

Nos. 26-4902, 26-6685 (Consolidated)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

L.T., et al.,

Plaintiffs-Appellees,

v.

U.S. IMMIGRATION AND CUSTOMS
ENFORCEMENT, et al.,

Defendants-Appellants.

No. 26-4902

D.C. No.

5:26-cv-00322-SSS-SP

Central District of California,
Riverside

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Plaintiffs-Appellees,

v.

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Riverside

Appeal from the United States District Court
Central District of California
No. 5:26-cv-00322-SSS-SP

DEFENDANTS-APPELLANTS' OPENING BRIEF

TODD BLANCHE

Attorney General

BILAL A. ESSAYLI

First Assistant United States Attorney

DANIEL A. BECK

Assistant United States Attorney

Chief, Civil Division

PUSHKAL MISHRA

Assistant United States Attorney

Federal Building

300 N. Los Angeles Street, Suite 7516

Los Angeles, California 90012

Telephone: (714) 338-3503

E-mail: pushkal.mishra@usdoj.gov

Attorneys for Defendants-Appellants

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I. INTRODUCTION

This appeal asks whether a district court may rewrite a preliminary injunction while that injunction is before this Court—without a motion, without adequate notice and hearing, without reasons, on the *ex parte* request of its own monitors—and then hold the United States answerable in hundreds of dollars per day for the actions of a nonparty. It may not.

On July 16, 2026, the district court enjoined ICE and ordered two monitors into Adelanto, which GEO operates. Plaintiffs told this Court on August 17 that the decree “state[s] its terms specifically” and “commands discrete, measurable outcomes.” No. 26-4902, Dkt. 20.1 at 11. But one week after this Court’s stay ruling, they went *ex parte* to the district court and said the monitors “cannot fulfill their Court-ordered obligations without further direction from the Court.” No. 26-4902, 2-ER-231.¹ That U-turn became the orders under review. The court entered its orders the next day, “[i]n chambers,” with no party present, on no motion, before the hearing the court had set for September 1 and before the government’s response was due. The order states one reason— “[u]pon

¹ Citations in the form “No. 26-4902, N-ER-page” are to the excerpts of record filed in the first appeal, No. 26-4902, Dkt. 24.1–24.6. Citations in the form “N-ER-page” are to the excerpts of record filed with this brief.

further review”—and adds terms the July decree lacked—including a channel for the monitors “to confer *ex parte* with the Court,” with “[a]ll communications . . . privileged and . . . not subject to discovery,” access for “the United States Marshals,” and a notice to every detainee bearing the monitors’ names and e-mails. 1-ER-22–25; No. 26-4902, 2-ER-176; *see* Part V.B, *infra*.

Two weeks later, “[f]or ease of reference” and after “the Court’s conversations with the monitors,” the court entered a First Amended Preliminary Injunction that extends the monitors’ charter from “the remedial plan described in paragraph 4” to “paragraphs 1 through 4”—the whole decree—admits “any materials, items, or equipment needed,” commands entry “within 10 minutes,” and requires the government to “guarantee . . . read-only, 24/7 access (on-site or remote) to any electronic records.” 1-ER-3, 1-ER-6–10, 1-ER-17 n.1.

Enforcement followed the same day. Though the records system is GEO’s and ICE “cannot grant access to” it, No. 26-4902, 2-ER-123 ¶¶ 5–6, the court warned of daily sanctions, ordered the government to show cause why it should not pay \$500 a day, No. 26-4902, 2-ER-144; No. 26-4902, 2-ER-103–05, and effectively forced ICE to renegotiate a federal

procurement contract to deliver a nonparty's system to a court-appointed monitor. No. 26-4902, 2-ER-123–24 ¶¶ 5–9. The clocks have not stopped: There is now a second order to show cause on twenty-four monitor requests, 2-ER-137; deadlines on photographs GEO took and records GEO controls, 2-ER-41; and, since 5:01 p.m. on October 16, a self-executing sanction of \$500 a day, 2-ER-37, for access that turns on a permission set GEO's software vendor does not expect to have ready before November 3. 2-ER-34–35. The court set a sanctions clock against the United States for a nonparty's performance.

None of this is lawful. A notice of appeal divests the district court of control over the injunction, *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982), leaving it power to preserve the status quo, not to “materially alter the status of the case on appeal,” *Nat. Res. Def. Council, Inc. v. Sw. Marine, Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001). The orders here did. They also violate Rule 65(d) twice over—no reasons, no specific terms—and they were built through the “investigative, quasi-inquisitorial, quasi-prosecutorial” channel the D.C. Circuit condemned in *Cobell v. Norton*, 334 F.3d 1128, 1142 (D.C. Cir. 2003). And they enforce against the United States, on a per-diem clock, commands only GEO can

perform—the “so-called ‘hostage’ theory of contempt” that “has no legal support.” *Newman v. Graddick*, 740 F.2d 1513, 1528 (11th Cir. 1984).

A district court that has lost control over an injunction cannot regain it a slice at a time. The August 28 and September 11 orders should be vacated.

II. STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 over the underlying action, subject to the limits of 8 U.S.C. § 1252(f)(1) addressed in Part VIII.E. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1), which reaches interlocutory orders “modifying” injunctions. The August 28 “Order Modifying Preliminary Injunction,” 1-ER-22, and the September 11 “First Amended Preliminary Injunction Order,” 1-ER-3, each imposed obligations the July decree did not, and an order that writes a court appointee’s recommendations into the injunction and mandates them is immediately appealable. *Valdivia v. Schwarzenegger*, 599 F.3d 984, 988 (9th Cir. 2010). Defendants noticed this appeal on October 9, 2026, 2-ER-165, within 60 days of each order. Fed. R. App. P. 4(a)(1)(B).²

² Plaintiffs’ suggestion that the August 28 order is not independently appealable, Dkt. 8.1 at 11–12 n.1, fails under *Valdivia*, and in any event the September 11 order re-entered every term, 1-ER-3, 1-ER-7–11.

The orders to show cause and sanctions orders of October 2, 9, and 15 enforce terms that the orders under review added, 2-ER-137; 2-ER-41; 2-ER-37; they are before the Court because they rest on the orders under review, and vacating those orders disposes of them. *United States v. United Mine Workers*, 330 U.S. 258, 295 (1947).

III. STATEMENT OF THE ISSUES

1. Whether the district court lacked jurisdiction to enlarge the preliminary injunction while the injunction is on appeal, where the August 28 and September 11 orders extended the monitors' charter from one paragraph to all four and added terms that materially alter the case before this Court.

2. Whether the orders violate Rule 65(d) because they state no reasons and because their added terms—*e.g.*, “any . . . equipment needed,” the Marshals “as needed,” “any electronic records that will help,” and “on-site or remote” access that the court enforced as remote the same day—leave their content to monitors who report to chambers through an *ex parte* channel.

3. Whether a district court may authorize its Rule 706 experts to confer with chambers in privileged, undiscoverable communications

and then amend the injunction, and threaten sanctions, on what those communications report.

4. Whether the August 28 and September 11 orders exceed the district court's equitable authority and Rule 65(d)(2) by commanding the United States to "guarantee" a nonparty contractor's performance—*e.g.*, producing the contractor's photographs and opening its electronic health-record system to remote users—acts only the nonparty can perform.

5. Whether 8 U.S.C. §§ 1252(f)(1) and 1231(h) withdraw the district court's authority to enlarge a classwide decree that prescribes—indeed, micromanages—how the Executive operates a detention facility it has arranged for and acquired under § 1231(g).

IV. STATUTORY ADDENDUM

Pertinent statutes and rules are set forth verbatim in the Addendum bound with this brief. Cir. R. 28-2.7.

V. STATEMENT OF THE CASE

A. Adelanto, the APC Contract, and the July 16 Injunction

GEO owned the Adelanto ICE Processing Center, a detention complex in Adelanto, California, and operates it under a detention-services contract (the APC Contract) requiring detention, transportation,

and medical services that comply with ICE’s 2011 Performance-Based National Detention Standards. No. 26-4902, 3-ER-509–14 ¶¶ 4, 8, 12; No. 26-4902, 4-ER-602–04. ICE’s on-site personnel “observe, identify, and notify the various contractors or sub-contractors of any perceived deficiencies and to maintain quality assurance” with those detention standards, but the contract “does not reserve to ICE any direct control of any part of the contracted work.” No. 26-4902, 3-ER-510–14 ¶¶ 4–5, 8–11. The electronic health-record system used at the facility is GEO’s; ICE officers “do not have access to” it and “cannot grant access to” it. No. 26-4902, 2-ER-123 ¶¶ 5–6. GEO staff take and hold the facility’s photographs. 2-ER-142, 146; 2-ER-57 at 15:7–12; Dkt. 3.2 ¶ 8. On October 2, GEO sold the real property to the United States but still runs the facilities under its existing ICE contract, with the same staff and records system. GEO Group, Inc., Current Report (Form 8-K), Items 1.01, 2.01 & Ex. 10.1 (Oct. 5, 2026); 2-ER-34 ¶¶ 4, 6–7; Dkt. 3.2 ¶ 8.³

Plaintiffs—four aliens then detained at Adelanto and an advocacy organization—sued ICE, DHS, and federal officials in January 2026. 2-

³ The 8-K and its exhibits are publicly available at <https://www.sec.gov/Archives/edgar/data/923796/000119312526413085/>.

ER-202; No. 26-4902, 4-ER-681; 2-ER-132. They did not sue GEO, by design: GEO was omitted “because of the particular defenses that GEO Group might have to claims against it.” No. 26-4902, 5-ER-886. On July 16, 2026, the district court provisionally certified a class of “[a]ll people who are now, or who in the future will be,” detained at Adelanto and entered a preliminary injunction. No. 26-4902, 1-ER-50. Paragraphs 1 through 4 dictate facility operations and a remedial plan for medical and disability systems to be developed with two monitors. No. 26-4902, 1-ER-45–48. Paragraph 5 appoints a Medical Monitor and a Conditions Monitor “[t]o ensure compliance with the remedial plan described in paragraph 4,” with authority to conduct “unannounced, independent inspections” and “reasonable access to . . . any physical and electronic health records relevant to the implementation of this order, staff, and detainees.” No. 26-4902, 1-ER-48–49. Detainees could “submit complaints or comments directly to the Medical or Conditions Monitors” through a locked box or a tablet “only accessible by” the monitors. No. 26-4902, 1-ER-49. The injunction issued without a statement of reasons.

