Mickalis*, the Second Circuit struck down an order requiring the defendants to conform to applicable firearm laws and adopt "appropriate prophylactic measures," without specifying the applicable laws or identifying "the ways in which the defendants must alter their behavior to comply with those laws." *Id.* at 144 (citation omitted). In contrast, here, the Third Order simply gives the CPA authority to determine policies and procedures on complaint intake and routing and certain investigative training in a way that is reviewable by the district court but cannot be vetoed by MCSO. See *Fortyune* v. *American Multi-Cinema, Inc.*, 364 F.3d 1075, 1087 (9th Cir. 2004) (emphasizing that the terms of the injunction need not "also elucidate *how* to enforce the injunction").

CONCLUSION

For all these reasons, this Court should affirm the district court's Third Order.

Respectfully submitted,

KRISTEN CLARKE
Assistant Attorney General

s/ Natasha N. Babazadeh
ELIZABETH P. HECKER
NATASHA N. BABAZADEH
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 598-1008

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 23-15036

I am the attorney or self-represented party.

This brief contains 9,609 **words,** including 0 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- (•) complies with the word limit of Cir. R. 32-1.
- ( ) is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ( ) is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ( ) is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ( ) complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
  - [ ] it is a joint brief submitted by separately represented parties.
  - [ ] a party or parties are filing a single brief in response to multiple briefs.
  - [ ] a party or parties are filing a single brief in response to a longer joint brief.
- ( ) complies with the length limit designated by court order dated [ ].
- ( ) is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/Natasha N. Babazadeh **Date** 8/21/23

*(use "*s/[typed name]*" to sign electronically-filed documents)*