Nos. 20-1556, 20-1805, 20-2115

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

COMMONWEALTH OF PUERTO RICO,

Defendant-Appellant

WANDA VAZQUEZ-GARCED, Governor of the Commonwealth of Puerto Rico;
LORENZO GONZALEZ-FELICIANO, Secretary, Department of Health;
JOSE DE-LEON, Director, Mental Retardation Program,

Defendants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

REDACTED BRIEF FOR THE UNITED STATES AS APPELLEE

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TABLE OF CONTENTS

PAGE

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

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

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

STATUTES: **PAGE**

REGULATIONS:

RULES:

MISCELLANEOUS:

GLOSSARY

CBSP	Community-Based Service Plan
CDDER	The Center for Developmental Disabilities Evaluation and Research at the University of Massachusetts Medical School
Consent Decree	The ISA, SISA, CBSP, and the JCAP, together
CRIPA	Civil Rights of Institutionalized Persons Act
CTS	Center for Transitional Services
DSPDI	Division of Services for People with Intellectual Disabilities
FMG	Fundación Modesto Gotay institution
HIPAA	Health Insurance Portability and Accessibility Act of 1996
ISA	Interim Settlement Agreement
JCAP	Joint Compliance Action Plan
JCC	Joint Compliance Coordinator
SISA	Supplemental Interim Settlement Agreement

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this matter pursuant to 28 U.S.C. 1345. The Commonwealth of Puerto Rico and pertinent officers (Commonwealth) filed timely notices of appeal on May 19, 2020, July 15, 2020, and September 18, 2020, challenging a total of 25 district court orders. This Court has jurisdiction over interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." 28 U.S.C. 1292(a)(1). Except for four orders, the appealed orders do not grant or modify an injunction. See pp. 36-53, *infra*. Thus, this Court should dismiss 21 of the 25 appealed orders for lack of jurisdiction.

Alternatively, this Court can hear certain matters under its supervisory mandamus jurisdiction. 28 U.S.C. 1651(a). However, the writ of mandamus is "an extraordinary remedy, to be reserved for extraordinary situations." *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U.S. 271, 289 (1988) (citations omitted). The Commonwealth cannot demonstrate this case meets the stringent requirements for mandamus relief. See pp. 91-94, *infra*.

INTRODUCTION AND STATEMENT OF THE ISSUES

More than twenty years ago, the United States opened an investigation, under the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. 1997 *et seq.*, into the conditions and practices within facilities run by the Commonwealth's

Division of Services for People with Intellectual Disabilities (DSPDI).[1] Following its investigation, the United States filed a civil action in 1999 against the Commonwealth to ensure the constitutional and legal rights of DSPDI participants. Shortly thereafter, the parties entered into a remedial settlement agreement, which set forth preliminary requirements for the Commonwealth to fulfill its legal obligations as to hundreds of then-institutionalized DSPDI participants with developmental disabilities. The parties subsequently entered into several other agreements, including one which provided for a Joint Compliance Coordinator (JCC) to monitor the Commonwealth's compliance efforts, as well as an extensive plan to transition DSPDI participants from institutional settings to integrated community placements. The district court entered each of these agreements as an order of the court (together, the Consent Decree).

While the Commonwealth has made notable progress in certain areas, it has yet to fully comply with the Consent Decree. The Commonwealth now asserts that the district court has overstepped the boundaries of the parties' agreements and impermissibly expanded the role of the JCC. As such, it filed three interlocutory appeals from 25 orders the district court issued to effectuate compliance with the Consent Decree. The consolidated appeals raise the following issues:

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[1] DSPDI is the agency's Spanish acronym. Although known as the Mental Retardation Program at the time of filing, we use "DSPDI" throughout.

1. Whether, apart from orders regarding the JCC's budget, compensation, and invoices, this Court has appellate jurisdiction over any of the appealed orders under 28 U.S.C. 1292(a)(1).

2. Assuming this Court finds that it has jurisdiction, whether the district court's issuance of the appealed orders was an abuse of discretion or otherwise violated the Commonwealth's contractual or due process rights.

3. Whether this Court should issue a writ of mandamus.

STATEMENT OF THE CASE

1. The United States' CRIPA Action And The Consent Decree

CRIPA allows the United States to sue local authorities, after giving them proper notice of alleged violations, for equitable relief from certain unconstitutional or otherwise unlawful conditions of confinement. 42 U.S.C. 1997a; 42 U.S.C. 1997b(a). Specifically, the United States may institute a civil action where it has reasonable cause to believe that a jurisdiction is "subjecting persons residing in or confined to an institution * * * to egregious or flagrant conditions which deprive such persons of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States causing such persons to suffer grievous harm." 42 U.S.C. 1997a.

In 1999, the United States filed a complaint against the Commonwealth under CRIPA following an investigation that revealed unconstitutional and

otherwise unlawful conditions and practices in DSPDI's treatment of persons with intellectual and developmental disabilities. App. 300.[2] Shortly after the United States filed its complaint, the parties entered into and the district court adopted an Interim Settlement Agreement (ISA). App. 310. In the ISA, the parties recognized that the rights of DSPDI participants "are secured and protected by the Constitution and laws of the United States." App. 314. Among other things, the ISA outlines both the specific remedial measures that institutions open at that time had to undertake and the Commonwealth's ongoing obligations to meet participant needs going forward, including by providing community-based alternatives to institutionalization. App. 315-322. The ISA also mandates that the Commonwealth provide DSPDI participants with adequate health care and safety. App. 315, 318-320.

A year later, the parties entered into and the court adopted the Supplemental Interim Settlement Agreement (SISA). App. 326. The SISA recognized that "despite defendants' efforts to achieve remediation pursuant to the terms of [the ISA], full compliance with its terms in accordance with the prescribed time deadlines has not been achieved." App. 327. To that end, the SISA created an

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[2] "App. __" refers to the page number of the Joint Appendix. "Conf. App. __" refers to the page number of the Joint Appendix filed under seal. "Doc. __, at __" refers to the docket number and page numbers on the district court docket sheet. "Br. ___" refers to page numbers in defendants-appellants' opening brief filed December 31, 2020.

independent office of the Court Monitor, called the "Joint Compliance Coordinator" or "JCC," to oversee, review, and report on the Commonwealth's implementation of much-needed measures consistent with the court's orders. App. 330-331.

The SISA provides for a truly independent court monitoring office, where the court is the ultimate decision-maker and plays a central role in evaluating and ensuring compliance. The SISA makes clear, for example, that the JCC shall not be discharged involuntarily or replaced absent a court order; the Commonwealth is to deposit and replenish JCC-related funds in the Court Registry; the JCC is to submit invoices to the court for its review and approval; and the court is to order the Clerk of the Court to pay the JCC from the Registry. See, *e.g.*, App. 327, 329.

Next, in 2001, the Commonwealth filed the parties' agreed-upon Community-Based Service Plan (CBSP) with the court, which entered it as a court order. App. 336, 378. The CBSP is a much more extensive and detailed set of requirements that requires the Commonwealth: (1) to provide community-based placement and treatment to participants in the most integrated setting whenever appropriate and to effectively foster their independence and participation in the local community consistent with *Olmstead* v. *L.C.*, 527 U.S. 581 (1999); and (2) to provide participants with adequate protections, services, and supports to meet their individualized needs in the community at all times. See App. 337.

In the ensuing years, the Commonwealth took many steps to comply with the various court orders. See App. 384. Yet, the parties recognized there were outstanding issues regarding health care, mental health services, participant safety, and habilitation, such as providing skills training to foster the development of independent living and community integration. App. 389. As a result, in October 2011, the parties entered a Joint Compliance Action Plan (JCAP), which, among other provisions, requires the Commonwealth to develop and implement effective measures to expand available residential and other provider capacity in the community to meet participants' individualized needs and ensure their health, safety, and welfare. App. 384. The court promptly approved and adopted the JCAP in a court order. App. 382. The court administratively closed the case but retained full jurisdiction to monitor and enforce the JCAP and reiterated that all existing orders remained in full force and effect. App. 382. The ISA, SISA, CBSP, and JCAP together constitute the Consent Decree. App. 384.

2. The Joint Compliance Coordinator (JCC)

As relevant here, the Commonwealth argues, among other things, that the court modified the Consent Decree through orders relating to (a) the current JCC's appointment and (b) the scope of duties and staffing of the JCC's office. Although the Commonwealth does not actually appeal from any of the orders appointing the

JCC and his staff or delineating his duties, we set forth necessary background and context below.

a. Pursuant to the SISA, the court appointed Dr. John McGee as the first JCC. App. 334. Under the SISA, McGee would have access to clerical assistance and the right to hire consultants as he deemed necessary to fulfill his duties. App. 328-329. The SISA requires the Commonwealth to bear the costs of these consultants but urges the parties and the JCC to "endeavor to agree upon" these costs. App. 329. The court later appointed Dr. Sylvia Fernández as assistant to the JCC, to carry out duties assigned by the JCC. App. 381. The court further set the salary for the assistant JCC position. App. 381.

Following McGee's unexpected passing, the court *sua sponte* appointed Fernández as JCC and ordered that she "immediately assume all of Dr. McGee's duties" and "have the same JCC authority conferred upon her." App. 402-403.[3] The court directed "the Commonwealth to work cooperatively with Dr. Fernández at all times, by facilitating the JCC's access to all persons, residences, facilities, programs, services, documents, and materials the JCC deems necessary or appropriate to consult or utilize in performing the duties and functions of the JCC."

[3] Although the SISA stated that if the agreed-upon JCC was no longer able to serve as the JCC, the parties would select a mutually acceptable replacement (App. 327), neither party objected to the court's *sua sponte* order naming Fernández as McGee's successor.

App. 403. Further, the court instructed the Commonwealth to "proactively provide the JCC with prompt notice of sentinel events," including "details on any and all individual transitions and the closure or opening of any community residence." App. 403-404. The court also appointed a new assistant to the JCC. App. 405.

Fernández resigned from her position as JCC in late 2014. See App. 410. The court directed the parties to submit names of agreed-upon candidates for JCC; they responded by filing a joint motion asking the court to appoint Dr. Javier Aceves. App. 411-413. Aceves assumed the role of JCC on January 1, 2015, and the court ordered that he "have the same JCC authority conferred upon him as set forth in prior orders." App. 450.

In February 2015, the court appointed Alfredo Castellanos as counsel to the JCC. App. 458. Almost two years later, the court appointed Castellanos as deputy JCC, explaining that he also would continue in his "constitutional advisor" role and would not receive any additional compensation. App. 460. In October 2018, the court again promoted Castellanos, naming him Chief Deputy JCC and Lead Monitor. App. 487.

Sometime in or around 2019, Aceves took a leave of absence and Castellanos assumed the role of Acting JCC.[4] See App. 606; Br. 17-18. On

[4] The record is unclear as to exactly when Castellanos assumed this role.

December 19, 2019, the court entered an order informing the parties that Aceves would be unable to return to work as the JCC, and designated Castellanos as JCC, effective January 1, 2020. App. 606. No party objected to this order. Castellanos currently serves as JCC.[5]

b. Throughout this case, the district court routinely entered orders to ensure that the JCC had adequate access to people, sites, and information to enable him to discharge his monitoring duties. On November 4, 2014, for example, the court entered an order mandating that as of that date, "the JCC shall be informed in advance (rather than after the fact, or by way of her own learning) of all matters that affect participants in this case. This includes but is not limited to, participant transfers to new provider homes." Doc. 1577. The order further directed that all emergency matters be "immediately communicated to the JCC." Doc. 1577, at 1.

Over time, because of complexities in ensuring the Commonwealth's compliance with the Consent Decree and its provision of adequate services to the

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[5] On January 14, 2020, the court entered an order instructing the parties to agree to a date in February 2020 for a status conference and to prepare an agenda. App. 227. The court also directed the parties not to file any further substantive motions or responses to pending motions until after the status conference. App. 227. See also Doc. 2690 (Amended Order). Despite this directive and before the status conference, the Commonwealth filed a "Motion in Compliance" [redacted]. Doc. 2710. [redacted] Doc. 2710. The Commonwealth did not request to discuss Castellanos's appointment as JCC.

hundreds of DSPDI participants with mental impairments, the court gradually expanded both the staff and budget of the monitor's office. Today, the JCC's office has deputy monitors, legal counsel, mental experts, and support staff, as well as multiple consultants. See, *e.g.*, App. 460, 468, 488, 602, 609. The Commonwealth has never objected to nor appealed from any of the court's orders expanding the JCC's office.

3. Proceedings Related To The Appealed Orders

The Commonwealth now appeals from 25 court orders, including: (1) four orders relating to the JCC's budget, compensation, and invoices[6]; (2) twelve orders relating to the COVID-19 pandemic; (3) five orders relating to participant transfers and institutionalization; and (4) three orders relating to other administrative matters. These orders are summarized as follows. See also pp. 34-36, *infra* (Summary Chart of 25 Appealed Orders).

a. The JCC's Budget, Compensation, And Invoice Orders

The Commonwealth appeals from four orders relating to (i) the JCC's budget and (ii) the JCC's compensation and invoices.

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[6] The Commonwealth's Second Amended Notice of Appeal also states that it appeals from a fifth order regarding objections to the JCC's May 2020 Invoice. Doc. 3141. However, the Commonwealth has abandoned its argument as to this order. See pp. 90-91, *infra*.

i. In the SISA, the parties agreed to, and the court endorsed, a deliberative and collaborative process whereby the parties and the JCC work together each year toward an agreed-upon annual budget for the JCC. App. 328-330. Only when the parties and the JCC are "unable to reach agreement on the financial terms and conditions of [the JCC's] compensation and reimbursement" is the court to decide on the budget. App. 329.

Despite the SISA protocol, the court, in some years, has set the budget for the JCC's office. In 2014, for example, the court noted that the parties had yet to submit a proposed budget for fiscal year 2014-2015. Doc. 1509. Without an agreement, the court ordered that the budget for fiscal year 2013-2014 would remain in effect throughout the next fiscal year. Doc. 1509. No party objected to this order. Likewise, in 2017, the court entered an order that increased the JCC's yearly budget "by a nominal $65,000." Doc. 2032, at 1. Again, no party objected.

On March 4, 2019, the court issued the budget order for fiscal year 2019-2020. App. 491. The court explained that although the case was 20 years old, the Commonwealth had achieved in full only 26% of the benchmarks in the JCAP and lacked significant progress in six areas, including transferring existing DSPDI participants from institutions to community settings, opening new provider homes, and addressing safety issues. App. 491. The court also recognized that the progress to date had resulted from the "relentless work of the monitoring team,"

and that to "expedite and foster compliance" with the Consent Decree, it would be necessary to "further empower[] the JCC office and its resources." App. 492. After considering the parties' recommendations, and in accordance with the JCAP, the court set forth a dozen duties it expected the JCC to perform. App. 492-493. The order also instructed the JCC's office to re-organize its structure to accomplish its augmented mission. App. 493-494. The court concluded that an increase in the JCC's annual budget was necessary to effectuate this change and, *sua sponte*, set the budget at more than $1,600,000. App. 495.