The government appealed on July 30. No. 26-4902, 5-ER-893. On August 6, this Court stayed the injunction because, without the reasons

Rule 65(d) requires, “we are unable to review the injunction.” No. 26-4902, Dkt. 15.1 at 1. The district court issued a memorandum of decision on August 12. No. 26-4902, 1-ER-2. On August 20, this Court denied a stay pending appeal (August 20 Stay Order). No. 26-4902, Dkt. 22.1. That order sustained the decree’s monitoring provisions on the understanding that monitor recommendations “must be adopted by the district court before they become effective.” *Id.* at 5. The merits appeal is set for argument on December 15, 2026. No. 26-4902, Dkts. 23.1, 28.

B. The August 28 Order

One week after this Court ruled, Plaintiffs applied *ex parte* to the district court for an “emergency hearing,” representing that “[t]he Monitors cannot fulfill their Court-ordered obligations without further direction from the Court.” No. 26-4902, 2-ER-226, 231. Ten days earlier, opposing a stay in this Court, Plaintiffs had represented that the decree “complies with Rule 65(d)(1)(B)–(C)’s requirements to ‘state its terms specifically’” and “commands discrete, measurable outcomes.” No. 26-4902, Dkt. 20.1 at 11. That U-turn produced the two orders under review in this appeal. The government objected and proposed an adversarial protocol. No. 26-4902, 2-ER-184, 186, 188. The court set a hearing for

September 1 and ordered the government to respond by August 31. No. 26-4902, 2-ER-176.

Yet on August 28—without a hearing and before the government’s response was due—the court entered an “Order Modifying Preliminary Injunction.” 1-ER-22. Its entire statement of reasons is one clause: “Upon further review of the preliminary injunction, the Court modifies the following highlighted language to the Independent Monitors’ section.” 1-ER-22. The order added inspections by “any additional persons assisting the monitors”; access for “the Court and its staff, including the United States Marshals”; authority for the monitors “to confer *ex parte* with the Court,” with “[a]ll communications . . . privileged and . . . not subject to discovery”; *ex parte* communications between the monitors and each side’s counsel; a notice to every detainee bearing the monitors’ names and e-mail addresses; and quarterly disclosure of *ex parte* contacts “except those with the Court and the parties’ primary contacts.” 1-ER-23–25. The court later acknowledged that the amendments came from the monitors’ e-mails to chambers. No. 26-4902, 2-ER-109 at 4:18–25.

C. The September 11 Order

At the September 1 hearing the court disclaimed any present intent

to enforce: “I don’t intend to issue any orders enforcing . . . the preliminary injunction at this time” No. 26-4902, 2-ER-108 at 3:18–21. On September 2, after “considering its discussions with the Medical and Conditions Monitors,” it docketed a tentative amended order. No. 26-4902, 2-ER-153–54. At a September 4 status conference, the court explained that the amendments responded to the monitors’ “requests to make their job a little bit easier,” No. 26-4902, 2-ER-55 at 3:19–23, and distinguished substantive amendments, which require “some sort of motion to amend,” from “how it is implemented,” No. 26-4902, 2-ER-60 at 8:9–18. No motion to amend was ever filed. The government objected to the records scope, the equipment term, and the comment system, and reserved its objection to the charter change. No. 26-4902, 2-ER-64–67, 2-ER-72–78, 2-ER-85–88, 2-ER-95–97.

On September 11, the court entered a “First Amended Preliminary Injunction Order” “[f]or ease of reference,” attributing the changes to the September 1 hearing and to “the Court’s conversations with the monitors.” 1-ER-3, 1-ER-17 n.1. Beyond re-entering the August 28 additions, the amended injunction most notably extends the monitors’ charter from “the remedial plan described in paragraph 4” to “this order

(namely, paragraphs 1 through 4),” 1-ER-6; widens “reasonable access” from “physical and electronic health records relevant to the implementation of this order” to “any relevant physical location” and “any physical and electronic records relevant to the implementation of this order,” 1-ER-7–8; lets the monitors “bring into the facility any materials, items, or equipment needed,” *id.*; requires a letter “at every entrance point” approving “entry into the facility within 10 minutes of arrival,” 1-ER-8; commands that “Defendants must guarantee . . . read-only, 24/7 access (on-site or remote) to any electronic records that will help facilitate their general duties,” *id.*; and routes detainee comments into a “Comment System” under which comments are “submitted confidentially to Plaintiffs’ counsel via a tablet,” who “may categorize or prioritize comments for the Monitors’ review.” 1-ER-8–9. The *ex parte* channel remains, and the monitors’ quarterly disclosures of *ex parte* contacts exclude “those with the Court.” 1-ER-10–11.

D. Enforcement

Enforcement followed the same day. Informed by the Medical Monitor that remote access to the health records had not been provided, the court warned of “daily monetary sanctions,” No. 26-4902, 2-ER-144,

and on September 15 ordered the government to show cause why “daily sanctions . . . in the amount of \$500 per violation (\$1,500 in total)” should not issue unless remote access was delivered by 5:00 p.m. the following day, later deferred to September 21. No. 26-4902, 2-ER-103–05; 2-ER-158. ICE had relayed the Medical Monitor’s request to GEO on September 2, and by September 9—even before the court required remote access—the two began negotiating the contract modification needed so a third party could access GEO’s system. No. 26-4902, 2-ER-124 ¶¶ 7–8. GEO then provisioned the accounts, and the court discharged the order to show cause. 2-ER-122, 125; 2-ER-150.⁴ When the Medical Monitor reported after his September 21 orientation that his credentials did not reach three components of GEO’s system, ICE asked GEO for them the next day. 2-ER-125.

The Medical Monitor’s first report, filed October 1, then adjudicated as follows: “I am unable to provide the Court with any analysis . . . due to *Defendants’ failure to fully comply with the Court’s order* to provide . . . remote access to medical records and guarantee physical access to the

⁴ On September 25, the government requested authorization for appeal on an expedited basis. See Part V.E, *infra*; Dkt. 3.2 ¶ 5.

facility.” 2-ER-149 (emphasis added). He had not visited the facility. 2-ER-54 at 12:4–7. The next day the court ordered the government to show cause on twenty-four monitor requests, in the monitors’ own words—“I would like to see proof of practice” 2-ER-137, 139–40. Plaintiffs moved on October 7 to enforce the amended injunction and for contempt sanctions of “\$500 per day.” 2-ER-132, 134.

On October 9, the court set \$500-a-day deadlines for GEO’s photographs (October 13) and for remote access to three more modules of GEO’s records system (October 16). 2-ER-58–59; 2-ER-41. It acknowledged on-site access exists: “the access to the information remotely is really what has posed the problem here.” 2-ER-53–54.

The photographs, which GEO took and held, Dkt. 3.2 ¶¶ 8–9, reached the Conditions Monitor by October 12, 2-ER-92 n.1, and the government reported the same day that two of the three records components were available and that ICE “is still awaiting updates from GEO Group” on the rest. 2-ER-92. On October 15, informed by the Conditions Monitor that the government had “not completely responded to her request” for segregation lists, the court “reminded” the government that “daily sanctions in the amount of \$500.00 will begin on October 16,

2026, at 5:01 p.m. if the issues identified in the October 2 Order to Show Cause are not resolved.” 2-ER-37.

On October 16, the government reported, with a sworn declaration, that the Medical Monitor’s access to GEO’s records system remains partial and will remain so until at least November 3: The system’s vendor, Sapphire, “an independent third party that works with GEO,” “is building an updated . . . permission set” that it “anticipates . . . will be completed by November 3, 2026.” 2-ER-30–32; 2-ER-34–36. The October 9 minutes had said the court “will likely impose” \$500 a day from October 17 and invited a good-cause declaration, 2-ER-41; the October 15 order made the sanction self-executing a day earlier, 2-ER-37. The one remaining item could not be resolved by then, or by any act of the United States, and the United States has been exposed to \$500 a day since 5:01 p.m. on October 16. 2-ER-30–32; 2-ER-37.

E. The Second Appeal and the Stay Proceedings

On October 9, 2026, the government noticed this appeal from the August 28 and September 11 orders, 2-ER-165, and applied in the district court for a stay of those orders pending appeal, 2-ER-94, which that court denied on October 19. 2-ER-28–29.

On October 10, the government moved this Court for a stay pending appeal and an administrative stay, Dkts. 3.1, 4.1; on October 11, the Court consolidated this appeal with No. 26-4902 and expedited it, No. 26-4902, Dkt. 32.1; on October 13, it denied the administrative stay. Dkt. 6.1 at 1–2. On October 16, the government notified this Court that the access at issue turns on “a nonparty’s vendor and its release schedule rather than anything within ICE’s control.” Dkt. 10.1 at 1. On October 21, the Court denied the stay (October 21 Stay Order). No. 26-4902, Dkt. 38.1.

VI. SUMMARY OF THE ARGUMENT

The August 28 and September 11 orders are unlawful for reasons separate from the merits of the July 16 injunction. Each ground is independently sufficient to vacate them.

First, the district court had no jurisdiction to amend the injunction. The notice of appeal divested the court of control over the injunction, *Griggs*, 459 U.S. at 58, leaving only the power to preserve the status quo—not to “adjudicate anew the merits” or “materially alter the status of the case on appeal.” *Sw. Marine*, 242 F.3d at 1166. The orders do both: They change the subject of the appeal—the monitors’ charter over a remedial plan (paragraph 4) became a charter over the entire decree

(paragraphs 1 through 4)—and would survive reversal of the July 16 injunction, because the September 11 order re-entered the whole decree, 1-ER-3, leaving an amended injunction standing. Nor were they enforcement; the court disclaimed it, called the terms accommodations for its monitors, and added commands the July decree lacked.

