FEDERAL CONSENT DECREE FAIRNESS ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

OF THE

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HOUSE OF REPRESENTATIVES

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FEDERAL CONSENT DECREE FAIRNESS ACT

TUESDAY, JUNE 21, 2005

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, THE INTERNET,
AND INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 5:40 p.m., in Room 2141, Rayburn House Office Building, the Honorable Lamar Smith (Chair of the Subcommittee) presiding.

Mr. SMITH. The Subcommittee on the Courts, the Internet, and Intellectual Property will come to order. As I mentioned a while ago, we are waiting for one witness, but we understand that he will be here momentarily and we will proceed.

A couple of announcements at the outset. One, thank you for the interest. This is late in the day and I appreciate the interest of those who are in the audience today as well as the Members who are here, too. We have finished with votes for the day, and unfortunately, that means a lot of Members are no longer here and have found other things to do. Nevertheless, it's a very, very important subject.

I'm going to recognize myself for an opening statement and then the Ranking Member and perhaps the Ranking Member of the full Judiciary Committee for their opening statements, as well.

I also want to recognize Ryan Visco, who is sitting to my right. She is an attorney with the Subcommittee and this is the first hearing that she has been in charge of, and so we are going to guarantee her a very smooth and informative and successful hearing at this point.

There's another reason for us to begin now and that is that Mr. Conyers, who is from Detroit, and I, who am from San Antonio, are eager to get home to watch a certain basketball game tonight. [Laughter.]

Let me recognize myself. For 40 years, Federal courts have issued a significant number of consent decrees that require State and local governments to comply with certain legal requirements affecting social, environmental, health, and educational issues. These consent decrees, often known as public law litigation, or institutional reform decrees, place the trial courts in the business of public administration.

State-run services, such as school busing, Medicaid, mental health facilities, prisons, and special education, all have been the subject of Federal lawsuits. It is not unusual for these Federal consent decrees to span 20 to 30 years and tie up significant portions

of State and local budgets. Due to the contractual nature of a consent decree, future Administrations are also bound by the original terms.

Under many consent decrees, traditional roles of State or local government officials are shifted to the judge and the lawyers involved in negotiating the consent decree. The end result is that State and local governments lose their ability to function democratically. Bound by Federal consent decrees, elected officials are less able to balance political and budgetary interests when legislating, nor can these officials react and adjust to unforseen constituent or budgetary needs as they arise.

In *Frew v. Hawkins,* a case that dealt with the Texas medical system, the Supreme Court commented extensively on the effects of unnecessarily rigid consent decrees. The Court cautioned judges that consent decrees may undermine democracy and flexibility in Government and admonished judges to be more flexible when State officials seek to modify the terms of existing consent decrees.

In light of *Frew,* the hearing today represents a timely forum to discuss the burdens placed on State and local officials who must comply with detailed consent decrees. While the Supreme Court reiterated that judges are not free to ignore right, they also urged judges to defer to State and local officials when they act as agents for the Government. The *Frew* court also warned judges against tying State and local officials to the contractual obligations developed by predecessor groups of plaintiffs and defendants.

H.R. 1229, the Federal Consent Decree Fairness Act of 2005, introduced by Congressman Blunt and Congressman Cooper, allows governments to revisit consent decrees in Federal court. The bill allows a State or local official to seek a motion to modify or vacate an already existing consent decree. This bill, in the spirit of the *Frew* case, enables State and local governments to seek redress in Federal court when existing consent decrees become too burdensome or obsolete.

As Justice Kennedy stated in *Frew,* the basic obligations of Federal law may remain the same, but the precise manner of their discharge may not. If the State establishes reason to modify the decree, the court should make the necessary changes.

Congressmen Blunt and Cooper's bill is a positive step in giving democratic responsibility to those who are the most responsive to the needs and wishes of the people, their elected representatives.

The authors of the book Democracy by Decree, both former public interest lawyers, write that, "Democracy by decree is a good thing gone wrong. It goes beyond the proper business of courts. It often renders government less capable of responding to the legitimate needs of the public and it makes politicians less accountable to the public. Democracy by decree works fine in pointing out what went wrong, but it works badly in putting things right."

Consent decrees can serve a valuable purpose by allowing those whose rights have been violated their day in Federal court. But the current rigid system does not preserve the flexibility necessary for elected representatives to discharge their responsibilities.

I want to thank the Majority Whip again for his work in this area, and before recognizing the Ranking Member for his opening statement, I just want to say that I feel certain that had the Rank-

ing Member, Mr. Berman, read the book Democracy by Decree, he would have given a far different opening statement today. But since he hasn't read it, he is at a distinct disadvantage, but nevertheless, we welcome his opening statement and the gentleman from CAlifornia is recognized.

Mr. BERMAN. This is just the hearing, not the markup, so there is time and I do appreciate you giving me the book—lending me the book, I should say, and I am going to take a look at it. But we do have an author of the book here, I believe, and so we can get the Reader's Digest summary right here.

The Chairman asked, when I told him I had some concerns about this bill, whether I was—that he hoped I'd be open minded. For a guy who's made a decision, I'm still pretty open minded. But I thought what I'd do is I'd shift the burden, or leave the burden with the people pushing the bill to deal with some of my concerns in the context of testimony. The Chairman has done a fine job of summarizing the bill and laying the framework for it and I will just, as quickly as I can, mention some concerns I have with the bill. Even though there are some consent decrees, including ones that govern bodies in my own area, there is one in particular that I have real concern about the wisdom of and the thinking behind it.

So, first of all, this issue of requiring the sort of review by motion of the defendants, the State or local governments or local entities, every 4 years, and in reality, much sooner allowing them to make motions, because most consent decrees aren't entered into the first day that the governor or the mayor takes office. They are entered somewhere in the midst of his term and frequently near the end of his or her term. So allowing that kind of review of a consent decree that the parties agreed to and shifting the burden so that the defendant State or city gets to go in, but the other party has to reprove the case, it seems to me will have one clear impact.

I can't think of why any plaintiff, whether it's the Federal Government or a private party, will ever settle a case. Why won't they want to litigate everything to a final judgment, which isn't, obviously, subject to that kind of automatic review and requirement that you reprove your case. So I think it eliminates settlements.

If this was just a bill that applied only retroactively and not prospectively, well, then that's a different story, but obviously, that would be an absurd way to approach it and the bill doesn't approach it that way and its effect on existing cases and prospective cases is to eliminate, to me, any motivation of the plaintiff to settle.

There are other questions about what constitutes a change of government. When you have a board of supervisors, is it two, is it three members have to change before you can be eligible? But those are narrower kinds of questions.

Then the requirement that the judge has to rule within 90 days or the consent decree is automatically dissolved, I think is a very unrealistic time frame. The judge might be in the middle of a long-term trial. There is going to have to be a retrial on the consent decree because the plaintiff has to reestablish the burden of proof. It isn't like this is something just submitted on papers. And the notion that the automaticity, that the consent decree is over and all

obligations are dissolved the moment 90 days passes from the time the city, county, or State makes the motion seems very unrealistic.

There's a carve-out here for school desegregation cases. In other words, consent decrees on that issue are not affected by this bill. There's also a carve-out for title VI and title VII of the Civil Rights Act in the House bill. But the carve-outs are only based on race, so that employment discrimination cases under title VII or the requirement not to discriminate based on Federal grants that are part of title VI does not apply to gender discrimination, it doesn't apply to age discrimination, and it doesn't apply to discrimination based on national origin, because as I understand it, for instance, discrimination against Latinos, which is a premise for at least several consent decrees that I know, are not exempted from this even though discrimination based on race is.

And then the definition of consent decree is much broader than the traditional definition—a court order based in whole or in part upon the consent or acquiesence of the parties. A plaintiff sues a State or local government, gets a final judgment. The judge says, "I rule with the plaintiffs, but I would like both sides of you to present a prospective order based on my rulings and the parameters of my decision." Both sides present proposed orders and he takes a little big from each. Is the fact that part of what the plaintiff submitted was accepted make this now a consent decree under the definition of this bill, so that even cases that are fully litigated and come to a final judgment can be reversed in as quickly as one or two or 4 years?

The compensation cap of, I think, $70 an hour is about one-fifth or one-eighth of what masters normally get, and my guess is you're not going to get truly skilled and people who are in demand to give up the time to supervise a consent decree with that kind of a limitation.

And finally, the *Frew* case. The Chairman said this is a bill that's consistent with the recent Supreme Court decision in *Frew*. I look at it totally differently. A Supreme Court nine-to-zero—nine-to-zero, that means Thomas, Scalia, Rehnquist—upheld the concept of consent decrees and set out some standards which give States and cities a basis in the context of asking consent decrees to be revisited, that even though they have to go forward to vacate or modify can point to that court decision and the construction in that court decision and the guidelines of that court decision to get more flexibility when conditions have changed where the decree is already—all the obligations have been met. So it seems to me that decision should be given a chance to work and let's see what happens in some of these cases where the Court has now issued some new standards for the lower courts to look at in deciding the case.

So other than that, I'm open to this, but if I could use one last example, and that is, ultimately, I look at a case like that New York City special education case, consent decree, huge amount of money that New York is required to spend on special education. Why? Federal law imposed an obligation that every kid is entitled, as I understand it, to be treated and we have failed to appropriate the funds to local school districts to meet the obligation we imposed on them through law.

The issue here isn't the consent decree, it's either give them the money or change the nature of the Federal law. Don't avoid our own accountability for the mistakes we have made that have put Tennessee into a bind or somebody else by creating a situation where consent decrees are thrown out all the time rather than look at the underlying issue and whether or not that meets a public interest and thereby avoiding our own accountability.

Thank you, Mr. Chairman, for your indulgence.

Mr. SMITH. Thank you, Mr. Berman.

The gentleman from Michigan, the Ranking Member of the full Judiciary Committee, is recognized for an opening statement.

Mr. CONYERS. Thank you, Chairman Smith. I join you in welcoming our distinguished panel, particularly our old friend Nathaniel Jones, now a former member of the Federal judiciary, and, of course, the Majority Whip of the Congress and our other two witnesses.

This is a surprise to me that we would now have hearings on a measure that would be a blow to victims of police brutality, the disabled, and victims of State-sponsored pollution. It is unseemly to me that States would promise to comply with Federal civil rights and environmental laws and then come to Congress in order to get out of such obligations.

First, by requiring virtually every Federal consent decree with State and local governments to be relitigated every 4 years would set back decades of progress in civil rights enforcement. It would also gut the Americans With Disabilities Act and permit any locality to violate the Clean Water and Air Acts. I'm anxious to hear why supporters of this legislation believe that police departments that abuse citizens or State agencies that fail to have wheelchair ramps at front entrances should receive a "get out of jail free" card in 4 years.

In my opinion, the best way for a State to get out of a consent decree is for it to comply with the law. Federal consent decrees aren't permanent. The parties and courts are free to revise the terms of the decree as circumstances change and as the defendants improve their conduct or behavior. Creating a set timetable for review, as this bill does, would give greater bargaining power to the lawbreakers, in my view.

And I'm also concerned with the unequal treatment of citizens who believe that the Justice Department actually brings too few, not too many, civil rights and environmental lawsuits. When it does bring cases, the Department uses consent decrees to ensure compliance with basic civil rights protections. Weakening these decrees would make it virtually impossible for the Department to ensure compliance with the State and invite States to break the law.

I am particularly interested in a case mentioned about the Wayne County Environmental Protection Agency case, which have asked the district court to terminate an 11-year-old consent decree which required the county to upgrade sewer systems and untreated sewage that was being dumped into drains and into the Detroit River. It involved a sewer tunnel costing $295 million plus $99 million more from communities and a $20 million bond from the county. The parties told the court that the objectives of the decree had

been met. If they had to come up every 4 years while this was going on, havoc could be a result.

And so for all those reasons plus the, I think, very fine reasoning employed by my colleague, Mr. Berman from California, lead me to approach this matter with some anxiety, since I think many on the courts themselves are reluctant to embrace a proposal this drastic.

I thank you, Chairman Smith, for allowing me to make these introductory remarks.

Mr. SMITH. Thank you, Mr. Conyers.

Without objection, all Members may submit their opening statements as a matter of the record.

Before I introduce the witnesses, I would like for them to stand and be sworn in, if they would, please. Would you please raise your right hand.

Do you solemnly swear that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. BLUNT. I do.

Judge JONES. I do.

Mr. GOETZ. I do.

Mr. SCHOENBROD. I do.

Mr. SMITH. Please be seated.

Our first witness is House Majority Whip Roy Blunt, the sponsor of the Federal Consent Decree Fairness Act of 2005. Representative Blunt has represented the Seventh Congressional District of Missouri since 1997. He received an undergraduate degree from Southwest Baptist University, where he later served as President, and a Master's degree from Southwest Missouri State University.

Let me say also that the Majority Whip has a half-a-dozen conflicts this afternoon and we're just grateful he can be here for a few minutes to testify.

Our next witness is Nathaniel R. Jones, Senior Counsel to the law firm of Blank Rome. Previously, he served as a Federal judge for the Sixth Circuit Court of Appeals. Judge Jones—you keep that title for life, I think—received his undergraduate and law degrees from Youngstown State University.

Our next witness is David Goetz, Commissioner of Finance and Administration for the State of Tennessee. Mr. Goetz received his Bachelor's degree from the University of Virginia.

Our final witness is David Schoenbrod, the co-author of Democracy by Decree: What Happens When Courts Run Government. He is a professor at New York Law School, where he teaches constitutional and environmental law. Professor Schoenbrod received Bachelor's and law degrees from Yale University. He was also a Marshall Scholar at Oxford University.

Welcome to you all. We have written statements from all the witnesses which, without objection, will be made a part of the record, and Mr. Blunt, we will begin with you.

TESTIMONY OF THE HONORABLE ROY BLUNT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MISSOURI

Mr. BLUNT. Mr. Chairman, thank you for letting me be here today and thank all of you for understanding my schedule, which, like yours, often seems to be out of my control, but I am glad I

could be here for a few minutes really to represent all of the sponsors of this legislation.

As you will know before the remarks here are over, I think this legislation was driven largely by a real challenge that the State of Tennessee faced. Mr. Goetz is here to talk about that. And because of that, not only is Lamar Alexander, Senator Alexander, the principal sponsor in the other body, but the entire Tennessee delegation has joined Mr. Cooper and I as cosponsors and we have a number of bipartisan cosponsors on this legislation.

Let me quickly summarize my testimony by making a couple of points. As we look at this whole problem of consent decrees and consent decrees that are not easily ended and just as easily become an excuse for a public official not to deal with the responsibility of a challenging problem, I really think that this legislation is more about inactivist public officials than it is judges that are too active.

More often than not, the consent decree becomes the excuse for a public official to say, you know, I would like to do something about this specific problem, but it is really under the control of the courts now and I can't do anything about it, or on an equal number of occasions with a different problem, saying I would really like to do something about that problem, but you know, we are so hampered by all of the money or all of the restrictions that the court is requiring in some other area that I just can't do anything.

Our system is designed to be run by publicly elected officials. It runs best when those officials take the responsibility that they have been elected to take. And so this really does put the responsibility on the elected official, and as has been pointed out by all of you, really, on the newly-elected official more often than not to come in and look at a problem and not be able just to say, that's a problem that I don't have a reasonable way to deal with so I'm not going to deal with it, but to have to look at a problem and decide to accept responsibility, go to the courts and ask that that responsibility be returned to them.

There are a number of examples, again, some of which you'll hear in detail, many of which are in the book that's already been mentioned. Let me just mention two or three examples that I think show some of the extent of this problem.

In the State of Utah in 1994, the governor was persuaded to enter into a consent decree only after being assured that this would be a consent decree that would have an outside time limit of 4 years, a 4-year deadline. The governor's view at that point that entered into this decree was that at the end of that 4 years, they were back to where they started. The public officials had responsibility again. If people still felt that something needed to be done here, they could start the process over again.

But as it turned out, in 1998, the judge who was in control of this case ruled that Utah hadn't done all that the judge thought they needed to do and so the consent decree that was a 4-year decree was extended, at least apparently at this point, indefinitely, and by 2003, the State of Utah had already spent $52 million to improve the foster care services under the decree plus about $4 million in attorneys' fees to deal with this case.

In Connecticut, there was a decree entered into in January 1991. Again, this dealt with the Department of Children and Families.

Because of budget shortfalls, in 2003, Connecticut was forced to lay off employees throughout their entire State governmental system. Of all the employees that were laid off, only the employees that were laid off at the Department of Children and Families had to be restored to their jobs, and those cuts then had to be taken disproportionately in other places in State government.

In a case that may be the case that my friend, Mr. Berman, was talking about, Los Angeles County Metropolitan Transportation Authority, they entered into a decree in 1996 regarding the bus system. Today, 47 percent of their entire budget goes to the bus system. The remaining—and this is only 9 years later—the remaining 53 percent is divided between 19 percent for street and freeway improvements—now get this right—47 percent for the bus system, 19 percent for street and freeway improvements, 16 percent for Metrorail, 1 percent for Metrolink, 12 percent on debt reduction, and essentially that is the budget.

In August 1974, New York City, in a case that again was mentioned in the book and could be mentioned later, entered into a consent decree requiring bilingual education. In 2001, the board attempted to overhaul bilingual education, but was constrained in the steps it could take by the terms of the consent decree. July 14, 2004, the New York Times published an article in which Latino parents were quoted complaining about the fact that their children were forced into bilingual education classes even when they would prefer that the children have English at school. Now, these are not children who were struggling with English at school, but because they were Latino, they were required to take Spanish and English at school, and that is just one of many examples.

Just to make a couple of comments really on the two or three points that Mr. Berman made, my sense of this is that while you do normally have elected officials' terms that last for 4 years—of course, some elected officials' terms last for longer than that—this is for newly-elected public officials. My belief would be that in a very recent consent decree, having been an elected official for some time, that the more recent the consent decree, the less likely that the new public official is to jump in and say, "I want to handle that problem, as well."

I really think the problem in the past has not been public officials clamoring to accept responsibility, but public officials, in some cases now for more than three decades, throwing up their hands and saying, "Well, you know, that is really something that even though technically that should be part of my job, there's no way I can deal with that." I think that you'd see the period of time normally being more than 4 years rather than less than, and if you're in the middle of a process that is easily demonstrated has not been completed and would not be completed by the public officials who should be responsible for it, the judges clearly don't have to do anything to move away from the consent decree.

I'm grateful that the Committee has moved forward with this hearing. I know that everyone approaches this issue in good faith and I look forward to seeing this bill progress as I'm sure all of my cosponsors, including, Mr. Goetz, the entire Tennessee delegation, Republicans and Democrats alike, will look forward to seeing this

bill move forward in the Committee and I thank you for letting me come by today, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Blunt. We appreciate your being here.

[The prepared statement of Mr. Blunt follows:]

PREPARED STATEMENT OF THE HONORABLE ROY BLUNT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MISSOURI

I'd like to thank the committee for inviting me to testify about this important legislation.

The other witnesses are well qualified to talk about some of the legal and technical aspects of this bill. Allow me to address the committee from my perspective as an elected official.

The Consent Decree Fairness Act is *not* about reining in an activist judiciary or about ending consent decrees. This legislation is about *increasing the responsibility and accountability of elected officials.*

Consent decrees are too often used by elected officials as an excuse not to solve problems that they have been elected to solve.

The principal goal of this legislation is to return the responsibility for public policy-making and the governing of public institutions to elected officials.

When a consent decree lasts for multiple decades, as many of them do, many elected officials never have the opportunity to take responsibility for important public services.

A politician can say, 'I would really like to do something about the transportation system in Los Angeles County, but I can't because of that consent decree.'

Or: 'I'd like to spend more on education in this state, but I really can't because our budget is determined by these consent decrees on other issues.' And their successors in that office can say the same thing.

Consent decrees, in my view, have become a hiding place for public officials, relieving them of responsibility in the area that the consent decree specifically affects.

So again, let me repeat. The Consent Decree Fairness Act is more about inactive public officials than it is about overly active judges.

This bill would create an obligation on the part of newly elected officials. They will have to look at every consent decree that their predecessors were part of and defend why the decree should continue, or go to the courts and explain why the consent decree no longer applies. If the plaintiff can explain to the judge why it's important that that consent decree continue, then the decree stays in place.

Let me give you a couple of examples from Missouri, where there are several major consent decrees governing how public policy is implemented:

The federal courts in 1983 began to oversee the foster care system in Jackson County, Missouri. As a result, in order to comply with the now 20-year-old consent decree, *a disproportionate share of all the foster funding for the state goes to Jackson County.* In addition, our state's Department of Mental Health operates now under five consent decrees, two of which date to the *1970s.*

Our goal here is to return public-policy responsibility to elected officials as soon as it is defensible. That's really how our system is supposed to work. Voters don't have any real control over what a federal judge does. They have much more control in our system over what public officials do. So when we increase the responsibility of elected officials for public services, we increase voter control over the government. We increase public officials' accountability to the voters.

There may be times when judicial oversight is needed and public officials can not or will not take responsibility. But the burden of proof that these changes are necessary must be with those who want to deviate from existing public policy.

Finally, let me reiterate that this bill does not automatically end any consent decree. It puts the responsibility on elected officials to decide whether to accept continued government by decree or to seek a modification or elimination of the decree. Then a judge has to decide the issue.

The only consent decrees that could be dissolved are those in which the plaintiff is incapable of proving a continued need for court supervision. If there is no longer a need for court supervision, wouldn't it be undemocratic NOT to return the policy decisions to elected officials and, in turn, the voters?

Again, I would like to thank the committee, and especially Chairman Smith, for inviting me to testify and for taking the time to consider this important matter.

Mr. SMITH. Judge Jones?

TESTIMONY OF THE HONORABLE NATHANIEL R. JONES, BLANK ROME LLP

Judge JONES. Thank you, Mr. Chairman. My name is Nathaniel R. Jones and I appreciate this opportunity to discuss my views on this legislation.

While the sponsors of the legislation are no doubt sincere in their belief that it will address deficiencies in consent decrees, I believe the bill will, in fact, take a wrecking ball to efforts to redress the rights of citizens and to a judicial process that has been invaluable to the administration of justice, and I would like to just set forth some of my concerns.

First of all, there is no problem that needs fixing. The unanimous 2004 Supreme Court decision in *Frew v. Hawkins* reaffirmed what courts are already doing, namely they are listening with deference to local officials and any other parties who petition for a consideration of the fairness of the particular consent decree.

One-size-fits-all legislation like this proposed bill will get it all wrong. This, in my judgment, is a case of an answer in search of a problem. The fundamental goal of the required fairness hearing that is required under the Federal Rules of Civil Procedure, which must precede the approval of a settlement and the entering of a consent decree, is to ascertain facts with respect to the fairness of the agreement, and that goes to the duration and other aspects of fairness. It makes no sense to deprive courts of the option, and I emphasize option, of using consent decrees which in many areas are an enormously valuable tool for courts, parties, and for helping Congress provide for the efficient implementation of laws that it itself has passed.

This bill will significantly raise the costs and reduce the effectiveness of all law implementation affecting State and local governments, thereby depriving citizens nationwide of benefit conferred by Federal laws protecting such things as the environment, access to health care, guarantees against discrimination based on age, gender, and disabilities, to name just a few, as well as the many important instances of racial discrimination.

Also, while the claim is that this bill will simply fix deficiencies in the process of renewing and modifying their terms, in practice, it will end, not simply mend, the use of consent decrees by Federal courts in all matters affecting State and local governments. No attorney representing a plaintiff against a State or local government would advise his or her client to enter into a consent decree that would have virtually no lasting effect or value.