Given this significant budget increase, the parties jointly moved the court to reconsider the March 4, 2019 budget order. App. 517. Despite the SISA's terms, the parties had not been given an opportunity to provide input on possible budget parameters. App. 519-520. The parties contended that such a large budget increase was "not necessary to ensure adequate monitoring of the Commonwealth's compliance with the Court's orders." App. 522. Although the court had issued "clarifying guidance about its expectations of the JCC," the parties explained that the guidance "falls squarely within the original broad parameters set out in the SISA." App. 523-524. The parties, however, did not object to the additional duties or re-organization of the JCC's office that the court proposed. Rather, they concluded that "to the extent there is reason to increase

JCC monitoring activity * * * the increase is not justification for excessive increases in the JCC's budget." App. 524.

The court granted the joint motion for reconsideration. App. 531. The parties and the JCC then agreed to a 2019-2020 budget of $833,000. App. 533; App. 540. The Commonwealth also agreed to deposit an additional $100,000 in "one-time reserve funding in case there is a need for additional money for JCC operations going forward." App. 535. The court approved the parties' proposed budget. App. 541. Still, the court alerted the parties that it would "pay close attention to the progress achieved by the Commonwealth in order to properly revisit all budget considerations for fiscal year 2020-2021, as warranted." App. 542.

On May 19, 2020, the court, *sua sponte*, issued the budget order for fiscal year 2020-2021, noting that its ordered amount of $833,000, plus $100,000 to be set as a reserve fund, was "the same exact budget amount as that for fiscal year 2019-2020." App. 889 (Budget Order). The Budget Order also added $40,000 for newly necessary office space and $100,000 for a court-appointed special investigator. App. 889. The Commonwealth appeals from this Budget Order.

ii. The SISA provides that the JCC "shall be reimbursed for reasonable expenses incurred in the discharge of his responsibilities." App. 328. The JCC must "submit monthly statements to the [c]ourt detailing all expenses incurred

during the prior month and shall provide copies to the parties." App. 329. While the parties may submit comments or objections, the SISA provides that the court will review the statements and order the Clerk "to make [the] appropriate payments." App. 329.

The budget for fiscal year 2019-2020 specified that "[n]o one in the office of the JCC is to receive in annual compensation more than the annual salary of a federal magistrate judge – currently about $191,000," or, prorated, slightly less than $16,000 per month. App. 540. At times, however, the JCC works significantly more than the billable hours he would be entitled to charge if not for the salary cap. See App. 858-859. In the past, the parties raised concerns when the JCC's invoice for his hourly services in a given month exceeded his prorated salary cap. See Doc. 2527, at 8-9 (noting the parties' concern with an invoice from Castellanos seeking $24,062.50). Therefore, at the February 2020 status conference the court asked that, going forward, Castellanos prorate his remaining salary for the year below the cap and submit invoices certifying that he had worked more hours than necessary to earn that amount. App. 858-859. No party objected to the court's stated approach. App. 858-859.

On May 5, 2020, the JCC filed a Request for Approval and Payment of Expenses, [redacted] for April 2020 [redacted] Conf. App. 191. [redacted]

[redacted] Conf. App. 205. [redacted] Conf. App. 205. On the same date, the Commonwealth filed a motion objecting to the April invoices [redacted] See Conf. App. 226-239.

The court reviewed the JCC's invoice and overruled the Commonwealth's objection. App. 804 (May 7, 2020 Opinion and Order). The court explained that throughout the case's 20-year history, the Commonwealth repeatedly had "question[ed], challeng[ed,] and even attack[ed] the monitor and his office." App. 802. In the few months since Castellanos was appointed JCC, the court stated, the Commonwealth not only had questioned Castellanos's authority to access documents, interview health department officials and providers, and conduct inspections and visits, but also had generally and repeatedly challenged the JCC's role and authority. App. 802. The court cited 42 docket entries since January 2020 addressing the JCC's function and work. App. 804. The court concluded that "[a]ny future attempt by the Commonwealth to re-litigate [these 42 docket entries] will be considered vexatious and sanctionable conduct." App. 804.

Turning to the Commonwealth's specific objections to the April 2020 invoice, the court explained that it periodically disburses the annually deposited JCC funds after it is satisfied that the JCC's invoices properly reflect work performed. App. 804-805. The court noted that considering April 2020 was characterized by intense COVID-19 pandemic work, it would not be surprised if expenses were higher. App. 805. The court further found that the JCC's monthly work is typical of monitors in mental-disability consent-decree cases across the country and that the JCC is greatly undercompensated in this case. App. 805. Accordingly, the court concluded that the JCC's [redacted] flat fee was appropriate. App. 805; Conf. App. 205. The Commonwealth appeals from the May 7, 2020 Opinion and Order.

[redacted] See Conf. App. 326. The court had authorized the JCC to retain CDDER's services in August 2019, noting that "the inclusion of the present expert services was contemplated by the [c]ourt when it approved the original budget for fiscal year 2019-2020." App. 555. The Commonwealth objected [redacted] Conf. App. 326. The court overruled the objection, explaining that the invoice

sufficiently summarized the work performed. App. 890 (CDDER Invoice Order). The Commonwealth appeals from the CDDER Invoice Order.

On August 5, 2020, the court entered an order that, effective immediately, increased the JCC's compensation to $215,000 to equal that of the monitor in the Puerto Rico Police Department reform case, *United States* v. *Puerto Rico*, No. 3:12-cv-2039. App. 1007 (Compensation Increase Order); Br. 29. The Commonwealth appeals from the Compensation Increase Order.[7]

b. The COVID-19 Pandemic Orders

The Commonwealth also appeals from a dozen orders that the district court entered to safeguard DSPDI participants' well-being during the COVID-19 pandemic. The orders relate to: (i) the development of a COVID-19 protocol; (ii) the need for an isolation facility; (iii) the formulation of reopening plans for when COVID-19 infection rates eased; (iv) the implementation of DSPDI's treatment and isolation plans for participants who test positive for COVID-19; and (v) the sharing of medical information with the JCC.

[7] In its opening brief, the Commonwealth complains about subsequent district court orders relating to the JCC's compensation and invoices for August through November 2020. Br. 29-32. However, the Commonwealth did not appeal from these orders, and they are not properly before this Court. Moreover, as of the September 2020 invoice, the JCC has resumed providing detailed invoices. See, *e.g.*, Doc. 3182-1 (September 2020 Invoice); Doc. 3277-1 (October 2020 Invoice).

i. In mid-March 2020, the district court issued an emergency order to protect the health, safety, and welfare of DSPDI participants during the COVID-19 pandemic. App. 611 (Emergency Order). Specifically, for at least 30 days, the court ordered the Commonwealth to: suspend activities at the Center for Transitional Services (CTS) day service centers; ensure that participants remain in their community homes; guarantee that community home providers have sufficient food and drink for participants for the next 45 days; suspend all visits to community homes until an agreed-upon DSPDI protocol exists; notify the JCC promptly if any participant is suspected of having coronavirus; and distribute the court's order to all DSPDI personnel and contractors. App. 612-613. The Emergency Order further directed DSPDI's Director to "remain in constant communication with the JCC to discuss and resolve all matters which arise." App. 612. The Commonwealth has not appealed from the Emergency Order.

A few days later, the Commonwealth filed a motion in response to the Emergency Order, asking the court to grant it greater flexibility in developing and implementing measures to meet participant needs while taking sufficient precautions to protect against their exposure to COVID-19. App. 614. The following day, the court ordered the parties to confer with the JCC about the Commonwealth's motion and to report on areas of agreement. App. 688 (COVID Order). The Court then clarified in an amended order that it would modify the

Emergency Order if the parties jointly requested. App. 691 (Amended COVID Order). The Commonwealth appeals from the COVID and Amended COVID Orders.

In compliance with the court's instructions, the parties conferred and the United States responded to the Commonwealth's motion. App. 694. The court then ordered the Commonwealth and the United States, with input from the JCC, to agree on a COVID-19 protocol by March 24, 2020. App. 699. When the Commonwealth failed to do so by 7:00 p.m., the court, noting the emergency nature of the situation, ordered the Commonwealth to produce a protocol by noon the following day or face monetary sanctions. App. 702 (Protocol Order). The Commonwealth appeals from the Protocol Order even though it submitted its protocol within ten minutes of the court's order. See App. 704; Br. 36.

On March 25, 2020, the court entered a second order regarding DSPDI's development of a COVID-19 protocol. App. 716 (Second Protocol Order). The court ordered the JCC and the United States to review DSPDI's submitted protocol, and directed the JCC to set a conference for the parties to discuss and approve a final protocol for the JCC to submit to the court. App. 716-717. The Second Protocol Order clarified that DSPDI did not face sanctions. App. 718. The Commonwealth appeals from the Second Protocol Order.

On March 30, 2020, the JCC filed its proposed COVID-19 Action Plan and Protocol, a draft of which it previously provided to the parties. App. 719. The JCC's submission was based on the Commonwealth's earlier draft but added in recommendations from the JCC's team of expert consultants and observations of participants, relatives, and providers. See App. 773. The court ordered the Commonwealth to inform the court whether the JCC's proposal was an acceptable "initial working tool during this pandemic," explaining that it "may be readily amended as conditions change." App. 773-774. In response, the Commonwealth [redacted]. See Conf. App. 18.

After carefully reviewing the Commonwealth's response, the court determined that the proposed modifications did not significantly alter the JCC's comprehensive protocol (which, in large part, was based on the Commonwealth's earlier submission). App. 776 (Order Approving JCC Protocol). The court adopted the JCC's protocol in its entirety but reiterated that the protocol was a "working document, which may be modified by the [c]ourt upon agreement of the parties." App. 776. The Commonwealth appeals from the Order Approving JCC Protocol.

ii. On April 3, 2020, after discussion with its expert consultants, the JCC sent a letter to DSPDI, copying counsel for the parties, suggesting that at least one

DSPDI facility be used as a temporary COVID-19 isolation unit for participants, family members, providers, or other DSPDI personnel, and asking DSPDI to respond with any objections. Doc. 2771, at 1-2. DSPDI had not yet responded when the JCC learned of two suspected COVID-19 cases among participants. Doc. 2771. The JCC filed an emergency notice informing the court that the JCC believed the proposal for an isolation unit would comply not only with the Emergency Order's mandate to safeguard and protect the participants' health, but also with the Consent Decree's safety and well-being provisions. Doc. 2771.

In response to the JCC's emergency notice, the court ordered [redacted] Conf. App. 75 (Isolation Plan Order). [redacted] Conf. App. 76. The Commonwealth appeals from the Isolation Plan Order.

On April 13, 2020, the Commonwealth filed a [redacted] isolation plan. Conf. App. 77, 83-84. The court then directed the JCC to discuss the Commonwealth's plan with his expert team and the United States, to arrange a conference call with the parties to discuss any recommendations and concerns, and to file a consensus isolation plan. App. 779. As ordered, the JCC provided the parties with revised isolation suggestions and requested their input. Conf. App. 98. [redacted] the JCC filed an isolation and treatment plan with the court.[8] Conf. App. 97-98. The court adopted the JCC's plan as a "working document," directing that it "commence immediately" to "safeguard the lives and health of the participants." App. 782 (Order Adopting Isolation Plan). The Commonwealth appeals from the Order Adopting Isolation Plan.

The Commonwealth moved the court to reconsider the Order Adopting Isolation Plan. Conf. App. 118. [redacted] Conf. App. 127-128. [redacted] Conf. App. 130-134. [redacted]

[8] In a subsequent filing, [redacted] Doc. 2788.

[redacted] Conf. App. 163. [redacted]

[redacted]. Conf. App. 138.

The court denied the Commonwealth's motion for reconsideration, stressing that "countless lives of human beings with mental disabilities * * * entirely depend" on the court, the JCC, and the parties, and that, in an emergency, the court and JCC "may have to act at warp speed" given that "we are all exploring a world [due to the pandemic] in which no one alive has visited before." App. 789 (Order Denying Reconsideration). The court reiterated that the Isolation Plan is "a working document subject to modifications." App. 788. The Commonwealth appeals from the Order Denying Reconsideration.

iii. In late May 2020, the court recognized that while the COVID-19 protocols it had adopted had been extremely effective in guaranteeing the participants' safety and well-being, lockdown restrictions soon would be eased, and essential services would need to resume under the JCAP. Doc. 2878. The court directed the JCC to prepare a report and recommendation to the parties, detailing next steps to address the needs of participants, providers, and family members. Doc. 2878. The parties then would have time to review and provide

comments to the JCC, who would submit a final report and recommendation to the court for approval. Doc. 2878.

Shortly thereafter, the Governor entered an Executive Order lifting Puerto Rico's lockdown as of June 15, 2020. See App. 896. The court entered an opinion and order clarifying that the Executive Order did not negate its Emergency Order but, given that the Commonwealth's COVID-19 numbers were constant, the court would favor modifying and vacating parts of the Emergency Order. App. 896-897 (Reopening Order). Before taking any action, the Reopening Order directed DSPDI to provide the JCC and the United States with information regarding DSPDI's reopening plans and instructed the JCC to evaluate plans in the manner set forth in its prior order. App. 896. The Commonwealth appeals from the Reopening Order.

iv. Although Hacienda Don Luis had been designated as a COVID-19 isolation center, at least eight participants were temporarily transferred there while the Commonwealth looked for alternative community homes after it closed one of its residential institutions, *i.e.*, the Fundación Modesto Gotay (FMG) institution. App. 1063, 1621. See also pp. 29-30, *infra*. The following week, in response to learning that participants in two other homes had tested positive for COVID-19, the court instructed the DSPDI Director and the JCC to confer and agree to a solution for isolating the participants within the existing COVID-19 Protocol,

given that the transfers had "compromised" Hacienda Don Luis.[9] App. 1063 (Alternative Isolation Order). The Alternative Isolation Order recognized that "DSPDI may be in the process" of attending to participants' isolation needs but directed the Commonwealth to keep the JCC informed and directed the JCC to file a motion informing the court of the outcome of the issue.[10] App. 1063. The Commonwealth appeals from the Alternative Isolation Order.