Second, the orders violate Rule 65(d). “[U]pon further review” and “[f]or ease of reference” are not reasons, and the only reasons in the record are privileged; this Court stayed the July 16 injunction for the same defect. Nor are the added terms specific: What equipment is “needed,” when the Marshals are “needed,” and which records “will help” is left to monitors who report to chambers *ex parte*. An injunction amended whenever its monitors ask is a perpetual decree, not a specific one. A decree whose terms are supplied after the fact, by its appointees’ requests—*e.g.*, the remote access here—is the “uncertainty and confusion on the part of those faced with injunctive orders” and the “contempt citation on a decree too vague to be understood” that the rule exists to prevent. *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974).

Third, the orders were built through a channel the adversarial system forbids. The monitors are the court’s Rule 706 experts, who must

“advise the parties of any findings” and face cross-examination. Fed. R. Evid. 706(b). Paragraph 5(j)(1) overrides both: The monitors write to chambers in private, and the court amends the decree and threatens sanctions on what they report. That is the “investigative, quasi-inquisitorial, quasi-prosecutorial role” *Cobell* vacated. 334 F.3d at 1142. It is also the expert-turned-fact-finder that *FTC v. Enforma Natural Products, Inc.*, 362 F.3d 1204, 1213 (9th Cir. 2004), forbids.

Fourth, the orders hold the United States answerable for a nonparty’s performance. A civil contempt sanction coerces an act the contemnor can perform—one who “‘carries the keys of his prison in his own pocket,’” *Int’l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 828 (1994) (citation omitted), but the photographs were GEO’s to produce and the records system GEO’s to open. A per-diem sanction that runs against the United States until GEO acts uses the contemnor “as a ‘hostage’ to put pressure on third parties.” *United States v. Int’l Bhd. of Teamsters*, 899 F.2d 143, 147 (2d Cir. 1990). Withholding payment from GEO or moving the detainees is pressure, not performance. And since October 16, a self-executing \$500-a-day sanction has run on an act—a vendor’s next release—that no party before the court can perform.

Fifth, Congress withdrew the authority to enlarge this decree. Section 1252(f)(1) bars classwide injunctions that “enjoin or restrain the operation of” the detention provisions, *Garland v. Aleman Gonzalez*, 596 U.S. 543, 550 (2022), and § 1231(g) is one of them. The duty the district court enforces runs to “people in [ICE’s] **custody**,” and the only intentional act it found at issue is that ICE “intentionally set conditions by **contracting** in 2019 with GEO Group,” No. 26-4902, 1-ER-29–30 (emphases added). Legal custody plus the contract is, on the court’s own account, what triggers the duty. That contract is the § 1231(g) act itself: the Secretary’s arrangement of “appropriate places of detention.” A classwide decree that dictates how that arrangement is performed, and that ICE can satisfy alone only by the other § 1231(g) act—relocating the detainees—restrains the operation of the statute twice over. Section 1252(f)(1) therefore forecloses the orders under review at the threshold: A court without “jurisdiction or authority to enjoin or restrain the operation of” § 1231(g) cannot add terms to a classwide decree that does exactly that. Section 1231(h) closes the other door. Having located the constitutional duty in legal custody—custody that exists only under §§ 1225, 1226, and 1231—and its terms in the contract, the court then

made the United States pay by the day until GEO performs those terms. That enforces the detention contract against the government for the benefit of nonparties to it—the “substantive or procedural right or benefit . . . legally enforceable by any party against the United States” that § 1231(h) plainly says the statute does not create.

Together, the orders show what the July 16 injunction has become: a decree that can be enforced against ICE only by rewriting it as the monitors ask and sanctioning the United States for what GEO does.

VII. STANDARD OF REVIEW

Whether the district court had jurisdiction to modify an injunction presently on appeal is a question of law reviewed *de novo*. See *Sw. Marine*, 242 F.3d at 1166. Whether an injunction complies with Rule 65(d) is reviewed *de novo*. *Premier Commc’ns Network, Inc. v. Fuentes*, 880 F.2d 1096, 1100 (9th Cir. 1989). The modification of an injunction and the enforcement of it through contempt are reviewed for abuse of discretion, but a court abuses its discretion when it applies the wrong legal rule, *Koon v. United States*, 518 U.S. 81, 100 (1996), and the reach of §§ 1252(f)(1) and 1231(h) is a question of statutory interpretation reviewed *de novo*, *Kelly v. Wengler*, 822 F.3d 1085, 1094 (9th Cir. 2016).

VIII. ARGUMENT

Each ground below independently warrants vacatur. And the September 11 order is invalid for a prior reason: It re-entered the July 16 decree in full, 1-ER-3, so every defect in that decree is a defect in the amended injunction. Plaintiffs lack standing to enjoin ICE for a contractor’s conduct; the court granted mandatory relief on disjunctive findings—“likely to succeed, or at least raise serious questions”—without finding that “the law and facts clearly favor” Plaintiffs, as *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc), requires; the decree binds a nonparty through ICE without an active-concert finding and makes ICE answer in contempt for what only GEO can perform; it delegates its terms to monitors and a future plan; it is untailored; and § 1252(f)(1) bars it classwide. No. 26-4902, Dkt. 23.1 at 18–68. The government adopts those arguments, Fed. R. App. P. 28(i), instead of repeating them here; a judgment reversing or vacating the July 16 order must reach the order that re-enters it.

A. The District Court Lacked Jurisdiction To Enlarge the Injunction on Appeal

1. The Notice of Appeal Divested the District Court of Power To Enlarge the Injunction

“The filing of a notice of appeal is an event of jurisdictional

significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.” *Griggs*, 459 U.S. at 58; *accord Coinbase, Inc. v. Bielski*, 599 U.S. 736, 740 (2023). The rule exists to prevent two courts from “simultaneously analyzing the same judgment.” *Griggs*, 459 U.S. at 59. The one exception, now codified in Rule 62(d), permits the district court to preserve the status quo pending appeal; it does not “restore jurisdiction to the district court to adjudicate anew the merits of the case,” and any action under it “may not materially alter the status of the case on appeal.” *Sw. Marine*, 242 F.3d at 1166 (quoting *McClatchy Newspapers v. Cent. Valley Typographical Union No. 46*, 686 F.2d 731, 734 (9th Cir. 1982)). Rule 62(d) does let the court “suspend, modify, restore, or grant an injunction” pending appeal, Fed. R. Civ. P. 62(d), but “modify” there means adjusting the terms on which the injunction is preserved—“on terms for bond or other terms that secure the opposing party’s rights,” *id.*—not imposing new obligations onto the enjoined party. Adding obligations the original decree did not contain changes the injunction itself, *Valdivia*, 599 F.3d at 988; that is not the adjustment “on terms” that Rule 62(d) permits, *Sw. Marine*, 242 F.3d at 1166.

The Rules supply the procedure for anything more. When a party seeks relief “that the court lacks authority to grant because of an appeal that has been docketed and is pending,” the district court may issue an indicative ruling, Fed. R. Civ. P. 62.1(a), and this Court “may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal,” Fed. R. App. P. 12.1(b). No one invoked it, and the district court did not purport to proceed under it.

2. The Orders Materially Altered the Case on Appeal

This Court’s cases mark the line. In *McClatchy*, the district court, after a notice of appeal from a judgment confirming an arbitration award, amended the judgment to require reinstatement of striking employees; the amendment “required a change from the status quo,” “materially affect[ed] substantial rights of the parties not decided in its original disposition of the case,” and “was rendered without jurisdiction and must be vacated.” 686 F.2d at 735. *Southwest Marine* upheld post-appeal refinements that “left unchanged the core questions before the appellate panel,” would “effectively be reversed” with the core requirements, and followed “a full and fair hearing on these core issues before the district court,” 242 F.3d at 1167—and there the decree already contained the

terms refined: “in a reasonably expeditious manner” became eighteen months; “at the surface” became a sampling method. *Id.* at 1165–67.

The August 28 and September 11 orders fail that test on every count.

They change the subject of the appeal. As to the monitors, No. 26-4902 asks whether a district court may appoint monitors to “ensure compliance” with “the remedial plan described in paragraph 4” at a facility a contractor operates, with “reasonable access” to it and its health records. No. 26-4902, 1-ER-48–49; No. 26-4902, Dkt. 23.1 at 50–57. The modified decree charters the monitors over *the whole injunction*, admits the Marshals, “guarantee[s]” **remote** access to “any electronic records,” and opens a privileged *ex parte* channel to chambers. *See* Parts V.B–C, *supra*. The court said the July text “makes it seem that the independent monitors are only to ensure compliance with the remedial plan,” called that reading “not correct,” and extended their remit to “paragraphs 1 through 4.” No. 26-4902, 2-ER-71 at 19:25–20:4. The decree the merits panel reviews in December will not be the decree in force.

They followed ex parte communications. A substantial modification requires notice and an adequate hearing. *Granny Goose Foods, Inc. v.*

Bhd. of Teamsters & Auto Truck Drivers Local No. 70, 415 U.S. 423, 439 (1974); *Hughes v. United States*, 342 U.S. 353, 357–58 (1952) (holding it “error” to modify a decree substantially after “no adequate hearing”). The August 28 order was entered on monitor e-mails to chambers, before the government’s response was due. No. 26-4902, 2-ER-176; 1-ER-22; No. 26-4902, 2-ER-109 at 4:18–25. Nor was the September 4 conference an adequate hearing on the terms. The court noticed it on three subjects, none bearing on the *ex parte* channel, the class notice, or the records guarantee. No. 26-4902, 2-ER-153. And no party could test where the terms came from, because the August 28 order had already made the monitors’ communications with the court “privileged and . . . not subject to discovery.” 1-ER-24. A hearing noticed on other subjects, about terms whose source the court had sealed, is not the adequate hearing *Hughes* requires. 342 U.S. at 357–58.