Long-term consent decrees are sometimes necessary to carry out the complex changes contemplated by laws that Congress has enacted in areas covered by the bill. The changes are often necessary to rebuild institutions that are shown to be depriving citizens of fundamental rights.

This legislation ignores the valuable lessons taught to this nation following the civil disturbances of the '60's, which were documented by the Kerner Commission in its 1968 report. That report pointed out that festering problems in areas of health and environment, housing, education, law enforcement, all resulting from a default by government at all levels, exact a tremendous price. Consent decrees prove to be an effective tool for redressing the resulting grievances.

The *Frew* decision really reinforces what courts have been doing in instances in which consent decrees have been challenged. During my 22 years as a Federal Court of Appeals Judge, I have sat on over 25 such cases which considered challenges to consent decrees. In addition to the Wayne County case that Congressman Conyers just referred to, there are cases in Ohio that dealt with the issue of injustice and unfairness that resulted in consent decrees and they were carefully supervised by the judicial bodies that had that responsibility. The consent decree, when circumstances warrant, is an effective means of dealing with serious social and economic and health problems.

Tampering with the power of courts to oversee consent decrees, as this legislation would do, with its shifting of the burden of proof onto the shoulders of the aggrieved and onto the victims, stands the whole traditional notion of the responsibility of remedy on its head.

One of the concerns that I have listed is the impact of the bill on the sensible functioning of the courts and the administration of justice. My concern here may not be surprising, given that I have spent more than 20 years as a Federal appellate judge. During that time, I have participated and I have observed colleagues who carefully and methodically and with great conscientiousness scrutinize claims of discrimination and attempts to resolve them short of full circuit litigation by using the consent decree process.

By providing the opportunity, and indeed an invitation to governors and officials of local government to relitigate matters that were previously regarded as settled by consent decrees, this bill would lead to many new proceedings which would come inevitably 4 years after a new decree and might come as soon as one or two if new officials were elected to replace the signatories of the previous decree. Indeed, I suspect that in any jurisdiction caught in a financial bind, the temptation would be there to reduce costs by reducing the obligations under a consent decree.

But reopened proceedings would be the least of the burdens placed on the courts. No one I have discussed this matter with believes that plaintiffs' lawyers in the great majority of cases would be willing to enter into consent decrees that can be revisited every 3 years with the burden left to the plaintiffs to defend the decree. Most will feel that allegiance to their clients' interests will require them to go to trial. This will mean not only a burden on the courts, but financial burdens on the parties.

The major costs of class action litigation, including attorneys' fees, in most cases, State and local governments, if they lose, will wind up paying the plaintiffs' lawyers' fees plus the fees of the very firms, mostly large firms, that the government retains to defend them in these actions. For Members of Congress who have been distressed by rising legal costs, this should be a matter of grave concern.

It should be added that the workload will further limit access to a court system that has already been forced to cut its services drastically. I can say with some authority that the Federal courts are now facing tremendous workloads that must be addressed by reduced staffs. Just a few weeks ago, representatives of the Federal judiciary testified before a House Appropriations Subcommittee

that the workload of the courts has increased by 18 percent between 2001 and 2005, while the funding for that period of time was decreased.

Moreover, in 2004, the judiciary lost more than 6 percent of its workforce due to funding constraints. Even though the workload is expected to increase even further as a result of the recently enacted Class Action Fairness Act, the judiciary will be operating approximately at only its 2001 staffing levels if it even receives the 2006 staff funding it has requested.

Before I was appointed to the bench, I was General Counsel for the NAACP, where I often represented children in court in civil rights cases. For many years, civil rights cases were fought to the bitter end, but about three decades ago, in the wake of the Kerner Commission recommendations, sensible public officials and private advocates decided to work these matters out through consensus and through consent decrees. As a result, we have had some noteworthy consent decrees that have broadly—greatly broadened opportunities for children.

Mr. SMITH. Judge Jones, I notice that you are about halfway through your written statement. Is there a way for you to summarize the rest of it?

Judge JONES. Yes. Thank you, Mr. Chairman, and I will submit, as you indicated, the statement as prepared.

But I would like to note that what strikes me is that this legislation is an attempt at circumventing the traditional standards for obtaining reform or modification of a consent decree. There is presently under rule 23 a means by which persons who have questions about a consent decree can challenge it. They can challenge it. They can seek reform, modification. And if that doesn't work, they can appeal. And I can say with complete authority that I have sat on appeals in which we have reversed the decisions of lower courts with regard to consent decrees.

There are, in every jurisdiction, in every circuit, you will find courts who have very meticulously scrutinized the way in which challenges were registered to consent decrees and these decrees have been monitored, and where they appeared to be not adhering to the rigorous standards set forth under the rules, they have been properly adjusted.

So it's my judgment that this is a case of using a cannon to swat a gnat. The problems that are raised by the persons who challenge the consent decrees are problems that can be addressed individually in case-specific manners. They do not need Congress to impose this type of broad-gauge legislation, which will do violence to the very terms and the various process that we have used in this country to resolve some serious problems that impact upon society.

Thank you very much, Mr. Chairman and Members of the Committee.

Mr. SMITH. Thank you, Judge Jones.

[The prepared statement of Judge Jones follows:]

PREPARED STATEMENT OF THE HONORABLE NATHANIEL R. JONES

My name is Nathaniel R. Jones and I appreciate the opportunity extended to me by members of this Subcommittee to offer my views on H.R. 1229, described as the Federal Consent Decree Fairness Act.

While the sponsors of H.R. 1229 no doubt sincerely believe that it will address deficiencies in consent decrees, I believe the bill will take a wrecking ball to efforts to redress the rights of citizens and to a judicial process that has been invaluable to the administration of justice. Here, in summary, are my major concerns:

1. There is no problem that needs fixing—the unanimous 2004 Supreme Court decision in *Frew v. Hawkins,* which directed district courts to listen with deference to local and state officials' recommendations for terminating or modifying decrees, but commanded them to enforce these decrees where the case for change is not made, got it right. One-size-fits-all legislation like H.R. 1229 gets it wrong. This is a case of an answer searching for a problem.
2. The fundamental goal of the required fairness hearing, which must precede the approval of a settlement and the entering of a consent decree, is to ascertain facts with respect to the fairness of the agreement.
3. It makes no sense to deprive courts of the option of using consent decrees, which in many areas are an enormously valuable tool for courts, parties, and for helping Congress provide for efficient implementation of laws it passes.
4. This bill will significantly raise the costs and reduce the effectiveness of all law implementation affecting state and local governments—thereby depriving citizens nationwide of benefits conferred by federal laws protecting the environment, access to health care, guarantees against discrimination based on age, gender, and disabilities, to name a few, as well as many important instances of race discrimination.
5. While the claim is that the bill will simply fix some deficiencies in the process of renewing and modifying their terms, in practice it will end, not simply mend, the use of consent decrees by federal courts in all matters affecting state and local governments. No attorney representing a plaintiff in litigation against a state or local government will advise his client to enter into a consent decree that will have virtually no lasting effect or value.
6. Long-term consent decrees are sometimes necessary to carry out the complex changes contemplated by laws Congress has enacted in areas covered by the bill. The changes are often necessary to rebuild institutions that are depriving citizens of fundamental rights.
7. H.R. 1229 ignores the valuable lessons taught the nation following the civil disturbances of the Sixties which were documented by the Kerner Commission in its 1968 Report. That report pointed out that festering problems in areas of health, the environment, housing, education and law enforcement resulting from a default by government at all levels, exact a tremendous price. Consent decrees proved to be an effective tool for redressing the resulting grievances.
8. The *Frew* decision reinforces what courts have been doing in instances in which consent decrees have been challenged. During my 22 years as a federal appellate judge, I sat on over 25 such cases which considered challenges to consent decrees. In addition to the Wayne County, Michigan example I cite in my testimony, I refer you to the case of *Waste Management of Ohio, Inc. vs. City of Dayton* in which the Sixth Circuit panel on which I sat reversed a District Court. The takeaway from that case is that there are standards already in place for modifying a consent decree when circumstances so warrant. Another significant case that demonstrates the need for flexibility by courts in dealing with consent decrees is *State of Ohio v. U.S. Department of Energy* pending since 1985 in the Southern District of Ohio. It involves a cleanup of the notorious Fernald nuclear waste site.
9. Tampering with the power of courts to oversee consent decrees, as this legislation would do, with its shifting of the burden of proof onto the shoulders of the aggrieved, stands the whole traditional notion of the responsibility for remedy on its head.

IMPACT ON COURTS AND THE ADMINISTRATION OF JUSTICE

One of the concerns I have listed is the impact of the bill on the sensible functioning of courts and the administration of justice. My concern here may not be surprising, given the fact that I spent more than 20 years on the federal Bench having been nominated by President Carter to a seat on the Court of Appeals for the 6th Circuit and confirmed by the Senate in 1979 and having served until 1995 when I took senior status and 2002 when I retired. It is not clear to me that enactment of H.R. 1229 will place new burdens on the courts without yielding any productive results for the parties.

By providing the opportunity, indeed an invitation, to governors and officials of local government to relitigate matters that were previously regarded as settled by consent decrees, the bill would lead to many new proceedings which would come inevitably four years after a new decree and might come as soon as one year or two, if new officials were elected to replace the signatories of the previous decree. Indeed I suspect that in any jurisdiction caught in a financial bind, the temptation would be there to reduce costs by reducing obligations under a consent decree.

But reopened proceedings would be the least of the burdens placed on the courts. No one I have discussed this matter with believes that plaintiffs' lawyers in the great majority of cases will be willing to enter into consent decrees that can be revisited every few years with the burden left to plaintiffs to defend the decree. Most will feel that allegiance to their clients' interests will require them to go to trial. This will mean not only a burden on the courts but financial burdens on the parties—the major costs of class action litigation including attorneys' fees. In most cases, state and local governments, if they lose will wind up paying the plaintiffs' lawyers fees plus the fees of the large firms that government defendants retain to represent them in court. For members of Congress who have been distressed by rising legal costs, this is a matter worth pondering long and hard.

It should be added that the workload will further limit access to a court system that has already been forced to cut its services drastically. Just a few weeks ago, representatives of the federal judiciary testified before a House Appropriations subcommittee that the workload of the courts had increased by 18% between FY 2001 and FY 2005, while funded staffing levels over the same period of time decreased by 1%. Moreover, in FY 2004, the judiciary lost more than 6% of its workforce due to funding constraints, resulting in fewer clerks' office hours in many courthouses for the public to file papers and seek information. Even though the workload is expected to increase even further as a result of the recently enacted Class Action Fairness Act, the judiciary will be operating approximately at only its FY 2001 staffing levels if it receives the FY 2006 staff funding it has requested.

Under such circumstances, defendants who have had their day in court, and who voluntarily settled their case, ought not be permitted to routinely tie up the courts at the expense of other litigants seeking justice. To permit such repetitive reexamination of consent decrees—especially when the violations persist or the remedies agreed upon have not been carried out—is a far more costly version of a playground "do-over" that fails to serve the public interest in the efficient administration of justice and protection of legal and constitutional rights.

IMPACT ON SUBSTANTIVE RIGHTS

Before I was appointed to the bench I served as General Counsel of the NAACP where I often represented children in court in civil rights cases. For many years, civil rights cases were fought to the bitter end in federal court rooms, but about three decades ago partially in response to the recommendations of the Kerner Commission, sensible public officials and private advocates decided that often it would be better to settle than fight. As a result we have had some noteworthy consent decrees that have greatly broadened opportunities for children.

One prime example is a suit filed late in 1980 by the NAACP and a class of plaintiffs against the state of Missouri and 22 suburban school districts. Just before trials was scheduled to begin in 1983 the parties entered into a settlement agreement calling for desegregation of the suburban districts, support for magnet schools in St. Louis and a program of educational improvements in St. Louis. The agreement was approved as a consent decree by the District Court and with minor modifications by the Court of Appeals. Certiorari was denied. In 1996, the State which paid the bulk of the expenses under the decree, filed a motion to terminate the decree on grounds that it had achieved "unitary status" (i.e., satisfied all its desegregation obligations. After a trial, a conciliator was appointed—Dr. William Danforth, then Chancellor of Washington University of St. Louis. The parties negotiated a revised consent decree that was contingent on replacing the court-ordered funds with funds approved by the state legislature. The legislature, working on bipartisan basis, approved the funding in 1999 and a new consent decree was negotiated the following year. Under the new decree plaintiffs may go back to court if there is a violation. That decree is still in effect.

The result has been the largest voluntary interdistrict desegregation program in the nation. Approximately 10,000 African American students from St. Louis attend schools each year in the suburban districts and that has been the case (with some variation in the numbers since 1984). About 3 in every 4 students are eligible for free and reduced price lunch. Yet they graduate high school and go on to college at about 2 to 3 times the rate of students in inner city schools. Additional opportuni-

ties have been made available in the city's magnets and as a result of the school improvement program.

None of this would have been possible without giving the consent decree process time to work. Ultimately the process brought public approval and financial and other types of support from public officials that required time to develop.

One major illustration of the importance of consent decrees in these areas is:

A case reported on Friday, June 3, in which the Department of Justice and the Environmental Protection Agency, along with Wayne County and nearby jurisdiction have asked the district court to terminate and 11 year old consent decree. The decree required the County to upgrade sewer systems that caused untreated sewage to be dumped into drains and eventually the Detroit River to prevent it from backing up into basements. The centerpiece of the improvements is a massive new sewer tunnel costing $295 million. Communities say they will spend $99 million more and the county is seeking approval to issue $20 million in bonds as part of the plan. The parties told the court that "the objectives of the decree have been met."

This case shows the scope of laws that would be damaged and how badly; why consent decrees sometimes must last much more than one to four years; why the consent decree option makes more sense than making litigated court orders the exclusive option; and that courts and parties to consent decrees know how to end them when it is time.

A second major example is the *Gautreaux* public housing litigation. This was a case begun in the late 60s by residents of public housing who had been subjected to rigid racial segregation. In 1981 the parties including the United States entered into a consent decree that was dismissed 1988. The results, documented in a book by Leonard Rubinowitz and James Rosenbaum, entitled Crossing the Class and Color Lines, have been hard won but impressive.

More than 7,500 public housing families found decent subsidized housing in desegregated areas, the great majority of them in the suburbs. The big winners were children. As experts Margery Turner Austin and Dolores Acevedo-Garcia write in the January/February issue of Poverty and Race, "the Gautreaux research showed that children whose families moved from predominantly black neighborhoods of Chicago to integrated neighborhoods in the suburbs were substantially more likely to succeed in school and go on to college or jobs." They also note that the success of Gautreaux helped launch efforts beginning in the mid-90s in 33 metropolitan areas to help low income families move from poor and predominantly minority neighborhoods to more affluent and racially integrated communities.

In both the St. Louis and Chicago cases, the costs of providing decent schools and decent housing, covered by the consent decrees have been more that repaid by the taxes paid by these youngsters as productive citizens and by avoiding the costs of incarceration and other manifestations of dysfunctional communities if nothing had been done to provide opportunity.

Now I recognize that under H.R. 1229, some types of racial discrimination cases would be exempted from the possibility of frequent relitigation. But if you look at a list of notable consent decrees over recent years, you will find that several involve the rights of abused or neglected children, or homeless children, or foster children to decent shelter or other opportunities. These would not be exempted from the proposed law. Since I see no material difference between these cases and the rights of children in racial discrimination cases, you will forgive me if I do not feel secure that the exemption would be a lasting one.

Beyond that, many of the important protections that have been achieved of environment rights or of access to health care or of fair treatment in state institutions have been gained through the vehicle of consent decrees.

Finally, I must note the civil rights exemption in H.R. 1229 is far from complete. In the race area it has no application to voting rights cases or to the great majority of housing cases. Nor would the bill protect people who are discriminated against because of their age, or gender, or condition of disability or because of their national origin. And, as I have noted, there is no principled reason for allowing some victims of rights denials the ability to negotiate consent decrees while denying it to others. These are not problems that can be fixed. I believe the bill is hopelessly flawed.

CONCLUSION

Over the years I served on the bench, I have observed an increasing desire among participants in the judicial system as well as among citizens, to find ways to resolve controversies without the need for the hand-to-hand combat of litigation which often inflicts pain and bitterness.

Among the tools of alternative dispute resolution, none has served better than consent decrees, particularly where major laws and public policies and large numbers of people are involved.

The courts have built a great deal of flexibility into the process. The fairness hearings prescribed under the Federal Rules of Civil Procedure allow the public to have its say and the judge to weigh competing interests before approving a settlement. The recent *Frew* decision provides the necessary flexibility to change a decree where circumstances have changed.

This is case where there is no evidence of a disease and where the cure is much worse than any of the problems it purports to address. I urge Congress to reject this legislation.

Mr. SMITH. Mr. Goetz?

TESTIMONY OF DAVID GOETZ, COMMISSIONER, DEPARTMENT OF FINANCE AND ADMINISTRATION, STATE OF TENNESSEE

Mr. GOETZ. Thank you, Mr. Chairman and Members of the Committee, for the honor of being allowed to testify to you today. My name is Dave Goetz. I am Commissioner of Finance and Administration for the State of Tennessee.

In my role as Commissioner, I act as the Tennessee official charged with overseeing and formulating policy for our State's Medicaid program, known as TennCare. I am here today to testify about Tennessee's experience with negotiated consent decrees, specifically in the context of our State's Medicaid program, and how my ability and our governor's ability to perform our duties have been severely handicapped by the existence of several consent decrees signed and negotiated by the previous Administrations.

First, I'd like to explain the reality of the world we face in Tennessee. Our Medicaid program was one of the first State Medicaid programs to move entirely to managed care and we provide greater coverage than any other State. The generosity of this program has come with some overwhelming costs. Tennessee's Medicaid program consumes 33.9 percent of State expenditures and 33.3 percent, respectively, over the last 2 years, the highest of any State in the country and well in excess of national averages.

In September of 2004, the State submitted a reform package to the Center for Medicare and Medicaid Services described by our governor as the silver rather than the platinum coverage. Our express goal was to maintain full coverage of everyone that was in the program. This reform initiative secured the necessary cost savings through innovations on drug coverage and benefit limits rather than disenrollments.

In the fall of 2004, however, skyrocketing utilization levels and costs of TennCare became a crisis. Projections revealed that, absent further reform, TennCare's expenses during the fiscal year 2006, which begins on July 1, 2005, would increase by some $650 million in State funds, well in excess of the total growth in revenue that we were projecting for the next year. The State would have been forced to impose drastic cuts on the remainder of the State's budget, including education, transportation, and public safety programs.

Unfortunately, however in large part because of this fiscal crisis and the restrictions imposed by one consent decree in the Grier litigation, disenrollments did become necessary. The Grier suit was first filed in 1979 and a succession of consent decrees, the most recent of which was entered in 1999, have governed the State's Medicaid program ever since. The Grier consent decree, which extends

significantly beyond the requirements imposed by Federal law, precludes implementation of such standard cost saving measures as an effective prior authorization pharmacy program and effective managed care.

The financial impact of this decree has been devastating. For example, just to focus on pharmacy, in fiscal year 2001 alone, TennCare's pharmacy costs increased 44.7 percent. And since 2000, Tennessee's pharmacy costs have more than tripled, rising from $716.3 million in fiscal 2000 to a projected $2.5 billion in fiscal 2005. In contrast to Tennessee's exploding pharmacy cost, the average annual percentage increase in Medicaid pharmacy spending per enrollee nationwide between 2000 and 2003 was only 12.6 percent. Tennessee now spends more per person on drugs than any other State. While the national average for prescriptions per person, per year is 10.5, Tennessee's average is 17.9.

This Administration came into office promising to reform TennCare. We had hoped that we could work with the counsel for the plaintiffs to negotiate changes to save this program. Negotiations were difficult, however, and only produced limited changes to the decree under discussion here. Our ability to implement a functional and effective preferred drug list was still precluded by the provisions of the Grier consent decree and the plaintiffs would not agree to the needed modifications.

Without the policy-making freedom to contain costs through these standard prior authorization measures, the State found that its options for containing costs and for sustaining the program were extremely limited, and thus, Governor Bredesen was finally forced on January 10 of this year to propose a comprehensive reform package that entailed both disenrollments of beneficiaries in optional Medicaid categories and benefit reductions for the remaining beneficiaries in mandatory coverage categories.

Now, in an attempt to ameliorate the extent of these disenrollments, the State has proposed a new spend-down program, which is designed to serve up to 100,000 of the neediest Tennesseeans who will otherwise be disenrolled. But once again, the implementation of this new program depends on the State's ability to generate the necessary cost savings, and that, in turn, depends upon the State's ability to implement reforms that are currently blocked by the restrictive terms of the Grier consent decree.

Once again, the plaintiffs in this case refused to agree to such modification, and therefore, the State now finds itself once again before a Federal judge where the State must seek a court order to modify a decree that originally was signed in 1986. In the process, the State must expend significant resources that could otherwise be spent on enrollees and to do so in hopes of being free to implement health care programs and procedures that are standard for other States throughout the country.

As these examples demonstrate, the present practice of permitting elected government officials to immunize their policy decisions from political change by entering into perpetual consent decrees has proven unworkable in our State. Rather than protecting constitutional rights, these consent decrees have hamstrung our State officials, making it difficult for us to manage effective operations and even more difficult for us to respond to new conditions by de-

signing and implementing reform measures that are necessary for the good of the entire State.

Indeed, particularly in the health care realm, officials need flexibility to respond to complex social and financial dynamics, allowing them to make important policy choices regarding the proper allocation of available resources to best serve those in the health care program while continuing to serve the interests of the whole community. Rather than protecting the TennCare beneficiaries, these consent decrees have become the principal roadblocks to preserving effective managed care for the greatest number of Tennesseeans. Thank you.

Mr. SMITH. Thank you, Mr. Goetz.

[The prepared statement of Mr. Goetz follows:]

PREPARED STATEMENT OF THE HONORABLE DAVID GOETZ

TESTIMONY OF

HONORABLE M.D. GOETZ, JR.

REGARDING H.R. 1229

BEFORE THE

HOUSE OF REPRESENTATIVES JUDICIARY COMMITTEE

SUBCOMMITTEE ON COURTS, THE INTERNET, & INTELLECTUAL PROPERTY

JUNE 21, 2005

Thank you, Mr. Chairman, and members of the House Judiciary Committee, for allowing me to testify today. My name is Dave Goetz, and I am the Commissioner of Finance and Administration for the State of Tennessee. In my role as Commissioner, I act as the Tennessee official charged with overseeing and formulating policy for our State's Medicaid program, TennCare. I am here today to testify about Tennessee's experience with negotiated consent decrees, specifically in the context of our State's Medicaid program, and how my ability to perform my duties has been severely handicapped by the existence of several consent decrees negotiated and signed by previous state administrations. As I will detail, the State's best efforts to contain the costs of and thereby save our health care program in the face of dire fiscal stress have been continuously and consistently burdened by oppressive consent decrees, consent decrees that place policy-making power in the hands of the federal judiciary.

First, I'd like to explain the reality of the world that we face in Tennessee. Our Medicaid program, TennCare, was the first state Medicaid program to move entirely to managed care, and it has continued as one of the most generous programs in the country, providing health care to one-fifth of the State's population. Indeed, we provide greater coverage than any other state, covering those who would otherwise not be covered, including those who are uninsurable and women who, though no longer eligible for federal welfare assistance, are still below the poverty level. But the generosity of the program has come with overwhelming costs. Indeed, TennCare consumed 33.9 and 33.3 percent of the State's total spending over the last two years, the highest of any State in the country and well in excess of the national averages. And without change to the program, by fiscal year 2007, as much as $1 billion in new revenue would be needed to fund the TennCare program. In the fall of 2004, skyrocketing utilization levels and costs of TennCare became a crisis. Projections revealed that, absent reform, TennCare's expenses during

the fiscal year 2006 (which begins July 1, 2005) would increase by some $650 million in State funds, well in excess of Tennessee's growth in revenue. Indeed, without reform, the State would have been forced to impose drastic cuts on the remainder of the State's budget, including education, transportation, and public safety programs. Thus, during the fall of 2004, the State conducted a detailed and thorough consideration of all available reform alternatives. It was (and remains) the State's strong preference to obtain the necessary cost savings through means other than disenrollment. In September of 2004, the State submitted its first reform package, described by the Governor as the "the silver rather than platinum coverage." This reform initiative secured the necessary cost savings through innovations on drug coverage and benefits limits rather than disenrollments.