The court vacated the Alternative Isolation Order the next day. App. 1097-1098 (COVID Notification Order). In its place, the COVID Notification Order directed DSPDI to inform the JCC or his designee twice per day of the status of participants with COVID-19 and any new COVID-19 cases. App. 1098. The order also provided DSPDI a deadline to either rehabilitate Hacienda Don Luis or find another suitable isolation facility. App. 1098. The Commonwealth appeals from the COVID Notification Order.

v. The Commonwealth also appeals from the district court's April 21, 2020 Order, which instructs the Commonwealth to readily provide all medical

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[9] [redacted] See Conf. App. 164. [redacted] See Conf. App. 102-103.

[10] The practice in this case is to file status reports as "informative motions."

information to the JCC and the United States in a timely manner upon request. App. 787 (HIPAA Order).[11] The HIPAA Order reminds the parties that "HIPAA requirements are inapplicable to the [JCC's] requests as he is not a party" and reiterates that the JCC is authorized and directed to use all available technology to perform his monitoring functions during the COVID-19 pandemic. App. 787.

c. Participant Transfer And Institutionalization Orders

The Commonwealth further appeals from five orders that relate to participant transfers and institutionalization.

i. The first of these orders concerned the placement and well-being of a specific DSPDI participant (*i.e.*, participant #156). [redacted] Conf. App. 361. [redacted]. Conf. App. 338.

On June 5, 2020, [redacted]. Conf. App. 338 (Participant 156 Order). [redacted]

[11] The Health Insurance Portability and Accessibility Act of 1996 (HIPAA), 42 U.S.C. 1320d *et seq.*, was enacted by Congress to "ensure the integrity and confidentiality of [patients'] information" and to protect against "unauthorized uses or disclosures of the information." 42 U.S.C. 1320d-2(d)(2)(A) & (B)(ii).

[redacted]. Conf. App. 338. The Commonwealth appeals from the Participant 156 Order.

On June 18, 2020, the Commonwealth filed an urgent motion requesting an order allowing the transfer of participant #156. Conf. App. 340. [redacted] Conf. App. 341. The following day, the court authorized the transfer [redacted] Conf. App. 361-362. Although it effectively supersedes the Participant 156 Order, the Commonwealth has not appealed this order.

ii. On the same date, the court also entered an order regarding participant re-institutionalization generally. App. 898 (Re-Institutionalization Order). The court was troubled both by DSPDI's recent transfers of participants to institutions and the lack of available homes for participants as required by the Consent Decree.[12]

[12] There had been 11 institutionalizations between January 2019 and July 2020. See App. 901. [redacted] (out of fewer than 1,000 total participants) [redacted]. See Conf. App. 378-405; App. 528.

App. 898. The court reiterated that the JCAP's central focus is to transition participants "from institutions to integrated community settings, not the other way around." App. 898. Moreover, consistent with the Supreme Court's decision in *Olmstead*, the CBSP requires community-based placement for participants in the most integrated setting. App. 898-899. The Re-Institutionalization Order directed DSPDI to implement a plan for community homes that would address participant needs, including the opening of new homes as warranted. App. 899-900. The Re-Institutionalization Order also directed DSPDI to file with the court a list of all institutionalized participants and not to institutionalize any further participants unless it first notified the United States and the JCC and received court approval. App. 900. The Commonwealth appeals from the Re-Institutionalization Order.

The Commonwealth filed a response to the Re-Institutionalization Order,

[redacted]

Conf. App. 363. Several weeks later, the Commonwealth filed its "Plan for New Community Homes." App. 907. After reviewing the Commonwealth's and the United States' responses (see Conf. App. 434), the court concluded that DSPDI was not complying with *Olmstead*, DSPDI's most recent institutionalization of a

participant had violated court orders, and DSPDI's New Homes Plan was insufficient. App. 1099 (Order Re: Institutionalization Order). The court held that its prior order prohibiting institutionalizations "stands," and ordered the Commonwealth to submit a revised New Homes Plan. App. 1099-1100. The Commonwealth appeals from this order.

iii. About a month later, without notice to the JCC, the court, or the United States, the Commonwealth ordered the immediate closure of the FMG institution and transfer of its more than 40 participants. App. 1032. The court, upon learning of the closure via a newspaper account on a Friday, ordered *sua sponte* that FMG not be closed nor the participants therein moved until at least the following Monday. App. 1032 (FMG Order). The FMG Order directed DSPDI to permit the JCC to inspect the facility that weekend and to provide the JCC all relevant information regarding the closure and the intended relocation of each participant. App. 1032. The Commonwealth appeals from the FMG Order.

Later the same night, the court amended its order upon learning that the participants already had been relocated. App. 1034 (Amended FMG Order). The Amended FMG Order set a hearing to address the lack of notice to the JCC, as well as the mental health and medical consequences of transferring participants, and the possible overcrowding of homes and participant institutionalization, as a result of FMG's closure. App. 1035. The Amended FMG Order further directed DSPDI to

provide the JCC with a list of transferred participants and each participant's current location; documentation regarding the investigation and decision to close FMG; and documentation relating to the decision to relocate each affected participant. App. 1035. The Commonwealth appeals from the Amended FMG Order.

d. Other Administrative Matters

Finally, the Commonwealth appeals from three orders relating to various administrative matters: (i) information regarding an outside study on provider rates; (ii) the court's communications with the JCC; and (iii) procedural rules regarding the filing of motions.

i. In a 2019 Joint Action Plan, the Commonwealth agreed to hire a company to perform a provider-rate assessment study and issue a report with recommendations to better tie the rates paid to service providers to the individual needs of the participants served. App. 499, 507-508. The Court ordered the Commonwealth to facilitate communication and collaboration between and among the JCC, the parties, and the company hired to do the rate study, Burns & Associates, Inc. (Burns). App. 785 (Burns Order). To save economic and judicial resources, the court entered the Burns Order to ensure an accurate study and to minimize unnecessary disputes after the report issued. App. 785. The order also directed Burns and the Commonwealth to provide its final report to the United

States and the JCC immediately upon completion. App. 785-786. The Commonwealth appeals from the Burns Order.

The Commonwealth moved for reconsideration [redacted] App. 791. While the court clarified that the JCC and the parties were prohibited from intervening in the company's auditing process, it reiterated that the JCC and the United States were entitled to information related to the Commonwealth's contract with Burns. App. 791. The Commonwealth does not appeal this order.

ii. In August 2020, the court entered an "order" in response to the Commonwealth's suggestions that the court had improperly engaged in *ex parte* communications with the JCC. App. 1060 (*Ex Parte* Communications Order). The court explained that, since the outset of the case, the court and the JCC have "historically met to confer and discuss updates of information relevant to the consent decree, as well as to the scheduling of conferences and other events." App. 1061. The court further noted that, in its 14 years presiding over the case, the Commonwealth had never before challenged the court's direct communication with the JCC, despite the practice being explicitly referenced in numerous court

orders. App. 1060-1061. The Commonwealth appeals from the *Ex Parte* Communications Order.

iii. In August 2020, the court also entered an order regarding a new procedure for filing motions. App. 1108 (Filing Procedure Order). Except for filings pursuant to a court order, the court required the parties to confer before filing any new motion in order to streamline matters and reduce unnecessary filings. App. 1108. The Commonwealth appeals from the Filing Procedure Order.

SUMMARY OF ARGUMENT

More than 20 years ago, the United States initiated this action against the Commonwealth, alleging violations of the constitutional and legal rights of persons with intellectual and developmental disabilities served by the Commonwealth's Division of Services for People with Intellectual Disabilities (DSPDI). Shortly thereafter, the parties entered into a remedial settlement agreement and, in subsequent years, entered several other agreements, including stipulating to the appointment of the JCC to oversee, review, and report on the Commonwealth's compliance efforts. While the Commonwealth has made notable progress in certain areas, it has yet to fully comply with the various agreements that together comprise the Consent Decree. Instead, the Commonwealth has spent the last year repeatedly challenging the JCC's long-established role and authority in this case. The Commonwealth now appeals from 25 recent orders the district court entered to

secure participants' health, safety, and well-being under the Constitution and other federal law and as required by the Consent Decree.

1. As an initial matter, except for four orders relating to the JCC's budget, compensation, and invoices, this Court should dismiss the Commonwealth's appeal for lack of appellate jurisdiction. Although the Commonwealth invokes this Court's jurisdiction under 28 U.S.C. 1292(a)(1), the vast majority of appealed orders neither modify the Consent Decree nor have the effect of granting an injunction, as required for interlocutory review. Moreover, this Court can also dismiss three of these same orders as moot because they were rendered null by superseding orders or events.

2. Even as to any order this Court reviews, the district court did not abuse its discretion or impermissibly usurp control over the DSPDI program. Nor did the court violate the Commonwealth's contractual or due process rights. Rather, the challenged orders were a proper use of the court's broad equitable power to enforce the Consent Decree. Moreover, as to four orders in particular, the Commonwealth has failed to develop—and therefore abandoned—any argument about those orders. Thus, to the extent this Court has appellate jurisdiction, it should affirm.

3. Recognizing that this Court may not have jurisdiction to hear its appeal under Section 1292(a)(1), the Commonwealth suggests that this Court could

alternatively exercise its supervisory mandamus jurisdiction. See 28 U.S.C. 1651(a). But nothing about the district court's actions below justify the extraordinary remedy of mandamus. The Commonwealth cannot satisfy its heavy burden to show either that it is entitled to its requested relief or that it would suffer irreparable harm absent this Court's intervention. Moreover, the balance of equities weighs in favor of the hundreds of vulnerable DSPDI participants who have been waiting for more than two decades for the Commonwealth to fully comply with the Consent Decree.

The following chart summarizes the 25 appealed orders and the United States' arguments as to whether this Court has appellate jurisdiction over the particular order, whether the order is also moot, and whether the Commonwealth has failed to develop—and therefore abandoned—any argument about the order:

#	Record Citation	Short Name Of Order	Appellate Juris. Y/N	Challenge To Order Is Moot	Challenge To Order Has Been Waived
Budget, Compensation, and Invoice Orders					
1	App. 889 (Add. 30)	Budget Order	Y		
2	App. 804 (Add. 24)	May 7, 2020 Opinion and Order	Y		
3	App. 890 (Add. 31)	CDDER Invoice Order	Y		
4	App. 1000 (Add. 42)	Compensation Increase Order	Y		
5	App. 893 (Add. 34)	Order Noting Notice of Objections	N		✓

#	Record Citation	Short Name of Order	Appellate Juris. Y/N	Challenge to order is Moot	Challenge to order has been Waived
COVID-19 Orders					
6	App. 688 (Add. 1)	COVID Order	N		
7	App. 691 (Add. 4)	Amended COVID Order	N		
8	App. 702 (Add. 7)	Protocol Order	N		
9	App. 716 (Add. 9)	Second Protocol Order	N		
10	App. 776 (Add. 12)	Order Approving JCC Protocol	N		
11	Conf. App. 75	Isolation Plan Order	N		
12	App. 782 (Add. 15)	Order Adopting Isolation Plan	N		
13	App. 789 (Add. 21)	Order Denying Reconsideration	N		
14	App. 896 (Add. 37)	Reopening Order	N		
15	App. 1063 (Add. 51)	Alternative Isolation Order	N	✓	✓
16	App. 1098 (Add. 54)	COVID Notification Order	N		
17	App. 787 (Add. 20)	HIPAA Order	N		
Participant Transfer and Institutionalization Orders					
18	Conf. App. 338	Participant 156 Order	N	✓	
19	App. 898 (App. 39)	Re-Institutionalization Order	N		
20	App. 1099 (App. 56)	Order Re: Institutionalization Order	N		✓

#	Record Citation	Short Name of Order	Appellate Juris. Y/N	Challenge to order is Moot	Challenge to order has been Waived
Participant Transfer and Institutionalization Orders Cont.					
21	App. 1032 (Add. 43)	FMG Order	N	✓	
22	App. 1034 (Add. 45)	Amended FMG Order	N		
Administrative Orders					
23	App. 785 (Add. 18)	Burns Order	N		✓
24	App. 1060 (Add. 48)	*Ex Parte* Communications Order	N		
25	App. 1108 (Add. 58)	Filing Procedure Order	N		

ARGUMENT

I

THIS COURT LACKS JURISDICTION OVER 21 OF THE 25 APPEALED ORDERS EITHER BECAUSE THE APPEAL DOES NOT SATISFY SECTION 1292(A)(1) OR BECAUSE THE APPEAL IS ALSO MOOT

The Commonwealth appeals 25 district court orders that effectuate the Consent Decree's mandate that the Commonwealth safeguard the health, safety, and well-being of DSPDI participants. In so doing, the Commonwealth invokes (Br. 2-3) this Court's appellate jurisdiction under 28 U.S.C. 1292(a)(1), which governs interlocutory orders of the district court "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." 28 U.S.C. 1292(a)(1). But Section 1292(a)(1) must be "strictly construed and any

doubts as to its applicability are to be resolved against immediate appealability, in keeping with the general congressional policy against piecemeal review." *Nwaubani* v. *Grossman*, 806 F.3d 677, 680 (1st Cir. 2015) (internal quotations and citations omitted).

This Court lacks appellate jurisdiction over all but four of the 25 orders because the other orders neither modify the Consent Decree nor have the effect of an injunction. Some of these orders also are moot. Additionally, the Commonwealth is not without recourse for its federalism concerns: it can seek relief under Federal Rule of Civil Procedure 60(b)(5) when appropriate and, if denied, seek this Court's review. As to this appeal, however, this Court should dismiss 21 of the 25 appealed orders for lack of jurisdiction.

A. This Court Does Not Have Jurisdiction Under Section 1292(a) Over 21 Of The 25 Appealed Orders

The Commonwealth argues that this Court has jurisdiction under 28 U.S.C. 1292(a)(1) over the appealed orders because they either have the effect of an injunction or they modify the Consent Decree, which is "in the nature of an injunction." Br. 2 (citing *Crumpton* v. *Bridgeport Educ. Ass'n*, 993 F.2d 1023, 1027 (2d Cir. 1993)). But the Commonwealth is mistaken. An injunction, for purposes of appeal, is an order directed to a party, requires that party to take action, is enforceable through contempt, does not simply relate to court procedures, and is designed to provide some of the substantive relief sought in the complaint in more

than a temporary fashion. See *Bogosian* v. *Woloohojian Realty Corp.*, 923 F.2d 898, 901 (1st Cir. 1991); 16 Charles Alan Wright & Arthur Miller, Federal Practice and Procedure § 3922 (3d ed. 2020).

Because the Consent Decree prescribes conduct for the Commonwealth and compels compliance, it is sufficiently injunctive in nature to be treated as an injunction under Section 1292(a)(1). See *Thompson* v. *Enomoto*, 815 F.2d 1323, 1326 (9th Cir. 1987). With the exception of four budget and compensation orders, however, none of the appealed orders have the effect of (1) modifying the Consent Decree or (2) granting an injunction. Thus, this Court lacks appellate jurisdiction.