Reversal of the original decree would not undo them. Reports filed on paragraphs 1 through 4 cannot be withdrawn; what the monitors and the Marshals observe cannot be unseen; GEO’s health records system modified to open remote access over the Internet cannot be undone; privileged communications with chambers cannot be discovered; a class

notice cannot be recalled; and the APC Contract, modified under threat of sanctions, is not restored. No. 26-4902, 2-ER-123–24 ¶¶ 5–9; 2-ER-122.

3. The Orders Are Not Enforcement

The status-quo exception reaches enforcement of an existing decree. A district court may act after a notice of appeal “to achieve the same enforcement purpose” when the appeal is from “a contempt order (or other supervisory action) that was issued to force compliance” with a decree already in place. *McClatchy*, 686 F.2d at 735. Enforcement presupposes a command the decree already contains.

The court disclaimed enforcement on September 1: “I don’t intend to issue any orders enforcing . . . the preliminary injunction at this time” No. 26-4902, 2-ER-108 at 3:18–21. It even describes the remote-access term as a mere accommodation: The monitor “wants to be able to access all of this information remotely” “because he isn’t local,” 2-ER-53 at 11:17–23—a monitor who, the court noted, “was the choice of plaintiffs,” 2-ER-55 at 13:3–4, and Plaintiffs’ counsel admitted that on-site review “could be more reasonable,” 2-ER-55 at 13:19–24. An order adding obligations to accommodate the court’s own agents does not enforce the decree against an adjudicated violation; it is the “change from

the status quo” *McClatchy* forbids. 686 F.2d at 735.

In *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1095–99 (9th Cir. 2002), this Court upheld a post-appeal order because it enforced an existing command, after an adjudicated violation, through an advisor who “never unilaterally issued findings of fact or conclusions of law regarding Napster’s compliance,” while restating that a district court “lacks jurisdiction to modify the injunction in such manner as to ‘finally adjudicate substantial rights directly involved in the appeal.’” *Id.* at 1097–99 (quoting *Newton v. Consol. Gas Co.*, 258 U.S. 165, 177 (1922)). By contrast, an order resting on conduct a district court concedes “does not violate the strict terms of the injunction” “goes beyond merely enforcing the injunction previously issued and has the ‘practical effect’ of modifying the original injunction.” *Simon v. City & Cnty. of San Francisco*, 135 F.4th 784, 814–15 (9th Cir. 2025).

The orders here fall on *Simon*’s side of that line. The July decree charged the monitors with “the remedial plan described in paragraph 4”; the September 11 order charges them with “paragraphs 1 through 4”—*i.e.*, the whole decree. *Compare* No. 26-4902, 1-ER-48, *with* 1-ER-6. Nothing in the July decree matches that, the *ex parte* channel, the

Marshals, the ten-minute letter, the class notice, class counsel’s curation of comments, or “24/7” remote access to “any electronic records.” 1-ER-6–10. They followed no adjudicated violation, No. 26-4902, 2-ER-108 at 3:18–21; their only stated source is the monitors’ privileged “conversations” with chambers, 1-ER-17 n.1—the opposite of *Napster’s* advisor.

4. The Orders Are Modifications, Not Clarifications

Labels do not control. An order that “substantially changed the terms and force of the injunction as it stood immediately prior” is “a modification, not a mere clarification.” *Gon v. First State Ins. Co.*, 871 F.2d 863, 866 (9th Cir. 1989). A reservation of power to effectuate a decree’s purposes does not authorize commands beyond its “four corners.” *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 574–76 (1984). “[C]ourts may not, under the guise of modification, impose entirely new injunctive relief.” *Salazar v. District of Columbia*, 896 F.3d 489, 498 (D.C. Cir. 2018). And an order that adds obligations the decree did not contain is a modification, whatever the court calls it. *Valdivia*, 599 F.3d at 988 (holding that an order that “added the recommendations of the Special Master to the Injunction and mandated them” “modifies an existing

injunction”); *Fraihat v. U.S. Immigr. & Customs Enf’t*, 16 F.4th 613, 618, 631 (9th Cir. 2021) (setting aside a “clarification” that was “a further order imposing more detailed requirements”).

Measured by text, every added term exceeds the July decree. “[R]easonable access to . . . electronic health records” became “must guarantee . . . read-only, 24/7 access (on-site or remote) to any electronic records,” *compare* No. 26-4902, 1-ER-49, *with* 1-ER-8—and “on-site or remote” became “remote” the same day (and the court warned of daily sanctions for “failure to provide the Medical Monitor with remote access”), when the Medical Monitor reported to chambers that remote access was lacking. No. 26-4902, 2-ER-144; No. 26-4902, 2-ER-105. The term meant whatever the monitor asked for.

Hughes read a decree that let the defendant sell his stock or place it in a voting trust as giving him “a choice of two different alternatives,” and held that an order compelling the sale “effected a substantial modification of the original decree.” 342 U.S. at 356–57; *see also United States v. ITT Cont’l Baking Co.*, 420 U.S. 223, 236 n.9 (1975) (explaining that the Court “would not sanction such modification in the guise of construing” the decree).

“On-site or remote” gave ICE the same choice, *Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 87 (2018) (making clear that “or” is “almost always disjunctive”); A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 116 (2012) (“Under the conjunctive/disjunctive canon, . . . *or* creates alternatives.”)—yet the sanctions warning for want of “remote access” took the on-site alternative away. That was not all. A grievance box “only accessible by” the monitors became one in which Plaintiffs’ counsel “categorize or prioritize” what the monitors see. *Compare* No. 26-4902, 1-ER-49, *with* 1-ER-9. A charter over “the remedial plan described in paragraph 4” became a charter over “paragraphs 1 through 4.” *Compare* No. 26-4902, 1-ER-48, *with* 1-ER-6.

Nor are the changes “implementation.” The district court itself distinguished substantive amendments, which require “some sort of motion to amend,” from “how it is implemented.” No. 26-4902, 2-ER-60 at 8:9–18. A term that compels an agency to renegotiate a contract within days under threat of \$1,500-per-day sanctions, No. 26-4902, 2-ER-104–05, or admits armed federal officers under the Judiciary’s direction into a contractor-operated detention facility, is not implementation of “reasonable access.” Rule 65 forbids that sequence: To change an

injunctive provision, the party “must move the district court,” with “notice of the proposed modification and an opportunity to be heard.” *LabMD, Inc. v. FTC*, 894 F.3d 1221, 1237 n.44 (11th Cir. 2018). A district court that has lost control over an injunction cannot regain it a slice at a time.⁵

Nor did the government sit on its rights. The orders did not injure it as written; they injured it as applied. The September 11 order said “on-site or remote,” 1-ER-8; the court read it as “remote” the same day, on its monitor’s *ex parte* report, and warned of daily sanctions. No. 26-4902, 2-ER-144. The government did not treat the warning as the injury; it performed. It negotiated the contract modification GEO required and obtained the discharge of that order on September 22. 2-ER-122; 2-ER-150. The same day, the Medical Monitor reported three components still outstanding and ICE asked GEO for them, 2-ER-125—the first sign that performance would move the clock rather than stop it.

⁵ The government preserved each of these objections. It appealed the July 16 injunction; objected to the records scope, the equipment term, and the comment system, and reserved its objection to the charter change, No. 26-4902, 2-ER-64–67, 2-ER-72–78, 2-ER-85–88, 2-ER-95–97; was never heard on the *ex parte* channel, the Marshals, the class notice, or the authorization letter; and has complied under protest, reserving its objections, 2-ER-156; 2-ER-123 n.1.

During the next three days, the government prepared for and requested the Solicitor General’s authorization, which the regulations require for any appeal by the United States, 28 C.F.R. § 0.20(b); the Solicitor General authorized the appeal on October 9, Dkt. 3.2 ¶ 5; and that day, while acknowledging that on-site access exists, the court set a daily clock on remote access to three further modules of GEO’s system, 2-ER-53–54; 2-ER-41—an injury no performance by the United States could end. The government noticed the appeal and sought a stay in the district court that day and moved in this Court the next day. Dkt. 3.2 ¶¶ 6, 11; Dkt. 3.1. Each reading of the decree “substantially changed the terms and force of the injunction as it stood immediately prior,” *Gon*, 871 F.2d at 866, and in those circumstances waiting “until a credible case for irreparable harm can be made is prudent rather than dilatory.” *Arc of Cal. v. Douglas*, 757 F.3d 975, 991 (9th Cir. 2014).

B. The Orders Violate Rule 65(d)

1. The Orders State No Reasons

“Every order granting an injunction . . . must: (A) state the reasons why it issued.” Fed. R. Civ. P. 65(d)(1)(A). A modification that imposes new commands “without the requisite findings for an injunction . . . crosse[s] the line from permissibly modifying into impermissibly

enjoining.” *Salazar*, 896 F.3d at 491. The August 28 order’s entire statement of reasons is “[u]pon further review.” 1-ER-22. The September 11 order’s is “[f]or ease of reference” and a footnote attributing its changes to “conversations with the monitors.” 1-ER-3, 1-ER-17 n.1. The only reasons in the record are privileged: The decree makes the monitors’ *ex parte* communications with the court “privileged and . . . not subject to discovery” and exempts them from the monitors’ quarterly disclosures of *ex parte* contacts. 1-ER-24–25; 1-ER-10–11. With the reasons sealed, no meaningful hearing could have been had, even if the district court had noticed one.

Where a court’s remedial discretion “was barely exercised,” its order “provides no meaningful basis for even deferential review.” *North Carolina v. Covington*, 581 U.S. 486, 488–89 (2017) (per curiam). When the July 16 injunction issued without reasons, this Court was “unable to review the injunction” and stayed it. No. 26-4902, Dkt. 15.1 at 1. The same defect here warrants that the orders on review be set aside.