Unfortunately, however, because of the severe restrictions imposed by one consent decree, in the *Grier* litigation, disenrollments became necessary. The *Grier* suit was first filed in 1979, and a succession of consent decrees (the most recent of which was entered in 1999) have governed the State's Medicaid program ever since. The *Grier* consent decree, which extends significantly beyond the requirements imposed by federal law, precludes implementation of such standard cost-savings measures as an effective prior authorization pharmacy regime and effective managed care. And the financial impact of the decree has been devastating. For example, to focus on pharmacy: in fiscal year 2001 alone, TennCare's pharmacy costs increased by an astounding 44.7 percent. And since 2000, TennCare's pharmacy costs have *more than tripled*, rising from $716.3 million in FY2000 to a projected $2.557 billion in FY2005. Though rising pharmacy costs may be a problem for all state Medicaid programs – indeed, for all health care programs – no State has experienced anything approaching the magnitude of growth that TennCare has endured. In contrast to Tennessee's exploding pharmacy costs, the average

annual percentage increase in Medicaid pharmacy spending per enrollee nationwide between 2000 and 2003 was only 12.6 percent. Tennessee now spends more per person on drugs than any other state. While the national average for prescriptions per person per year is 10.5, Tennessee's average is 17.9.

This administration came into office promising to reform TennCare. We had hoped that we could work with counsel for the plaintiffs to secure the needed reform. In fact, in March of 2003, we initiated and participated in a lengthy series of meetings with plaintiffs' counsel, hoping that by working together, we could save this program. Our main goal was to implement a pharmaceutical initiative that already exists in most other states, a Preferred Drug List with a genuine prior authorization requirement for nonpreferred drugs. Negotiations were difficult, and only produced limited changes to the decree. Our ability to implement a functional and effective Preferred Drug List was still precluded by other provisions of the *Grier* consent decree, and Plaintiffs would not agree to the needed modifications. Without the policy-making freedom to contain costs through these standard prior authorization measures, the State found that its options for containing costs and for sustaining the program were extremely limited. And thus Governor Bredesen was finally forced, on January 10 of this year, to propose a comprehensive reform package that entailed both disenrollments of beneficiaries in optional Medicaid categories and benefit reductions for remaining beneficiaries in mandatory coverage categories.

Now, in an attempt to ameliorate the extent of the disenrollments, the State has proposed a new spend down program, which is designed to serve up to 100,000 of the neediest Tennesseans who will otherwise be disenrolled. But, once again, implementation of this new program depends upon the State's ability to generate the necessary cost-savings through other means, and that, in turn, depends upon the State's ability to implement reforms that are currently

blocked by the restrictive terms of the *Grier* consent decree. Once again, the plaintiffs in this case refuse to agree to such modification. And, therefore, the State now finds itself once again before a federal judge, where the State must seek a court order to modify a decree that was originally signed in 1986. In the process, the State must expend significant resources that could otherwise be spent on enrollees, and do so in the hopes of being free to implement health care programs and procedures that are standard for other states throughout the country.

This present litigation, however, is not the first time the Governor's present reform package has been the subject of consent decree based litigation. In January of this year, a federal district court judge in Nashville used another consent decree to issue an order that completely blocked the Governor's reform package from going forward. This particular consent decree, originally signed in 2001 in the *Rosen* litigation, was initially negotiated to secure certain procedural protections to enrollees before their benefits may be terminated. Nowhere in that consent decree are the State's substantive policy choices discussed or limited. Nonetheless, the federal district judge read such limitations into the *Rosen* consent decree. And although all parties agreed that the authority of the State to change its eligibility standards was not properly before the court, the district court, on its own, ordered the State of Tennessee to come before the court and offer justification and evidentiary support for the State's policy decision to disenroll some classes of TennCare beneficiaries.

To be clear, this reform package, including the disenrollments, had been specifically authorized by the Tennessee legislature and carefully designed by State officials after extensive review of all available options. Moreover, the reform package was blessed by the Centers for Medicare and Medicaid Services (also known as CMS), the federal agency responsible for enacting and implementing the federal Medicaid regulations. Notwithstanding CMS's approvals,

the district court judge held extensive hearings reviewing the State's policy rationales and choices. In the course of these proceedings, the State was forced to endure extensive discovery and expend vast resources defending its policy decision. The Court of Appeals for the Sixth Circuit ultimately reversed this judicial inquiry into the State's policy-making prerogatives involving Tennessee's Medicaid program. But even after the Sixth Circuit had upheld the State's authority to implement the substantive policy choices contained in the reform package, the district court enjoined implementation of the reforms, holding that the State had not provided for adequate notice and opportunity for hearing to disenrollees. Despite the fact that CMS had specifically approved the very procedures at issue, the district court issued an injunctive order forbidding the State from going forward with the disenrollments because, he asserted, the procedures did not live up to the requirements contained in the consent decree. The court's decision only infused greater delay and uncertainty into the reform process. Fortunately, the Sixth Circuit once again reversed the district court's injunctive order. Though the State was eventually able to move forward with reform, it could do so only after significant time and resources had been devoted to this unnecessary, protracted litigation.

As these examples demonstrate, the present practice of permitting elected government officials to immunize their policy decisions from political change by entering into perpetual consent decrees has proven unworkable. Rather than protecting constitutional rights, these consent decrees have hamstrung our State officials, making it difficult for them to manage effective operations and even more difficult for them to respond to new conditions by designing and implementing reform measures that are necessary for the good of the entire State. Indeed, particularly in the health care realm, officials need flexibility to respond to complex social and financial dynamics, allowing them to make important policy choices regarding the proper

allocation of available resources to best serve those in the health care program while continuing to serve the interests of the whole community. Rather than protecting the TennCare beneficiaries, these consent decrees have become the principle roadblocks to preserving effective managed care for the greatest number of Tennesseans.

As the Tennessee experience illustrates, when consent decrees are allowed to exist perpetually, state officials with responsibility for administering the program at issue are unduly constrained by plaintiffs' attorneys and federal judges. Indeed, under our federalist system of government, consent decrees governing state institutions should not last forever. By their very nature, they involve federal judicial supervision over a function that our system of government has assigned to the political branches of state government. Such supervision may be appropriate and is justified by the original consent of the state and by the felt need to address an alleged violation of federal law (even where, as here, the State has denied the allegation and it has never been adjudicated). However, neither of those justifications supports the perpetual governance by consent decree of a state institution.

It is common sense that a federal court's regulatory control of a state institution should not extend beyond the time required to remedy the effects of past violations. And the requirement that federal courts return control of state institutions to the state flows logically from the fact that the only justification for displacement of the authority entrusted to the local officials is the presence of a federal constitutional or statutory violation and a consent decree designed to alleviate such a violation is only justifiable as long as it continues to do so. Thus, when the alleged violation of federal law that gave rise to the decree in the first place has been remedied, continued imposition of a consent decree is no longer justified. And when the purposes of the consent decree have been achieved, responsibility for discharging the State's obligations should

be promptly returned to the State and its officials. As our recent experiences in Tennessee illustrate, however, such responsibility is not returned to the state officials without an expensive and protracted fight. Rather, these consent decrees continue to exist; they pervade every aspect of the state's decision-making; hinder every attempt at innovation; constrain necessary reform; and grant federal judges undue authority to review every aspect of the state's programs. Legislation like that before this Committee is desperately needed to return control over state institutions to the states.

It is also improper to allow an agreement by one elected administration or one official to forever thwart the democratic process, for inherent in our democratic system of government (both state and federal) is the right of each generation of elected and appointed officials to alter the course chartered by their predecessors. To allow a consent decree to go on perpetually is to bind all future officers of the State, regardless of their view about whether the relief contained therein was necessary or desirable. And this is how they are currently practiced: consent decrees in institutional reform cases are often written to last for all time, and when a district court signs off on these agreements, it reflects a belief that the commitments embodied in these agreements should run perpetually. Thus, by allowing this form of perpetual consent decree, we grant to one state official the power to bind the government and its future officials. New officials, who were not parties to the agreement, are unable to move forward with the policies they were elected by the People to implement, and are thus unable to put into practice their new insights and solutions to the problems of allocating revenues and resources. This ought to change. The foundational principles of representative democracy do not permit elected public officials to bind the body politic long after they have left office. The policy-making decisions of previous administrations,

and previous generations, should not be binding on future generations and their elected representatives.

Finally, consent decrees not only tie the hands of future administrations, but they also undermine the democratic process by allowing governments to do by litigation that which they could not do with elected majorities. Indeed, when we tolerate perpetual consent decrees, we are tolerating a system that encourages elected officials to implement their policy choices through negotiated consent decrees rather than to achieve such policies by their own authority, as given to them by popular or legislative enactments.

In closing, I would simply like to reiterate that the legislation presently pending before this Committee is of vital importance. Across this country, consent decrees continue to tie the hands of state officials in ways that do not comport with basic democratic principles. But this issue is not merely theoretical. Tennessee's efforts to address the intractable problems of runaway medical and pharmacy costs of its Medicaid program should serve as an example of cooperative, bipartisan federalism. Our State's administration under Governor Bredesen's leadership has worked closely and cooperatively with CMS, under the leadership of President Bush's Commissioner, Dr. McClellan, to identify practical solutions to difficult problems. The solutions agreed to by our State and federal elected and appointed officials should not be subject to the approval of plaintiffs' counsel or a federal judge. By binding future state officials, bestowing upon federal judges inappropriate review over policy-making authority, and ultimately undermining the policy-making functions of the elected branches of government, consent decrees often function in ways that can have devastating consequences for the health and well-being of the people.

Mr. SMITH. Professor Schoenbrod?

TESTIMONY OF DAVID SCHOENBROD, PROFESSOR, NEW YORK LAW SCHOOL

Mr. SCHOENBROD. My name is David Schoenbrod. Thank you very much for the opportunity to allow me to testify today.

I have worked for Senator Hubert Humphrey and Vice President Hubert Humphrey, for Judge Spottswood Robinson, for the Bedford-Stuyvesant Restoration Corporation, and the Natural Resources Defense Council. It was a case that I litigated at the Natural Resources Defense Council that began to let me open my eyes to the problem this Committee is addressing today.

My litigation partner, Ross Sandler, and I won a judgment that New York City had violated a Federal law in regard to air pollution. The judge told the parties to come up with a consent decree, and so we found ourselves negotiating with city and State officials in charges of roads and mass transit and police and so on and we hammered out a detailed plan to improve mass transit and ease traffic jams. The plan was signed by the judge and so became a decree binding all the State and local defendants in the case and their successors in office.

One of those successors turned out to be Ross Sandler, my litigation partner, because years later, he was appointed by Mayor Ed Koch, a successor mayor himself, to be the Transportation Commissioner. Ross found that some of the requirements in the decree that we were so proud to put there and seemed like such great ideas back in the day turned out not to work in practice.

But meanwhile, I was a law professor teaching remedies and came to understand that officials in Ross's position could not, as a practical matter, deviate from these requirements without the consent of plaintiffs' attorneys, and to gain such consent, it turns out, defendants also must agree to add additional requirements to the decree. So the decrees become longer and longer and public officials lose power to private attorneys.

Having gone through this experience, we ended up writing a book, the book you've referred to, called Democracy by Decree. Our book shows that decrees against State and local government are thick on the ground, that they often last for decades, and they are generally broader and more intrusive than necessary to protect rights. Commissioner Goetz has pointed out some examples of that. The special education case in New York City that Congressman Berman referred to is another example of a decree that's much broader than the Federal right it's supposed to enforce.

Our book also shows why decrees are broader than necessary to protect rights. Those who negotiate the decrees include plaintiffs' attorneys, lower-level government officials in charge of the program, and government attorneys. We call these negotiators the controlling group. The controlling group's members each have ideas about how to improve the program, and through a process of horse trading, they agree on a plan. Now, the government officials who are part of the controlling group welcome a plan that is broader than needed to protect rights because a court order gives them a way to grow their powers and to increase their budget without hav-

ing to go through the normal process of convincing people like mayors and governors and legislators to go along with what they want.

The governors and mayors themselves have their own reason to go along, too. Contested litigation makes them a target of criticism, while announcing a consent decree lets them take credit for finding a solution. And often, these decrees can be constructed so the really tough requirements fall after the election, after the next election.

The judges also go along with signing an over-broad decree because no one is objecting, and otherwise, the judge would personally have to write the decree, which means a long hearing and taking responsibility for policy choices.

A year after our book was published, the Supreme Court issued its unanimous opinion in *Frew v. Hawkins.* The Justices forcefully recognized the problem of over-broad consent decrees. They also made clear that the proper measure of a decree should be plaintiffs' rights rather than the deal struck in the consent decree.

But the Supreme Court did not fully fix the problem, because the instructions it gave to lower courts are ambiguous. They are framed as a restatement of the rule in a prior case. But *Frew* actually changed that rule rather than restated it. The ambiguity in *Frew* has already led one court, the court in *Jeff D. v. Kempthorne,* which is cited in a law review article, copies of which are over there and the Committee has, to act as if *Frew* changed nothing.

Now, the ambiguity in *Frew* grows out of the Supreme Court's understandable reluctance to be seen as too readily overruling precedent. Congress, however, is free to write on a clean slate and the Supreme Court has made clear that Congress could make new litigation ground rules applicable to old as well as new decrees. That was in the case of *French v. Miller,* and as to that point, no Justice disagreed.

The Federal Consent Decree Fairness Act clarifies the ambiguity in *Frew* by stating a clear rule that reflects *Frew*'s intention that defendants should be able to get rid of decree terms that are broader than necessary to protect rights, and that is how it should be in a democracy.

Mr. SMITH. Thank you, Professor Schoenbrod, and it is "Schoenbrod," not "broad," is that correct?

Mr. SCHOENBROD. Exactly.

Mr. SMITH. Schoenbrod. Thank you.

[The prepared statement of Mr. Schoenbrod follows:]

PREPARED STATEMENT OF DAVID SCHOENBROD

My name is David Schoenbrod. I am testifying on behalf of Ross Sandler and myself. We are professors at New York Law School. He teaches state and local government law and is Director of the Center for New York City Law. I teach the law of remedies and am a co-author of a casebook that deals extensively with decrees against state and local government, David Schoenbrod, Angus Macbeth, David I. Levine & David J. Jung, *Remedies: Public and Private* (West Publishing, 3d ed. 2002). In the 1970s, Professor Sandler and I were a litigation team at the Natural Resources Defense Council. Our cases included many matters of special concern to the poor and racial minorities. At other times, Professor Sandler was later Commissioner of Transportation of the City of New York under Mayor Edward I. Koch and in private law practice. I have worked for Senator and Vice President Hubert Humphrey, Judge Spottswood W. Robinson III of the Court of Appeals for the District of Columbia Circuit, and John Doar and Franklin Thomas at the Senator Robert Kennedy's Bedford-Stuyvesant community development organization.

The sponsors of the Federal Consent Decree Fairness Act state that it based upon a proposal made in a book written by Professor Sandler and myself, *Democracy by Decree: What Happens When Courts Run Government* (Yale University Press, 2003). The book grew out of our experience at the Natural Resources Defense Council. In representing advocacy organizations in litigation against the mayor of New York City and the governor of New York State, our court room victories resulted in the judge asking the parties to negotiate a consent decree against the mayor, governor, and other officials of the state and city. The decree controlled in detail important aspects of how the city and state operated their roads, ran their transit system, deployed their police, regulated pollution, and much more. In time, we came to be surprised by the scope and duration of the power that we had over city and state official who, unlike us, were politically accountable. When Professor Sandler later became commissioner of transportation, he became a defendant in the case and, as such, was subject to the decree we had negotiated.

Professor Sandler and I have not lost our firm conviction that the doors of federal court house should be open to those whose rights are violated. But, we have gained the understanding that, as federal courts now operate, consent decrees are more intrusive and last longer than needed to protect rights.

Our is not the usual complaint about "judicial activism." That complaint is that judges are too active in finding rights in the constitution or statutes. Our complaint is that the decrees go beyond enforcing whatever rights the judges do find.

The obvious question is, why are the decrees broader than necessary to protect the rights when judges know that decrees are supposed to enforce rights? The cases begin with plaintiffs' attorneys seeking to change how some government program operates—be it foster care, the construction of sidewalk, or any of the dozens of types of state and local programs subject to institutional reform litigation. It is usually easy for the plaintiffs attorney to find some "legal hook" that they can use to draft a complaint because Congress and federal agencies have created so many standards applicable to state and local programs that most programs are in violation of some federal standard.

With the plaintiffs attorneys having an open and shut case, the judge tells the parties to negotiate a decree. Those sitting around the negotiating table include the plaintiffs' attorneys, defendant officials, and government attorneys. We call these negotiators the "controlling group." All of the members of the controlling group have ideas about how to improve the program, and that includes the non elected government officials who work for the program that is the target of the case. Through a process of horse trading, they construct a plan to change it. The plans are usually quite detailed. Many go on for dozens of pages. These plans are not tethered to the rights that gave rise to the suit but rather reflect the controlling group's collective idea about how to make program fun better. The signature of a judge turns this plan into a federal court order that must be obeyed by the defendants and their successors in office. Many decrees last for decades.

Typically, no one objects to the entry of a decree broader than needed to protect rights. For the officials who run the program under reform, the decree gives them a way to broaden their power and grow their budget by court order rather than through the usual processes for securing the approval of governors, mayors, or legislatures. Governors and mayors have own reasons to go along. Contested litigation makes them a target of criticism, while the consent decree lets them take credit for a solution. It can often be constructed so that the most onerous requirements fall due are after next election.

Judges sign the overbroad decree because no one objects and otherwise they will have to write the decree themselves, which would mean conducting a long hearing and taking responsibility for the policy choices. This is not judicial activism. It is judicial passivity.

Once the decree is signed, it must of course be obeyed unless and until the decree is modified or vacated. But, obeying the decree sometimes make no sense. New initiatives often don't work as hoped. Budget priorities or circumstances often change. Take, for example, Escalera v. New York City Housing Authority, 924 F.Supp. 1323 (S.D.N.Y. 1996). The litigation began in 1967 with a complaint that the New York City Housing Authority failed to give adequate procedural due process to tenants who were delinquent. The problem was real, but the federal judge was not content to declare a violation of due process of law. That probably would have been enough to solve the problem because the tenants and the authority agreed on a new set of procedures prior to eviction that gave the tenants extra notice and assistance beyond constitutional minima. Instead of terminating the case, the lawyers for the tenants and the authority in 1971 submitted a consent decree to the federal judge that mandated the elaborate new procedures and ceded to the judge perpetual supervisory power over the procedures.

In 1993, twenty-two years later, crack cocaine had emerged as a serious issue. The New York City Housing Authority received urgent requests from tenants to evict those tenants who dealt drugs from their apartments. The authority wanted to invoke the Bawdy House Law, a special procedure available under state law that would allow rapid eviction of proven drug dealers who used their apartments for sales, yet still accorded them due process. Legal Aid attorneys, citing the twenty-two year old consent decree, objected. They were still attorneys of record and, on behalf of all tenants, argued that the special procedure was illegal because it varied from the more protracted procedure specified in the old decree. It took two years of intensive litigation before the Housing Authority was allowed to use the special procedures.

The courtroom scenes would have been comic if they were not so tragic. Experts called by both sides battled over whether the advent of crack cocaine was sufficiently new and unexpected to warrant revising the old decree, whether living next door to a drug dealer actually increased risk of criminal violence, and whether hiring more housing police might be a better solution, i.e., <"more suitable" than evicting drug dealers. After three days of testimony Judge Loretta A. Preska issued a fifty-five-page opinion deciding that on balance it was permissible for the New York City Housing Authority to use the lawful, speedy procedures. While this litigation continued, the tenants, the purported beneficiaries of the old decree, lived with the danger and intimidation of drug dealers next door. The snarl of litigation so incensed the organization of elected representatives of all the tenants of the New York City Housing Authority that it hired other lawyers to fight on the side of the Housing Authority and against their old lawyers.

As the *Escalera* case illustrates, under the leading Supreme Court case, *Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367 (1992), it is difficult for states and localities to get out from under decretal requirements that make no sense and are unnecessary to protect rights. The Rufo test is demanding and time consuming. And, to have any chance at success, the leaders of the defendant agency must divert their attention from other managerial problems to litigation. So, the leaders typically decide not to litigate and instead beseech plaintiffs attorneys to consent to a modification. The plaintiffs may give the state or city some leeway, but in return demand that new obligations be added to the decree. In this way, the decree grows from dozens of pages to hundreds or even thousands of pages. With all the modifications on consent, side deals, and letters of understanding, it is often only the controlling group that understands what the consent decree requires.

In its unanimous opinion in *Frew v. Hawkins,* 124 S.Ct. 899 (2004), the Supreme Court has forcefully recognized the problem of consent decrees that unnecessarily constrain the policy making discretion of state and local officials. The Court made clear that the proper measure of injunctive relief should be plaintiffs' rights rather than a bargain struck in a consent decree. For an analysis of *Frew,* see Sandler & Schoenbrod, "The Supreme Court, Democracy and Institutional Reform Litigation," 49 *New York Law School Law Review* 915 (2005), available online at http://www.nyls.edu/pdfs/Vol49no3p915–942.pdf.

While the Supreme Court has recognized the problem, it has not fully fixed it. In institutional reform litigation, there has been a persistent gap between the Supreme Court's calls for lower courts to respect the policy making prerogatives of state and local officials and actual practice in the lower courts, as we have shown. See *Democracy by Decree* at ch. 6. One reason is that it is difficult for successor officials to complain effectively about overbroad decrees entered into by their predecessors. *Frew* itself does not fix the problem because the Supreme Court is, after all, a court rather than a legislature and so typically works incrementally rather than by comprehensively reversing and revising previously announced litigation ground rules. But, the Court has recognized that Congress can change these ground rules and make new ground rules applicable to old as well as new decrees. *French v. Miller,* 530 U.S. 327 (2000). In *French,* none of the justices expressed a contrary view on this point.

The Federal Consent Decree Fairness Act articulates ground rules for modifying and vacating consent decrees entered against states and localities. These ground rules are in accord with the view expressed by the Supreme Court's opinion in *Frew* that the proper measure of injunctive relief should be plaintiffs' rights rather than a bargain struck in a consent decree. Section 2 of the Act articulates principles that the Supreme Court recognizes, but that controlling groups often get away with ignoring. Section 3 begins by defining the consent decrees to which this section applies. It then goes on to allow state and local officials to move to modify or terminate the decree, but instructs the court to deny the motion if plaintiffs show the decree is needed to protect their rights.

The Act allows courts to protect rights, but otherwise lets state and local officials run state and local government. That is how it should be.

Mr. SMITH. Let me direct my first question to you, and what I want to point out is that you are a public interest lawyer, as is the co-author of the book. You mentioned some of your background experiences. And in the book, early on, you refer to who was then the President of the American Civil Liberties Union informing you that leading public advocacy organizations have shifted resources from litigation to lobbying, public education, political organizing, and other avenues of reform.