1. Except For The Budget And Compensation Orders, The Appealed Orders Do Not Modify The Consent Decree And Therefore Are Not Immediately Appealable

The Commonwealth asserts (Br. 66-76) that three categories of orders "modified the terms of the Consent Decree in numerous and very significant ways": (1) the "Appointment of the Current JCC"; (2) the "Scope of Duties and Staffing"; and (3) the "JCC Budget and Compensation." As an initial matter, the United States agrees that this Court has jurisdiction to review four budget, compensation, and invoice orders because they either modify the Consent Decree or they require the Commonwealth to pay money to the JCC through the Court Registry and, therefore, are final for purposes of 28 U.S.C. 1291. See *Whitfield* v. *Municipality of Fajardo*, 564 F.3d 40, 44 (1st Cir. 2009); *Gates* v. *Rowland*, 39

F.3d 1439, 1450 (9th Cir. 1994). These orders are: (1) the Budget Order, see p. 13, *supra*; (2) the May 7, 2020 Opinion and Order, see pp. 15-16, *supra*; (3) the Compensation Increase Order, see p. 17, *supra*; and (4) the CDDER Invoice Order, see pp. 16-17, *supra*.[13] As to these four orders, this Court should affirm on the merits. See pp. 55-65, *infra*. With respect to the other two categories of orders, the Commonwealth has not appealed from any orders that relate to (a) the appointment of the current JCC or (b) the scope of duties and staffing of the JCC's office, and any such appeal would be time-barred. Thus, no appellate jurisdiction exists.

To determine whether an order modifies an injunction, the Court must ask whether the order has altered the underlying decree in a jurisdictionally significant way. *Morales Feliciano* v. *Rullan*, 303 F.3d 1, 7 (1st Cir. 2002) (citing *Sierra Club* v. *Marsh*, 907 F.2d 210, 212 (1st Cir. 1990)). While orders that *modify* an injunction may be appealable, orders that merely *clarify* an injunction are not. *Ibid.* A change is not jurisdictionally significant where it relates simply to the conduct or progress of litigation and does not substantially readjust the parties'

[13] The Commonwealth also appealed from a fifth order regarding objections to the JCC's May 2020 Invoice. See Doc. 3141. Because this "order" merely noted the Commonwealth's notice of objections, see App. 893, this Court does not have jurisdiction. Moreover, the Commonwealth has not developed, and therefore has abandoned, any arguments about that order. See pp. 90-91, *infra*.

legal relations. *Ibid.* "Doubts as to the applicability of [S]ection 1292(a)(1) are to be resolved against immediate appealability." *Ibid.*

a. The Commonwealth first challenges (Br. 66-68) the appointment of JCC Castellanos, asserting that his *sua sponte* appointment modified the Consent Decree. Yet, Castellanos's appointment affords no basis for appellate jurisdiction.

As an initial matter, this Court lacks jurisdiction to review Castellanos's appointment because the Commonwealth did not appeal from the order so appointing him. See *United States* v. *Apple Inc.*, 787 F.3d 131, 138 (2d Cir. 2015) (holding that a court lacks jurisdiction to review orders that were not included in the notice of appeal). The Commonwealth argues (Br. 68) that it was prevented from objecting below because the district court "enjoined the parties from filing any substantive motions," but the Commonwealth has not appealed from this so-called "injunction" nor could it have.

Regardless, the district court's order did not enjoin the Commonwealth from challenging Castellanos's appointment. Rather, it instructed the parties to schedule a status conference with the court in three-weeks' time, set an agenda for the conference, and refrain *temporarily* from filing substantive motions until after the conference. App. 227. See also Doc. 2690 (Amended Order); note 5, *supra*. Despite the court's instructions, the Commonwealth filed a motion shortly thereafter on a different set of issues that it requested to discuss at the upcoming

status conference. Doc. 2710. Significantly, the Commonwealth never filed an objection to Castellanos's appointment, nor did it raise such an objection at or after the status conference. See App. 719-790. Accordingly, this Court lacks jurisdiction to consider Castellanos's appointment.

The law-of-the-case doctrine reinforces the conclusion that the order appointing Castellanos was not a modification to the Consent Decree. The Commonwealth had notice that the court previously had appointed various JCCs without input from the parties. See App. 402. To the extent such appointments modified the Consent Decree, the Commonwealth did not object or appeal when the court appointed Fernández as JCC in 2012, Castellanos as Acting JCC in or around 2019, or Castellanos as JCC in 2019. Under the law of the case, the Commonwealth should not now be allowed to appeal this "modification." See *Ellis* v. *United States*, 313 F.3d 636, 646-647 (1st Cir. 2002) (explaining law-of-the-case doctrine); *Thompson* v. *Enomoto*, 915 F.2d 1383, 1390 (9th Cir. 1990) (holding that because the defendant did not appeal a modification of a consent decree when the court accepted the monitor's first report, it could not do so with respect to the monitor's fourth report). Accordingly, this Court lacks jurisdiction to consider Castellanos's appointment.[14]

[14] The Commonwealth also complains (Br. 67) that Castellanos is not a (continued . . .)

b. The Commonwealth next argues (Br. 74) that the district court has "unilaterally allowed the position of the JCC to evolve into what has become a parallel administrative structure to the DSPDI." But again, because none of the 25 orders appealed relate to the office of the JCC's staffing or its scope of duties, the Commonwealth's challenges are not properly before this Court. See *Apple Inc.*, 787 F.3d at 134, 140. Nor are they modifications to the Consent Decree in any event. Rather, they are consistent with the decade-long practice in this case and the terms of the Decree.

Under the SISA, the JCC has the right to hire consultants he deems necessary to fulfill his duties. App. 328-329. And in 2010, the district court appointed the first assistant to the JCC by court order. App. 381. Neither at that time nor in the following decade has the Commonwealth objected to the appointments of any additional JCC staff. To the contrary, it expressed as recently as 2019 that it "value[s] the office of the JCC, as well as the particular people who currently work in the office." App. 519.

(. . . continued)
healthcare professional, but nothing in the SISA requires the JCC to have any particular professional background. App. 326. Cf. *Moore* v. *Tangipahoa Par. Sch. Bd.*, 864 F.3d 401, 405 (5th Cir. 2017) (finding that an order appointing a monitor who was not qualified under the terms of the injunction was a modification for jurisdiction purposes). Because the Consent Decree does not specify that the JCC must be a healthcare professional, the appointment of a non-healthcare professional does not modify its terms or provide a basis for appellate jurisdiction, especially where there is no appealed-from order before this Court.

Similarly, the Commonwealth complains (Br. 75-76) that the JCC has not been performing his monitoring duties because he last filed a comprehensive report in October 2019. The Commonwealth ignores that the district court postponed the deadline for the JCC's March 2020 report to September 2020 because of earthquakes in Puerto Rico. App. 608. The September 2020 report was further postponed because the Commonwealth failed to provide the JCC with the necessary information for his report. App. 1258, 1481. The JCC has complied with all existing court deadlines. Because the Commonwealth never appealed the numerous orders appointing staff to the office of the JCC or extending the deadlines for the JCC to file his reports, this Court is without jurisdiction as to these matters.

2. The Appealed-From Orders Do Not Have The Effect Of An Injunction

The Commonwealth does not argue that any of the remaining orders modified the Consent Decree; therefore, this Court would have jurisdiction under Section 1292(a)(1) only if they have the effect of an injunction. They do not.

In determining whether an order is appealable as an injunction under Section 1292(a)(1), the Court must look to the practical effect of the order, not its form. *Morales Feliciano*, 303 F.3d at 6. "An order by a federal court that relates only to the conduct or progress of the litigation before that court ordinarily is not considered an injunction and therefore is not appealable under [Section]

1292(a)(1)." *Ramirez* v. *Rivera-Dueno*, 861 F.2d 328, 334 (1st Cir. 1988) (quoting *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U.S. 271, 279 (1988)). Additionally, the party seeking review "must establish that the contested order imposes 'serious, perhaps irreparable consequence[s]' and that it may be challenged effectively only by immediate appeal." *Morales Feliciano*, 303 F.3d at 6-7 (quoting *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 84 (1981)). Examining each of the orders relating to the COVID-19 pandemic, participant transfers and institutionalization, and other administrative matters in turn, the Commonwealth cannot meet its burden to establish appellate jurisdiction.

First, an order directed at a monitor that does not directly order defendants to do anything is simply not injunctive. See *Ramirez*, 861 F.2d at 334. The Second Protocol Order regarding COVID-19 (1) directed the JCC and the United States to review the Commonwealth's protocol, (2) directed the JCC to meet with the parties to discuss and approve a final protocol, which the JCC would then submit to the court, and (3) stated that no sanction would be imposed on DSPDI at that time. App. 716-718; see p. 19, *supra*. This order did not direct the Commonwealth to do anything. Similarly, the *Ex Parte* Communications Order does not order the parties or the JCC to do anything. See pp. 31-32, *supra*. Rather, that order sets forth the court's response to allegations the Commonwealth raised regarding communications between the court and the JCC. App. 1060-1062.

Because these two orders are not directed at the Commonwealth, they are not injunctive and, therefore, this Court lacks appellate jurisdiction.

Second, an order directing a monitor to meet with the parties and determine whether consensus can be reached is not clearly injunctive. See *Ramirez*, 861 F.2d at 334. Here, in response to the Commonwealth's objections to the Emergency Order regarding COVID-19, the court entered two orders: (1) the COVID Order directing the parties to confer and discuss the Commonwealth's proposed COVID-19 measures; and (2) the Amended COVID Order clarifying that the court would modify the Emergency Order if the parties jointly requested it do so. App. 688, 691; see pp. 18-19, *supra*. Similarly, the Alternative Isolation Order instructs the DSPDI Director and the JCC to confer to try to rectify the compromised status of the Commonwealth's isolation facility. App. 1063. On their face, these three orders are not clearly injunctive as they require only that the parties confer. Thus, this Court lacks jurisdiction to review these orders.[15]

Third, this Court has expressed doubt that an order requiring a defendant to provide information constitutes an injunction and, even if it does, a defendant could not show it would suffer irreparable harm from providing information to a monitor. See *Navarro-Ayala* v. *Hernandez-Colon*, 956 F.2d 348, 351 (1st Cir.

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[15] Additionally, the Commonwealth has abandoned all issues regarding the Alternative Isolation Order by failing to develop any arguments as to the order. See pp. 90-91, *infra*.

1992). Four orders fall into this category. The district court's COVID-19 Reopening Order directed DSPDI to provide the JCC and the United States with information regarding its reopening plans and instructed the JCC to evaluate DSPDI's plans in the manner set forth in its prior order. App. 896. Likewise, the Amended FMG Order set a hearing date and required the Commonwealth to provide certain information to the JCC. App. 1035. The COVID Notification Order requires DSPDI to regularly inform the JCC of the status of participants with COVID-19. App. 1097-1098. And the Burns Order instructs the Commonwealth to facilitate communication and collaboration between and among the JCC, the parties, and Burns and to provide the JCC and the United States a copy of the Burns report upon its completion.[16] App. 785-786. Because these four orders require only that the Commonwealth provide information to the JCC and the United States consistent with the terms of the Consent Decree, they are not clearly injunctive nor do they cause the Commonwealth irreparable harm. Again, this Court lacks appellate jurisdiction.

Fourth, "orders directing parties to prepare, submit, or participate in formulating plans * * * have not generally been held to be appealable injunctions." *Ramirez*, 861 F.2d at 334. The Commonwealth appeals from two

[16] Additionally, the Commonwealth has abandoned its argument as to the Burns Order. See pp. 90-91, *infra*.

orders that dealt with the formulation of a COVID-19 protocol (App. 702-703, 776) and three orders that address an isolation and treatment plan (Conf. App. 75; App. 782, 788-789). These orders are likewise not clearly injunctive.

More specifically, the Protocol Order directed the Commonwealth to produce a COVID-19 protocol. App. 702-703. While the order did threaten monetary sanctions, the Commonwealth submitted its protocol just ten minutes after the order's issuance and never faced sanctions. Br. 36; App. 704, 718. The Commonwealth cannot reasonably claim that it was irreparably harmed by this order, especially where it did not object to (or appeal from) the underlying order in which the court initially required it to file a COVID-19 protocol. App. 699. Similarly, the Commonwealth does not argue that it was harmed by the Order Approving JCC Protocol nor could it, as the order's plain language demonstrates that it was not final but rather subject to later modification. See App. 776 ("[T]his Protocol constitutes a working document, which may be modified by the Court upon agreement of the parties.").

The three orders relating to the need for a DSPDI isolation plan for participants infected with COVID-19 are likewise not injunctive. See pp. 20-23, *supra*. The Isolation Plan Order [redacted] Conf.

App. 75.[17] The Order Adopting Isolation Plan adopts the JCC's isolation and treatment recommendations as a "working document." App. 782. And the Order Denying Reconsideration denies the Commonwealth's motion and reiterates the isolation plan is "a working document subject to modifications." App. 788-789. Given the nature of these orders, the Commonwealth cannot show that they had the effect of an injunction or subjected the Commonwealth to irreparable harm. Indeed, in response to the Commonwealth's motion for reconsideration, the court encouraged the Commonwealth to discuss its proposal with the United States and the JCC in an attempt to reach consensus, again demonstrating that the orders were subject to further modification. App. 788-789.

Fifth, three of the appealed orders simply confirm prior orders; they do not grant new injunctions. Therefore, this Court lacks jurisdiction over them and, in any event, these orders should be affirmed under the law-of-the-case doctrine. See *Ellis*, 313 F.3d at 646 (holding that "a court ordinarily ought to respect and follow

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17 [redacted] Conf. App. 76. The Commonwealth complains (Br. 90) that it did not receive this recommendation. [redacted] Doc. 2771-1, at 1. [redacted]

its own rulings, made earlier in the same case"). The Participant 156 Order (Conf. App. 338) and the Re-Institutionalization Order (App. 898) require that participants not be transferred or institutionalized until the Commonwealth provides certain information to the JCC—information that it already had to provide to the JCC in advance by prior court order.[18] See Doc. 1577. And the HIPAA Order (App. 787) restates the court's oft-repeated admonishment that the JCC must have access to "to all persons, residences, facilities, programs, services, documents, and materials the JCC deems necessary or appropriate to consult or utilize in performing the duties and functions of the JCC." See, *e.g.*, App. 403. None of these orders has the effect of an injunction.