Nor do the August 12 memorandum or the September 1 and 4 conferences supply the reasons. The memorandum’s findings preceded every added term and mention none. No. 26-4902, 1-ER-2. And even if

reasons may be contrived after the fact, they would contradict what the district court itself stated. Indeed, the September conferences supply nothing for the added terms: The only source the September 11 order cites is “conversations with the monitors,” 1-ER-17 n.1, which the same order makes privileged, 1-ER-10. A reason the parties cannot see and this Court cannot review is not a reason stated. And the added commands are mandatory relief, which issues only where “the law and facts clearly favor” the movant. *Garcia*, 786 F.3d at 740. No one moved, and nothing was found: The district court made no such finding on any added term—its stated reasons were “[u]pon further review” and “[f]or ease of reference,” 1-ER-22; 1-ER-3—just as it skipped the standard for the July decree. No. 26-4902, Dkt. 23.1 at 33.

2. The Added Terms Are Not Specific; They Are Whatever the Monitors Ask

Rule 65(d) also requires every injunction to “state its terms specifically” and “describe in reasonable detail . . . the act or acts restrained or required.” Fed. R. Civ. P. 65(d)(1)(B)–(C). “The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one.” *Int’l Longshoremen’s Ass’n, Local 1291 v. Phila. Marine Trade Ass’n*, 389 U.S. 64, 76 (1967);

see Schmidt v. Lessard, 414 U.S. 473, 476 (1974) (making clear that Rule 65(d) was designed to prevent “uncertainty and confusion on the part of those faced with injunctive orders”). The added terms are not specific. The government must admit “any materials, items, or equipment needed,” admit the Marshals “as needed,” and “guarantee” access to “any electronic records that will help facilitate their general duties.” 1-ER-7–8. What is “needed” and which records “help” is left to the monitors, whose communications with the court are privileged. The records term shows how: “on-site or remote” in the order, “remote” in the sanctions warning the same day, on the Medical Monitor’s report. 1-ER-8; No. 26-4902, 2-ER-144; *see* Part VIII.A.4, *supra*. The court could not say what the records term covers—“Well, I don’t know how their system works” No. 26-4902, 2-ER-66 at 14:3–13—yet days later ordered the government to show cause, on the monitors’ report, why it had not complied. No. 26-4902, 2-ER-104–05.

This Court has already decided who supplies the content of a general decree term—and it is not the court’s appointee. The decree in *Gates v. Shinn* required “appropriate” psychiatric care; a court-appointed mediator “construed ‘appropriate’” into thirteen modifications; and the

district court imposed them at \$10,000 a day. 98 F.3d 463, 464–66 (9th Cir. 1996). This Court vacated and reversed: The decree, not “the mediator’s subsequent directives, must command” the conduct, because specificity “amounts to a choice of who decides,” and the rule is not “avoided by substituting some unspecific words, like ‘appropriate,’ for others, like ‘sufficient.’” *Id.* at 468, 471–72. The August 28 and September 11 amendments are the mediator’s thirteen modifications—the monitors’ “requests to make their job a little bit easier,” No. 26-4902, 2-ER-55 at 3:19–23, entered as decree on no motion, after no hearing, from “conversations with the monitors” not on the docket, 1-ER-17 n.1.

That the district court wrote the directives into the decree first, rather than enforcing them outright, cures nothing. The July decree’s “reasonable access” was the *Gates* decree’s “appropriate”: a term only the monitors could fill—and they did. The amendments replaced it with terms just as open—“any . . . equipment needed,” “any electronic records that will help,” 1-ER-7–8—so the monitors still decide what the decree requires. That is the substitution of one “unspecific” word for another that *Gates* forbids. A term the court’s appointee fills is not “specific in terms” however it entered the decree, and it cannot support contempt.

Gates, 98 F.3d at 468; *see Reno Air Racing Ass’n v. McCord*, 452 F.3d 1126, 1132–33 (9th Cir. 2006) (vacating contempt sanctions where the order failed to give “fair and well-defined notice” of what it required). The district court did not clarify the decree here, *see* Part VIII.A.4, *supra*; it rewrote it twice, and it has announced that it will keep rewriting, with “the first amended, second amended, third amended” version to follow “anytime the Court amends the preliminary injunction for any reason.” No. 26-4902, 2-ER-55 at 3:24–4:6. An injunction amended whenever its monitors ask is not a decree with specific terms. It is a perpetual one. *See Gates*, 98 F.3d at 471–72; *cf. Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 435–36 (1976) (holding that the district court “exceeded its authority” by enforcing its decree “so as to require annual readjustment” of its terms).

And that the terms appeared in a tentative order before the September 4 conference, Dkt. 8.1 at 13–14, does not help: The August 28 order preceded any hearing and the government’s deadline to respond, No. 26-4902, 2-ER-176; 1-ER-22, and the September conference was convened to discuss logistics, not terms, *see* Part VIII.C, *infra*. And the draft never said “remote”: It guaranteed “read-only, 24/7 access to any

electronic records,” Dkt. 3.3 at 10, which became “[o]n-site or remote” in the September 11 order after the government objected and conditioned remote access on GEO’s protocols. No. 26-4902, 2-ER-64 at 12:15–13:11, No. 26-4902, 2-ER-66 at 14:3–9. What a party has allowed in practice, or offered subject to objection, is not thereby a term of the decree. *Hook v. Arizona*, 120 F.3d 921, 925 (9th Cir. 1997) (reversing an order that wrote into a decree an entitlement the defendant had long permitted).

The defect runs back to the July 16 decree, *see* No. 26-4902, Dkt. 23.1 at 52–57, and the amendments compound it. The injunction commands general standards—“[a]dequate sanitation,” “[n]utritious and sanitary meals”—and leaves their content to two monitors. No. 26-4902, 1-ER-45–46, 1-ER-48–49. It incorporates a remedial plan the court had not yet adopted when Plaintiffs went *ex parte*, No. 26-4902, 1-ER-48—with the consequence Plaintiffs then conceded: “Defendants are under no obligation to remedy” the medical and disability systems. 2-ER-164.

The September 11 order left that defect in place and added to it: It extended the monitors’ charter from the still-unadopted plan to the whole decree. 1-ER-6. This Court vacated the portion of an earlier injunction at this facility that incorporated outside guidance for exactly this reason,

directing district courts to “avoid imposing provisions that micromanage the Government’s administration of conditions at Adelanto.” *Roman v. Wolf*, 977 F.3d 935, 946 (9th Cir. 2020) (per curiam). A ten-minute entry gate, an open-ended equipment term, and round-the-clock remote access to “any electronic records” are micromanagement by another name.

C. The Orders Were Built Through an Ex Parte Channel That Rule 706 and the Adversarial System Forbid

1. The Orders Were Entered Without Notice or an Adequate Hearing

The August 20 Stay Order’s premise was that monitor recommendations become effective only when “adopted by the district court.” No. 26-4902, Dkt. 22.1 at 5 (citing *Melendres v. Skinner*, 113 F.4th 1126, 1139–40 (9th Cir. 2024)). Adoption is a judicial act: notice, the other side’s input, findings, and a reviewable order. Even a master’s findings bind only after the court “give[s] the parties notice and an opportunity to be heard” and “decide[s] de novo all objections to findings of fact.” Fed. R. Civ. P. 53(f)(1), (3).

Instead, the monitors wrote to chambers, and on August 28 the court amended the decree on their e-mails—before the September 1 hearing it had set and before the government’s August 31 response was due. No. 26-4902, 2-ER-109 at 4:18–5:5; No. 26-4902, 2-ER-176; 1-ER-22.

It entered the September 11 order “based upon [its] discussion with the monitors,” No. 26-4902, 2-ER-60 at 8:9–18. Every enforcement step since has also rested on what a monitor “informed the Court.” No. 26-4902, 2-ER-104; No. 26-4902, 2-ER-144; 2-ER-37. And the decree makes those communications “privileged and . . . not subject to discovery.” 1-ER-10.

The September conferences did not cure the defect: The government could object to the draft’s text but could not test the monitor-supplied facts on which the court imposed it, and neither conference was the notice and opportunity *Armstrong v. Brown*, 768 F.3d 975, 980 (9th Cir. 2014), contemplates. There, the district court “identified its specific concerns,” “explained the particular changes it intended to make,” and “permitted the State to respond orally at the hearing and to submit a further written response.” 768 F.3d at 980.

Here, by contrast, the August 28 terms were in force before the first hearing; the September 4 conference addressed a draft the court described as the monitors’ “requests to make their job a little bit easier,” No. 26-4902, 2-ER-55 at 3:19–23; and the order that followed attributes its changes not to anything said at either conference but to “the Court’s conversations with the monitors,” 1-ER-17 n.1. Neither conference took

evidence; the September 11 order provides no reason for overruling the objections the government raised, No. 26-4902, 2-ER-64–67, 2-ER-72–78, 2-ER-85–88, 2-ER-95–97; and the court began enforcing the new terms the day it entered them, No. 26-4902, 2-ER-144. Notice of a draft is not notice of the reasons for it. The opportunity *Armstrong* requires is “[t]he opportunity to present reasons . . . why [the] proposed action should not be taken,” *id.* (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985)), and no one can answer reasons that are privileged.

The court’s agenda confirms it. The September 2 order setting the conference—entered in chambers, no party present—listed what the parties would “discuss”: “changes to the grievance process,” the Conditions Monitor’s “reasonable rate,” and “other logistical issues pertaining to the preliminary injunction.” No. 26-4902, 2-ER-153. The terms themselves arrived the same day, “[f]or ease of reference,” as a tentative order that already “includes the entire preliminary injunction order with any modifications made at the September 1, 2026, hearing and subsequent amendments.” No. 26-4902, 2-ER-154. A conference convened to discuss the logistics of terms already drafted is not an opportunity to be heard on whether they should be adopted; the court had decided the

terms and reserved the hearing for how to implement them. It said so when the government raised its concerns about the comment system: “I’ve already ordered the process. So I’m more concerned with how to implement what I’ve already ordered” No. 26-4902, 2-ER-88 at 36:13–16. That is the sequence the court itself described the same day—substance by motion, “how it is implemented” by conference, No. 26-4902, 2-ER-60 at 8:9–18—applied to terms no motion ever proposed.