The point I want to make is that it's not a situation here where those who are opposed to modifying consent decrees are all civil liberty lawyers and those who want to reform consent decrees are all non-civil liberties lawyers. There are a lot of people like you who have real credibility and are, for that reason, able to, I think, be very persuasive about the case that we need to modify the consent decrees.

Let me give you a chance to respond to a couple of the assertions made by Judge Jones. You can kind of take your pick here. He said that the bill will significantly raise the cost and reduce the effectiveness of all law implementation affecting State and local governments. He said it would deprive courts of the option of using consent decrees, and there is no problem that needs fixing. I think you've addressed that. But if you'd like to respond to the first two points for the record, that would be good.

Mr. SCHOENBROD. I believe that this act would not significantly reduce the extent to which plaintiffs would want to use consent decrees. There are powerful reasons, both doctrinal and practical, for plaintiffs to want to use—continue to want to use consent decrees.

First of all, as a doctrinal matter, when the decree is entered not by the consent but over the opposition of the defendant, the court is not allowed to go beyond what's needed to protect rights. And if a court does do so, it's very apt to be struck down on appeal. And so what plaintiffs can get through a litigated decree is much more limited than is possible through a consent decree.

Beyond that, there are great practical reasons to prefer a consent decree. With a consent decree, the plaintiffs could get immediate relief, quick relief, whereas with litigation, the litigation takes a long time. Litigation is resource-intensive. It's very expensive. Judges prefer to have the cases settled by consent rather than by litigation, and the judges are going to be pushing in that direction with or without this bill.

There are uncertainties with litigation, and beyond that, there are questions with attorneys' fees, practical issues of attorneys' fees that would tend to push plaintiffs' attorneys toward accepting consent decrees, not the least of which is if a group of plaintiffs passes up a consent decree and litigates and doesn't get any more, that is not going to help their fee application.

Beyond that, it seems to me that when I hear people say that this bill means that the decrees will be thrown out in 2 years or 4 years, forgets the fact that plaintiffs have open to them the possibility of showing that the decree is still needed. So it's not as if the case or the decree just simply ends after 4 years.

The example Representative Conyers brought up about the Detroit water pollution project, if it's going to take 11 years to build the thing and it's not certain it's going to get built, then it seems to me it's a pretty simple case to show that a Federal right to meet water pollution standards is subject to—is in jeopardy and that's the kind of thing that under this act would allow the decree to continue.

Mr. SMITH. Okay. Thank you.

Mr. Goetz, tell me if you agree with me. It seems to me that those who are concerned about changing consent decrees are worried about or concerned about the problems it might create in a theoretical context, whereas people like you who have had problems with consent decrees are coming at it from a more practical perspective, and here you dealt with Medicaid in Tennessee. You have Professor Schoenbrod's statement that consent decrees are more intrusive and last longer than needed to protect rights. I suspect that fits the situation in Tennessee. Do you agree with my point about the difference between the theoretical and the practical?

Mr. GOETZ. Obviously, I have to, just having to be the person who has to put together the budget for the State of Tennessee every year and do this. But I respect the experience of Judge Jones and of others who have come up through this, and as a non-attorney, I'll have to give that disclaimer, also. I won't profess to have an opinion on all the legal issues.

But it is a practical reality in the State of Tennessee that we are not going to have significant new revenues. We spent 4 years and the previous Administration in a very long and protracted and ugly tax debate that was ultimately just produced an increase in sales taxes and no one seems to—and no one in the State has the stomach for anything else.

So this leaves us, as a practical reality, of having to choose whether or not we're going to fund a new K-12, or a new pre-kindergarten program, for example, that we believe is deeply needed by the children in the State, whether we can continue to have the safe and effective prison system that we have. All of those kinds of choices lead us to at least be able to balance, but unfortunately, the consent decrees make us unable to balance the interests that we have across the State.

Mr. SMITH. Thank you, Mr. Goetz.

I am going to, without objection, recognize myself for an additional minute so I can ask Judge Jones a question.

Judge Jones, you've had the wonderful experience of being a Federal judge. What is the harm in allowing, as this bill does, an elected official to petition a Federal judge and have a consent decree modified? In other words, you still have the Federal judge deciding whether or not that request for modification is legitimate or well-grounded, so what is the harm of at least having that option out there just in case it is necessary, in case a consent decree has sort of expired in its usefulness or been enforced in a lackadaisical fashion or whatever the reason? Why not give a Federal judge that power?

Judge JONES. There is no prohibition against a public official or anyone else petitioning a court for a reconsideration or a modifica-

tion of a consent decree. That is inherent in the whole process. In fact, it begins at the time that the consent decree is being presented to the court. The court must first—what a party must do is obtain a preliminary approval of a court of an agreed order that the parties themselves have negotiated at arm's length. They submit that to a court for preliminary approval. The court examines that and decides whether he or she is going to grant preliminary approval.

At that time, a notice is sent to all potential parties, members of the class, any person that may be affected, inviting them to comment at a subsequent hearing, which is called a fairness hearing. A fairness hearing is very much like a town hall meeting. Persons can come in, whether they are named defendants in the case or not. They can come in and comment on the consent decree.

And what the court considers are three basic things. The court considers whether the agreement is fair, whether it is reasonable, and it looks to the whole question of possible duration. And if it's satisfied itself that it is fair, that it is reasonable, and that, in all other respects, the public interest is being served, it can approve the order.

So—and then once it's operating, after whatever period of time, if any person has an issue with regard to the way it's being operated and implemented, they can petition the judge to have this matter revisited. And if the judge grants the application, there can be—for a hearing, there will be a hearing. If the judge denies it, there can be an appeal taken.

And I pointed out in my direct testimony that I have sat on numerous cases in which the appeals dealt with the action taken by the district judge in either approving or rejecting the application of a party to modify or act upon a consent decree. One of my most—one of the last opinions I wrote as a member of the Sixth Circuit Court of Appeals was in one of these Tennessee cases in which I reversed the district judge and remanded the case for a fairness hearing, because in my judgment, the record shows that some interveners, some parties who wanted to be heard, were not given that opportunity by the district judge. And under the Rules of Appellate Procedure and the Rules of Civil Procedure, those parties have a right to be heard under the law. And I wrote the opinion for our panel that reversed and remanded for a hearing.

So that's why I said a moment ago that there's no problem here. There's a process already in case. And what we're doing, if there's some particular problems with a particular case, there's a—all one has to do is petition, if unsatisfied with the result, appeal. And with the way the courts are now viewing these matters, I think those who are concerned can be most reassured that they're going to get a very fair shot at the appellate level in virtually every circuit.

Mr. SMITH. Thank you, Judge Jones.

I don't think we have time for the Professor to respond, but maybe during the course of the questions and answers yet to come, he could. But thank you for your comments.

The gentlewoman from California, Ms. Waters, is recognized for her questions.

Ms. WATERS. Thank you very much, Mr. Chairman and Members. I was tied up, but I'm glad that I was able to get here because this legislation is extraordinary legislation that seeks to overturn a very, very important process by which we can settle big disputes.

I'm from Los Angeles. We are accustomed to having consent decrees dealing with some very serious problems there. Mentioned in some of what I have here today is a consent decree with Metropolitan Transit Authority where poor people and minorities were not receiving bus service and that consent decree works out ways by which there would be more bus purchases and better service would be provided.

I also had an opportunity to quickly review one of these Tennessee cases and it looks as if they just don't know how to use technology to get prior approval for medication. It seems to me in this day and age that that would be very easy to do and 3 days is a hell of a lot of time to do it.

However, having said that, I focused in, Judge Jones, on part of your testimony that deals with the civil rights exemption, or the so-called civil rights exemption, and it looks as if you say it is far from complete, and I'll just quote you, "in the race area, it has no application to voting rights cases or to the great majority of housing cases, nor would the bill protect people who are discriminated against because of their age or gender or condition of disability or because of their national origin." That's very serious. This is the 40th anniversary of the Voting Rights Act and we don't know what we're going to have to do just to keep some of those jurisdictions that are under the watchful eye of the Justice Department in section 5 in line, and I think there's some attempt to strip all of that out of the Voting Rights Act. So this really does catch my attention.

Would you, and maybe you've said it already, again tell this Committee why you believe that these so-called exemptions will not, in fact, protect very important law that we have, particularly Voting Rights Act?

Judge JONES. Thank you, Congresswoman Waters. I think you're absolutely right in your summary, your analysis. The act specifically exempts school desegregation, title VI and title VII. Title VI deals with agencies that receive Federal funding, and title VII deals with employment discrimination. But that does not include the issues of housing discrimination, discrimination faced by—and I should also point out that it deals with race. It does not exclude and does not exempt persons who are aged, who are handicapped or disabled, or persons who are victims of housing discrimination or other forms of discrimination, ethnic and otherwise.

Ms. WATERS. Gender?

Judge JONES. Gender, very definitely, gender is not included in that exemption. So it does not cover that situation, and one of the dangers is, that I see—and I must put on my old civil rights hat here for a moment because I did serve as General Counsel of the NAACP—I am concerned about opening the door, the unraveling effect that this legislation can prompt.

Those who sponsor it may now say, well, we've exempted school desegregation and we've exempted title VI and title VII, but who is to say that 5 years from now, somebody will come along and say, well, okay. Why should we continue to exempt victims of discrimi-

nation who claim discrimination under title VI or title VII? Why don't we just sweep them in under this prohibition and limitation?

The problem here is tampering with the courts, the historic jurisdiction and power that the courts have to be flexible to deal with claims of racial and other kinds of discrimination, and to open the door for carving out this type of condition, I think is very dangerous. Also, it does not create the kind of protection—or, in fact, it strips the protection from persons who have traditionally come to rely upon the courts for protection against claims of racial discrimination and other kinds of discrimination.

Mr. WATT. Thank you very much, Mr. Chairman and Members. I think this is extremely serious. And again, like I said, I mentioned the MTA in Los Angeles, but the Police Department, I think even the Fire Department all have been operating for a number of years under consent decrees and it has served us well.

I would yield back the balance of my time——

Mr. SMITH. Thank——

Judge JONES. May I note that national origin is also a group that is not exempted.

Ms. WATERS. That's what I understand from reading this. Thank you.

Mr. SMITH. Thank you, Ms. Waters.

The gentleman from Michigan, the Ranking Member of the Judiciary Committee, Mr. Conyers, is recognized for his questions.

Mr. CONYERS. Thank you, Mr. Chairman.

I'm trying to figure out benefits that might accrue from a 4-year exploration of consent decrees, and before I do it, could I ask our witness from Tennessee, did he agree with the consent decrees that were entered in previously that I think you inherited, more or less?

Mr. GOETZ. We did inherit them, Mr. Conyers. We had an agreement to change one piece in order to be able to implement a preferred drug list program, et al., but we advised the plaintiffs at that time that we did not consider this sufficient and that we needed to explore other ways to change the program, and it was in coming up with those other ways to change the program that the restrictions of the consent decree became more apparent.

Mr. CONYERS. In other words, you're sorry that you entered the consent decree?

Mr. GOETZ. Well, we don't consider ourselves to have entered into the consent decree, Mr. Conyers. It was—the language was inherited——

Mr. CONYERS. You see, what we're doing here is that we're bringing judicial decisions, cases that were tried—I mean, in this one hearing, I think we've had 20, at least, different cases that have been summarized for us to prove the consent decrees don't work. I haven't read one of those cases, and I'll have a lot of work to do at the rate that we're going to use the strategies here.

But consent decrees suggest voluntariness. I mean, if you don't like a consent decree, you can go to trial. It's what both parties enter into. And so I don't want to say I'm hearing a little bit of sour grapes from a couple of the witnesses, but consent decrees, if you get what you want in it, are good, and consent decrees that don't satisfy you or have hidden significances, well, they are bad.

And so now we are going to fix it by allowing all of them to expire in the end of 4 years when, as Judge Jones keeps repeating, you don't have to wait 4 years now to terminate a consent decree. You can go in the next year. Let's have a 3-year. Let's have 2 years. Let's have 1 year. Let's not have any, and you can try to terminate it whenever you get good and ready.

So I see with the voter rights extensions coming up that expire, we could end up—I mean, they're complicated enough and we've needed them for 40 years. To now put a 4-year term limit on the right to vote, which is far from unsettled that it's available on an equal basis to everyone in the several States, would be a very, very difficult thing for us to support.

I would imagine that in many quarters of this country, and even among lawyers and judges, not to mention the Department of Justice itself, it would have a humongously unsettling effect. To say that this isn't going to bother anybody too much, Professor, doesn't leave me feeling better because you've written a book about it, which I haven't read, doesn't leave me feeling any better at all.

I think it's going to have a completely unsettling effect were this to go forward. I'm hoping that as we study this and as we get—I know we'll need more than one witness, one set of hearings, that we really think about this for a minute.

Why is it that anybody that doesn't like a consent decree can't go forward and have a trial? If you really are against consent decrees, the lesson I would write an essay about is don't enter into consent decrees. Don't consent if you don't mean it.

Mr. SMITH. Mr. Conyers, I'd like to recognize you without objection for an additional minute, but I'd like to recognize you for that purpose to allow Professor Schoenbrod to respond slightly or briefly to your point about there would be a 4-year, in effect, limitation on all the consent decrees. Would that be all right?

Mr. CONYERS. No. Thanks. I'd rather take my 1 minute and give it to Judge Jones. He may want to improve upon my commentary.

Mr. SMITH. Okay. The gentleman continues to be recognized.

Mr. CONYERS. You could enter into a consent decree with me, Professor, and we could arrange somehow for you to get your side of this into the testimony. [Laughter.]

But I'm sure that you'll be able to anyway.

Is there anything that I am missing, Judge Jones, here?

Judge JONES. I think you very accurately captured the crisis that will be generated by the enactment of this type of legislation, and you've pointed out most appropriately that consent decrees are just that. They're consent. They're not unilaterally entered into. The parties must agree. And what they agree with, when they agree, they have a contract which the court scrutinizes for fairness and for reasonableness. And once that's been approved, it's a deal, and if there's a challenge to it, they can petition the court for a modification or an adjustment.

There has been a reference made to a book which I have not read. I've read summaries of the book, and I'm not here promoting a book, but I would like to commend to the Committee another book, and that is the Kerner Commission report of 1968. It is still very relevant, and with Congressman Conyers coming from Detroit, and Detroit was a major point of upset that led to the appointment

of the Kerner Commission, and Congresswoman Waters from Los Angeles coming from a city that had Watts, both cities are among those mentioned in this report.

I think we have forgotten the lessons that are set forth in this report and I would urge that along with reading the good Professor's book, that you might want to revisit the Kerner Commission report.

Mr. CONYERS. Mr. Chairman, could we get time so that the Professor could make a response to myself and Judge Jones?

Mr. SMITH. Mr. Conyers, you took the hopes out of my thinking. I thank you for suggesting that, and without objection, the gentleman from Michigan is recognized for another minute so that Professor Schoenbrod can respond.

Mr. SCHOENBROD. Thank you very much, Representative Conyers and Mr. Chairman. I didn't say that nobody would be upset about this legislation. What I did say was that I thought that plaintiffs would continue to want to use consent decrees.

The issue here is not whether we're going to outlaw consent decrees or not. Nobody is saying we're going to outlaw consent decrees. The issue was whether the lodestar after which decrees should be used is the protection of rights or the defense of old contracts, old contracts entered into through consent decrees.

And it seems to me the reasons why we should be limiting these decrees to protecting rights and not defending old contracts are very well expressed in a quote I want to read from Justice Brennan. "One of the fundamental premises of our popular democracy is that each generation of representatives can and will remain responsive to the needs and desires of those whom they represent. Crucial to this end is the assurance that new legislators will not automatically be bound by the policies and undertakings of earlier days. Nothing would so jeopardize the legitimacy of our system of government that relies upon the ebbs and flows of politics to clean out the rascals than the possibility that those same rascals might perpetuate their policies simply by locking them into binding contracts, and one kind of those binding contracts is the consent decree, many of which last for decades."

Mr. SMITH. Thank you, Professor. Thank you, Mr. Conyers.

The gentleman from California, Mr. Berman, is recognized for his questions.

Mr. BERMAN. My guess is that the next President, be it Democrat or Republican, is going to come into office on January 20 of 2009 and say, "Geez, I wish we weren't mired down in Iraq. Can I start all over again?" It doesn't always work like that. This notion that I'm new, I shouldn't be stuck with the obligations of the—I mean, that's the institutional process in this country. We become, we inherit a lot when new Administrations come in, whether it's city, State, or Federal.

I'm wondering, I'm curious how the Congressmen and the Senators from Arizona would feel once this became law, that voracious water-sucking California will now be able to take a case which was filed in 1952 for which there was a consent decree between the two States, approved by a judge with a special master, who I don't believe was working at the equivalent in 1950's and '60's dollars of $70 an hour, a consent decree in 1964, several supplemental de-

crees, a 1989 motion to open the decrees to allot additional water rights for Indian reservations, and a 2000 Supreme Court ruling on whether that motion was precluded.

I'm not sure the people of Arizona want California, every single time we have a new governor's election, to be able to reopen that consent decree so Arizona can reestablish within 90 days their rights to water from the Colorado River against what California is taking. So what about that exemption for water cases, and the next case, and then the next case? There are some consent decrees—and by the way, however that court decides, it will be appealed and the Supreme Court will be seeing that case every single time because the interests are so vast and California is so thirsty.

I am troubled. I understand your point, Professor, and I'll think about it more, about this notion of why it won't affect the interest in settling. But my guess is what mostly happens when these lawsuits are filed is the governor, the director of finance of the State, the mayor of a city goes to the Attorney General's office or to the county counsel or the city attorney and the guy says, "We've got exposure here." That L.A. Police Department consent decree didn't come into effect because L.A. had been doing everything right and they just wanted to find a nice way to change the way they were reviewing brutality cases and all that. It came because they had some serious legal problems.

And the plaintiffs—I mean, I hear—I don't know what the Federal judge can do to force a public interest attorney—and by the way, notwithstanding your support for this bill, a lot of public interest attorneys I talked to strongly disagree about whether it's good or not—but I can't think what a Federal judge can do to leverage a plaintiff's lawyer to settle a case for a client who presumably knows what's going on when he has to tell him that in 6 months or 1 year or 1 year and a half, this thing will open up again and you will have to retry this case to have anything of this consent decree that they're now agreeing to enter into with you.

I mean, I really—it seems to me like on that issue alone, there is a massive new dynamic that enters into this, and yes, the decrees may be broader than the Federal rights, but there's a reason why the governmental entity is settling, an it isn't just because they're a nice guy or they feel guilty of what they've been doing or—it's because they think they could lose in court. And once they can only lose for a short time, isn't that dynamic changed so massively that the incentive to settle is so diluted and diminished that—so go back over that again, if you would, Professor.

Mr. SCHOENBROD. Thank you. I think you're right that often these cases are settled because the defendant has done something very wrong and is in trouble. But then there's what you mentioned that the decrees get broader.

But the point is that in many of these situations, it's going to take a while for the defendant city or State to fix the problem, and that's the very reason why the city or State is not going to go back into court as soon as possible because it's just going to put egg on the mayor or the governor's face because they're going to still have a deficient problem, or a deficient situation, and they're going to have to pay fees to the plaintiffs for having to prove what they didn't have to prove before.

So I know of cases in New York where I think New York City could actually get out from under the decrees and they're not doing it, even where they've, in fact, fixed the problem, just because of the bureaucratic momentum.

Mr. BERMAN. There are some politicians who want——

Mr. SMITH. Without objection, the gentleman from California is recognized for an additional minute.

Mr. BERMAN. There are some politicians who—I'm going to—vote for me and I'm going to show you, I'm going back into court and I'm going to go after this thing, and let me tell you, they're going to have to prove their case. A judge is going to have to order me to do that. And he'll run his election campaign and presumably, because he'll want a second term, if he has the popular side of an issue where rights are being violated, and once in a while those are not the same sides, he's going to have all the political motivations to do it, apart from a judgment, a legal analysis of the merits.

Mr. SCHOENBROD. Well, I trust the judge, that the judge is going to be capable of figuring out where the rights are violated, and where the rights are violated, the defendants still are going to be bound.

Mr. SMITH. Thank you. Thank you, Mr. Berman.

I'd like to thank all the Members for their attendance, the witnesses for their testimony, and the audience for their interest. This has been a very good hearing. It's not often that the Ranking Member and I disagree on issues before the IP Subcommittee. This happens to be one of the rare instances. Nevertheless, we've learned a lot. We appreciate what you all had to say, and Professor Schoenbrod, you bore the brunt here today, but I think that if individuals will read your book, they'll realize that you're trying to achieve the same results that they are, and I think that's what's important.

Without objection, we stand adjourned.

[Whereupon, at 7:05 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE HOWARD L. BERMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND RANKING MEMBER, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

Mr. Chairman, I would like to thank you for scheduling a hearing on H.R. 1229. While I understand the motivations behind the bill, the legislation raises more issues than it solves.

H.R. 1229 purports to be a "balanced system that protects the rights of individuals to hold state and local governments accountable in court, while preserving our democratic process through narrowly drawn agreements that respect elected officials' public policy choices." But in fact, it creates far from a balanced system.

This bill would virtually eliminate all consent decrees involving state and local governments. The bill shifts the burden of proof from the defendant to the plaintiffs and require them to re-prove their case every few years. Counsels for plaintiffs will simply refuse to enter into any such decrees, for fear that they would have to relitigate in four years or sooner, if there is a new administration. They will insist on going to trial in every case in order to protect their clients. In fact, I find it ironic that the proponents of class action reform would support legislation that actually increases opportunities for trial lawyers. Perhaps H.R. 1229 should more properly be entitled "The Trial Lawyers' Full Employment Act of 2005," as it is almost certainly guaranteed to result in an increase in litigation.

Furthermore, the requirement that the court rule in 90 days requires that plaintiffs re-prove their entire case in a completely unrealistic timeframe. And of course, defendants will have every incentive to delay and drag out discovery, so the 90-day requirement alone is a death knell for consent decrees.

The bill also provides that to continue the decree, the plaintiff must prove that continuation is necessary to "uphold a federal right." But many of the laws covered by this bill impose important requirements, but don't necessarily confer "rights" on individuals within the meaning of recent Supreme Court cases.

Furthermore, the bill also suffers from an overly narrow carve-out for civil rights which does not ensure that civil rights are protected. (Explicitly exempted are those consent decrees involving school desegregation on the basis of race, color, or national origin, as well as actions to remedy racial discrimination under Title VI and VII of the Civil Rights Act of 1964.) The Title VI and VII exemptions only apply to discrimination on the basis of race. Consent decrees to remedy discrimination on the basis of national origin, gender, age, or disability remain covered by the bill.

Because the bill's definition of "consent decree" is much broader than the traditional definition, any court order "based in whole or part upon the consent or acquiescence of the parties" may be covered. But courts always ask both parties for input into final orders. So if a court takes a suggestion from the losing party, or the losing party declines to object, or appeal, that might leave a final court order just as unenforceable as a true consent decree.

Then there is a special master compensation provision which sets an unreasonably low cap on pay. The bill's proponents seem to want to discourage competent professionals from serving as monitors.

This is a solution in search of a problem. HR 1229 purports to fix a problem that does not exist. Existing federal law already permits the modification and dissolution of consent decrees. The courts currently apply a generous and flexible standard for allowing state and local governments to modify or terminate existing consent decrees. If the parties, or politicians for that matter, want to change aspects of the consent decree, they are free to petition the court to do so now.