Sixth, the Filing Procedure Order merely requires the parties to confer before filing any new motion. App. 1108; see p. 32, *supra*. That is a non-appealable interlocutory order that falls well within the district court's inherent authority to manage its own docket in the interest of judicial efficiency. See *United States* v. *Correia*, 531 F.2d 1095, 1098 (1st Cir. 1976).

In sum, the Commonwealth has established neither that the vast majority of the appealed orders have the effect of an injunction nor that they will cause the

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[18] The Commonwealth also appeals from the Order Re: Institutionalization Order at Docket No. 2900, which affirms that the Re-Institutionalization Order "stands." See App. 1099. But the Commonwealth has abandoned its argument as to this order. See pp. 90-91, *infra*.

Commonwealth irreparable harm. Therefore, this Court lacks jurisdiction to hear the Commonwealth's appeal as to these 21 orders.

Additionally, this Court can dismiss three of these same orders as moot because they were rendered null by superseding orders or events. First, the Commonwealth's appeal of the FMG Order is moot because the court's Amended FMG Order vacated the FMG Order. See App. 1034; pp. 29-30, *supra*. Second, the Alternative Isolation Order is moot because the district court vacated the order the next day. See App. 1098; p. 25, *supra*. Third, the court's June 19, 2020 order, which granted the Commonwealth's urgent motion to transfer participant #156, effectively superseded the Participant 156 Order. See Conf. App. 361. Therefore, this Court should dismiss the Commonwealth's challenges to the FMG Order, the Alternative Isolation Order, and the Participant 156 Order for this reason as well.

B. This Appeal Is Not An Appropriate Vehicle For Raising Federalism Concerns

The Commonwealth asserts that "sensitive federalism concerns" require this Court to act now because the district court's orders have "greatly expanded its jurisdiction and the role of the JCC beyond the explicit consent given by the Commonwealth," and thus impermissibly modified the Consent Decree. Br. 62-63 (citing *Horne* v. *Flores*, 557 U.S. 433, 448 (2009)). But the Commonwealth's generalized federalism concerns "do not automatically trump the powers of federal courts to enforce * * * a consent decree." *Labor/Cmty. Strategy Ctr.* v. *Los*

Angeles Cnty. Metro. Transp. Auth., 263 F.3d 1041, 1050 (9th Cir. 2001) (quoting *Stone* v. *City & Cnty. of S.F.*, 968 F.2d 850, 861 (9th Cir. 1992), as amended on denial of reh'g (Aug. 25, 1992)). "[S]everal courts have held that federalism concerns do not prevent a federal court from enforcing a consent decree to which state officials have consented." *Stone*, 968 F.2d at 861 n.20 (collecting cases). Rather, "by its nature, a consent decree contemplates a court's continuing involvement in a matter." *Aronov* v. *Napolitano*, 562 F.3d 84, 91-92 (1st Cir. 2009) (en banc). Nor is the Commonwealth without recourse. As explained below, it could file a motion under Rule 60(b)(5) to modify or terminate the Consent Decree if changed circumstances so warranted.

The Commonwealth also suggests that because it "did not admit to any violation of law" in the Consent Decree (see Br. 10), and that there was not a judicial finding of unconstitutional conduct (see Br. 61), the challenged orders are somehow infirm. But "[e]ven if no constitutional wrong exists, it does not necessarily follow that the federal court's power to enforce the consent decree is somehow lessened." *Stone*, 968 F.2d at 861 n.20. See also *Local No. 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 525 (1986) (holding that a remedial scheme embodied in a consent decree may be broader than that which a federal court could award after a trial on the merits); *Badgley* v. *Santacroce*, 800

F.2d 33, 38 (2d Cir. 1986) ("The respect due the federal judgment is not lessened because the judgment was entered by consent.").

Further, if the Commonwealth "believes the purposes of the decree have been achieved" (Br. 64), it should have sought relief under Rule 60(b)(5), which permits modifications of consent decrees if prospective enforcement is no longer equitable considering changed circumstances. See *Horne*, 557 U.S. at 447; *Aronov*, 562 F.3d at 91 (explaining that unlike a private settlement, a party seeking to modify a consent decree "must meet a significant burden to demonstrate that circumstances have changed to a degree that justifies a modification"). But as the Commonwealth has emphasized (Br. 58), it is not seeking "to modify the terms of the Consent Decree" nor does it argue that continued enforcement of the decree is no longer appropriate based on sufficient compliance. It is only when compliance with federal law has been achieved that the court must return responsibility for discharging the Commonwealth's obligations to the Commonwealth. See *Horne*, 557 U.S. at 450.

Finally, the Supreme Court's decision in *Frew* v. *Hawkins*, 540 U.S. 431 (2004), makes clear that the Commonwealth's recourse is to seek relief under Rule 60(b)(5). There, state officials similarly argued that enforcing a consent decree would undermine the sovereign interests and accountability of state governments. 540 U.S. at 441. The *Frew* Court was sympathetic to those

concerns, recognizing that "[i]f not limited to reasonable and necessary implementations of federal law, remedies outlined in consent decrees involving state officeholders may improperly deprive future officials of their designated legislative and executive powers." *Ibid.* But the proper recourse for addressing alleged federalism concerns is not simply to complain about the district court's exercise of its power to enforce a consent decree; rather, it is to file a motion under Rule 60(b)(5). See *Ibid.* "If the State establishes reason to modify the decree, the court should make the necessary changes; where it has not done so, however, the decree should be enforced according to its terms." *Id.* at 442.

For all these reasons, while this Court may review the Commonwealth's challenges to the budget, compensation, and invoice orders, this Court should dismiss the Commonwealth's remaining challenges for lack of jurisdiction.

II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ISSUING THE CHALLENGED ORDERS TO ENFORCE THE CONSENT DECREE

The district court did not abuse its discretion in issuing the budget, compensation, and invoice orders. And even assuming this Court has jurisdiction to review the other orders on appeal because they either modified the Consent Decree or issued an injunction, this Court should affirm.

A. Standard Of Review

A district court has wide discretion to interpret and modify an injunction where necessary to achieve the original purposes of an injunction that have not been fully achieved. *In re Pearson*, 990 F.2d 653, 657 (1st Cir. 1993); *Sierra Club, Lone Star Chapter* v. *Cedar Point Oil Co.*, 73 F.3d 546, 579 (5th Cir. 1996). This broad discretion gives district courts flexibility in determining how consent decrees are to be implemented in practice. "In overseeing broad institutional reform litigation, the district court becomes in many ways more like a manager or policy planner than a judge." *Navarro-Ayala* v. *Hernandez-Colon*, 951 F.2d 1325, 1338 (1st Cir. 1991). The court also "gains an intimate understanding of the workings of an institution and learns what specific changes are needed within that institution in order to achieve the goals of the consent decree." *Ibid.*; see also *Frew* v. *Janek*, 845 F.3d 579, 580 (5th Cir. 2016) (holding that the presiding judge had a greater appreciation of a consent decree's operation and that his decisions were entitled to significant deference); *Jeff D.* v. *Otter*, 643 F.3d 278, 283 (9th Cir. 2011) (similar). Thus, on issues concerning institutional management and compliance, this Court generally should defer to the district court. *Navarro-Ayala*, 951 F.2d at 1339.

The Commonwealth argues for a different standard of review. It asserts (Br. 60-62) that ordinary contract principles apply and that the district court's orders are

not entitled to special deference. But that is incorrect in the posture of this case. Here, the Commonwealth's DSPDI program undoubtedly is subject to the district court's jurisdiction under the Consent Decree. See pp. 3-6, *supra*. Thus, the question is whether the district court had the authority to implement particular policies – *i.e.*, related to COVID-19, participant transfers, institutionalization, information sharing, etc. – to further the safety and well-being of DSPDI participants. Because the district court's orders are targeted to ensure that the Commonwealth meets the Consent Decree's broad programmatic goals of safeguarding the health, safety, and well-being of participants, this case is akin to those in which the district court is entitled to broad deference and this Court largely should defer to the decisions below. See *Navarro-Ayala*, 951 F.2d at 1338-1340 (where the Court is asked to decide "whether the defendants have conceded to the [district] court authority to implement a particular policy in an institution already surrendered to the general authority of the court," broad discretion is warranted, but ordinary contract principles apply to "whether [the defendant] has voluntarily surrendered to the federal court its authority over the institution at all").

B. This Court Should Affirm The Budget, Compensation, And Invoice Orders

Although the United States agrees that this Court has jurisdiction over four orders relating to the JCC's budget, compensation, and invoices, this Court should affirm those orders on the merits because the Commonwealth's arguments fail.

Specifically, the Commonwealth argues (Br. 68-73) that the Budget Order, the May 7, 2020 Opinion and Order, and the Compensation Increase Order impermissibly modified the Consent Decree's provisions about the approval and payment of the JCC's expenses. Additionally, the Commonwealth argues (Br. 97-98) that the May 7, 2020 Opinion and Order and the CDDER Invoice Order have curtailed its contractual right under the SISA to determine the financial terms and conditions of the JCC's compensation. Not so.

1. The District Court's Modifications To The Consent Decree Were Appropriate Under The Circumstances

The Commonwealth argues (Br. 68-73) that (1) the Budget Order, (2) the May 7, 2020 Opinion and Order, and (3) the Compensation Increase Order impermissibly modified the Consent Decree's provisions regarding the approval and payment of the JCC's expenses.[19] However, a district court has wide-discretion to interpret and modify an injunction where necessary to achieve the injunction's original purposes. *Pearson*, 990 F.2d at 657. Given the factual circumstances, the court's entry of these three orders was appropriate and should be affirmed.

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[19] The Commonwealth also challenges the Alternative Fee Order, which it did not appeal, and the JCC's invoices for September, October, and November 2020, all of which post-dated its second amended appeal. Br. 70-72. To the extent the Commonwealth relies on proceedings following its notice of appeal, and from which it did not appeal, to bolster arguments about earlier orders, that is improper. See *United States* v. *Apple Inc.*, 787 F.3d 131, 140 (2d Cir. 2015).

a. In 2019, the parties and the JCC agreed to a budget for fiscal year 2019-2020 of $833,000. App. 533, 540; see pp. 11-13, *supra*. In its order approving the parties' proposed budget for fiscal year 2019-2020, the court alerted the parties that "it will pay close attention to the progress achieved by the Commonwealth in order to properly revisit all budget considerations for fiscal year 2020-2021, as warranted." App. 542. In 2020, the court *sua sponte* issued the Budget Order for Fiscal Year 2020-2021. App. 889. As in past years where the parties had not timely submitted a proposed budget, the Budget Order set the JCC's budget at "the same exact budget amount as" the prior year. App. 889. See also Doc. 1509 (stating that the prior year's budget shall remain in effect); Doc. 2032 (increasing the budget by a nominal $65,000 given the Commonwealth's slow progress in complying with the Consent Decree).

The Commonwealth argues (Br. 68-69) that the Budget Order was issued contrary to the SISA because it was issued without the parties' input. The United States does not dispute that, in issuing the Budget Order, the court did not follow the SISA's procedures. However, the modification of the Consent Decree to allow the court to extend the JCC's budget for an additional year at either the same level or a "nominal" increase has been in effect for at least six years. See Doc. 1509. The Commonwealth should not be allowed to raise an appeal for the first time at this late date. See *Moore* v. *Tangipahoa Par. Sch. Bd.*, 864 F.3d 401, 407 (5th Cir.

2017) (holding that a court did not abuse its discretion in modifying the selection-and-approval process for a certain position in a consent-decree case where the defendant was on notice that the court's past practice was consistent with the alleged modification); *Thompson* v. *Enomoto*, 915 F.2d 1383, 1390 (9th Cir. 1990) (affirming a modification to a consent decree that had been in effect for eight years under the law-of-the-case doctrine).

Moreover, even if the Budget Order were a new modification of the consent decree, its entry was not an abuse of discretion. A modification to a monitor's annual budget is warranted where an increase is necessary to the successful, expeditious completion of the consent decree. See *United States* v. *Westchester Cnty.*, No. 1:06-cv-2860, 2017 WL 728702, at *3-5 (S.D.N.Y. Feb. 23, 2017). In the proposed budget for fiscal year 2019-2020, the parties explained that they had worked together "to develop a budget that will equip the JCC to help advance the Commonwealth's compliance with existing orders in this case, and that is not objectionable to the parties." App. 534. The court set the budget for fiscal year 2020-2021 at the same amount that the parties and the JCC had jointly agreed to the prior year, even though the COVID-19 pandemic created significant additional work for the JCC. See App. 534; App. 805. As the parties before recognized, this amount was necessary to achieving compliance in a timely manner. App. 535.

In an analogous context, the Seventh Circuit rejected a similar challenge by a school board to budget orders implementing a remedial decree. See *People Who Care* v. *Rockford Bd. of Educ., Sch. Dist. No. 205*, 171 F.3d 1083, 1087 (7th Cir. 1999). The Seventh Circuit determined that it had jurisdiction to hear the appeals but that the board's challenges lacked merit. *Ibid.* The board objected to specific expenditure items in the budget orders but never proposed an alternative budget. *Ibid.* The Seventh Circuit concluded that "when it comes to the design of specific programs for achieving the objectives of the valid provisions [of the remedial decree], and to the funding for those programs, we have no practical alternative to deferring broadly to the judgment of the district court." *Ibid.* That was especially so where the school board never quantified in the district court or the court of appeals its preferred mode of compliance. *Id.* at 1088.

Here, the Commonwealth objects to the procedural process by which the Budget Order was issued but similarly fails to quantify what its preferred budget would be. It is hard to see how the Commonwealth will be irreparably harmed by a budget amount it previously stated was "not objectionable." App. 534. The Budget Order should be affirmed.

b. The Commonwealth also challenges (Br. 69) the court's May 7, 2020 Opinion and Order, which the court issued in response to the Commonwealth's objection to the April 2020 JCC invoices. See pp. 15-16, *supra*. Specifically, the

Commonwealth argues that by approving the JCC's "non-descriptive, non-itemized monthly invoices with a flat fee" and the "JCC staff and consultant invoices with vague entries," the court improperly modified the Consent Decree, which requires detailed monthly invoices. Br. 69.

Even if allowing the JCC to charge a flat fee is construed as a modification of the consent decree, it was not an abuse of discretion. As the district court explained, given that the JCC routinely worked more hours than he could bill under the Budget Order, it was "a more efficient practice" to allow him to bill a flat fee. App. 859. This is especially true given that both sides had previously criticized the JCC for billing more in a given month for his hourly services than would be allowed under the district court's flat-fee directive. See App. 552.