2. The Monitors Adjudicate, Which Rule 706 and This Court’s Precedents Forbid

The Medical Monitor’s first report shows what the channel produces: not a recommendation but an outright verdict of “Defendants’ failure to fully comply with the Court’s order.” 2-ER-149. That was before he had set foot in the facility to use the on-site access that was available. 2-ER-54 at 12:4–7; *see* 2-ER-53–54 at 11:24–12:3, 12:12–14 (district court: “[Dr. Stern] could just go down there and see the records,” and nothing was “preventing [him] from accessing this information if he were to go to the facility”). The Conditions Monitor similarly reported that the government had “not completely responded to her request” and the court set the \$500-a-day clock on her say-so. 2-ER-37; *see, e.g.*, 2-ER-137–40 (order to show cause reprinting twenty-four monitor requests in the

monitors' own words, including "I would like to see proof of practice"). That is coercive relief without adequate notice and hearing.

The D.C. Circuit condemned this combination of roles in *Cobell*, where a monitor "authorized . . . to engage in *ex parte* communications" played "an investigative, quasi-inquisitorial, quasi-prosecutorial role that is unknown to our adversarial legal system," and the *ex parte* contacts "so clearly cast a shadow over [his] impartiality that the district court abused its discretion." 334 F.3d at 1141–44; see *Melendres*, 113 F.4th at 1135 n.12 (distinguishing *Cobell*'s "wide-ranging extrajudicial duties"); *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1150 (D.C. Cir. 2009).

The monitors this Court has upheld were nothing like these. The monitor in *Melendres* exercised "quite narrow" authority after a bench trial, a permanent injunction, and two adjudicated contempts, under a decree providing that "[t]he ultimate arbiter of compliance is the Court," and this Court sustained the order because nothing in it "precludes an emergency motion to the district court for expeditious judicial review of the Monitor's decision." 113 F.4th at 1129–31, 1136–40. *Melendres* presupposes a reviewable record; paragraph 5(j)(1) leaves none.

Armstrong, 768 F.3d at 987–88, vacated a Rule 706 expert’s final adjudicatory authority for the same reason, contrasting approved appointments, which “specifically limited the expert to making recommendations subject to review by the district court.” *Id.* at 988. The quarterly disclosure of *ex parte* contacts excludes “those with the Court.” 1-ER-11. Those courts approved safeguards; paragraph 5(j)(1) secrecy.

These monitors were appointed under Federal Rule of Evidence 706 as “the Court’s expert,” No. 26-4902, 2-ER-253—a witness who must “advise the parties of any findings the expert makes” and is subject to deposition and cross-examination. Fed. R. Evid. 706(b). This Court enforces that line. In *Enforma*, it vacated a preliminary injunction entered in civil-contempt proceedings where the district court may have relied on its appointed expert’s unrecorded views: A court’s advisor “may not assume the role of an expert witness by supplying new evidence; nor may an advisor usurp the role of the judge by making findings of fact or conclusions of law,” and this Court endorsed, as safeguards, an expert report or “a record of *ex parte* communications” so that the advice can be tested. 362 F.3d at 1213–15. Whatever the appointment’s source, no court-appointed agent may supply, outside the record, the facts on which

coercive relief rests. *Cobell*, 334 F.3d at 1142–43; *Enforma*, 362 F.3d at 1213.

What the monitors are doing is not monitoring. They inspect without notice to the operator, 2-ER-142 (“I arrived at the facility unannounced”); report to chambers in private, 1-ER-17 n.1 (amendments drawn from “the Court’s conversations with the monitors”); request the terms the court then enters, No. 26-4902, 2-ER-55 at 3:18–23; identify the noncompliance on which the court then threatens sanctions, 2-ER-37; and fix—after the fact and beyond the government’s view—what “needed” equipment and helpful records the decree requires, 1-ER-8. That is the “roving federal district court” *Philip Morris* forbids, 566 F.3d at 1150, operating inside an Executive detention facility against a party that is not the operator.

3. The District Court Rejected the Adversarial Alternative

The government saw the danger at the outset. Opposing the *ex parte* application, it objected that the monitors’ “first exposure to conditions at Adelanto should not be a hearing convened at one party’s insistence, on one day’s notice, to receive that party’s non-compliance narrative,” because a proceeding “designed to immerse the Monitors in

one side's untested allegations" would compromise their independence. No. 26-4902, 2-ER-187. The court granted the application, 2-ER-163, and held the hearing with the monitors present anyway, No. 26-4902, 2-ER-108. It rejected the adversarial protocol the same opposition proposed—every substantive communication “docketed, both sides heard, and every compliance finding made by the Court on a proper adversarial record,” No. 26-4902, 2-ER-186, 188—and renewed at the September 4 conference, where counsel asked that the monitors keep “copy[ing] both sides,” No. 26-4902, 2-ER-82–83 at 30:19–31:4; the September 11 order kept the privileged channel instead, 1-ER-10.

The October 21 Stay Order observed that the government had “not identified any harm that this provision has caused” and expected that monitor information behind any further order “will be docketed as part of the record” with “adequate notice and opportunity to respond.” No. 26-4902, Dkt. 38.1 at 2 n.1. The harm is the orders under review, each entered on what the privileged channel carried and without the docketing the government requested; the expectation the stay order states is the practice paragraph 5(j)(1) displaces. Two monitors drafting a detention facility's operating rules in private correspondence with chambers is the

institution-shaping that belongs to “the political branches,” not the federal courts. *Lewis v. Casey*, 518 U.S. 343, 349 (1996).

D. The Orders Make the United States Answerable for a Nonparty’s Performance

The enforcement orders that followed confirm that the terms in the August 28 and September 11 orders are new. The July decree required “reasonable access”; nothing in it could have been enforced by a deadline for a nonparty’s photographs or a \$500-a-day clock on remote access to a nonparty’s records system. The decree thus makes the United States answerable for what GEO does. The added terms command results, not merely acts—a “guarantee” of access to GEO’s system, production of GEO’s photographs—and the district court has enforced them exactly that way, against the only party before it, for the performance of a nonparty and now a nonparty’s vendor. An injunction so framed exceeds the court’s equitable authority and Rule 65(d)(2).⁶

⁶ The Court may take judicial notice of the later proceedings, *Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006), and of GEO’s filings with the Securities and Exchange Commission, *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1064 n.7 (9th Cir. 2008).

1. An Injunction, and the Contempt That Enforces It, May Command Only Acts the Enjoined Party Can Perform

Civil contempt exists to secure compliance with a command the contemnor can perform. The contemnor “is able to purge the contempt and obtain his release by committing an affirmative act, and thus ‘carries the keys of his prison in his own pocket.’” *Bagwell*, 512 U.S. at 828 (quoting *Gompers v. Buck’s Stove & Range Co.*, 221 U.S. 418, 442 (1911)). “Where compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action.” *United States v. Rylander*, 460 U.S. 752, 757 (1983). A command that depends on a nonparty’s act leaves the enjoined party nothing to purge—which is why an injunction must be framed in acts its addressee can perform.

Measured against that rule, every added term fails. The decree orders that “Defendants must guarantee” the monitors around-the-clock access to a records system that GEO owns and ICE “cannot grant access to.” 1-ER-8; No. 26-4902, 2-ER-123 ¶¶ 5–6. It set a date for photographs GEO took and held. Dkt. 3.2 ¶¶ 7–9. And the October 15 order put a \$500-a-day clock on a permission set that only GEO’s vendor can write and does not expect to deliver before November 3. 2-ER-37; 2-ER-34–35.

“Ability to comply is a crucial inquiry for the court’s decision concerning coercive civil contempt orders,” and a finding that an obligation could be met collectively does not establish that any one party “was capable of satisfying the whole obligation.” *Donovan v. Mazzola*, 761 F.2d 1411, 1418–19 (9th Cir. 1985). A per-diem fine that only a nonparty’s act can end does not coerce the United States, because the United States cannot purge it. And a fine with no purge is punishment, not coercion, *Bagwell*, 512 U.S. at 829, and this one enforces a command that was never ICE’s to perform, No. 26-4902, Dkt. 23.1 at 54–55.

There is no act the United States can perform, by itself, that satisfies the commands the enforcement orders read into the decree. 2-ER-58–59; 2-ER-41. ICE relayed the Medical Monitor’s request to GEO on September 2, began negotiating the required contract modification on September 9—before any order required remote access, No. 26-4902, 2-ER-124 ¶¶ 7–8—and executed it under the first order to show cause, 2-ER-122; 2-ER-150; asked GEO on September 22 for the three components now at issue, 2-ER-125; and on October 16 transmitted the access instructions GEO supplied, 2-ER-32. The scope of the command is decisive: Once the enjoined party has done what the order lawfully

requires, coercion cannot continue because a third party has yet to perform a different act. The order required access “on-site or remote,” 1-ER-8; on-site access has existed throughout, 2-ER-53–54; what remains is a vendor’s permission set. Any coercive sanction had to end with ICE’s acts: “When the sole coercive purpose of the civil contempt order was satisfied, . . . the necessity for any coercive sanction ended, and the sanction should have terminated.” *Shuffler v. Heritage Bank*, 720 F.2d 1141, 1148 (9th Cir. 1983) (holding that a per-diem fine imposed on debtors to make them release a bankruptcy stay so that their creditor bank could foreclose had to end when the stay was released, not run “until the date [the bank] actually foreclosed,” because the judgment did not compel the debtors “affirmatively to assist in the foreclosure”).