All this is done in the wake of a unanimous 2004 Supreme Court Frew decision which instructed local district courts to afford significant deference to state officials'

preferences in fulfilling the state's obligations. All nine Justices—that includes Scalia, Thomas, and Rehnquist—proffered some guidelines that district courts should use when reviewing consent decrees to determine whether or not they should continue to remain in place. They didn't say to get rid of consent decrees. Instead, they suggested the prescription to fix the problem. They wrote: "As public servants, the officials of the State must be presumed to have a high degree of competence in deciding how best to discharge their governmental responsibilities. . . . 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."

Therefore, I disagree in the first instance that state and local officials' hands are truly tied, but if they are, the answer is not to alter the standards for consent decrees. Congress should either fund the mandate or change the underlying federal law. Consent decrees are just a convenient scapegoat.

This bill will not fix any of the problems that the proponents cite. In fact, it will actually create more problems than it will solve.

I yield back the balance of my time.

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND RANKING MEMBER, COMMITTEE ON THE JUDICIARY

This bill is a blow to victims of police brutality, the disabled, and victims of state-sponsored pollution. It is unseemly that states would promise to comply with federal civil rights and environmental laws and then come to Congress in order to get out of such obligations.

First, by requiring virtually every federal consent decree with state and local governments to be relitigated every four years, it would set back decades of progress in civil rights enforcement, gut the Americans with Disabilities Act, and permit any locality to violate the Clean Water and Clean Air Acts. I am curious to hear why supporters of this legislation believe that police departments that abuse citizens or state agencies that fail to have wheelchair ramps at front entrances should receive a "Get out of Jail Free" card in four years.

Second, in my opinion, the best way for a state to get out of a consent decree is for it to comply with the law. Federal consent decrees are not permanent; the parties and courts are free to revise the terms of decrees as circumstances change and as the defendants improve their behavior. Creating a set timetable for review, as this bill does, would give greater bargaining power to lawbreakers.

Finally, those of us who are concerned with the unequal treatment of citizens believe the Justice Department brings too few, not too many, civil rights and environmental lawsuits. When it does bring cases, the Department uses consent decrees to ensure compliance with basic civil rights protections. Weakening consent decrees would make it impossible for the Department to ensure compliance with the law and invite states to break the law.

Creating a way out of the system is the same as suggesting that some people deserve lesser treatment than others, and I thought we had crossed that rubicon in the 1960's. At a time when we still see unarmed citizens being beaten by police officers and the mentally ill are being abused at state-run care centers, we should be strengthening federal law enforcement, not weakening it.

PREPARED STATEMENT OF THE HONORABLE MAXINE WATERS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman, H.R. 1229, the Federal Consent Decree Fairness Act, has aspects that could prove detrimental to consent decrees as they stand now. Consent decrees have been a valuable tool in the administration of justice by providing an alternate way to resolve claims involving state and local governments without protracted and costly litigation. Also, consent decrees offer the opportunity for parties to work together to resolve their dispute and do not impose requirements that have not been mutually agreed to by both parties. However, H.R. 1229 proposes reforms that could seriously impede the usefulness and power of consent decrees.

Mr. Chairman, H.R. 1229 specifically undermines the purpose of consent decrees, making it a less attractive option to plaintiff's lawyers. To illustrate, H.R. 1229 allows the defendants, the party responsible for the initial violation that brought about the need for a consent decree, to file a motion to modify or vacate a consent decree after four years or any time a new administration is elected. This is allowed regardless of the timelines instituted in the original consent decree, and regardless

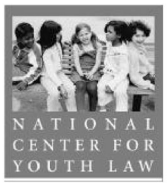
of whether the defendant has complied with the consent decree. This provision will lead to the plaintiff's having to reprove their cases, even in situations where the defendant has failed to redress the violations that brought about the need for a consent decree.

Existing law already provides for the modification and termination of consent decrees. For, the law allows revision or dissolution of a consent decree if a party shows that a significant unanticipated change in circumstances warrants such revision or termination. Therefore, H.R. 1229 is not creating needed reform for the challenge of consent decrees. Current law already provides a strong basis to question the validity to all or some aspects of existing consent decrees.

Mr. Chairman, H.R. 1229 also undermines consent decrees by automatically nullifying such decree if a court does not respond to a defendant's motion within ninety days. This time period is way too short. With courts having so many cases on their dockets, usually motions are not responded to so fast. In addition, plaintiffs should not be forced to re-litigate their cases in such a small time frame.

Mr. Chairman, these are just a few examples of how H.R. 1229 seeks to undermine the usefulness of the consent decree. If such a bill were to pass, plaintiff's attorneys would no longer see consent decrees as a sensible, viable option for their clients, leaving would-be plaintiffs with few legal means to seek protection of their civil rights. We need solid and dependable protection for civil rights and consent decrees have proven to be a valuable instrument in this area of the law and I yield back the balance of my time.

LETTER FROM CURTIS L. CHILD, SENIOR ATTORNEY, NATIONAL CENTER FOR YOUTH LAW, TO THE HONORABLE LAMAR SMITH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND CHAIRMAN, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY



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June 27, 2005

Honorable Lamar S. Smith, Chairman
Subcommittee on Courts, the Internet, and Intellectual Property
U.S. House of Representatives Committee on the Judiciary
2184 Rayburn House Office Building
Washington, D.C., 20515

RE: H.R. 1229—"Federal Consent Decree Fairness Act"

Dear Chairman Smith:

On June 21, 2005, the Subcommittee held a hearing on H.R. 1229, legislation sponsored by Representative Blunt that would create the Federal Consent Decree Fairness Act. The National Center for Youth Law is opposed to this legislation and urges its defeat for the reasons stated below. Please include this letter in the record of the June 21, hearing on H.R. 1229.

NCYL is a nonprofit organization that uses the law to improve the lives of poor children, working to ensure they have the resources, support and opportunities they need for a healthy and productive future. Often our work includes litigating against governmental agencies who fail to meet their legal obligations to protect or provide benefits and services to disadvantaged and vulnerable children. Some of this litigation has resulted in the entry of federal consent decrees between plaintiffs represented by NCYL and state officials who are defendants in those actions.

NCYL is currently lead counsel in David C. v . Leavitt , No. 93-C-206W (D. Ut.), a case that has been repeatedly cited by the proponents of H.R. 1229 as an example of the need for the legislation. Indeed, Representative Blunt mentioned the case in his oral testimony at the hearing before the Subcommittee last week as an example of a case where judicial oversight is no longer needed. Let me give you the background of the need for the David. C. litigation, how the parties reached a Settlement Agreement, the state defendant's performance on meeting the terms of the Settlement Agreement, the improvements the litigation and Settlement Agreement decree have brought about in protecting neglected and vulnerable children in Utah's foster care system, and the need for continued adherence to the Settlement Agreement.

The David C. litigation was filed by NCYL in 1993 on behalf of abused and neglected children in Utah, many of whom had experienced more severe harm while in foster care than prior to their placements. The Utah foster care system's

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horrendous treatment of David C., the named plaintiff, and his two brothers is exemplary of the systemic failures leading up to the lawsuit. David C. was three years old when he was taken into DCFS custody, along with his two brothers, due to severe physical and sexual abuse by their biological parents. Nine months later, David's older brother died in a foster home due to blunt force injuries of the abdomen and complications. The autopsy report also found "evidence of multiple blunt injuries . . . of varying ages on all body surfaces." David, who was then removed from the home along with his younger brother, was found to have "multiple incidence of trauma" covering most surfaces of his body. Upon arrival at his new foster home, David had a black eye, a severely swollen nose, bruises on his swollen penis, a handprint across his chest, and parches of hair missing from his head. Subsequently, David's diagnosed mental health problems stemming from these abusive acts were left untreated by DCFS and, at age seven, when the case was filed, he was displaying severe behavioral problems. Unfortunately, David C. was not alone in experiencing these sorts of traumatizing events while in the State's care. At least a half-dozen studies of the state's child welfare system had reported on the system's inadequacies, including a couple of internal audits by the Department of Human Services itself and a couple by the advocacy group, Utah Children.

Partly in response to the David C. litigation, a year later, the Utah legislature appropriated an additional $16 million for child welfare services, enacted a 180-page child welfare reform bill, increased the budget of the guardian ad litem's office threefold, and established new standards for guardian ad litems. In August 1994, the U.S. District Court in Salt Lake City approved a settlement requiring reforms in virtually every facet of the state's protective services and foster care systems. The settlement was reached after many months of negotiations between the parties, with the assistance of a respected neutral mediator. The settlement was signed by then Governor Leavitt at a public ceremony during which he thanked NCYL for its "commitment to children's issues and cooperative work to improve the state's services to children." The Settlement Agreement addressed virtually all aspects of the child welfare system, including child protective services, family services, shelter care, kinship care, foster care, health, education, and mental health services for abused and neglected children.

As part of the Settlement Agreement, the parties agreed to establish a three-member monitoring panel, which was responsible for overseeing the reforms. The panel consisted of a member who was agreed to by both parties, and one person chosen by each party. The panel was provided with staff and a budget to analyze data and to prepare quarterly reports on compliance. Unfortunately, report after report issued by the panel demonstrated that the State was not fulfilling its promises under the Settlement Agreement. In the panel's fourth report issued on April 20, 1998, the panel concluded that the State was in compliance with only 20% of the Settlement Agreement's terms, and that it would be unable to correct this substantial noncompliance before the 48-month term of the agreement had ended. In light of the defendants' ongoing failure to comply with the Settlement Agreement over the course of four years, NCYL filed a motion asking the district court to extend the Settlement Agreement. Utah vigorously opposed the motion to extend, claiming the agreement's termination clause should be given full force and effect even though Utah was out of compliance with the vast majority of the

other provisions of the Settlement Agreement. Plaintiffs relied on the Supreme Court case, Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992), which holds that modification of a consent decree is proper if there has been a significant change in circumstances warranting revision and the proposed modification is suitably tailored to the changed circumstances. The Court found that it had the authority to extend the Settlement Agreement and that Utah was seriously out of compliance with the reforms they had agreed to four years earlier, but it thought that it would be futile to extend an agreement with which compliance had been so poor. Instead, the Court ordered Utah to modify and comply with a new plan that it created for comprehensive reform, which ultimately became known as the Milestone Plan. Governor Leavitt publicly stated that Utah would implement the Milestone Plan whether or not the Court ordered them to do so. The Court retained jurisdiction to monitor implementation of the Milestone Plan so long as the compliance provisions developed by the State had not been met, and ordered an independent child welfare policy organization to serve as its Monitor.

Rather than channeling their full energy into reforming the child welfare system, Utah instead then spent a considerable amount of time and resources filing appeals and motions seeking to prevent enforcement of the Milestone Plan. Utah withdrew its last motion in 2002 after its repeated efforts were unsuccessful. Fortunately, for the past few years, Utah has moved beyond its past litigation strategy and instead focused its efforts on complying with the Milestone Plan. The Monitor's reports in 2003, 2004, and 2005 demonstrate progress in many areas, but indicate that there is substantial work left to be done in order to comply with the terms of the Milestone Plan. The Court has made clear that its doors are open to Utah's requests for modifications of the Milestone Plan, and plaintiffs have demonstrated a willingness to make adjustments in response to Utah's concerns that some provisions are burdensome. The parties have entered into two stipulations that have had the effect of "trimming" the Milestone Plan in response to Utah's request for adjustments and streamlining of some of the provisions. Utah is on the right track, and, although it is not yet in compliance with all provisions of the Milestone Plan, its progress in some regions demonstrates an ability to do so in the future. The assistance of the Monitor and the oversight of the Court have been critical to Utah's ability to develop a child welfare system with the resources and internal capacity to meet the substantial challenges involved in ensuring children's safety and well-being.

With that background let me state what we believe are the major problems presented by H.R. 1229 and the impact it would have on the David C. case and other cases that we may bring to protect children who have been victims in not only their own homes but in the custody of the state. However, by no means are the threats of H.R. 1229 limited to the types of cases filed by NCYL, it also poses a threat to federal civil rights law, the authority of federal courts and the rights of parties to negotiate their own settlements and remedies to terminate litigation. The major problems with the Consent Decree Fairness Act include:

- It will deter, if not completely preclude, plaintiffs from agreeing to settlements that have no lasting value beyond the limited terms specified in this act, i.e. four years or an intervening election. Even though a defendant may be willing to enter into a mutual, negotiated compromise and cut short the litigation to focus on the remedy, plaintiffs would have little incentive to enter into an agreement that forces them to

relitigate the issues upon the artificial statutory expiration of the agreement anyway and particularly when the decision may be based on future political whims. The result is that plaintiffs and defendants will be forced to litigate cases to judgment that will extend the course of the litigation over several years and significantly increase the costs.

- Existing law protects defendants where they can make a showing that conditions have changed supporting the termination or modification of a consent decree. As the United States Supreme Court just recently unanimously held in Frew v. Hawkins, 540 U.S. 431, 441-442 (2004) district courts should apply a "flexible standard" to the modification of consent decrees when a change in the facts or law warrant the change and after giving state officials "latitude and substantial discretion."[1] Where the state establishes a reason to modify the decree the court should make the necessary changes. This bill turns that obligation on its head by shifting the burden to the aggrieved plaintiffs to show that after an arbitrary time period or an election the agreed upon decree should continue.
- The definition of a consent decree in the bill is extraordinarily broad and leaves open the possibility that any order entered into by the court that had the parties' participation and whole or partial consent or acquiescence of the parties is a consent decree. For example, if the court ordered each side to make recommended findings and took some recommendations from each side to craft the order, that order could be construed as a consent order. As such it would be subject to time the limits in this bill and allow relitigation of final orders never intended to be consensual.
- The 90-day limitation in which the court must rule on the defendant's motion to modify or vacate the consent decree is often unrealistic. Most importantly, invalidating the order if the motion has not been decided within 90 days again presumes that circumstances have changed in a case where nothing more than four years has expired or there has been an election. Plaintiffs are denied the relief which was found reasonable by the court and agreed upon by the parties simply because of judicial inaction on what may be an extremely complex case or an otherwise crowded docket. Again, the effect of this provision is to deprive aggrieved plaintiffs of their established remedies with an illogical and probably inaccurate presumption.
- The retroactive application of the bill would unfairly place on plaintiffs a condition certainly never contemplated while entering into the consent decree which, if known, would have resulted in a significantly different consent decree, if one would have been entered into at all. I can say that NCYL would have not been inclined to enter into the Settlement Agreement that it did in David C. if it would have been forced to make a new affirmative showing of the State's failures upon a mere political change in administrations.
- The limitation on compensation of special masters supervising consent decrees, when appropriate, would make it nearly impossible to obtain competent and respected individuals to take on the tasks required of supervising consent decrees. By their definition, special masters are necessary when there is an "exceptional condition" and where their matters cannot be addressed effectively and timely by a judge or

[1] The Supreme Court in Frew noted Utah's "legitimate concerns" asserted as *amici curiae* that consent decrees can undermine the sovereign interests and accountability of state governments but did not retreat from its Ruffo holding. The Court continued to recognize that "[i]f 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." 540 U.S. at 442.

magistrate. In other words, the compensation restriction in this bill would preclude obtaining a qualified master in cases found where special qualifications are needed.

If H.R. 1229 were passed and signed, the defendant Governor of Utah could immediately move to vacate or modify the consent decree and shift the burden to the plaintiff children to establish the Settlement Agreement continues to be necessary to uphold their federal rights despite the fact that Utah is not yet in compliance with its own reform plan. Essentially plaintiffs would be required to relitigate the case they first brought seeking reforms in a foster care system that was, by agreement, failing abused and vulnerable children. To this day compliance has improved but there is much that needs to be done. However, plaintiffs have continually worked with the state on developing agreements to modify the original consent decree and subsequent orders to achieve outcomes recommended by a monitoring panel and expert consultants. The district court has actively overseen the Settlement Agreement and has directed the parties to enter into stipulations regarding future compliance where circumstances have changed. The Settlement Agreement has worked as it should: it has brought the state closer to compliance with the federal rights of the foster children plaintiffs balanced with changing circumstances asserted by the defendant state. The result is children who are safer and better cared for while in the state's custody. But more needs to be done. Meanwhile the state is free at any time to show that under current law the Settlement Agreement should be modified or vacated based on *its* showing that it is in compliance with the Milestone Plan it developed in order to meet the needs of Utah's abused and neglected children.

H.R. 1229 is essentially a "get out of jail free card" for state and local governments who have failed and continue to fail to meet their obligations under federal law to the most vulnerable of citizens. The proponents of this bill, under the guise of political accountability, seek to leave abused children, vulnerable adults, discriminated against minorities and women, neglected seniors, and disabled persons to a political structure that through its own prior agreements has recognized the need for systemic reform. These agreements should be protected not weakened.

We urge you to reject H.R. 1229. If you have any questions or if we can provide any additional information please feel free to contact us.

Sincerely,

/s/
Curtis L. Child
Senior Attorney

cc: Members of the U.S. House of Representatives Committee on the Judiciary
Subcommittee on Courts, the Internet, and Intellectual Property

LETTER FROM GENE KIMMELMAN, SENIOR DIRECTOR, PUBLIC POLICY AND ADVOCACY, TO THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND RANKING MEMBER, COMMITTEE ON THE JUDICIARY

June 21, 2005

The Honorable John Conyers
Ranking, Committee on Judiciary
2142 Rayburn House Office Building
Washington, DC 20515

Dear Congressman Conyers:

Consumers Union, the publisher of *Consumer Reports*, opposes the "Federal Consent Decree Fairness Act" (HR1229). If passed, the legislation would severely weaken the nation's system of consent decrees – agreements negotiated between litigating parties and approved by a court – that reduce the burden on the court system by enabling parties to avoid expensive, prolonged litigation.

Where the defendant in a federal court case is a state or local government or official, the pending legislation would allow officials to terminate most past and future federal court consent decrees either after four years, or whenever a new state or local administration takes office. The bill would make it very unlikely that future plaintiffs would enter into a consent decree negotiation, because any resulting consent agreement could be voided within the following four years.

Because the provisions also would apply to most consent decrees that plaintiffs had entered into in the past, it would unfairly take away the rights of a party who has entered into an agreement in good faith. This may have enormous consequences, not only in the area of health care and Medicaid, but also relating to cases involving consumer, environmental, transportation, due process and other rights. Finally, the past consent agreements that will be affected have been approved by a court. This legislation would eliminate judicial discretion exercised by the judge who approved the consent decree. Where a judge believed a consent decree should end after a certain amount of time, he or she would have been free to insist upon the inclusion of a "sunset" provision.

We urge Committee members to vote against this legislation. However, if the Committee proceeds, we ask that Committee members seek a complete listing of all past and pending consent decrees potentially impacted by this legislation.

Sincerely,

Gene Kimmelman
Senior Director
Public Policy and Advocacy

LETTER FROM ERIC MANN, DIRECTOR, LABOR/COMMUNITY STRATEGY CENTER (LCSC), AND BARBARA LOTT-HOLLAND, CO-CHAIR, BUS RIDERS UNION (BRU), TO THE HONORABLE HOWARD L. BERMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND RANKING MEMBER, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

April 7, 2005

The Honorable Howard L. Berman
United States House of Representatives
2221 Rayburn House Office Building
Washington, DC 20515

Dear Congressman Berman,

We are writing to ask for your urgent leadership and support to help defeat the onerous "Federal Consent Decree Fairness Act," introduced by Senator Alexander as S. 489 and by Representative Blunt as H.R. 1229, and which is currently before the Committee on the Judiciary in both the Senate and the House of Representatives.

We are writing as leaders of the Los Angeles based Labor/Community Strategy Center and Bus Riders Union (LCSC/BRU). Our organization is the lead plaintiff in a class action lawsuit, which resulted in a consent decree to massively improve the Los Angeles bus system, brought by the NAACP Legal Defense and Educational Fund (LDF) against the Metropolitan Transportation Authority under Title VI of the 1964 Civil Rights Act. After more than a decade of work preparing litigation, negotiating a settlement, and enforcing its terms, we understand the critical importance of consent decrees as one of the few legal tools we have to try to protect and enforce hard won civil rights in those cases where a government agency does not voluntarily do so itself.

The dangers of the "Federal Consent Decree Fairness Act"
The "Federal Consent Decree Fairness Act" (S.489 and H.R. 1229) (which could more honestly be called the "Consent Decree Abolition Act") threatens to severely weaken federal civil rights law, the authority of the federal courts, and consequently impede and even prevent improvements such as those achieved through the LCSC/BRU-MTA consent decree in the future by:

- Allowing defendants—the party responsible for the original violation of rights that a consent decree is designed to remedy—to file a motion to modify or vacate a consent decree after four years or any time a new administration is elected, irrespective of the timelines established in the decree itself and irrespective of whether the defendant has complied with its provisions;
- Placing the legal burden of proof on the plaintiffs—the party whose rights have been violated—to reprove their case anytime such a motion by defendants is filed, reversing current law under which the defendants have to demonstrate that a consent decree's provisions are no longer needed in order to remedy the initial violation of rights they are responsible for;
- Automatically nullifying a consent decree if a court does not respond to a defendant's motion within 90 days until the court issues a ruling; given that we all know that often the courts do not work that fast, this will create gaps in federal oversight of protection for plaintiffs rights (if the court later upholds the decree)

and in some cases could result in early termination of a decree (if the court later rules in favor of a defendant's motion to vacate a decree);

- Limiting the payment of special masters supervising consent decrees to $45 to $90 an hour, making it virtually impossible to attract any jurist of stature with the federal courts to take on this always contested, and often thankless, job;
- Setting a dangerous precedent, paving the way for local and state governments to vacate contracts they enter into with vendors, school boards, contractors, attorneys, employees, and others on the grounds that the new administration (or even the same administration) does not like the terms of a previously negotiated agreement, thereby opening a pandora's box of nullification and throwing local, state and federal government into contractual chaos.

S. 489 and H.R. 1229 are premised on the false notion that defendants are overly constrained and burdened by consent decrees, imply that defendants are forced into such settlements, and say nothing of the value of the actual changes implemented through consent decrees—changes which would not otherwise be made, leaving would-be plaintiffs with few legal means to seek protection of their civil rights. Through the example of our own experience with consent decree negotiation and implementation, this letter addresses each of these issues in detail.

Consent decrees result in critically important reforms and improvements

While the consent decree we are party to is an imperfect document, it has resulted in significant improvements—designed to remedy years of inequities in the allocation of resources within L.A.'s transit system—since it was signed in 1996. In our original suit, the LCSC/BRU charged the MTA with establishing a separate and unequal mass transportation system. MTA was allocating the lion's share of public money to high cost-overrun rail construction projects designed to serve more affluent, and more often white, riders. This came at the expense of more than 90% of MTA riders who depend on the bus system, and who are more than 80% Black, Latino, Asian/Pacific Islander and profoundly poor.

To remedy this inequity, the LCSC/BRU-MTA consent decree makes the L.A. bus system the priority. Specifically, the decree mandates low fares, massively reduced bus overcrowding and new service to improve access to health care, education and job centers for bus riders through the reallocation of funds from other programs outside the bus system. *Over the past 8 years, our work to enforce the terms of the decree has already achieved*:

1) the replacement of 2,000 old, mostly diesel, buses with new, clean fuel, compressed natural gas buses—resulting in a cleaner, more reliable bus fleet;
2) the expansion of the bus fleet by approximately 350 buses to reduce massive overcrowding—resulting in markedly improved conditions for bus riders, including less overcrowding and shorter wait and transfer times;
3) no fare increase for a 7 year period.

Currently we are working to have additional court orders fully implemented for 145 new expansion buses and over 300,000 annual service hours to further reduce bus overcrowding and are awaiting court orders on our Plan for Countywide New Bus Service and our plan to remedy adverse impact caused by bus service cuts.