Additionally, the Commonwealth's general assertion (Br. 69) that the April invoices had "vague entries" does not demonstrate the district court abused its discretion in approving the bill. In *Moore*, the defendant similarly argued that the district court erred in relying on a court-appointed monitor's summary of his hours worked and descriptions of tasks performed because it was neither itemized nor did it include time entries. *Moore* v. *Tangipahoa Par. Sch. Bd.*, 843 F.3d 198, 202 (5th Cir. 2016). But the Fifth Circuit held that the monitor was not required to "extensively document his activities" or "provide specific documentation in order to receive a salary increase." *Ibid.* The defendant also objected that the district

court improperly credited the monitor with time spent working on tasks it claimed were outside the scope of the monitor's duties and responsibilities. *Ibid.* However, the Fifth Circuit explained that the monitor's responsibilities were broadly defined to allow him flexibility in determining how to carry out his duties. *Id.* at 203. Given the court's many years of oversight, the Fifth Circuit concluded that the district court was "well-versed with regard to the details and progress" of the efforts to comply with the consent decree and the role the monitor plays, and therefore did not abuse its discretion in taking into consideration the monitor's reported activities in calculating a new salary. *Ibid.* Cf. *Fox* v. *Vice*, 563 U.S. 826, 838 (2011) (recognizing that trial courts are entitled to substantial deference with respect to determinations of reasonable attorney's fees given their superior understanding of the litigation) (quotation marks and citations omitted). So too here. The district court did not abuse its discretion in approving the April 2020 invoices over the Commonwealth's objections.

c. Finally, the Commonwealth appeals from the Compensation Increase Order, in which the district court *sua sponte* increased the JCC's compensation to $215,000 annually because "[t]he work of the JCC has exponentially increased this past year." App. 1007. The United States does not dispute that this order modified the Consent Decree and prior orders, which had limited the JCC's compensation to the annual salary of a federal magistrate judge, or about $191,000. See App. 540.

However, as in *Westchester County*, a modification in the JCC's annual budget is not an abuse of discretion as the history of the case establishes that the JCC has been paid far less than commercial rates given the number of hours worked. See 2017 WL 728702, at *3-5. This Court likewise should affirm this order.

2. The District Court Did Not Curtail The Commonwealth's Contractual Rights To Challenge The JCC's Invoices

The Commonwealth further argues (Br. 97-99) that the May 7, 2020 Opinion and Order and the CDDER Invoice Order violated its rights to challenge the JCC's invoices. These challenges lack merit.

First, the Commonwealth argues that the May 7, 2020 Opinion and Order and the CDDER Invoice Order have curtailed its contractual right under the SISA to determine the financial terms and conditions of the JCC's compensation and complains that "public funds are being spent by the JCC without allowing the Commonwealth to audit the purpose, need, or propriety of such expenses." Br. 97-98. Because the Commonwealth's rights under the Consent Decree are not as broad as the Commonwealth suggests, this argument fails.

The SISA gives the JCC "the right to hire consultants he deems necessary to fulfill his obligations in this case," and requires the Commonwealth to "bear the costs of these consultants." App. 328-329. The JCC's annual budget encompasses the financial terms and conditions of the JCC's compensation and reimbursement for expenses, including the cost of consultants. App. 328-329. Consistent with the

SISA's protocol, the court authorized the JCC to retain the services of CDDER in August 2019, noting that "the inclusion of the present expert services was contemplated by the Court when it approved the original budget for fiscal year 2019-2020." See App. 555. Relatedly, nothing in the SISA gives the Commonwealth the right to determine the JCC's compensation. Rather, while the parties are to "endeavor to agree upon" the JCC's annual budget, the SISA grants the district court authority to decide budget-related disagreements. App. 329. The Consent Decree is clear: the Commonwealth gave the JCC the right to hire consultants he deems necessary, and the court the final authority to approve expenses.

Second, the Commonwealth argues (Br. 97-98) the May 7, 2020 Opinion and Order and CDDER Invoice Order effectively curtailed its contractual right to review and object to the JCC's monthly invoices. To be sure, the SISA provides the parties with three business days to file any comments on or objections to the JCC's monthly invoices. App. 329. But the SISA directs the court to review the statements and order the Clerk to make appropriate payments. App. 329. The court need not adopt the Commonwealth's objections.

Nor do the May 7, 2020 Opinion and Order or CDDER Invoice Order enjoin the Commonwealth from raising future objections to invoices. The Opinion and Order explained that the Commonwealth's latest objection was one in a long series

of actions by the Commonwealth repeatedly questioning the role and authority of the office of the JCC to monitor the Commonwealth's compliance with the Consent Decree. App. 802-804; see p. 15, *supra*. Indeed, the court cited 42 docket entries between January and May 7, 2020 alone addressing the JCC's function and work. App. 804. The court concluded that "[a]ny future attempt by the Commonwealth to re-litigate [these 42 docket entries] will be considered vexatious and sanctionable conduct." App. 804. In context, the court was cautioning the Commonwealth not to re-litigate the JCC's authority to monitor the Commonwealth; the court was not prohibiting the Commonwealth from raising nonfrivolous objections to future invoices. See App. 804. As to the CDDER Invoice Order, the court stated that it would not permit insinuations that the JCC or its experts are corrupt when such insinuations are clearly unfounded. App. 892. The court did not preclude the Commonwealth from raising an objection when it reasonably believes an expense is unjustified or excessive.

Indeed, after entry of these orders, the Commonwealth objected to the JCC's May, June, and July 2020 invoices. See App. 1110. The court did not sanction the Commonwealth for raising these objections but, rather, deemed the objection preserved and ongoing to avoid further boilerplate filings. App. 1110. Thus, the Commonwealth did not object to the JCC's August 2020 invoices, but did submit comments and objections, on other grounds, to the JCC's September invoices.

App. 1383-1384. Clearly, the Commonwealth does not believe it has been precluded from objecting to invoices going forward. Accordingly, this Court should affirm the budget, compensation, and invoice orders.

C. Even If This Court Finds It Has Jurisdiction Over The Other 21 Appealed Orders, This Court Should Affirm The Orders As An Appropriate Exercise Of The Court's Equitable Authority

If this Court nevertheless finds that it has jurisdiction over some or all the 21 appealed orders the district court entered to safeguard the health, safety, and well-being of DSPDI participants, it should affirm. The Commonwealth contends (Br. 77-108) that, through these 21 appealed orders, the district court: (1) improperly curtailed the Commonwealth's power to operate the DSPDI program; (2) allowed the JCC to "usurp unbridled power"; (3) curtailed the Commonwealth's contractual rights; and (4) denied the Commonwealth due process. But the challenged orders were a proper use of the court's broad equitable power to enforce the Consent Decree. The court did not abuse its discretion or impermissibly usurp control over the DSPDI program. Nor did it violate the Commonwealth's contractual or due process rights. Moreover, as to four orders in particular, the Commonwealth has failed to develop—and therefore abandoned—any argument about those orders. Accordingly, even if this Court exercises jurisdiction over anything more than the budget, compensation, and invoice orders, it should affirm those orders.

1. Because The Commonwealth Has Not Yet Fulfilled The Terms Of The Consent Decree, The District Court's Orders Relating To Participant Transfers And Institutionalization Are Appropriate

The Commonwealth argues (Br. 77-78) that the district court usurped the Commonwealth's powers—namely, the Secretary of Health's oversight of the DSPDI program under the Puerto Rico Constitution and Puerto Rico Statutes—by prohibiting DSPDI from transitioning or transferring participants to new homes, institutions, or out of the DSPDI program, without first obtaining court approval. In the Commonwealth's view, such orders have "the practical effect of divesting the DSPDI from the authority to operate the program." Br. 79. But because the Commonwealth is not yet in compliance with the Consent Decree, the court's continued involvement in DSPDI's programs is not only permitted but required. Moreover, the court's orders effectuating the Consent Decree are entitled to significant deference. Indeed, where the Commonwealth has yet to comply with most of the parties' agreed-upon benchmarks, it would be premature to return to it control of the DSPDI program. See *Horne* v. *Flores*, 557 U.S. 433, 451 (2009).

a. In particular, the Commonwealth challenges (Br. 78-81) three orders (the Re-Institutionalization Order, the FMG Order, and the Amended FMG Order) regarding transferring or institutionalizing participants that it asserts have the effect of improperly supplanting DSPDI's professional judgment with the JCC's views. Courts repeatedly have held, however, that in determining whether an individual

can appropriately receive services in the community, the determinations of the state's treatment professionals are not controlling. See *United States* v. *Mississippi*, 400 F. Supp. 3d 546, 551 (S.D. Miss. 2019) (collecting cases) (finding that, if establishing a case required reliance on the defendant-jurisdiction's own treatment professionals, jurisdictions could circumscribe the requirements of the Americans with Disabilities Act); *Day* v. *District of Columbia*, 894 F. Supp. 2d 1, 23-24 (D.D.C. 2012) (recognizing that plaintiffs need not prove the public entity's treatment professionals have determined eligibility for community services). Moreover, the three orders are all aimed at effectuating the Consent Decree's overarching goals.

First, the Commonwealth takes issue with the Re-Institutionalization Order. Br. 78; see pp. 27-28, *supra*. The Commonwealth argues that, in determining that the Commonwealth's decision to institutionalize a participant violated *Olmstead* v. *L.C.*, 527 U.S. 581 (1999), the court "simply substituted its uninformed criteria for that of the Commonwealth's medical professionals * * * without any hearing [or] affording the Commonwealth due process." Br. 78-79. But that mischaracterizes the Re-Institutionalization Order.

The court entered the Re-Institutionalization Order because it was troubled by the Commonwealth's recent transfer of multiple participants from less restrictive settings to institutions. App. 898. See also App. 901 (highlighting that

between January 2019 and July 2020, there had been 11 institutionalizations). Despite the Consent Decree's central aim to transition participants "from institutions to integrated community settings, not the other way around," the court found that "there still exists a very concerning deficiency in the number of available homes for participants." App. 898-899. Therefore, the court ordered the Commonwealth to do three things: (1) implement a plan for community homes that addressed the need of all participants, including by opening new homes as warranted; (2) file with the court an updated list of all institutionalized participants; and (3) not institutionalize any more participants without prior notice to the United States and the JCC. App. 899-900.

Each of these actions is consistent with the existing Consent Decree and longstanding orders of the case. The SISA empowers the JCC to oversee, review, and report on the Commonwealth's implementation of much-needed measures to comply with court orders. App. 330-331. The CBSP requires the Commonwealth to provide community-based placement and treatment to participants in the most integrated setting whenever appropriate. App. 336-337. The JCAP likewise requires the Commonwealth to expand community capacity to meet the needs of participants, including those needing significant medical care. App. 391. And a subsequent order enforcing the Consent Decree requires the JCC be informed in advance of all matters that affect participants, including participant transfers to

new providers. Doc. 1577. The Re-Institutionalization Order does not have "the practical effect of divesting" DSPDI's "authority to operate the program" (Br. 79); it simply requires that determinations are subject to the court's oversight and review—*i.e.*, precisely what the Commonwealth bargained for when entering the agreements that comprise the Consent Decree.

Second, the Commonwealth challenges the FMG Order, asserting that "the district court substituted the professional criteria of the DSPDI's experts on an emergency matter, for that of the JCC." Br. 79-80; see p. 29, *supra*. But, as already explained, this issue is moot. See p. 50, *supra*.

Third, the Commonwealth argues (Br. 80-81) that the court improperly arrogated power to itself through the Amended FMG Order, which, in its view, chastised the Commonwealth for failing to provide prior notice to the JCC. But the court's November 2014 Order required the Commonwealth to inform the JCC "in advance (rather than after the fact, or by way of [his] own learning) of all matters that affect participants in this case," including participant transfers to new residences and issues with providers. Doc. 1577. The order further directed that all emergency matters be "immediately communicated to the JCC." Doc. 1577. Additionally, many FMG-based participants were transferred to Hacienda Don Luis [redacted] App. 1063; Conf. App. 163. Thus, the Commonwealth also was required to alert the JCC under the

Emergency Order, which directs the DSPDI Director to "remain in constant communication with the JCC to discuss and resolve all matters which arise." App. 612. Accordingly, the court did not abuse its discretion in issuing the Re-Institutionalization Order, the now moot FMG Order, or the Amended FMG Order.

b. In challenging the three orders discussed immediately above, the Commonwealth primarily relies on this Court's decision in *Langton* v. *Johnston*, 928 F.2d 1206 (1st Cir. 1991), to argue that the court arrogated powers to itself. See Br. 78. But *Langton* does not support the Commonwealth's argument. There, the plaintiffs appealed from a district court's determination not to hold the defendants in contempt for their failure to achieve perfect compliance with a consent decree. *Langton*, 928 F.2d. at 1220. In deciding not to issue a contempt order, the court found that defendants had made "notable progress" and were in "substantial compliance with the overall mandate of the consent decrees." *Id.* at 1222.

This Court explained that a consent decree in the public law context "provides for a complex, on-going regime of performance," which "prolongs and deepens, rather than terminates the court's involvement with the dispute." *Langton*, 928 F.2d at 1221 (internal quotations omitted). The Court further recognized that "federal district courts have been allowed—indeed, at times constitutionally required—to intrude in the affairs of state and local governments"

and that a district court's "prolonged institutional involvement with the litigation * * * is worthy of considerable deference." *Id.* at 1221-1222. Consistent with *Langton*, and considering the still unmet needs of DSPDI participants, this Court should reject the Commonwealth's argument and uphold the three aforementioned orders as appropriately effectuating the Consent Decree.

2. The JCC's Role Is Consistent With The Consent Decree And Subsequent Court Orders

The Commonwealth next challenges (Br. 82-88) the scope of the JCC's authority. The Commonwealth first asserts that the appealed orders generally are infirm because the JCC's authority "is not delineated, is unconfined, and is a constantly moving target," in contravention of the Consent Decree, which ostensibly limited the JCC's responsibilities to monitoring functions. Br. 83. The Commonwealth then challenges seven different orders (and other, non-appealed orders) as surreptitiously allowing the JCC to operate the DSPDI program, granting the JCC authority over matters that fall outside the Consent Decree, and giving the JCC veto power over DSPDI's decisions (Br. 87-97). These include the Order Approving JCC Protocol, Isolation Plan Order, Order Adopting Isolation Plan, Order Denying Reconsideration, COVID Notification Order, HIPAA Order, and Participant 156 Order. However, for the reasons discussed below, neither the courts actions generally nor the seven appealed orders specifically challenged here allow the JCC to exceed the scope of the Consent Decree or intrude improperly in

the administration of DSPDI's program, and therefore the district court did not abuse its discretion.

a. Contrary to the Commonwealth's general challenge to the JCC's authority, none of the appealed orders allow the JCC to exceed the scope of the Consent Decree or intrude improperly in the administration of DSPDI's program. Throughout this litigation, the court has always viewed the JCC as "a deputized federal officer" who acts as "the eyes and ears of th[e] court." See Doc. 1508, at 2. Indeed, the court described this as one of the "bedrock pronouncements and directives" of this case. Doc. 2690.