The United States stands where those debtors stood: It did the acts within its power, and the step that remains—opening GEO’s records modules—requires an act of GEO and its vendor, not another act of ICE. What remains is GEO’s to do, Dkt. 3.2 ¶¶ 8–9; 2-ER-92, and what GEO can do in turn depends on its vendor, Sapphire, which does not expect to deliver the needed permission before November 3. 2-ER-34–35. The government has carried its burden of producing evidence of present

inability, *Rylander*, 460 U.S. at 757, “categorically and in detail,” *Coleman v. Newsom*, 131 F.4th 948, 959–60 (9th Cir. 2025) (quoting *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1241 (9th Cir. 1999)), in sworn declarations that describe each of those acts and what remains. No. 26-4902, 2-ER-122–24; 2-ER-34–36. Where the record establishes “a present inability to comply,” the civil contempt “inquiry is at an end.” *Coleman*, 131 F.4th at 960 (citation omitted). The district court failed to undertake that inquiry as to the added terms.

2. The “Hostage” Theory of Contempt Has No Legal Support

In *Newman v. Graddick*, the district court held Alabama’s Attorney General in contempt, with a fine keyed to the prison population, to induce the Governor, the Legislature, and the Parole Board to reduce overcrowding. The Eleventh Circuit reversed: There was “no authority for holding” him in contempt “to prompt the Governor, the Legislature or the Parole Board of the State of Alabama, separately or severally, to remedy the problem,” because “[t]his so-called ‘hostage’ theory of contempt . . . has no legal support.” 740 F.2d at 1528.

The Second Circuit agreed in *Teamsters*, vacating a purge condition requiring a union official to procure the dismissal of lawsuits by local

unions he did not control: “A contempt order should not use the contemnor as a ‘hostage’ to put pressure on third parties interested in his release from contempt.” 899 F.2d at 147. And where “the facts are not disputed and the question is the contemnor’s legal authority to comply,” “the question is one of law.” *Id.* at 147–48 & n.4.

This Court draws the same line. In *Institute of Cetacean Research v. Sea Shepherd Conservation Society*, 774 F.3d 935 (9th Cir. 2014), it held contemnors liable “only for their own intentional acts in furtherance of” the enjoined conduct, disclaiming any holding that would reach “actions they did not direct, incite, or control,” *id.* at 953, and it distinguished *Tegal Corp. v. Tokyo Electron Co.*, 248 F.3d 1376 (Fed. Cir. 2001), as a case in which the enjoined party had taken no affirmative act, 774 F.3d at 952–53. *Tegal* states the rule for an injunction that imposes no express duty to prevent another’s conduct: Courts that have “held parties in contempt based on the conduct of others” have “required proof that the party subject to contempt sanctions had control over those who engaged in the conduct proscribed by the injunction,” and a party’s ability to sue its affiliate is not that control. 248 F.3d at 1379–80.

The orders under review invert those principles. The district court

saw the problem before it entered the decree. Denying Plaintiffs’ first motion, it asked how, “if GEO Group says, well, we’re only going to give nine” nurses when the court ordered twelve, the court could “enforce that against GEO Group if they’re not a party to the proceeding other than telling ICE, the Government, to do so?” No. 26-4902, 5-ER-864. It then entered the decree in that form; its memorandum begins nearly every operative sentence “GEO Group must,” twenty times, No. 26-4902, 1-ER-4–9, and every operative command is performed by GEO’s employees, on GEO’s schedule, using GEO’s systems, at a facility GEO operates. No. 26-4902, 3-ER-512–13 ¶ 10; No. 26-4902, 2-ER-259 ¶¶ 6–7. The added terms push that structure further. GEO is not a party. The district court made no finding that GEO is ICE’s agent or acts “in active concert or participation” with it, Fed. R. Civ. P. 65(d)(2)(C); conducted no proceeding at which GEO was heard; and did not purport to bind GEO. *See also* No. 26-4902, Dkt. 23.1 at 51–52.

The sanction is in force: Since 5:01 p.m. on October 16, the United States has been exposed to \$500 a day for the release schedule of a software company that is neither a party nor within ICE’s control—a sanction it cannot purge by any act of its own. 2-ER-37; 2-ER-30–32; 2-

ER-35. The United States has obeyed every command addressed to it, and the fine runs anyway, because the jural command, as the court now reads it, is that GEO's vendor finish. A fine the contemnor cannot purge by obeying is not coercing obedience; it is punishing a party for a nonparty's calendar. *Bagwell*, 512 U.S. at 829. That ends the matter: A sanction a party cannot purge by obedience is not a tool for securing compliance, and no court may keep it running on the hope that pressure on ICE will somehow become performance by GEO.

3. Contract Is Not Control, and Pressure Is Not Performance

The district court identified three ways the government could comply: withholding payment from GEO, terminating the contract, or “relocating the detainees to another facility.” No. 26-4902, 1-ER-22–23. None fills the gap. Contract is not control, and pressure is not performance.

First, withholding payment. A contracting agency's power to withhold payment from its contractor is a “power to oppose,” and the Supreme Court rejected the equation of that power with control in *General Building Contractors*: A “power to oppose” a counterparty “is not tantamount to a ‘right to control’” it, and “a rule equating the two

would convert every contractual relationship into an agency relationship.” *Gen. Bldg. Contractors Ass’n v. Pennsylvania*, 458 U.S. 375, 393–94 (1982); accord *Pasadena Republican Club v. W. Justice Ctr.*, 985 F.3d 1161, 1172 (9th Cir. 2021) (holding that a city was not answerable for the decisions of the private operator it put in charge of a city building). Payment leverage no more makes GEO ICE’s agent than the employers’ bargaining leverage made the union theirs. As this Court has made clear, control over another’s records “must be firmly placed in reality,” not inferred from “an esoteric concept such as ‘inherent relationship,’” or for that matter “potential liability” or the “power to impose a prospective remedy.” *United States v. Int’l Union of Petroleum & Indus. Workers*, 870 F.2d 1450, 1453–54 (9th Cir. 1989).

Second, terminating the contract. Termination is the power to end the arrangement, not to direct it, and this Court reads a contracting agency’s retained rights by their terms: A clause requiring the contractor to comply with governing standards “gives no authority to” the agency; a consent right that operates “only to the extent the Contractor wishes” to act is “entirely reactive”; and “[t]he duty to comply with mandatory legal obligations is not a source of discretion.” *Nat. Res. Def. Council v.*

Haaland, 102 F.4th 1045, 1075–76 (9th Cir. 2024). A threat to end the contract does not open GEO’s records system or produce GEO’s photographs; it is pressure, and pressure is not performance, as recent developments in this case have made amply clear. *See* No. 26-4902, 2-ER-123 ¶¶ 5–6 (ICE officers “do not have access to Sapphire and cannot grant access to Sapphire”); 2-ER-144–45 (Conditions Monitor “requested that the Warden provide photographs” and “ha[d] not yet received any photos”); Part VIII.D.1, *supra*.⁷

Third, relocating the detainees. This way is different only because ICE can take it alone, and it is not compliance. Releasing or transferring some 1,800 detainees, No. 26-4902, 1-ER-13, does not perform the decree; it abandons the facility the decree governs. And it is an exercise of § 1231(g) authority that § 1252(f)(1) forbids a lower court to command

⁷ Both pressure theories also assume a response no court has found. The government “can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.” *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); *cf.* No. 26-4902, Dkt. 23.1 at 20–21 (traceability requires that the contractor’s choice be the product of “coercion” or “significant encouragement” (citing *Murthy v. Missouri*, 603 U.S. 43, 69 (2024); *Blum*, 457 U.S. at 1004)). The court found neither coercion nor encouragement; it rested on a contract. *See* No. 26-4902, Dkt. 23.1 at 18–32.

classwide. *See* Part VIII.E, *infra*.

4. The “Non-Delegable Duty” Does Not Bridge the Gap, and Equity Confirms It

The “non-delegable constitutional duty” the district court invoked, No. 26-4902, 1-ER-30, does not bridge the gap either. *West v. Atkins* holds that “[c]ontracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody” 487 U.S. 42, 56 (1988). But the State there “delegated that function to” the contract physician, and the Supreme Court thus held that he was the state actor who had to answer for those acts, *id.* at 54–57. If *West* governs here, GEO is a state actor at Adelanto, answerable for its own acts—and Plaintiffs did not sue it. *Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 757 (9th Cir. 2020) (holding that a private operator and its staff “were acting under color of state law with respect to the actions for which [the patient] attempts to hold them liable”). The inquiry is conduct-specific; it “begins by identifying ‘the specific conduct of which the plaintiff complains.’” *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (1999) (quoting *Blum*, 457 U.S. at 1004).

Delegation to private operators is lawful, *GEO Grp., Inc. v. Newsom*, 50 F.4th 745, 757 n.6 (9th Cir. 2022) (en banc); what *West*

preserves is the government’s responsibility for its own intentional conduct. That conduct here, the district court found, was the contract: The “intentional decision” was “contracting in 2019 with GEO Group”; the standard was the PBNDS the contract requires; the “reasonable available measures” were ICE’s “contractual authority to observe, identify, and notify GEO Group”; and the failure was that Defendants “failed to hold GEO Group accountable” under that contract. No. 26-4902, 1-ER-29–31. A constitutional duty whose every element is the contract (and its administration) is discharged by administering the contract.⁸ The district court itself appeared to view the government’s part as done once GEO was informed: When the stay lifted, it described the government as “ensuring” compliance “by virtue of informing [GEO] of the injunction and the parameters of that injunction,” which “it appears . . . has been done.” No. 26-4902, 2-ER-109 at 4:14–17.

Equity frames the same point as tailoring. Injunctive relief “should

⁸ Plaintiffs’ own chart supporting their proposed injunction maps each substantive provision to a section of the PBNDS the contract incorporates, No. 26-4902, 3-ER-406–08, and this Court described those provisions as the ones that “mirror the requirements in the Government’s contract with GEO.” No. 26-4902, Dkt. 22.1 at 5; *see* No. 26-4902, Dkt. 23.1 at 49. The decree’s commands are the contract’s terms, and the sanctions punish the United States for GEO’s performance of them.

be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs,” *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); “federal-court decrees must directly address and relate to the constitutional violation itself,” and they “exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation,” *Milliken v. Bradley*, 433 U.S. 267, 282 (1977); *see Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991) (holding that relief “must be tailored to remedy the specific harm alleged”). A term the enjoined party cannot perform fails that test by construction: Its burden on the defendant is total, and its relief to the plaintiffs is nil, because the act that would relieve them belongs to someone else. The violation the court found was ICE’s contract, No. 26-4902, 1-ER-30; a remedy that “directly address[es]” that violation runs to the contract and its administration, not to the contractor’s records system.