Though MTA is frequently frustrated with having to fulfill the contract they signed, and in fact has stalled, fought our claims, and appealed every step of the way, even the agency ultimately admitted that the buses "are worth every penny" and have plastered Los Angeles with an advertising campaign proclaiming "Things Are Getting Better on the Bus."

While substantial gains have been made, we believe many more steps, requiring more years of work, still must be taken in order to fulfill the consent decree and to more equitably allocate transit funds for L.A.'s transit dependent bus riders. Senator Alexander, on the other hand, says that the consent decree has "forced the Metropolitan Transit Authority [sic] to spend 47 percent of its budget on city buses – leaving just over half the budget to pay for all the rest of the transportation needs of the city of Los Angeles." Yet, a 47% allocation for 90% of the agency's ridership is hardly overspending on bus riders—imagine the administration of a 90% Black school district spending only 47% of its funds on Black children!

Consent decrees are voluntary and require compromise from both parties
Consent decrees are by their nature mutual, negotiated compromises. The fact that they are developed through mediation rather than arbitration means they are voluntarily entered into and not forced on either party. Both parties are free to reject the findings of mediation and can ultimately reject the decree itself by not signing it. During negotiation of the decree, our own members often found the text of the draft consent decree unacceptable. It was only through further work of our attorneys, and compromises by the MTA, which in turn generated compromises on our part, that the final document got signed.

Consent decrees generally come out of legal suits based on egregious actions on the part of the defendant, and a defendant generally only signs a decree if its legal counsel is convinced it will lose if the case goes to trial. In our case, we can only assume that the MTA determined it was in its own best interest to sign the consent decree rather than risk going to trial and face a possible finding of liability for violating the Civil Rights Act. For our part, we also carefully weighed the options and chose the one which gave us the greatest basis for unity with the MTA, in the hopes that this would be the best path to effect the greatest material change for L.A.'s bus riders.

Consent decrees already grant numerous rights to defendants
Because consent decrees are negotiated settlements, defendants have every opportunity to fight for flexibility in: 1) what remedies the consent decree mandates; 2) what standards are used to implement—and ultimately comply with—those remedies; and 3) the timelines for implementation. Then, even after the decree has been signed, defendants still have the opportunity at every single juncture to fight for how they think the decree should be (or should not be) implemented. Because special masters are appointed by the federal courts and ultimately subject to be overturned, they are properly constrained to rule in a careful and fair manner. Even after a special master enters a ruling, defendants have the option to appeal to the federal courts.

In our case, the MTA has used all these options, resulting in the delay of remedy implementation and, ultimately, less remedy as a whole. To take just one example, the

consent decree mandated a reduction in overcrowding levels to no more than 15 people standing on average by a deadline 14 months after the decree was signed. The BRU argued that the way to reduce overcrowding was to increase capacity with more buses and that this would need to be done before the overcrowding deadline passed in order to meet the standard. MTA argued that it had the discretion to determine how it would meet the standard and that since the deadline had not yet passed, they did not have to take any specific action.

MTA was granted this discretion by the courts and when the deadline came, and the buses remained overcrowded, MTA then argued it needed time to count the overcrowding. Long story short, though the special master ultimately agreed with us that more buses were needed to reduce overcrowding, it was more than 2 ½ years after the signing of the consent decree before his order to buy more buses was issued. Even then, bus riders did not receive the remedy they were due for several more years. MTA decided to appeal the order for more buses all the way to the Supreme Court, arguing state's rights—"siding with the segregationists" as District Court Judge Terry Hatter put it. Though LCSC/BRU was upheld on each appeal, MTA did manage to get the total number of required buses reduced from 532 to 350 in the process.

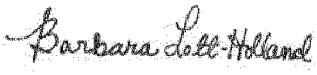
From the "voluntary enrollment" plans of Southern School boards during the "all deliberate speed" of the Brown vs. Board of Education years, to our present struggle to see through implementation of the LCSC/BRU consent decree, defendants are given enormous latitude as to how and when to comply with the agreements that they themselves negotiated and signed.

Consent decree enforcement is already an onerous task, significantly borne by plaintiffs whose rights are at stake. Defendants, who generally have time and resources on their side, often find it to their advantage to stall out and not comply with a decree's terms—even under current law. Allowing defendants a legal means of escape from full implementation of consent decrees will further limit plaintiffs' options for seeking remedy for civil rights violations. We need *greater protections* for civil rights and *more effective* means for consent decree enforcement, not less. We urge you to vote no on S. 489/H.R. 1229.

If you have any questions, please feel free to call us: (213) 387-2800. Thank you.

Sincerely,

Eric Mann
Director, Labor/Community Strategy Center



Barbara Lott-Holland
Co-Chair, Bus Riders Union

PREPARED STATEMENT OF MARK L. SHURTLEFF, UTAH ATTORNEY GENERAL

INTRODUCTION

Mr. Chairman and members of the committee, my name is Mark Shurtleff and I am the Attorney General of the State of Utah. I appreciate the opportunity to address you today and share my concerns about how federal consent decrees have impacted the judicial, legislative and political processes of the State of Utah. I have served four years on the Federalism Working Group of the National Association of Attorneys General, and led nineteen other state AGs on an Amicus Brief in support of Texas in it's case challenging a federal consent decree before the United States Supreme Court in *Frew v. Hawkins, et al.,* 540 U.S. 431 (2004) (attached as Exhibit 1.) I can assure you that many of my colleagues share my concerns. I can also report that many of us are encouraged that Congress, this committee, and in particular Representative Blunt and his co-sponsors, have seen fit to try and address those concerns in H.R. 1229.

SEPARATION OF POWERS

It goes without saying that one of the greatest protections to our liberty as Americans crafted by the Founding Fathers was the constitutional separation of powers. The horizontal separation among three branches of government was a legal barrier to tyranny. As stated by James Madison in *The Federalist Papers, No. 47,* too much power in one branch of government "is the very definition of tyranny." Citing Montesquieu, he went on to explain that, "were the power of judging joined with the legislative, the life and liberty of the subjects would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor."

As important to strength of democracy in America today is the constitutional guarantee of a "vertical" separation of powers between the federal government and the states. This principle of federalism, often tested as in the present case, has nevertheless been the taproot of a democratic tree made of fifty sovereign states joined together in one powerful sovereign nation. It is the sworn duty of state attorneys general to uphold, protect, defend and execute the laws of this nation and of the State of Utah. I am here today to sound a warning cry that unfettered and unchecked manipulation of consent decrees by federal judges attacks both the horizontal and vertical foundations of freedom as guaranteed by the separation of powers doctrine.

In fairness to the federal judicial branch, I must inform you that the United States Supreme Court recently expressed it's concerns regarding the current state of consent decrees and unanimously recognized and validated the concerns of state attorneys general as set forth in our Amicus Brief in *Frew v. Hawkins.* Although the court in that case denied Texas' effort to get out from under what had become an abusive decree and overreaching federal judicial control of state executive functions, it recognized as "legitimate" the state officials' concerns that "enforcement of consent decrees can undermine the sovereign interests and accountability of state governments." Writing for the court, Justice Kennedy concluded that "if 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. They may also lead to federal court oversight of state programs for long periods of time even absent an ongoing violation of federal law." Frew, *Id.* 441. (Attached as Exhibit 2.) The court reminded judges who are enforcing federal consent decrees that,

> principles of federalism require that state officials with front-line responsibility for administering the program be given latitude and substantial discretion. The federal court must exercise its equitable powers to ensure that when the objects of the decree have been attained, responsibility for discharging the State's obligations is returned promptly to the State and its officials. As public servants, the officials of the State must be presumed to have a high degree of competence in deciding how best to discharge their governmental responsibilities. *Id.* at 442

We are encouraged at this direction given to federal judges. If they follow that direction, principles of federalism and separation of powers will be preserved. Unfortunately, those directions were stated in *dictum* and do not carry the weight of the law on the matter. I therefore urge the Congress of the United States to codify into law the intent of the Court's *dictum* by enacting the very reasonable protections set forth in H.R. 1229. By establishing reasonable time limits on decrees, focusing the burden of proof for extending decrees to the plaintiff, and limiting the compensation

and term of special masters, Congress would do much to ensure the healthy balance of power between branches and layers of governments.

Please understand that while every consent decree arises out of litigation over state implementation of federal programs, I am not here to challenge or pass judgment on your authority to enact laws that have launched hundreds of federal agency regulations imposing thousands of court enforceable mandates on state and local government. Many of those laws were enacted with the support and encouragement of state and local elected officials. I do remind you, however, that, as stated by Professors Ross Sandler and David Schoenbrod in their New York Law School Law Review article entitled *The Supreme Court, Democracy and Institutional Reform Litigation,*

> "given the number and specificity of these mandates and their tendency to set aspirational standards for state and local government, it is no great trick for private advocates to discover some aspect of a large state or local program that falls short, be it Medicaid, special education, environmental protection, or foster care." 49 N.Y.L. Sch. L. Rev. 915, 926.(Attached as Exhibit 3.)

State and local officials, in responding to many of those legal challenges, have found it advantageous to settle rather that litigate, and to agree to federal judicial oversight of the settlement agreement. The problem we are asking you to take a role in remedying is in the increasing propensity of federal judges to extend the agreements beyond the requirements and terms agreed by the parties, and to impose duties and expenditures upon the states that go well beyond requirements not only of the settlement agreement but also beyond those imposed by the federal law that created the program. As stated by Professors Sandler and Schoenbrod,

> Plaintiffs' lawyers can use the threat to litigate to exact new obligations. Decrees that begin at fifty or eighty pages grow in length to hundreds and even thousands of pages, and thus become increasingly difficult to escape . . . Prison cases, it is not too much of an exaggeration to say, may start by challenging brutality and end with decrees specifying the square footage of cells, the temperature of food in the dining room, and the availability of television and movies. *Id.* at 928.

DAVID C.—A UTAH CASE STUDY

Allow me to share with you a case we have been dealing with in Utah for over a decade that clearly illustrates my point. In 1993, the National Center for Youth Law in Oakland, California brought a class action lawsuit on behalf of children against the Governor and other officials of the State of Utah, alleging federal constitutional and statutory violations in the operation of Utah's child welfare system. In recognition of the need for improvements, the Utah Legislature passed the Child Welfare Reform Act effective July 1, 1994. The Act codified many federal statutory requirements and provisions and established stringent new time limits and standards. The parties thereafter entered into a settlement agreement that included many of the provisions of the new law, and imposed 93 substantive requirements on Utah, including the duty to investigate reports of child abuse or neglect within specific deadlines; provide placement support services for foster parents; and ensure that foster children attend school and receive medical and dental treatment. The agreement was incorporated into a final Consent Decree order signed by the district court on August 29, 1994. By agreement, the decree was to terminate on August 29, 1998. Termination was expressly not made subject to Utah achieving any set degree of compliance by the end of the four-year period. There was nothing in the agreement that would allow the parties, or the court, to modify or extend the end date for any reason.

The State of Utah undertook extraordinary efforts to improve our childcare system and to meet our part of the agreement. Nevertheless (as is sadly too often the case,) the plaintiffs weren't satisfied with their interpretation of progress, and brought an action two years into the decree asking the federal judge to order that Utah had acted in bad faith and to appoint a receiver to take over the entire Division of Child and Family Services. In denying those requests, U.S. District Court Judge David Winder praised the State's efforts and noted the State's infusion of large amounts of human and financial resources into the Utah child protection system; its training of staff and foster parents; and its reorganization of relevant State agencies. In fact, the Utah Legislature increased funding to DCFS by 108% ($49 million to $102 million) from 1994 to 1997 that resulted in a 49% increase in supervisors, a 60% increase in caseworkers, a 49% increase in support staff and the hiring of 42 new contract case workers! Still, in recognition of the difficult task at

hand, Judge Winder cautioned, "The problems of child welfare are very complex. Defendant's task is large, and the recognition that to effectuate change requires time reflects no more than a healthy sense of realism." Unfortunately, the wall of separation between branches of government and between federal and state sovereignty began to crumble from that point on.

During the next fourteen months of the decree, the appointed "monitoring panel" did not issue any new compliance reports and plaintiffs did not seek any more enforcement assistance from the federal court. But just four months prior to the agreed upon mandatory termination date, the panel, for the first time, morphed the 93 agreed provisions into 316 items and arbitrarily found that the State had only met 20% of these new requirements. A week later the plaintiffs filed a motion to extend the term of the decree. A new federal judge had since been appointed, and in reviewing the facts, stated that she found it "hard to imagine that [the increases have] actually led to a 5% decline in child welfare as the panel report suggests." She denied the motion to extend, but stated her opinion that the agreement had "failed."

Just two weeks before the termination of the decree, plaintiffs asked the court to modify the agreement and order and approve and brand new Comprehensive Plan. In October of 1999, more than a year after the consent decree terminated by its own provisions, the judge stated: "It appears to me that I will be keeping jurisdiction until I am told by the monitor that it is fine for me to get out." Four days later she granted plaintiff's motion and ordered Utah to comply with the new plan indefinitely. We appealed to the Tenth Circuit which affirmed the decision finding the federal court had the "inherent equitable power to modify" an unlitigated consent decree and, therefore, in effect held that a federal court could substitute its judgment for that of the parties to an agreement and change any provision of that agreement even over the State's objection.

In 2001 the U.S. Supreme Court denied our Petition for Cert. In 2003 the federal judge, who now appears to be acting not only a state executive but also a state legislator, ordered Utah to comply with the new plan requiring additional funding, training, and sufficient appropriation to hire fifty new employees by DCFS. And so it goes.

During the 2004 and 2005 legislative sessions, dozens of bill were filed to amend the laws relating to child protection issues in response from public outcry that the pendulum had swung the other direction and children were being removed too soon and parental rights were being violated. Most of the bills did not pass, partly out of concern by the legislature that the federal judge would find those changes to further violate the court's plan and keep Utah's child welfare system under the federal "thumb" for more years. There is a strong sentiment in Utah that it is not state elected officials, but an unelected, lifetime appointed federal judge who controls Utah's child welfare system.

CONCLUSION

The federal judge in the *David C.* case has not yet taken the opportunity to follow the advice of the Supreme Court stated in *dictum* in *Frew,* that,

> A State, in the ordinary course, depends upon successor officials, both appointed and elected, to bring new insights and solutions to problems of allocating revenues and resources. The basic obligations of federal law may remain the same, but the precise manner of their discharge may not. 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.

We must now look to Congress to give life and the force of law to the "hopes" of the Supreme Court as to how judges will recognize the fundamental requirements of separation and federalism. As stated by Professors Sandler and Schoenbrod,

> Still it will be hard for judges to follow the guidance of *Frew.* The way in which modification motions usually present themselves appear to call for a toughness by the judge not demanded at the time of the initial consent. In the initial negotiations, every effort is made to reach agreement to avoid litigation. Later, judicial flexibility disappears and in its place appears a hardness and desire to hold the defendants' feet to the fire. As former federal judge Marvin Frankel said concerning his role as a special master at the beginning of an institutional reform case involving special education, 'My job was to get an agreement,' because in complex cases, 'you rely on the parties to work it out.' But Special Master Frankel was much less flexible three years into the case when the consent decree's complex plan for evaluating, placing, and teaching 100,000 children with

special needs proved difficult, costly, and largely unworkable, and produced many unwanted side effects. He then wrote that '[t]he time has come, it is now believed, for defendants either to comply with the judgments or to confront the familiar consequences of noncompliance . . . Demanding respect for their expertise, defendants ought to get it. Promising compliance, they ought to achieve it or face contempt charges.' The Frew dictum, made in a context of a motion for contempt, speaks to this reality by instructing judges and litigants that they are not to forget the values associated with local democracy and flexibility, nor the difficult reality or costs of social change. Judges walk a fine line when affirmatively dictating how government will deliver its services. The Frew dictum, if followed, shifts the judicial balance toward democratic values and away from contractual rigidity. *The Supreme Court, Democracy, and Institutional Reform Litigation, supra,* at page 929.

Once again, let me thank you for considering a law that would put reasonable limitations on the ability of federal judges to supplant the authority of state and local executive and legislative officials and thereby, in the words of Sandler and Schoenbrod, "create rights rather than enforce them."

ATTACHMENT

Supreme Court of the United States
Linda FREW, on behalf of her daughter, Carla FREW, et al., Petitioners,
v.
Albert HAWKINS, Commissioner, Texas Health and Human Services Commission, et al.
No. 02-628.
Argued Oct. 7, 2003.
Decided Jan. 14, 2004.

Background: Action was brought to enforce state Medicaid program's consent decree obligations. The United States District Court for the Eastern District of Texas, William Wayne Justice, J., 109 F.Supp.2d 579, ruled that obligations were enforceable, and state appealed. The Fifth Circuit Court of Appeals, Reavley, Circuit Judge, 300 F.3d 530, reversed. Certiorari was granted.

Holding: The Supreme Court, Justice Kennedy, held that Eleventh Amendment did not bar enforcement of decree.

Reversed.

As a participant in the Medicaid program, Texas must meet certain federal ***900** requirements, including that it have an Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program for children. The petitioners, mothers of children eligible for EPSDT services in Texas, sought injunctive relief against state agencies and various state officials, claiming that the Texas program did not meet federal requirements. The claims against the state agencies were dismissed on Eleventh Amendment grounds, but the state officials remained in the suit and entered into a consent decree approved by the Federal District Court. In contrast with the federal statute's brief and general mandate, the decree required state officials to implement many specific proposals. Two years later, when the petitioners filed an enforcement action, the District Court rejected the state officials' argument that the Eleventh Amendment rendered the decree unenforceable, found violations of the decree, and directed the parties to submit proposals outlining possible remedies. On interlocutory appeal, the Fifth Circuit reversed, holding that the Eleventh Amendment prevented enforcement of the decree because the violations of the decree did not also constitute violations of the Medicaid Act.
Held: Enforcement of the consent decree does not violate the Eleventh Amendment. Pp. 903-906.

(a) This case involves the intersection of two areas of federal law: the Eleventh Amendment and the rules governing consent decrees. The state officials argue that a federal court should not enforce a consent decree arising under *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714, unless it first identifies, at the enforcement stage, a violation of federal law such as the EPSDT statute itself. This Court disagrees. The decree here is a federal court order that springs from a federal dispute and furthers the objectives of federal law. *Firefighters v. Cleveland*, 478 U.S. 501, 525, 106 S.Ct. 3063, 92 L.Ed.2d 405. The petitioners' enforcement motion sought a remedy consistent with *Ex parte Young* and *Firefighters* and accepted by the state officials when they asked the court to approve the consent decree. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67, in which this ***432** Court found *Ex parte Young's* rationale inapplicable to suits brought against state officials alleging state-law violations, is distinguishable from this case, which involves a federal decree entered to implement a federal statute. Enforcing the decree vindicates an agreement

that the state officials reached to comply with federal law. Federal courts are not reduced to approving consent decrees and hoping for compliance. Once entered, that decree may be enforced. See *Hutto v. Finney,* 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522. Pp. 903-905.

(b) The state officials and *amici* state attorneys general express legitimate concerns that enforcement of consent decrees can undermine sovereign interests and accountability of state governments. However, when a consent decree is entered under *Ex parte Young,* the response to their concerns has its source not in the Eleventh Amendment but in the court's equitable powers and in the direction given by Federal Rule of Civil Procedure 60(b)(5), which encompasses an equity court's traditional power to modify its decree in light of changed circumstances. See, *e.g., Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367, 112 S.Ct. 748, 116 L.Ed.2d 867. If a detailed order is required to ensure compliance with a decree ***901** for prospective relief that in effect mandates the State to administer a significant federal program, federalism principles require that state officials with front-line responsibility for the program be given latitude and substantial discretion. The federal court must ensure that when the decree's objects have been attained, responsibility for discharging the State's obligations is returned promptly to the State and its officials. The basic obligations of federal law may remain the same, but the precise manner of their discharge may not. If the State establishes reason to modify the decree, the court should make the necessary changes; otherwise, the decree should be enforced according to its terms. Pp. 905-906.

300 F.3d 530, reversed and remanded.

KENNEDY, J., delivered the opinion for a unanimous Court.

Susan Finkelstein Zinn, Counsel of Record, San Antonio, TX, Edward B. Cloutman, III, Dallas, TX, Jane Kathryn Swanson, The Woodlands, TX, Professor Barbara Bader, Aldave University of Oregon School of Law, Eugene, OR, Attorneys for Petitioners.

Greg Abbott, Attorney General of Texas, Barry R. McBee, First Assistant Attorney General, Jeffrey S. Boyd, Deputy Attorney General, Litigation, ***433** Rafael Edward Cruz, Solicitor General, Counsel of Record, Melanie P. Sarwal, Assistant Solicitor General, Austin, Texas, Attorneys for Respondents.

Justice KENNEDY delivered the opinion of the Court.

In this case we consider whether the Eleventh Amendment bars enforcement of a federal consent decree entered into by state officials.

I

Medicaid is a cooperative federal-state program that provides federal funding for state medical services to the poor. See *Wilder v. Virginia Hospital Assn.,* 496 U.S. 498, 502, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990). State participation is voluntary; but once a State elects to join the program, it must administer a state plan that meets federal requirements. One requirement is that every participating State must have an Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program. See 79 Stat. 343, as amended, 42 U.S.C. §§ 1396a(a)(43), 1396d(r). EPSDT programs provide health care services to ***434** children to reduce lifelong vulnerability to illness or disease. The EPSDT provisions of the Medicaid statute require participating States to provide various medical services to eligible children, and to provide notice of the services. See *ibid.*

The petitioners here are mothers of children eligible for EPSDT services in Texas. In 1993 they filed a civil action pursuant to Rev. Stat. § 1979, 42 U.S.C. § 1983, seeking injunctive relief against the Texas Department of Health and the Texas Health and Human Services Commission, as well as various officials at these agencies charged with implementing the Texas EPSDT program. The named officials included the Commissioners of the two agencies, the Texas State Medicaid Director, and certain employees at the Texas Department of Health. The individuals were sued in their official capacities and were represented throughout the litigation by the office of the Texas attorney general.

***902** The petitioners alleged that the Texas program did not satisfy the requirements

of federal law. They asserted that the Texas program did not ensure eligible children would receive health, dental, vision, and hearing screens; failed to meet annual participation goals; and gave eligible recipients inadequate notice of available services. The petitioners also claimed the program lacked proper case management and corrective procedures and did not provide uniform services throughout Texas.

After the suit was filed, the two Texas state agencies named in the suit moved to dismiss the claims against them on Eleventh Amendment grounds. The petitioners did not object, and in 1994 the District Court dismissed the state agencies as parties. The state officials remained in the suit, and the District Court certified a class consisting of children in Texas entitled to EPSDT services, a class of more than 1 million persons. Following extensive settlement negotiations, the petitioners and the state officials agreed to resolve the suit by entering into a consent decree. The District ***435** Court conducted a fairness hearing, approved the consent decree, and entered it in 1996. Judicial enforcement of the 1996 consent decree is the subject of the present dispute. The decree is a detailed document about 80 pages long that orders a comprehensive plan for implementing the federal statute. In contrast with the brief and general mandate in the statute itself, the consent decree requires the state officials to implement many specific procedures. An example illustrates the nature of the difference. The EPSDT statute requires States to "provid[e] or arrang[e] for the provision of ... screening services in all cases where they are requested," and also to arrange for "corrective treatment" in such cases. 42 U.S.C. §§ 1396a(a)(43)(B), (C). The consent decree implements the provision in part by directing the Texas Department of Health to staff and maintain toll-free telephone numbers for eligible recipients who seek assistance in scheduling and arranging appointments. Consent Decree ¶¶ 241-242, Lodging of Petitioners 63-64. According to the decree, the advisors at the toll-free numbers must furnish the name, address, and telephone numbers of one or more health care providers in the appropriate specialty in a convenient location, and they also must assist with transportation arrangements to and from appointments. *Id.,* ¶¶ 243-245, Lodging of Petitioners 64. The advisers must inform recipients enrolled in managed care health plans that they are free to choose a primary care physician upon enrollment. *Id.,* ¶ 244, Lodging of Petitioners 64.