The legal framework under which the office of the JCC operates is quite broad, calling for the JCC to oversee, review, and report on the Commonwealth's implementation of needed measures to comply with court orders in this case. App. 330-331. To be sure, that legal framework has not changed since the district court adopted the SISA more than 20 years ago. See Br. 83-84. But the parties and the court have on multiple occasions set forth their expectation that the JCC would take on additional duties and increase his monitoring activity *within* the existing legal framework. See App. 471-474, 485, 492-494, 523-524. The parties jointly suggested, for example, that the JCC assume "a more active, hands-on role in helping fix the problems of the [DSPDI]," including by "designing remedial solutions, providing technical assistance, and offering a guiding hand to the

Commonwealth as it develops and implements measures to address identified problem areas, especially those of a long-standing duration." App. 471-472 (July 16, 2018 Joint Submission on the Court's Compliance Order).

Moreover, the JCC's duties and responsibilities do not exceed what other courts have found to be reasonable. The Commonwealth cites (Br. 84-88) three cases for the proposition that courts have generally disapproved of broad delegations of power to monitors in public consent decree cases, particularly when the monitored party has raised objections. But those cases are easily distinguishable. Those defendants (unlike the Commonwealth) did not consent to the appointment of a monitor, and two of the cases involved oversight of state prison systems—where courts must give the State additional deference considering the unique safety and security concerns.

More specifically, the D.C. Circuit held in *Cobell* v. *Norton* that a district court did not have "inherent power to appoint a monitor * * * over a party's substantial objection." 334 F.3d 1128, 1141 (D.C. Cir. 2003). But the court emphasized that its holding was "a narrow one, tethered to the peculiar facts" of the case, including the fact that the monitor's role was not limited to overseeing compliance with a consent decree because there was no consent decree to enforce and that the defendant had raised a "nonfrivolous reason" to object to appointment

of the monitor. *Id.* at 1141-1142.[20] Similarly, in *Ruiz* v. *Estelle*, the Fifth Circuit affirmed a special master's appointment to observe and report on the defendants' compliance but, given the Supreme Court's "policy of minimum intrusion into the affairs of state prison administration," determined that the order of reference was too sweeping in that it permitted the master to submit to the district court reports based on his own observations and investigations in the absence of a formal hearing before the master. 679 F.2d 1115, 1162-1163 (5th Cir.), amended in part, vacated in part, 688 F.2d 266 (5th Cir. 1982). Finally, the Ninth Circuit held in *Toussaint* v. *McCarthy* that, given the unique safety and security concerns in prisons, the district court abused its discretion by allowing a monitor to review *de novo* the defendant's inmate segregation decisions because precedent required such decisions to be affirmed so long as "some evidence" in the record supported the challenged decision. 801 F.2d 1080, 1105-1106 (9th Cir. 1986).

In contrast to these cases, the Commonwealth consented to the appointment of the JCC and his duties and responsibilities. The Commonwealth argues that the district court has "essentially assumed, itself or through the JCC, the control of the operational and administrative determinations of the [Puerto Rico Department of

[20] The D.C. Circuit also dismissed the defendant's claim that the district court had committed judicial overreach. *Cobell*, 334 F.3d at 1137. While the orders "were full of sound and fury," they did not have the practical effect of an injunction because they required defendant to do very little. *Id.* at 1138.

Health] and the DSPDI regarding the measures that are necessary to protect the DSPDI population." Br. 89. But, as further explained below, neither the appealed orders generally nor the seven orders specifically cited allow the JCC to exceed the scope of the Consent Decree or intrude improperly in the administration of DSPDI's program.

b. First, nothing about the orders establishing COVID-19 protocols warrants this Court's intervention. The Commonwealth complains that through the Emergency Order, the court impermissibly interjected itself into the DSPDI's administrative functions and operational matters. Br. 89. The Commonwealth did not appeal from the Emergency Order however, and, therefore, this Court lacks jurisdiction to review it. To the extent that the Order Approving JCC Protocol, Isolation Plan Order, Order Adopting Isolation Plan, and Order Denying Reconsideration are all grounded in the Emergency Order, the Court should decline to review them as well. See *United States* v. *Apple Inc.*, 787 F.3d 131, 140 (2d Cir. 2015) (declining to review disputes that were grounded in orders not included in the notice of appeal).

Next, the Commonwealth appeals from the Order Approving JCC Protocol. In its view, the court "ignored the Commonwealth's concerns and disagreements with certain items in the JCC's proposed COVID-19 protocol." Br. 89 (emphasis omitted). But to the contrary, the court "carefully reviewed" the Commonwealth's

proposed modifications and found that they did not "alter significantly" the JCC's protocol. App. 776. This is hardly surprising. The JCC's proposal was based on the Commonwealth's earlier draft, but included recommendations from the JCC's expert consultants and insight from the participants, their relatives, and healthcare and service providers who would be directly affected by the protocol. App. 773.

The Commonwealth also appeals from a series of orders (the Isolation Plan Order, Order Adopting Isolation Plan, and Order Denying Reconsideration) relating to its isolation plan for participants infected with COVID-19. Br. 90-91. The court did not abuse its discretion in issuing these three orders. The Commonwealth asserts that adopting a JCC plan over its objection is "tantamount to surreptitiously allowing the JCC to run and operate the [DSPDI] program." Br. 90. But the JCC's expertise and familiarity with the case weigh in favor respecting his recommendations. Indeed, district courts routinely adopt the recommendations and reports of a court monitor, even over the objections of a party to a consent decree. See, *e.g.*, *Thompson*, 915 F.2d at 1386 (noting the district court's process of adopting the reports of the court monitor in whole or modified after hearing objections by each party); *Toussaint* v. *Rowland*, 711 F. Supp. 536, 543 (N.D. Cal. 1989), aff'd in part, vacated in part, rev'd in part sub nom. *Toussaint* v. *McCarthy*, 926 F.2d 800 (9th Cir. 1990) (adopting for the most part the monitor's report); *Juan F. By & Through Lynch* v. *Weicker*, 37 F.3d 874, 877 (2d Cir. 1994) (noting

that the district court "adopted the monitor's findings of fact and, with some modifications, adopted his recommendations as a court order"). The court did not abuse its discretion in issuing any of these orders.

c. Second, the Commonwealth complains about several orders because they were issued *sua sponte* or based on the JCC's *ex parte* recommendations and because they purportedly violate the Commonwealth's autonomy in addressing the COVID-19 pandemic. Br. 92-94. However, except for the COVID Notification Order, the Commonwealth has not appealed from any of the orders about which it now complains,[21] and this Court therefore lacks jurisdiction to review them. See *Apple Inc.*, 787 F.3d at 138. As to the COVID Notification Order, it requires that DSPDI inform the JCC twice a day of the status of participants with COVID-19 as well as any new cases. App. 1097-1098. But the Emergency Order already required DSPDI's Director to "remain in constant communication with the JCC to discuss and resolve all matters which arise" and to "immediately notif[y]" the JCC

[21] See Order Re: CTS Visits to Community Homes (App. 1237); Order Re: Designation of Medical Experts by DSPDI for Meeting with JCC's Medical Experts (App. 1279); October 28, 2020 Order (App. 1512); October 28, 2020 Order (App. 1515); Order Re: Provider Contracts (App. 1521); November 12, 2020 Order (App. 1708); Order Re: JCC's Informative Motion on Covid-19 Testing (App. 1746); November 30, 2020 Order (App. 1758); December 2, 2020 Order (App. 1793); December 2, 2020 Order (Doc. 3339); December 4, 2020 Order (Doc. 3345); December 11, 2020 Order (App. 1865); December 17, 2020 Order (App. 1934); December 18, 2020 Amended Order (Conf. App. 542); December 19, 2020 Order (App. 1951); Order Re: Motions (App. 1961).

of suspected coronavirus cases at any home. App. 612. The COVID Notification Order, therefore, imposes no new requirements; rather, it clarifies requirements already imposed by an order the Commonwealth chose not to appeal, and it should be affirmed under the law of the case. *Ellis* v. *United States*, 313 F.3d 636, 646 (1st Cir. 2002); *Thompson*, 915 F.2d at 1390.

Moreover, even if this Court were to reach the merits of the COVID Notification Order, it is well settled that a district court has wide discretion to interpret and modify a decree when there are changed legal or factual circumstances, regardless of the parties' silence. *Pearson*, 990 F.2d at 657. As this Court has recognized, this is especially so where a consent decree requires judicial supervision of congregate settings. *Id.* at 658. Given the urgent nature of treating participants infected with coronavirus, especially those residing in groups homes, the COVID Notification Order was not an abuse of discretion.

The Commonwealth also challenges (Br. 95-96) the HIPAA Order, which the court issued *sua sponte*, claiming that it prohibits the Commonwealth from complying with the Health Insurance Portability and Accessibility Act of 1996, 42 U.S.C. 1320d, *et seq.* (HIPAA). Congress enacted HIPAA to "ensure the integrity and confidentiality of [patients'] information" and to protect against "unauthorized uses or disclosures of the information." 42 U.S.C. 1320d-2(d)(2)(A) & (B)(ii). However, HIPAA regulations authorize covered entities to disclose protected

health information to a health oversight agency. 45 C.F.R. 164.512(d) ("A covered entity may disclose protected health information to a health oversight agency" for "activities necessary for appropriate oversight of * * * [e]ntities subject to civil rights laws for which health information is necessary for determining compliance."). A "health oversight agency" includes "an agency or authority of the United States, a State, a territory, * * * or a person or entity acting under a grant of authority from or contract with such a public agency." 45 C.F.R. 164.501. Here, the SISA grants the JCC the authority to oversee the DSPDI program. App. 330-331. Thus, instead of limiting the JCC's access to participants' medical records, HIPAA expressly authorizes the Commonwealth to disclose such information to the JCC. Accordingly, there is no basis to disturb the district court's order.

d. Finally, the Commonwealth challenges (Br. 96) the Participant 156 Order, which it alleges blocked the transfer of a participant despite an emergency requiring his immediate transfer. The Commonwealth asserts that, through this order, the court "vested the JCC with veto power over the DSPDI's decisions, including the clinical decisions made by treating professionals responsible for the health and wellbeing of the individual participants." Br. 96. But again, the Commonwealth misconstrues the district court's order.

The Participant 156 Order [redacted] Conf. App. 338. [redacted] Conf. App. 338. Nearly two weeks after the Participant 156 Order was entered, the Commonwealth filed an urgent motion requesting that the court permit the participant's immediate transfer [redacted]. Conf. App. 340-341. In a non-appealed order, the court promptly granted the motion, effectively superseding the Participant 156 Order. Conf. App. 361. Nothing in either order suggests that the court has vested the JCC with veto power over DSPDI's decisions. Accordingly, the Commonwealth's challenge to the scope of the JCC's authority fails as none of the appealed orders allow the JCC to exceed the scope of the Consent Decree or intrude improperly in the administration of DSPDI's program.

3. The District Court Did Not Curtail The Commonwealth's Contractual Rights To Challenge The Actions Of The JCC

The Commonwealth also asserts that the Filing Procedure Order "obliterate[ed] the Commonwealth's contractual right to demand compliance with the Consent Decree by the JCC." Br. 99. The Commonwealth asserts that this

order "is effectively an injunction" because it prevents it from responding to any of the JCC's motions. Br. 99-100. Not so.

To reduce unnecessary filings, the Filing Procedure Order simply requires the parties to confer before filing any new motion.[22] App. 1108 (noting that there were 377 docket entries between January 1, 2020 and August 17, 2020). Such an order is appropriate under the court's "inherent power to control its own docket to ensure that cases proceed before it in a timely and orderly fashion." *United States* v. *Correia*, 531 F.2d 1095, 1098 (1st Cir. 1976). See also *Landis* v. *North Am. Co.*, 299 U.S. 248, 253-254 (1936). Indeed, two jurisdictions within the First Circuit require parties in all cases to confer before filing motions as a matter of course. See D.N.H. Civ. L.R. 7.1(c); L.R., D. Mass. 7.1(a)(2). In sum, simply because the district court decides some matters against the Commonwealth and, moreover, has administrative procedures governing the litigation does not mean the Commonwealth's contractual rights under the Consent Decree are curtailed.

[22] The Commonwealth notes (Br. 57) that in October 2020, the court refused to consider a response it filed to an Informative Motion filed by the JCC because the Commonwealth did not comply with this order. See App. 1502. Because the Commonwealth filed a response, not a motion, the court's order seemingly is erroneous. But the Commonwealth does not appeal from this order, nor could it, and it is not before this Court.

4. The District Court Has Not Curtailed The Commonwealth's Due Process Rights

The Commonwealth argues that the court has violated its due process rights by (a) issuing seven of the appealed orders either *sua sponte* or based on the JCC's informative motions without giving the Commonwealth an opportunity to respond and (b) by allowing the JCC to exclude the Commonwealth's counsel from certain communications and meetings. Those arguments lack merit.

Due process requires notice and an opportunity to be heard. *Mullane* v. *Central Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950); *In re Williams*, 398 F.3d 116, 119 (1st Cir. 2005) (defining procedural due process). Here, the Commonwealth has had both. It is hard to imagine that the nearly 750 docket entries filed in 2020 alone, including objections, responses, motions for reconsideration, and briefing on the issues raised on appeal have denied the Commonwealth any amount of "due process."

a. The Commonwealth argues (Br. 102) that the court has violated its due process rights by issuing orders based on *ex parte* communications with the JCC without giving the Commonwealth notice of the basis for such orders. It further argues (Br. 102) that the court issued orders in response to the JCC's informative

motions without giving the Commonwealth a reasonable opportunity to respond.[23] Specifically, the Commonwealth appeals from seven orders that it asserts (Br. 104) were issued either *sua sponte* or in response to an informative motion.[24] None of these orders have denied the Commonwealth due process.

First, the Commonwealth challenges the Isolation Plan Order and the Order Adopting Isolation Plan because the court entered these two orders based on informative motions the JCC filed and without an opportunity for the Commonwealth to address the issue before the orders took effect. Br. 104. The record demonstrates, however, that the Commonwealth had ample notice and opportunity to weigh in on the isolation issue.