An injunction against a government defendant whose contractor performs the physical work must be framed in terms of acts that defendant can lawfully perform, and a contempt sanction must be tied to such an act. *See Haaland*, 102 F.4th at 1074. This Court sustained relief

directed to a remote custodian in *Armstrong v. Brown*, 732 F.3d 955 (9th Cir. 2013), precisely because “[t]he orders do not require that defendants compel the counties to do anything; nor do the orders require any kind of punitive or coercive action on the part of defendants if county officials fail to comply with their state and federal duties.” *Id.* at 962. This decree is the opposite: not an injunction enforced against a party for the party’s disobedience, but an injunction against a nonparty’s acts, enforced against the party that pays the nonparty’s invoices.

E. Sections 1252(f)(1) and 1231(h) Withdraw Authority To Enlarge This Classwide Decree

The notice of appeal suspended the district court’s authority to enlarge this decree. *See* Part VIII.A, *supra*. Two statutes forbid it. Section 1252(f)(1) withdraws from every court “other than the Supreme Court” the “jurisdiction or authority to enjoin or restrain the operation of” 8 U.S.C. §§ 1221–1232. 8 U.S.C. § 1252(f)(1). Its question is what the injunction orders federal officials to do. Section 1231(h) asks a different one—whether § 1231 supplies the entitlement the decree enforces—and answers that “[n]othing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States” The government incorporates

here its § 1252(f)(1) argument in No. 26-4902, Dkt. 23.1 at 25–29.

1. Section 1252(f)(1) Withdraws Authority for a Classwide Decree That Dictates How ICE Carries Out Detention

Start with what the orders direct. Section 1231(g)(1) directs the Secretary to “arrange for appropriate places of detention” and lets it acquire and “operate facilities . . . necessary for detention.” 8 U.S.C. § 1231(g)(1). ICE performs that command at Adelanto through its contract with GEO, a choice the statute’s “general grant plainly encompasses.” *GEO Grp.*, 50 F.4th at 757 n.6. The added terms prescribe how that arrangement must run: entry within ten minutes, “any . . . equipment needed,” a comment system, and a “guarantee” of round-the-clock access to the contractor’s records. 1-ER-6–10. Those are not incidental effects of relief aimed elsewhere; they *are* the relief. Their object is the detention arrangement itself, and the statute reaches injunctions “that order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out” the covered provisions. *Aleman Gonzalez*, 596 U.S. at 549–50. The claim’s source, constitutional or statutory, does not change what they require. 8 U.S.C. § 1252(f)(1) (withdrawing the authority “[r]egardless of the nature of the

action or claim”); *Aleman Gonzalez*, 596 U.S. at 553; see *Friends of the Everglades, Inc. v. Sec’y of U.S. Dep’t of Homeland Sec.*, 174 F.4th 822, 834–35 (11th Cir. 2026) (vacating, under § 1252(f)(1), an injunction targeted at an immigration detention facility).

The district court’s own findings place the decree inside the covered part at both ends. The duty it enforces runs to persons “in the legal custody” of ICE, No. 26-4902, 1-ER-50—custody held under §§ 1225, 1226, and 1231—and the only intentional act it found was “contracting in 2019 with GEO Group,” No. 26-4902, 1-ER-30, which is ICE’s performance of § 1231(g)(1). A classwide decree that attaches to custody under the covered provisions and dictates the manner of performing the § 1231(g) arrangement “restrain[s] the operation of” those provisions whatever the claims are called. *Aleman Gonzalez*, 596 U.S. at 553.

Even if the commands themselves did not operate on § 1231(g)—they do—compliance with them would. The record already shows it. The only way ICE could deliver the remote access the September 11 order required ICE to “guarantee” was to renegotiate the APC Contract itself. No. 26-4902, 2-ER-124 ¶¶ 8–9; 2-ER-122; 2-ER-150. An order whose first act of compliance is a federal procurement amendment does not have a

“collateral effect” on § 1231(g); it rewrites the detention arrangement § 1231(g) authorizes. The district court’s own three ways to comply, Part VIII.D.3, *supra*, confirm it: The first two are pressure on a nonparty; only the third is where ICE may act alone. The power to transfer detainees “arises from” § 1231(g)(1) and may not be restrained “by granting injunctive relief in a . . . class action suit.” *Van Dinh v. Reno*, 197 F.3d 427, 433 (10th Cir. 1999). And *Friends of the Everglades* held that an injunction preventing the Secretary “from detaining aliens in a place of his choosing ‘enjoin[s] or restrain[s] the operation[s]’ of sections 1231(g) and 1226(a),” whatever the claim, and distinguished relief whose effect on detention would be merely collateral. 174 F.4th at 834–35. An order that can be obeyed only by moving the class imposes the same restraint one step removed. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867) (“[W]hat cannot be done directly cannot be done indirectly.”).

The United States’ October 2 purchase of the complex confirms the point. The orders were entered on an arrangement ICE had made under § 1231(g)(1), and they now dictate how the Executive operates a facility it owns and continues to run through a contractor—to “operate facilities . . . necessary for detention” being the statutory text. Form 8-K, Items

1.01, 2.01; *see GEO Grp.*, 50 F.4th at 751, 757 n.6.⁹

2. Section 1231(h) Withholds the Entitlement the Sanctions Enforce

Section 1231(h) asks what entitlement the decree enforces, and where it comes from. The district court located the duty’s content in the contract—one “requiring compliance with PBNDS medical standards”—and ICE’s means of meeting it in its “contractual authority to observe, identify, and notify GEO Group of any deficiencies.” No. 26-4902, 1-ER-30. Each added term is a task the contractor performs, from the Marshals at the gate to remote access to GEO’s records system, and the only way the United States can deliver any of them is to procure GEO’s performance by contract, as it had to for remote access. No. 26-4902, 2-ER-123–24 ¶¶ 5–9. A sanction that runs until GEO performs enforces, as a right against the United States, the contractor’s performance of an arrangement made under § 1231(g). That entitlement has no source but the contract made under § 1231, and this Court looks to a duty’s source,

⁹ The orders under review are classwide relief: They re-enter the whole decree for everyone now or “in the future” detained at Adelanto, No. 26-4902, 1-ER-50; 1-ER-3, and every added term runs to the facility, not to any individual alien. A district court that could not enter this classwide decree in July could not enlarge it in August and September.

not the claim’s label. *See Tucson Airport Auth. v. Gen. Dynamics Corp.*, 136 F.3d 641, 647–48 (9th Cir. 1998) (treating constitutional claims as contract-based where the asserted obligation “is in the first instance dependent on the contract”). Section 1231(h) forecloses deriving it there.

This Court so read a materially identical clause governing former § 1252(i), rejecting as “not tenable” the argument that the clause “was only intended to eliminate judicial relief founded on a private right of action.” *Campos v. INS*, 62 F.3d 311, 313–14 (9th Cir. 1995). Equity cannot “circumvent Congress’s exclusion of private enforcement.” *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 328 (2015). And Plaintiffs, who “do not assert a cause of action as third-party beneficiaries of the ICE-GEO contract,” No. 26-4902, 3-ER-427, cannot obtain the same performance by having the United States sanctioned until GEO delivers it. *Astra USA, Inc. v. Santa Clara Cnty.*, 563 U.S. 110, 118 (2011) (holding that the absence of an enforceable right “would be rendered meaningless if [plaintiffs] could overcome that obstacle by suing to enforce the contract’s . . . obligations instead”). The limit falls on the remedy, not on any detainee’s rights: A detainee keeps every claim against ICE’s own

conduct and loses only an entitlement to GEO’s contract performance.¹⁰

Nor does § 1252(f)(1) foreclose relief; the statute channels it. Habeas remains open against any unlawful custody—two of the named Plaintiffs were released from Adelanto through it, No. 26-4902, 3-ER-520–23 ¶¶ 35, 39—and classwide injunctive relief against the operation of the covered provisions remains available at the Supreme Court. *Biden v. Texas*, 597 U.S. 785, 799 (2022). The district court is not the correct forum for the relief sought against the federal government, and § 1231(h) independently withholds the benefits the sanctions enforce. It lacked authority to enter the August 28 and September 11 orders.

IX. CONCLUSION

The Court should vacate the August 28 and September 11 orders.

¹⁰ Section 1231(h) “does not deprive an alien of the right to rely on 28 U.S.C. § 2241 to challenge detention that is without statutory authority,” *Zadvydas v. Davis*, 533 U.S. 678, 687–88 (2001), and the First Circuit has read it not to confine review of statutory removal limits to petitions for review, *D.V.D. v. U.S. Dep’t of Homeland Sec.*, No. 26-1212, 2026 WL 2797801, at *14–15 (1st Cir. Sept. 18, 2026), *cert. granted*, No. 26-426 (U.S. Sept. 29, 2026).

Dated: October 23, 2026

Respectfully submitted,

TODD BLANCHE

Attorney General

BILAL A. ESSAYLI

First Assistant United States Attorney

DANIEL A. BECK

Assistant United States Attorney

Chief, Civil Division

/s/ Pushkal Mishra

PUSHKAL MISHRA

Assistant United States Attorney

Attorneys for Defendants-Appellants

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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No. 26-4902, L.T. v. U.S. Immigration and Customs Enforcement — Defendants-Appellants’ appeal from the July 16, 2026 preliminary injunction entered in the same district court case (C.D. Cal. No. 5:26-cv-00322-SSS-SP). The two appeals have been consolidated. No. 26-4902, Dkt. 32.1.

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UNITED STATES COURT OF APPEALS
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