Two years after the consent decree was entered, the petitioners filed a motion to enforce it in the District Court. The state officials, it was alleged, had not complied with the decree in various respects. The officials denied the allegations and maintained that the Eleventh Amendment rendered the decree unenforceable even if they were in noncompliance. After an evidentiary hearing, the District Court issued a detailed opinion concluding that certain provisions ***436** of the consent decree had been violated. *Frew v. Gilbert,* 109 F.Supp.2d 579 (E.D.Tex.2000). The District Court rejected the Eleventh Amendment argument, *id.,* at 660-678, and directed the parties to submit proposals outlining possible remedies for the violations.

The state officials filed an interlocutory appeal, and the Court of Appeals for the Fifth Circuit reversed. The Court of Appeals held that the Eleventh Amendment prevented enforcement of the decree unless the violation of the consent decree was also a statutory violation of the Medicaid Act that imposed a clear and binding obligation ***903** on the State. *Frazar v. Gilbert,* 300 F.3d 530, 543 (C.A.5 2002). The Court of Appeals assessed the violations identified by the District Court and concluded that none provided a valid basis for enforcement. Regardless of whether the EPSDT program complied with the detailed consent decree, the Court of Appeals reasoned, the program was good enough to comply with the general mandates of federal law. The Court of Appeals concluded that because the petitioners had not established a violation of federal law, the District Court lacked jurisdiction to remedy the consent decree violations. *Id.,* at 546-551.

Other Circuits have reached a contrary result, holding that the Eleventh Amendment does not bar enforcement of consent decrees in like circumstances. See, *e.g., Kozlowski v. Coughlin,* 871 F.2d 241, 244 (C.A.2 1989); *Wisconsin Hospital Assn. v. Reivitz,* 820

F.2d 863, 868 (C.A.7 1987). We granted certiorari to resolve the conflict among the Courts of Appeals. 538 U.S. 905, 123 S.Ct. 1481, 155 L.Ed.2d 223 (2003).

II

The petitioners advance two reasons why the consent decree can be enforced without violating the Eleventh Amendment. First, they argue the State waived its Eleventh Amendment immunity in the course of litigation. Second, they contend that enforcement is permitted under the principles of *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). We agree that ***437** the decree is enforceable under *Ex parte Young,* and so we do not address the waiver argument.

[1] [2] This case involves the intersection of two areas of federal law: the reach of the Eleventh Amendment and the rules governing consent decrees. The Eleventh Amendment confirms the sovereign status of the States by shielding them from suits by individuals absent their consent. *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 54, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). To ensure the enforcement of federal law, however, the Eleventh Amendment permits suits for prospective injunctive relief against state officials acting in violation of federal law. *Ex parte Young, supra.* This standard allows courts to order prospective relief see *Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); *Milliken v. Bradley,* 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977), as well as measures ancillary to appropriate prospective relief, *Green v. Mansour,* 474 U.S. 64, 71-73, 106 S.Ct. 423, 88 L.Ed.2d 371 (1985). Federal courts may not award retrospective relief, for instance money damages or its equivalent, if the State invokes its immunity. *Edelman, supra,* at 668, 94 S.Ct. 1347.

[3] Consent decrees have elements of both contracts and judicial decrees. *Firefighters v. Cleveland,* 478 U.S. 501, 519, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986). A consent decree "embodies an agreement of the parties" and is also "an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees." *Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367, 378, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992). Consent decrees entered in federal court must be directed to protecting federal interests. In *Firefighters,* we observed that a federal consent decree must spring from, and serve to resolve, a dispute within the court's subject-matter jurisdiction; must come within the general scope of the case made by the pleadings; and must further the objectives of the law upon which the complaint was based. 478 U.S., at 525, 106 S.Ct. 3063.

****904** [4] This brings us to the intersection of the principles governing consent decrees and the Eleventh Amendment. As we ***438** understand their argument, the state officials do not contend that the terms of the decree were impermissible under *Ex parte Young.* Nor do they contend that the consent decree failed to comply with *Firefighters.* The officials challenge only the enforcement of the decree, not its entry. They argue that the Eleventh Amendment narrows the circumstances in which courts can enforce federal consent decrees involving state officials.

The theory advanced by the state officials is similar to the one accepted by the Court of Appeals. The officials reason that *Ex parte Young* creates a narrow exception to the general rule of Eleventh Amendment immunity from suit. Consent decrees involving state representatives threaten to broaden this exception, they contend, because decrees allow state officials to bind state governments to significantly more commitments than what federal law requires. Brief for Respondents 9-22. Permitting the enforcement of a broad consent decree would give courts jurisdiction over not just federal law, but also everything else that officials agreed to when they entered into the consent decree. A State in full compliance with federal law could remain subject to federal court oversight through a course of judicial proceedings brought to enforce the

consent decree. To avoid circumventing Eleventh Amendment protections, the officials argue, a federal court should not enforce a consent decree arising from an *Ex parte Young* suit unless the court first identifies, at the enforcement stage, a violation of federal law such as the EPSDT statute itself. Brief for Respondents 9-22.

We disagree with this view of the Eleventh Amendment. The decree is a federal court order that springs from a federal dispute and furthers the objectives of federal law. See *Firefighters, supra,* at 525, 106 S.Ct. 3063. The decree states that it creates "a mandatory, enforceable obligation." Consent Decree ¶ 302, Lodging of Petitioners 76. In light of the State's assertion of its Eleventh Amendment immunity, the state ***439** officials lacked the authority to agree to remedies beyond the scope of *Ex parte Young* absent a waiver, as the petitioners concede. Tr. of Oral Arg. 12. We can assume, moreover, that the state officials could not enter into a consent decree failing to satisfy the general requirements of consent decrees outlined in *Firefighters.* The petitioners' motion to enforce, however, sought enforcement of a remedy consistent with *Ex parte Young* and *Firefighters,* a remedy the state officials themselves had accepted when they asked the District Court to approve the decree. Enforcing the agreement does not violate the Eleventh Amendment.

The theory advanced by the state officials relies heavily on our decision in *Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). *Pennhurst* is distinguishable. In that case we found the rationale of *Ex parte Young* inapplicable to suits brought against state officials alleging violations of state law. *Id.,* at 106, 104 S.Ct. 900. Jurisdiction was improper because "[a] federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law." *Ibid.* Here, by contrast, the order to be enforced is a federal decree entered to implement a federal statute. The decree does implement the Medicaid statute in a highly detailed way, requiring the state officials to take some steps that the statute does not specifically require. The same could be said, however, of any effort to implement the general ***905** EPSDT statute in a particular way. The decree reflects a choice among various ways that a State could implement the Medicaid Act. As a result, enforcing the decree vindicates an agreement that the state officials reached to comply with federal law. *Hutto v. Finney,* 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978), is instructive on this point. In *Finney,* the Court upheld a District Court's award of attorney's fees designed to encourage state compliance with an existing court order. State prisoners had sued state prison officials claiming that the conditions of their confinement ***440** violated the Eighth Amendment, and the District Court had ordered the officials to improve prison conditions. When the officials refused to comply in good faith with the order, the District Court awarded attorney's fees to the prisoners' lawyers to be paid from the state treasury. *Id.,* at 685, 98 S.Ct. 2565. The state officials objected, arguing that the relief was not valid under the Eleventh Amendment because it exceeded the scope of *Ex parte Young.* The Court rejected this argument:

"In exercising their prospective powers under *Ex parte Young* and *Edelman v. Jordan,* federal courts are not reduced to issuing injunctions against state officers and hoping for compliance. Once issued, an injunction may be enforced .... If a state agency refuses to adhere to a court order, a financial penalty may be the most effective means of insuring compliance. The principles of federalism that inform Eleventh Amendment doctrine surely do not require federal courts to enforce their decrees only by sending high state officials to jail. The less intrusive power to impose a fine is properly treated as ancillary to the federal court's power to impose injunctive relief." 437 U.S., at 690-691, 98 S.Ct. 2565.

The award of attorney's fees "vindicated the District Court's authority over a recalcitrant litigant," the Court continued. "We see no reason to distinguish this award from any other penalty imposed to enforce a prospective injunction." *Id.,* at 691-692, 98 S.Ct. 2565.

While *Finney* is somewhat different from the present case in that it involved the scope of remedies for violation of a prior order rather than the antecedent question whether

remedies are permitted in the first instance, a similar principle applies. Federal courts are not reduced to approving consent decrees and hoping for compliance. Once entered, a consent decree may be enforced.

***441** III

[5] The state officials warn that enforcement of consent decrees can undermine the sovereign interests and accountability of state governments. Brief for Respondents 23-32. The attorneys general of 19 States assert similar arguments as *amici curiae.* Brief for Utah et al. as *Amici Curiae.* The concerns they express are legitimate ones. If 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. They may also lead to federal court oversight of state programs for long periods of time even absent an ongoing violation of federal law.

When a federal court has entered a consent decree under *Ex parte Young,* the law's primary response to these concerns has its source not in the Eleventh Amendment but in the court's equitable powers and the direction given by the Federal Rules of Civil Procedure. In particular, Rule 60(b)(5) allows a party to move for ****906** relief if "it is no longer equitable that the judgment should have prospective application." The Rule encompasses the traditional power of a court of equity to modify its decree in light of changed circumstances. In *Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992), the Court explored the application of the Rule to consent decrees involving institutional reform. The Court noted that district courts should apply a "flexible standard" to the modification of consent decrees when a significant change in facts or law warrants their amendment. *Id.,* at 393, 112 S.Ct. 748. See also *Philadelphia Welfare Rights Org. v. Shapp,* 602 F.2d 1114 (C.A.3 1979) (modifying consent decree implementing Pennsylvania's EPSDT program in light of changed circumstances).

Rufo rejected the idea that the institutional concerns of government officials were "only marginally relevant" when officials moved to amend a consent decree, and noted that ***442** "principles of federalism and simple common sense require the [district] court to give significant weight" to the views of government officials. 502 U.S., at 392, n. 14, 112 S.Ct. 748. When a suit under *Ex parte Young* requires a detailed order to ensure compliance with a decree for prospective relief, and the decree in effect mandates the State, through its named officials, to administer a significant federal program, principles of federalism require that state officials with front-line responsibility for administering the program be given latitude and substantial discretion.

The federal court must exercise its equitable powers to ensure that when the objects of the decree have been attained, responsibility for discharging the State's obligations is returned promptly to the State and its officials. As public servants, the officials of the State must be presumed to have a high degree of competence in deciding how best to discharge their governmental responsibilities. A State, in the ordinary course, depends upon successor officials, both appointed and elected, to bring new insights and solutions to problems of allocating revenues and resources. The basic obligations of federal law may remain the same, but the precise manner of their discharge may not. 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.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

U.S.,2004.

Frew ex rel. Frew v. Hawkins

540 U.S. 431, 124 S.Ct. 899, 157 L.Ed.2d 855, 72 USLW 4123, Med & Med GD (CCH) P

301,501, 04 Cal. Daily Op. Serv. 305, 2004 Daily Journal D.A.R. 398, 17 Fla. L. Weekly Fed. S 96

Briefs and Other Related Documents (Back to top)

- 2003 WL 22336032, 72 USLW 3305 (Oral Argument) Oral Argument (Oct. 07, 2003)
- 2003 WL 21839114 (Appellate Brief) Reply Brief (Aug. 04, 2003)
- 2003 WL 21524706 (Appellate Brief) Brief of the National Conference of State Legislatures, Council of State Governments, National Association of Counties, and International City/County Management Association as Amici Curiae Supporting Respondents (Jul. 02, 2003)
- 2003 WL 21537757 (Appellate Brief) Brief for the States of Utah, Colorado, Delaware, Hawaii, Idaho, Louisiana, Maryland, Michigan, Mississippi, Nevada, New Hampshire, North Dakota, Oklahoma, Pennsylvania, South Dakota, Virginia, Vermont, Wisconsin, and Wyoming as Amicus Curiae in Supp ort of Respondents (Jul. 02, 2003)
- 2003 WL 21537762 (Appellate Brief) Respondent's Brief (Jul. 02, 2003)
- 2003 WL 21058311 (Appellate Brief) Brief for Petitioners (May. 08, 2003)
- 2003 WL 21087007 (Appellate Brief) Brief of AARP, The American Association of People with Disabilities, The American Civil Liberties Union, The Anti-Defamation League, The Judge David L. Bazelon Center for Mental Health Law, Children's Rights, The National Association of Protection an d Advocacy Systems, The National Health Law Program, and Now Legal Defense and Education Fund as Amici Curiae in Support of Petitioners (May. 08, 2003)
- 2003 WL 21087008 (Appellate Brief) Brief for the United States as Amicus Curiae (May. 08, 2003)
- 2003 WL 21251606 (Appellate Petition, Motion and Filing) Respondents' Brief in Opposition (Feb. 05, 2003)Original Image of this Document (PDF)
- 02-628 (Docket) (Oct. 24, 2002)
- 2002 WL 32101037 (Appellate Petition, Motion and Filing) Petition for a Writ of Certiorari (Oct. 22, 2002)Original Image of this Document with Appendix (PDF)

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PREPARED STATEMENT ON THE NEGATIVE IMPACT OF THE PROPOSED LEGISLATION (S. 489, H.R. 1229) ON THE TRANSIT DEPENDENT OF LOS ANGELES FROM THE LOS ANGELES-BASED LABOR/COMMUNITY STRATEGY CENTER AND BUS RIDER UNION (LCSC/BRU)

The Los Angeles based Labor/Community Strategy Center and Bus Riders Union (LCSC/BRU) is the lead plaintiff in a class action lawsuit, which resulted in a consent decree to massively improve the Los Angeles bus system, brought by the NAACP Legal Defense and Educational Fund (LDF) against the Metropolitan Transportation Authority under Title VI of the 1964 Civil Rights Act. After more than a decade of work preparing litigation, negotiating a settlement, and enforcing its terms, we understand the critical importance of consent decrees as one of the few legal tools we have to try to protect and enforce hard won civil rights in those cases where a government agency does not voluntarily do so itself.

The consent decree we signed with the Los Angeles MTA has resulted in significant improvements for the transit dependent—designed to remedy years of inequities in the allocation of resources within L.A.'s transit system—since it was signed in 1996. In our original suit, the LCSC/BRU charged the MTA with establishing a separate and unequal mass transportation system. MTA was allocating the lion's share of public money to high cost-overrun rail construction projects designed to serve more affluent, and more often white, riders. This came at the expense of more than 90% of MTA riders who depend on the bus system, and who are more than 80% Black, Latino, Asian/Pacific Islander and profoundly poor.

To remedy this inequity, the LCSC/BRU-MTA consent decree makes the L.A. bus system the priority. Specifically, the decree mandates low fares, massively reduced bus overcrowding and new service to improve access to health care, education and job centers for bus riders through the reallocation of funds from other programs outside the bus system. *Over the past 8 years, our work to enforce the terms of the decree has already achieved:*

1) the replacement of 2,000 old, mostly diesel, buses with new, clean fuel, compressed natural gas buses—resulting in a cleaner, more reliable bus fleet;
2) the expansion of the bus fleet by approximately 350 buses to reduce massive overcrowding—resulting in markedly improved conditions for bus riders, including less overcrowding and shorter wait and transfer times;
3) no fare increase for a 7 year period.

Though MTA is frequently frustrated with having to fulfill the contract they signed, and in fact has stalled, fought our claims, and appealed every step of the way, even the agency ultimately admitted that the buses "are worth every penny" and have plastered Los Angeles with an advertising campaign proclaiming "Things Are Getting Better on the Bus."

Senator Alexander says that the consent decree has "forced the Metropolitan Transit Authority [sic] to spend 47 percent of its budget on city buses—leaving just over half the budget to pay for all the rest of the transportation needs of the city of Los Angeles." Yet, a 47% allocation for 90% of the agency's ridership is hardly overspending on bus riders—imagine the administration of a 90% Black school district spending only 47% of its funds on Black children!

If the proposed legislation passes, consent decrees will rarely if ever be signed, thereby effectively cutting off this important legal tool designed to protect the rights of historically disenfranchised groups. Before signing our consent decree in 1996, the Los Angeles MTA was raiding funds from the inner city bus sysetm to feed their costly train and suburban rail projects. If this had been allowed to continue, the overwhelmingly working class and poor Black, Latino, and Asian Pacific Islander bus riding class would have seen their mobility and access to jobs, hospitals, and other crucial services go from already-bad to even-worse. The MTA was violating the civil rights of bus riders, and it took the signing of a consent decree to hold the MTA, a $3 billion agency, accountable.

ARTICLE ENTITLED "BREAKING THE DEAL," BY TIMOTHY STOLTZFUS JOST, LEGAL TIMES

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ALM

Breaking the Deal

Proposed limits on federal consent decrees would let states abandon commitments.

BY TIMOTHY STOLTZFUS JOST

Bashing judges as petty anti-democratic tyrants is a hardy perennial of American politics. It bloomed once again this spring in the political and media brouhaha surrounding the Terry Schiavo litigation.

But it paints a false picture of America's courtrooms. The truth is that our judges are thoughtful, honorable, and prudent men and women who do their best to interpret laws adopted by our democratically elected Congress and state legislatures and apply them to messy factual situations. So it is unfortunate to see Sen. Lamar Alexander (R-Tenn.) joining the chorus of those unfairly attacking these public servants.

Alexander's April 4 commentary urged passage of his proposed Federal Consent Decree Fairness Act ("Free the People's Choice," Page 58). The senator's immediate concern is several consent decrees that are undemocratically (he contends) binding the Tennessee Medicaid program. Let's get the facts straight.

PLAYING BY THE LAW

Medicaid is our nation's largest health insurance program. In fiscal 2006, the federal government will spend almost $200 billion on the program. The federal government pays 64 cents of every dollar spent in Tennessee on Medicaid. Since Tennessee does not have to take this money, it is not unreasonable to expect the state to comply with federal law when it does. The consent decrees that Sen. Alexander's proposed legislation would help abrogate require nothing more than that.

In each of the three consent decrees described by Alexander, Tennessee was sued for not complying with federal Medicaid law. The Supreme Court has long recognized that federal law gives Medicaid recipients enforceable rights. Some of these—such as the right of poor children to early and periodic screening, diagnosis, and treatment of illness—are quite sweeping.

In each of the three cases, Tennessee's democratically elected governor agreed to take specific steps to comply with a law adopted by Congress. In each case, the plaintiffs agreed to give up substantial rights to achieve a more rapid settlement of the dispute. In each case, the plaintiffs and the state came to an agreement that they presumably felt they could live with and committed themselves to it. In not one of these cases did a judge tell the parties what to put in their agreement.

Tennessee may now believe that it is in compliance with Medicaid law. If this is true, it simply needs to move to modify or terminate the decrees that bind it.

It may also believe that particular judicial orders enforcing these consent decrees are incorrect. If it believes that, it can appeal. Indeed, on April 12 the U.S. Court of Appeals for the 6th Circuit reversed one of the court orders mentioned by Sen. Alexander that had blocked certain changes in the state's program, concluding that the order exceeded the terms of the consent decree.

But as the Supreme Court held unanimously last year in *Frew v. Hawkins*, another case involving a Medicaid consent decree, a state that has entered into a consent decree cannot simply walk away from the order because it no longer feels like complying.

The proposed Federal Consent Decree Fairness Act would allow a state to do just that, and not only in Medicaid disputes. This legislation applies to virtually all cases brought against state and local gov-

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ernments to enforce federal law. The legislation would apply not just to litigation brought by individuals seeking the protection of federal law, but also to most litigation brought by the Justice Department against state and local governments. Although Sen. Alexander's bill would exempt school desegregation cases, it would cover cases involving race discrimination in employment; housing; and hospitals or other institutions receiving federal funding. It would also undermine consent decrees entered to enforce the Voting Rights Act. It would weaken consent decrees in cases under the Americans With Disabilities Act, cases enforcing federal environmental statutes, and cases brought to defend property and economic rights, religious liberty, or access to guns under the Second Amendment.

It is no wonder that a broad coalition of 86 national, state, and local groups—including the AARP, the National Urban League, and the Southern Poverty Law Center—submitted a letter to Congress on April 12 opposing this legislation.

DISCOURAGING ACT

The Federal Consent Decree Fairness Act would dramatically change the terms of consent decrees both existing and future. It would limit the certain duration of such decrees to four years or until the end of the term of the governor or highest-ranking official who agreed to the decree. At that time, the state or local government could move to modify or terminate the decree without offering any reason whatsoever.

The burden would shift to the plaintiff to prove that continuation of the consent decree was necessary "to uphold a Federal right," a technical phrase that could leave out many claims under federal laws. The plaintiff, in other words, would have to litigate the case all over again. If the court failed to act on the state's motion to overturn within 90 days (and the federal courts are fairly busy places), the consent decree would be terminated until the court decided the motion.

As a practical matter, the Federal Consent Decree Fairness Act would mean that no consent decree against a state government could be expected to last longer than four years. The vast majority would be even shorter in duration, as most would be entered at some point after the beginning of the term of office of the relevant official. States would be allowed to walk away from their commitments simply by electing a new governor, cities by electing a new mayor.

Because the legislation limits the effectiveness of only consent decrees, not litigated decisions, the immediate effect would be to discourage future consent decrees. If future plaintiffs wanted to make sure that a final decree remained enforceable, most cases now settled through consent decrees would have to be litigated to judgment. Yet the Supreme Court has long articulated a policy encouraging settlement of cases, as has Congress.

WHY WE CONSENT

Settlement of cases is vital for conserving the limited resources of the federal courts and for preventing intolerable judicial backlogs. It allows parties to avoid the prolonged uncertainty of complex litigation. It also saves them tens of thousands of dollars in attorney and expert witness fees, discovery costs, and other expenses. Those saddled with more litigation costs would include the Justice Department and other federal agencies, the federal courts, the intended beneficiaries of federal rights, and even state and local governments (the intended beneficiaries of Sen. Alexander's legislation).

Though a consent decree is enforceable as a judgment of the court, it is also a contract between the parties—and comes with many of the benefits of private agreements. Consent decrees allow the parties to determine the scope and terms of a judgment through the give-and-take of negotiation rather than to have terms judicially imposed that neither side may favor.

The kinds of cases addressed by the Alexander legislation commonly involve federal rights in complex federal programs and legislative schemes. Plaintiffs and defendants both accept certain losses in settling these cases in reliance on the decree's promise of corresponding gains. Plaintiffs settle for less-expansive interpretations of their rights than they may be entitled to; defendants agree to more specific obligations than they might have otherwise assumed.

Like other contracts, consent decrees are efficient—they represent terms that both sides believe they can work with. Courts ought to be particularly hesitant to modify these terms as any modification is likely to alter the balance struck by the parties—to restore to one party advantages earlier forgone and deprive the other of benefits it may have sacrificed much to gain.

FAIR AND FLEXIBLE

Litigants often use consent decrees to address problems that cannot be fixed overnight. For example, the city of New Orleans settled a Clean Water Act lawsuit with the Justice Department in 1998 by agreeing to modernize an antiquated sewage collection system. Many consent decrees, therefore, last for considerable periods of time. The time limits that would, for all practical purposes, be imposed by Alexander's legislation would be impractical and even unworkable in many cases.