The JCC first raised the need for a COVID-19 isolation plan in a letter to DSPDI. Doc. 2771, at 1-2. Only after DSPDI failed to respond, and the JCC learned that two participants had suspected cases of COVID-19, did the JCC file an

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[23] To illustrate this point, the Commonwealth cites (Br. 102 n.33) a series of informative motions and responsive orders. This Court lacks jurisdiction to review these orders as none of them were appealed. See *Apple Inc.*, 787 F.3d at 138. Moreover, the orders either require the Commonwealth to provide information or otherwise comply with prior court orders or they provide the Commonwealth with an opportunity to respond to the JCC's informative motion. None of the cited orders violate due process.

[24] To the extent the Commonwealth relies on more recent interactions with the court (Br. 104-105), this Court's review is limited to the record available to the district court at the time it entered the appealed orders. See *Apple Inc.*, 787 F.3d at 140.

emergency notice with the court. Doc. 2771. The Isolation Plan Order [redacted] Conf. App. 75. Thus, the order specifically provided an opportunity for the Commonwealth to address the isolation issue before the court acted. Indeed, the Commonwealth requested, and was granted, an extension of time to provide its isolation plan to the court. See Doc. 2778; Doc. 2780.

After the Commonwealth submitted its isolation plan, the court directed the JCC and the United States to review the plan, and further directed the JCC to arrange a conference with the parties to reach a consensus. App. 779. [redacted] See Conf. App. 97-98. The court then entered the Order Adopting Isolation Plan, approving of the JCC's revised plan but stressing that the Isolation Plan was a "working document, subject to modifications." App. 782. As such, the Commonwealth had both notice and an opportunity to be heard on this issue.

Second, the Commonwealth challenges the district court's *sua sponte* issuance of the HIPAA Order. This order, however, does not impose new requirements on the Commonwealth. App. 787. Rather, it reiterates the importance of the JCC's ongoing and ready access to "to all persons, residences, facilities, programs, services, documents, and materials the JCC deems necessary

or appropriate to consult or utilize in performing the duties and functions of the JCC." See, *e.g.*, App. 403. Regardless of whether it was issued *sua sponte*, the HIPAA Order is consistent with the law of the case and should be affirmed. See *Ellis*, 313 F.3d at 646; *Thompson*, 915 F.2d at 1390.

Moreover, the Commonwealth understands this access is necessary for the JCC to fulfill his responsibility to oversee, review, and report on the Commonwealth's implementation of much-needed measures to comply with the Consent Decree and other court orders. See App. 330-331. In fact, the Commonwealth previously worked cooperatively with the JCC to facilitate this access, including by training JCC staff on how to navigate the Commonwealth's electronic database to access information about DSPDI services and participant outcomes and encouraging the JCC to take advantage of its system. See App. 475-476. This Court should affirm the HIPAA Order.

Third, the Commonwealth faults (Br. 104) the district court for issuing the Reopening Order *sua sponte*. But, in the context here, that is not a basis to invalidate the order. One week before issuing the Reopening Order, the court entered an order recognizing that lockdown restrictions would likely soon be eased, and essential services would need to resume under the JCAP. Doc. 2878. The court therefore established a protocol for the JCC and the parties to work together in anticipation of the eventual easing of lockdown restrictions. Doc. 2878.

Specifically, the court directed the JCC to provide the parties a report and recommendation detailing next steps to address the needs of participants, providers, and family members. Doc. 2878. The parties then would have time to review and provide comments to the JCC, who would submit a final report and recommendation to the court for approval. Doc. 2878.

But before the JCC could draft his report and recommendation, the Governor issued an Executive Order that soon would lift Puerto Rico's lockdown. See App. 896. The Reopening Order clarified that the Governor's Executive Order would not by itself negate the Emergency Order in this case. App. 896. Nevertheless, the court stated that it would favor modifying and vacating parts of its Emergency Order. App. 896-897. To that end, the court directed DSPDI to provide the JCC and the United States with information regarding reopening plans, and instructed the JCC to evaluate DSPDI's plans in the manner set forth in its prior order. App. 896. As with the Isolation Orders, the Reopening Order specifically calls for the Commonwealth to have an opportunity to be heard before the issuance of an order governing reopening plans. Thus, the court did not deny the Commonwealth due process and there is no basis for this Court to overturn the Reopening Order.

Fourth, the Commonwealth argues (Br. 45-46, 104) that the Participant 156 Order violated due process because it was based on information the court received from the JCC and issued without first hearing the Commonwealth's position. To

be sure, the court issued the Participant 156 Order in response to information it received from the JCC. Conf. App. 338. But it is not a final order. [redacted] Conf. App. 338. [redacted]. Conf. App. 338. Such an approach is consistent with the court's past directive that the Commonwealth inform the JCC of all participant transfers to new provider homes "in advance (rather than after the fact, or by way of [the JCC's] own learning)." Doc. 1577. Thus, the Participant 156 Order specifically provides the Commonwealth with both notice and an opportunity to be heard; it does not violate due process.

Fifth, the Commonwealth argues (Br. 104) that the Re-Institutionalization Order violated its due process because it was entered *sua sponte*. As discussed already, see pp. 67-69, *supra*, the Re-Institutionalization Order simply requires the Commonwealth to comply with the Consent Decree and longstanding orders of the case. See App. 330-331, 336-337, 391; Doc. 1577. The Re-Institutionalization Order did not violate the Commonwealth's due process rights where it "did not require defendants to perform any new obligations; [the order] merely made more precise and realistic the required performance of obligations that defendants had

already undertaken." See *Juan F.*, 37 F.3d at 880 (rejecting defendants' argument that they were denied due process where the orders complied with procedures in a consent decree). Moreover, even if the Re-Institutionalization Order modified the Consent Decree, a court may modify an injunction in favor of a plaintiff where necessary to achieve the original purposes of an injunction that have not been fully reached. *Sierra Club*, 73 F.3d at 579.

Finally, the Commonwealth again invokes the Filing Procedure Order as an improper *sua sponte* order. Br. 104. But as discussed previously, see pp. 80-81, *supra*, a district court has the inherent power to issue such an order *sua sponte* to aid in docket management and in the interest of judicial efficiency. See *Dietz* v. *Bouldin*, 136 S. Ct. 1885, 1892 (2016). The Commonwealth cannot seriously contend that the order, which resembles many courts' local rules, violated its due process rights. Because the district court's actions do not implicate constitutional concerns, the Commonwealth's reliance on these orders fails.

b. The Commonwealth also argues (Br. 105-106) that the court curtailed its due process rights by allowing the JCC to exclude the Commonwealth's counsel from certain communications and meetings. However, the Commonwealth has not appealed from any such examples included in its brief. See Br. 105 n.34. Thus, the Commonwealth cannot seek relief from these orders.

In any event, given the "managerial" role played by a monitor in the remedial phase of institutional reform litigation, there is a practical reason for such exclusion. See *People Who Care*, 171 F.3d at 1088. As the Seventh Circuit aptly recognized, prohibiting a monitor from having direct communications with interested parties "would slow him down and thus further protract this litigation." *Ibid.*

Moreover, there is a long history of allowing the JCC to conduct his monitoring functions without the presence of counsel. See, *e.g.*, Doc. 1521 (ordering that JCC may conduct site visits with a JCC consultant "with or without counsel").[25] The Commonwealth did not object to any of these prior orders, and its attempt to change course now should be denied. See *People Who Care*, 171 F.3d at 1088 (where the defendant had not objected to a series of orders authorizing *ex parte* communications, denying a defendant's objection that two later orders were improper because the special master had engaged in *ex parte* communications with the plaintiff's lawyers); *Thompson*, 915 F.2d at 1390 (holding that it would be

[25] See also Doc. 2512 (ordering that, per "the norm," the JCC "can make requests for information directly to the DSPDI without having to go through counsel"); Doc. 2690 (reiterating that the JCC "has the authority to conduct both announced and unannounced visits, with or without prior notice and with or without counsel being present" and that the JCC "can make requests for information directly to the DSPDI without having to go through counsel").

"nonsensical" to permit defendants to appeal a modification of a consent decree which had "been in effect for years").

It is axiomatic that "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). Given the emergency nature of the COVID-19 pandemic and the need for expeditious action, none of the appealed orders have denied the Commonwealth the due process to which it is entitled.

5. The Commonwealth Has Waived Issues Not Properly Addressed And Developed In Its Brief

The Commonwealth's Second Amended Notice of Appeal lists 25 orders from which it appeals. Doc. 3141. However, the Commonwealth makes no more than passing references to four of these orders. Accordingly, the Commonwealth has waived any arguments pertaining to, and is not entitled to any relief regarding, those four orders. See *Ryan* v. *Royal Ins. Co. of Am.*, 916 F.2d 731, 734 (1st Cir. 1990) (Issues argued on appeal "in a perfunctory manner, unaccompanied by some developed argumentation, are deemed to have been abandoned.").

First, while the Commonwealth purportedly appeals from an "Order Re: Objections to JCC May 2020 Invoices of June 3, 2020 (Docket No. 2885)," see Doc. 3141 (Second Amended Notice of Appeal), the Commonwealth makes no reference whatsoever to the order in its opening brief. Additionally, the Burns Order (App. 785), the Alternative Isolation Order (App. 1063), and the Order Re:

Institutionalization Order at Docket No. 2900 (App. 1099) are only briefly referenced in the Commonwealth's statement of facts (Br. 42, 44-45, 48); the brief contains no argument about why these orders should be overturned.[26] Therefore, this Court should affirm the district court's judgment as to these four orders.

* * *

In sum, whether this Court exercises its jurisdiction only as to the four orders for which the United States agrees there is appellate jurisdiction, or some or all of the other 21 orders challenged on appeal, it should affirm. The district court properly used its broad equitable power to enforce the Consent Decree in issuing the appealed orders. It did not abuse its discretion or impermissibly usurp control over the DSPDI program. Nor did it violate the Commonwealth's contractual or due process rights.

III

MANDAMUS RELIEF IS NOT APPROPRIATE

Recognizing that this Court may not have jurisdiction to hear its appeal under 28 U.S.C. 1292(a)(1), the Commonwealth suggests (Br. 4-5) that this Court

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[26] The Commonwealth's argument contains one reference to the Order Denying the Commonwealth's Motion for Reconsideration of the Burns Order. See Br. 82 (citing App. 792). However, the Commonwealth did not appeal this order and its brief simply uses it as an example of the court referring to the JCC as an "arm of the court." Br. 82. The Commonwealth does not address the substance of the order or make any argument as to the Burns Order.

could alternatively consider its appeal under its supervisory mandamus jurisdiction. See 28 U.S.C. 1651(a). Yet, the Commonwealth cannot meet the stringent requirements for the extraordinary remedy of mandamus where it has not established that the district court clearly abused its discretion or that it would be irreparably harmed absent this Court's issuance of a writ.

The writ of mandamus is "an extraordinary remedy, to be reserved for extraordinary situations." *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U.S. 271, 289 (1988). As this Court has recognized, the writ of mandamus is not readily utilized "as a means of correcting a district court's unappealable orders." *Ramirez* v. *Rivera-Dueno*, 861 F.2d 328, 334 (1st Cir. 1988). To limit the use of mandamus, courts have developed stringent requirements for its issuance: "A petitioner seeking mandamus must show [1] that there is a clear entitlement to the relief requested, and [2] that irreparable harm will likely occur if the writ is withheld." *In re Cargill, Inc.*, 66 F.3d 1256, 1260 (1st Cir. 1995). Additionally, the petitioner must show that the balance of the equities favor granting this extraordinary relief. *Ibid.*

The Commonwealth has not met its burden to show it is clearly entitled to the requested relief. The Commonwealth makes sweeping and conclusory statements that it "meets the requirements for *mandamus* relief" because "the district court has clearly exceeded the scope of its authority under the Consent

Decree." Br. 5. But, where a matter is committed to judicial discretion, it cannot be "clear and indisputable" that a petitioner is entitled to a particular result. *Allied Chem. Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (citation omitted). And a district court has wide discretion to interpret and modify an injunction where necessary to achieve the original purposes of an injunction that have not been fully reached. *Pearson*, 990 F.2d at 657; *Sierra Club*, 73 F.3d at 579.

The district court is not limited to ordering parties to execute only those actions that are explicitly outlined in a consent decree so long as the orders do not violate the decree's clear language and are in line with the decree's overarching goals. See *Officers for Justice* v. *Civil Serv. Comm'n of the City & Cnty. of S.F.*, 979 F.2d 721, 727 (9th Cir. 1992); *Juan F.*, 37 F.3d at 878-879. Here, for the reasons explained in Argument II, pp. 53-91, *supra*, the appealed orders comport with the Consent Decree's overarching goals of ensuring DSPDI participants' health, safety, and well-being and are grounded in the district court's broad equitable powers to enforce its own decrees. See *Frew* v. *Hawkins*, 540 U.S. 431, 440 (2004) ("Federal courts are not reduced to approving consent decrees and hoping for compliance. Once entered, a consent decree may be enforced."). Because the court did not exceed its authority under the Consent Decree, there is no basis for issuing mandamus relief.

Nor can the Commonwealth establish some special risk of irreparable harm or a balance of equities that weighs in its favor. To establish irreparable harm, the petitioner must prove that is has "no other adequate means to attain the relief" it desires. *Allied Chem. Corp.*, 449 U.S. at 35. But the Commonwealth does have other recourse—*e.g.*, it can file a motion under Rule 60(b)(5). See pp. 52-53, *supra*. Finally, and especially in light of the Commonwealth's failed showing, the balance of the equities weighs in favor of the hundreds of DSPDI participants who have been waiting for more than two decades for the Commonwealth to fully comply with the Consent Decree. Accordingly, there is no basis to grant the extraordinary writ of mandamus.

CONCLUSION

This appeal should be dismissed for lack of jurisdiction as to 21 of the 25 challenged orders. As to the four budget, compensation, and invoice orders that this Court can review, it should affirm. Alternatively, if this Court determines that it has jurisdiction to review additional orders, it also should affirm those orders. The arguments in favor of affirmance also show why this Court should deny mandamus relief, especially given the lack of irreparable harm to the

Commonwealth and the balance of equities in favor of the participants in DSPDI's care.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing REDACTED BRIEF FOR THE UNITED STATES AS APPELLEE:

1. complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B), and this Court's order dated March 1, 2021, because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 21,986 words; and

2. complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2019, in 14-point Times New Roman font.

s/ Yael Bortnick
YAEL BORTNICK
Attorney

Date: March 16, 2021

CERTIFICATE OF SERVICE

I certify that on March 16, 2021, I electronically filed the foregoing REDACTED BRIEF FOR THE UNITED STATES AS APPELLEE with the United States Court of Appeals for the First Circuit via this Court's CM/ECF system, which will send notice to all counsel of record by electronic mail. All participants in this case are registered CM/ECF users.

s/ Yael Bortnick
YAEL BORTNICK
Attorney