Time limits are also unnecessary. Consent decrees in class actions currently cannot be entered until a judge holds a "fairness hearing" to ensure that the agreement is consistent with the public interest. Under Federal Rule of Civil Procedure 60(b)(5), any consent decree can be modified or terminated whenever either party shows that "it is no longer equitable" that the decree be enforced as agreed. And, indeed, consent decrees are often modified or terminated as conditions change.

But as the Supreme Court declared unanimously last year in *Frew*: "[D]istrict courts should apply a 'flexible standard' to the modification of consent decrees when a significant change in facts or law warrants their amendment. . . . 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."

By tying the life of consent decrees to the election process, the Federal Consent Decree Fairness Act would also inject the disruption of state politics into the federal judicial process. "Elect me," politicians might promise, "and I'll end that consent decree." Outgoing governors could enter into consent decrees to politically embarrass their successors by forcing them to move for modification of decrees in popular programs. The bill would thus drag the federal judiciary into state and local political bickering, threatening the very respect for judicial impartiality upon which the rule of law depends.

The Federal Consent Decree Fairness Act poses a serious threat to the authority of the courts, to the power of Congress, and to our federal democracy. It would undermine the key role that federal courts play in protecting the public's rights under the Constitution and under federal law. It is simply bad public policy and should be rejected.

Timothy Stoltzfus Jost is the Robert L. Willett Family Professor of Law at the Washington and Lee University School of Law. He wrote an opinion opposing the Federal Consent Decree Fairness Act for Sen. Max Baucus (D-Mont.).

LETTER FROM WILLIAM TAYLOR, CHAIRMAN, CITIZENS' COMMISSION ON CIVIL RIGHTS, AND VICE CHAIR, LEADERSHIP CONFERENCE ON CIVIL RIGHTS (LCCR), TO THE UNITED STATES SENATE

April 4, 2005

United States Senate
Washington, DC 20510

Dear Senator:

Many civil rights and public interest organizations have written to you urging that you oppose the Federal Consent Decree Fairness Act (S 489, H.R. 1229). I write to provide you with the experience and perspective of someone who has worked on civil rights litigation for 50 years and who has negotiated several consent decrees over the last 25 years.

I agree with the fundamental point made in several of the letters—that the proposed legislation would undermine remedies prescribed by the Constitution and by Congress to protect against government infringement of the rights of people.

Beyond this, however, I find it surprising that legislators who have expressed concern about the burgeoning costs of litigation should advocate a measure that will surely discourage the prospects for settlement of cases and ensure that major litigation will be long term and costly to all parties. Over the years as counsel for classes of African American children, I have settled cases in St. Louis, Cincinnati and Fort Wayne that would have necessitated lengthy trials if agreements had not been reached and entered as consent decrees. I believe that plaintiffs would have prevailed in these trials and the government defendants would have been taxed with costs and attorneys fees not only for their own high-priced lawyers but for plaintiffs as well.

While I obviously cannot speak for the utility of all consent decrees, there are safeguards built into the process that work to ensure that proposed consent decrees are in the public interest. First, the Federal Rules of Civil procedure prescribe fairness hearings held by district court judges which provide for public input and call for determinations that the consent decree is in the public interest. Second, in the rare instances in which a consent decree departs from the agreement of the parties, it is subject to appeal. Third, as has been noted in several letters, the decree can always be modified if there are changed circumstances.

The proposal in S 489 and HR 1229 to curb consent decrees therefore purports to solve a problem that does not exist. Worse, it creates a new set of problems. By tying the

life of consent decrees to the election process, the proposed legislation injects disruptive politics into the judicial process. Office seekers may be tempted to run on the platform that the consent decree imposes high costs for solving community problems on tax payers or that it creates social responsibilities (e.g., group homes) that some people would like to escape. "Elect me," these politicians are apt to say and "I'll get rid of that consent decree." Thus the bill would impair a crucial part of an independent judicial system.

While I recognize that the legislation specifically exempts school desegregation litigation, the problems I describe apply to many other problems. Constructive efforts to deal with practices that impair the effective function of mental health facilities or juvenile detention programs, for example, would be hampered if not undermined completely. Structural reform in almost all cases takes more than four years.

Finally, the bills themselves reflect sloppiness and a failure to think issues through. For example, consider what will happen if the parties decide in lieu of a consent decree to enter into a "private settlement," which by the terms of the bill is not covered. Such private settlements would likely be contracts enforceable in state courts. The Congress has just finished mandating that class actions be heard in federal court. Now it would be sending many types of class actions to state courts.

Other problems include the following. The findings and definitions speak of "imposing" consent decrees and injunctive relief. But by their very terms, "consent decrees" are not "imposed" but entered by the consent of the parties. The findings say that consent decrees should not apply to "parties not involved in the litigation." How does this apply to members of a class who are not named plaintiffs?

If there is any intent to proceed with this legislation, there should be thorough hearings in both houses of the Congress. As matters stand, this legislation would take a wrecking ball to the judicial function and to the long standing legal principle that encourages settlements rather than confrontations.

Sincerely yours,

William Taylor
Chairman, Citizens'
Commission on Civil Rights
and Vice Chair, Leadership
Conference on Civil Rights

ARTICLE ENTITLED "SUNSET FOR CONSENT DECREES," THE WASHINGTON POST, WRITTEN BY SIMON LAZARUS, PUBLIC POLICY COUNSEL, NATIONAL SENIOR CITIZENS LAW CENTER

washingtonpost.com

Sunset for Consent Decrees

Friday, April 1, 2005; Page A26

David S. Broder characterized legislation introduced by Sen. Lamar Alexander (R-Tenn.) as a "package of changes" to redress state and local grievances about "unfunded mandates" [op-ed, March 17].

But the Federal Consent Decree Fairness Act has little or nothing to do with unfunded mandates. Sen. Alexander's bill would sunset any federal court judgment to which a state or local government voluntarily agreed as soon as the top elected official who authorized the agreement left office or in four years, whichever period is shorter.

No doubt his bill is aimed at relieving Tennessee's governor of the necessity of persuading a federal district court to modify an outstanding consent decree spelling out Medicaid compliance requirements.

But Medicaid mandates are not unfunded. States receive billions in federal dollars to administer health care for needy children, mothers and nursing home residents. Lawsuits are brought to ensure that states keep their end of the bargain.

Mischief from Mr. Alexander's bill would reach far beyond Medicaid to other federal laws that require partnership with state and local governments. To take one example, in 1998 New Orleans settled a Justice Department Clean Water Act lawsuit by agreeing to modernize an antiquated sewage collection system. This long-term cleanup commitment would be rendered unworkable by the bill's rigid sunset deadline.

Mr. Alexander's bill is aimed at overturning a unanimous 2004 Supreme Court decision that long-term decrees may be modified "if the state establishes reason." If the state cannot provide reason, the court concluded, "The decree should be enforced according to its terms."

Congress should not upend the balance struck by the court. This court-stripping exercise is no answer to the unfunded mandates that concern Mr. Broder.

SIMON LAZARUS

Public Policy Counsel

National Senior Citizens Law Center

Washington

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LETTER FROM BARBARA B. KENNELLY, CHAIR, LEADERSHIP COUNCIL OF AGING ORGANIZATIONS (LCAO), *et al.*, to the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary

LEADERSHIP COUNCIL
of
AGING ORGANIZATIONS

Barbara B. Kennelly, Chair

June 15, 2005 Via Fax and Messenger

Honorable John Conyers
Ranking Member, Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Congressman Conyers:

Consent decrees play a critical role in our legal system. Everyone benefits from the ability to avoid lengthy and expensive trials by mutual agreement to common-sense, compromise solutions. Unfortunately, this time-honored approach is under unwarranted attack.

The "Consent Decree Fairness Act" (H.R. 1229) would effectively end the consent decree process in any case involving state or local officials. It would do so by letting these officials terminate any federal court consent decree after four years or whenever a new state or local administration takes office. They could do so without even explaining why they think the consent decree was no longer needed or showing they are in compliance with applicable law.

Instead, the legislation would require those who had brought lawsuits leading to consent decrees to demonstrate once again that the agreement should still be enforced – and it would deliberately make it very difficult for them to do so. That would undermine the purpose for entering into consent decrees with state or local officials, and thus leave no option but protracted, high-cost legal battles with those seeking legal redress when due process and other rights are in question.

This is not only unwise, it is unnecessary, as either party in a consent decree can already change the consent agreement any time they can convincingly demonstrate that change is needed.

The sponsors have stated that they believe this legislation is needed to control Medicaid costs. However, consent decrees should not be made a scapegoat for financial challenges in state Medicaid programs that, in fact, are due to spiraling costs throughout the health care system. The specific consent decrees behind their concerns protect due process rights that must be guarded for all Americans – especially those most vulnerable among us whose voices are so easily muted.

Eliminating consent decrees would damage the integrity and efficiency of our legal system. It would have no meaningful impact on the ever-escalating cost problems that plague our entire health care system, which is the real issue that needs to be addressed all across this great nation.

That is why we, the undersigned members of the Leadership Council of Aging Organizations (LCAO), strongly oppose this legislation. We urge you to also oppose it, and look forward to working with you to

10 G St, NE, Suite 600, Washington, DC 20002 ? (202)216-0420 ? (202)216-0445 (Fax) ? www.lcao.org

ensure affordable access to necessary health care in ways that maintain the integrity of our legal system and the rights of all Americans.

Sincerely,

AARP
AFL-CIO
AFSCME Retiree Program
Alliance for Aging Research
Alliance for Retired Americans
American Association for International Aging
American Federation of Teachers Program on Retirement and Retirees
American Foundation for the Blind
American Society of Consultant Pharmacists
Association for Gerontology and Human Development in Historically Black Colleges and Universities
Families USA
Gray Panthers
National Academy of Elder Law Attorneys
National Association for Hispanic Elderly
National Association of Professional Geriatric Care Managers
National Association of Social Workers
National Association of State Long-Term Care Ombudsman Programs
National Citizens' Coalition for Nursing Home Reform
National Committee on the Aging, Inc.
National Committee to Preserve Social Security and Medicare
National Senior Citizens Law Center
OWL
Service Employees International Union Retired Members Program

LETTER FROM THE LEADERSHIP CONFERENCE ON CIVIL RIGHTS (LCCR)

Leadership Conference on Civil Rights

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National Council of La Raza

COMPLIANCE ENFORCEMENT COMMITTEE:
Karen K. Narasaki
National Asian Pacific American Legal Consortium

EXECUTIVE DIRECTOR
Wade J. Henderson

April 12, 2005

Dear Senator or Representative:

On behalf of the undersigned organizations, we write to urge you to oppose the Federal Consent Decree Fairness Act (S. 489/ H.R.1229), recently introduced by Senator Lamar Alexander (R-TN) and Representative Roy Blunt (R-MO). If enacted, this bill would eviscerate a crucial means of resolving meritorious claims involving state and local governments without expensive and time-consuming litigation. In addition, the proposed legislation would impose grossly unfair burdens on the federal government, the federal courts, and beneficiaries of a wide array of federal protections in areas such as environmental, consumer, health care, and civil rights laws.

The Proposed Legislation Would Virtually Eliminate Consent Decrees Involving State and Local Governments

The Federal Consent Decree Fairness Act allows a state or local government to file a motion to vacate or modify a consent decree four years after the decree is entered or after the election of a new state or local official. Under the legislation, a consent decree will lapse if the federal court overseeing the decree does not rule on this issue within 90 days. The bill's language creates an ominous situation for federal and private plaintiffs, who could be required to re-prove their entire case every four years or every time the voters elect a new administration. In addition, the 90-day period for a court to issue a ruling would place undue pressure on an already overburdened federal judicial system. The legislation would also punish plaintiffs unjustly if a federal court is unable to issue a decision within the 90-day period.

The proposed bill would eliminate the value and effectiveness of consent decrees by restricting the ability of the litigating parties to enter into settlement agreements. Under the proposed legislation, at the time a defendant moves for dissolution or modification of a consent decree, a plaintiff can keep the decree in place only by showing that his or her federal rights continue to be violated. This burden of proof provision – which reverses decades of existing law that places the burden on the defendants – creates an additional disincentive for plaintiffs to settle because plaintiffs, knowing that they will be effectively forced to prove their case at trial on the merits after either four years or a change in administration, will justifiably question what benefits they will receive through consent decrees. The proposed bill also provides defendants with a new incentive to "run out the clock." Rather than encouraging litigants to enter into voluntary, enforceable settlements, the bill almost compels plaintiffs to go to trial so that they may obtain

litigated judgments that cannot be so easily modified. By creating disincentives to settle and forcing matters to contested litigation, the bill will further clog federal courts.

Moreover, with many consent decrees, a four-year time limit is a woefully inadequate period to correct the history of government practices or policies that created the harm. In many cases, the ability to fulfill the terms of a consent decree within the artificial time period imposed by the bill may either be impossible to achieve, or, require drastic steps that would not be desirable to the defendants or the plaintiffs.

The Proposed Legislation Purports to Fix a Problem That Does Not Exist

Existing federal law already permits the modification and dissolution of consent decrees. The courts currently apply a generous and flexible standard for allowing state and local governments to modify or terminate existing consent decrees. A party need only show that a significant unanticipated change in circumstances warrants revision of the decree. Examples of changed circumstances include a change in underlying law, when the goals of the consent decree have been achieved or when a consent decree proves to be detrimental to the public interest.

S. 489/H.R. 1229 inappropriately seeks to overturn *Frew v. Hawkins*, a recent unanimous decision by the U.S. Supreme Court that affirms flexible, common-sense standards for administering consent decrees involving state and local governments.[1] In *Frew*, the U.S. Supreme Court noted, "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."[2] The Supreme Court emphasized in *Frew* that state and local governments have a court remedy that allows them to modify or terminate a consent decree when a significant change in circumstances has occurred.

The Proposed Legislation Would Affect a Wide Range of Litigation and Have a Damaging Effect on Many Communities

The bill would affect most litigation brought by the U.S. Department of Justice (DOJ) against state and local governments, as well as litigation brought by private parties. For example, it would allow local governments to avoid implementation of consent decrees that govern long-standing and productive efforts by the DOJ to bring water, sewage, and air pollution control systems into compliance with federal environmental standards. The bill would complicate current and future efforts to ensure that billions of dollars in federal funds for transportation, economic development, and other programs are spent in conformance with applicable requirements specified by Congress. Enforcement of the Voting Rights Act would be very burdensome. The bill would also impact discrimination cases involving employment, housing, health care, state and local hospitals, universities, or other institutions that receive federal Title VI and Title IX funding and adversely affect agreements that have been protecting children's health, safety, and education for years. Indeed, the bill would negatively affect a wide spectrum of cases brought to secure federal rights in federal court against state and local governments.

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[1] *Frew v. Hawkins*, 540 U.S. 431 (2004).
[2] *Id.* at 442.

The bill, if enacted, would potentially result in the dissolution of the following constructive consent decrees:

- ***United States of America v. City of Los Angeles***[3] - consent decree entered following a DOJ investigation of allegedly widespread police corruption, including brutality and planting of evidence, in the Rampart Division of the Los Angeles Police Department. The decree, which was negotiated in 2000 and entered in 2001, creates procedures for, among other things, insuring that those arrested are examined for injuries (para 73) and that citizens have a viable mechanism for filing complaints against the LAPD (para 74). James Hahn was the City Attorney at the time decree was entered, and then became the Mayor of Los Angeles. Thus, if S. 489/H.R. 1229 were law, the City could now seek relief from the decree while offering no evidence that anything has changed since it agreed to the decree.

- ***United States v. Mercer County, NJ*** [4] – earlier this year, DOJ entered into a consent decree to settle a case it brought against a county-run nursing facility under the Civil Rights of Institutionalized Persons Act, for alleged gross violations of the standards of care and responsibility expected of those caring for the elderly and disabled. DOJ entered into a consent decree with the county designed to put in place sufficient staffing and attention to insure that those in the county's custody received the level and quality of care required by several federal statutes, including the Medicare and Medicaid Acts. Both sides declared that they were entering into the consent decree to avoid "protracted litigation." If S. 489/H.R. 1229 were to become law, the county could have the decree vacated as soon as there is a change in county administration, thus exposing the elderly and disabled in its care to renewed danger while the federal government sought to once again prove its case.

- ***United States and League of Women Voters of New Orleans, et al. v. Sewerage & Water Board of New Orleans, et al.*** – consent decree growing out of a suit[5] by DOJ under the Clean Water Act for modernization of an antiquated sewage collection system that spewed raw sewage onto city streets. The long-term clean-up commitment by the City could be severely compromised by this legislation.

Contrary to views of the bill's supporters, consent decrees are an efficient means for willing parties to enter into a carefully negotiated agreement without litigation. Consent decrees reflect the litigating parties' reasoned judgment that a consensual resolution is preferable to full-blown litigation. The Federal Consent Decree Act misrepresents the consensual nature of consent decrees and the well-established legal precedent on the practicality and efficiency of this settlement tool. Consistent with this precedent, federal courts currently apply a reasonable and flexible standard when asked to modify or dissolve consent decrees. Congress should not enact legislation simply to correct what some perceive as a few onerous consent decrees. Therefore, we urge you to oppose this bill and any similar amendments.

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[3] (C.D. Cal. - no case number given), at http://www.lapdonline.org/pdf_files/boi/final_consent_decree.pdf
[4] (D.N.J.) (consent decree at http://www.usdoj.gov/crt/split/documents/split_mercer_settle_2_17_05.pdf
[5] *United States and League of Women Voters of New Orleans, et al. v. Sewerage & Water Board of New Orleans, et al.*, Civil Action No. 93-3212, 63 Fed. Reg. 26825-26826 (May 8, 1998).

If you have questions or need additional information, please contact Michael Foreman, Deputy Director of Legal Programs at the Lawyers Committee for Civil Rights (202-662-8600, ext. 351), or Andrea Martin, Senior Counsel at the Leadership Conference on Civil Rights (202-263-2852), or Steve Hitov, Managing Attorney at the National Health Law Program (202-289-7661).

Sincerely,

David Certner, Director of Federal Affairs
AARP

Benjamin Wolf, Associate Legal Director
ACLU of Illinois

Ramona Ripston, Executive Director.
ACLU of Southern California

Janis Spire, Executive Director
Alliance for Children's Rights

Nan Aron, President
Alliance for Justice

Helena R. Berger, Chief Operating Officer
American Association of People with Disabilities

Laura W. Murphy, Director
American Civil Liberties Union – Washington Legislative Office

Scott Barstow, Director of Public Policy and Legislation
American Counseling Association

Barry Lynn, Executive Director
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Bazelon Center for Mental Health Law

Tom Gerety, Executive Director & Brennan Center Professor
Brennan Center for Justice at New York University School of Law

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Marcia Robinson Lowry, Executive Director
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National Association of Social Workers

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Laurence Lavin, Director
National Health Law Program, Inc.

Michael Avery, President
National Lawyers Guild

Don Saunders, Director of Civil Legal Services
National Legal Aid & Defender Association

Debra Ness, President
National Partnership for Women & Families

Simon Lazarus, Public Policy Counsel
National Senior Citizens Law Center

Stephanie J. Jones, Executive Director
National Urban League Institute for Opportunity and Equality

Dina Lassow, Senior Counsel
National Women's Law Center

Karen Wayland, Legislative Director
Natural Resources Defense Council

Patricia Kaplan, Executive Director
New Haven Legal Assistance Association

Ralph G. Neas, President
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Joan Claybrook, President
Public Citizen

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Paul Freese, Jr., Director of Litigation & Advocacy
Public Counsel – Los Angeles

Cesar Perales, Executive Director
Puerto Rican Legal Defense & Education Fund

Rabbi David Saperstein, Director and Counsel
Religious Action Center of Reform Judaism

Meredith Dodson, Director of Domestic campaigns
RESULTS

J. Richard Cohen, President & CEO
Southern Poverty Law Center

Javier N. Maldonado, Executive Director
Texas Lawyers' Committee for Civil Rights

Scott Cummings, Acting Professor of Law
UCLA School of Law

Jeremy Chwat, Director of Public Policy
United Spinal Association (formerly Eastern Paralyzed Veterans Association)

Belinda Belcher, Executive Director
Uptown People's Law Center – Chicago

Helen Gonzales, Policy Director
USAction

Deborah Stein, Director of Federal Policy and Advocacy
Voices for America's Children

LEGAL CASE SUBMITTED BY THE HONORABLE LAMAR SMITH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND CHAIRMAN, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

132 F.3d 1142, 28 Envtl. L. Rep. 20,459, 1997 Fed.App. 0369P
United States Court of Appeals,
Sixth Circuit.
WASTE MANAGEMENT OF OHIO, INC., Plaintiff-Appellant,
v.
CITY OF DAYTON, Defendant-Appellee.
No. 96-3977.
Argued Sept. 9, 1997.
Decided Dec. 23, 1997.

MOORE, J., delivered the opinion of the court, in which SUHRHEINRICH, J., joined. JONES, J. (pp. 1146-47), delivered a separate opinion concurring in the result.

MOORE, Circuit Judge.
Plaintiff-Appellant Waste Management of Ohio, Inc. ("WMO") appeals the district court's order that found a lack of jurisdiction to address its dispute with Defendant-Appellee City of Dayton (the "City"). The underlying dispute concerns whether the City, by virtue of its post-settlement actions, is estopped from refusing to approve WMO's construction of buildings on the south side of a landfill property, instead of the west side as originally designated in a consent decree between the parties. For the following reasons, we conclude that the district court does have subject matter jurisdiction over this dispute and, therefore, reverse.

I. BACKGROUND

In February 1991 federal litigation ensued between WMO and the City regarding the latter's denial of WMO's request to rezone a large tract of land on the west side of Dayton (from single-family residential to industrial) in order for a sanitary landfill (the "Stony Hollow Landfill") to be operated thereon. Joint Appendix (J.A.) at 18 (Compl., filed Feb. 22, 1991). WMO and the City entered into a settlement agreement on April 15, 1992 (the "Settlement Agreement"), which resolved the lawsuit, provided for construction of the Stony Hollow Landfill, and incorporated the Planned Development for Stony Hollow ("revised PD-69" or "PD-69"). J.A. at 88, 105 (Def.'s Ex. B with Attach. A). This Settlement Agreement was, in turn, incorporated into a consent decree entered and approved by the district judge on April 16, 1992 (the "Consent Decree"). J.A. at 84 (Agreed Consent Decree and Order, filed Apr. 16, 1992).

Two years after the judicial entry of the Consent Decree and the City's subsequent approval of the rezoning, as part of the process of obtaining final permits required for the construction of the Stony Hollow Landfill, WMO submitted an Overall Site Plan containing specific design and construction requirements to the Ohio EPA with a copy to the City. In a letter dated March 15, 1994 from Paul Woodie, Director of Planning for the City, to WMO, the City pointed to four areas [FN1] in which there existed a discrepancy between the Overall Site Plan and PD-69, the fourth being the relocation of buildings and support facilities from the west side to the south side. J.A. at 359-60 (Pl.'s Ex. 7 at 1-2). The letter further stated, however, with respect to the fourth item only, "it appears that the new arrangement does meet the intent and provisions of PD-69" and that "[t]he change in access drives, building locations and support facilities as shown ... is in substantial compliance with PD-69." J.A. at 360 (Pl.'s Ex. 7 at 2). WMO and the City differ as to the meaning and legal significance of this statement as it relates to the relocation issue. This difference in perception became apparent when WMO sought permission to fill a ravine in order to bring the southern area up to grade in preparation for the building construction and to alter

slightly the buildings' location on the south *1144 side, and the City responded that it had never approved the relocation in the first place. J.A. at 364 (Pl.'s Ex. 8 at 2). WMO then proceeded under the Dayton Zoning Code § 150.289 to seek approval for the relocation. J.A. at 215 (Def.'s Ex. B). Woodie and Michael Cromartie, the Superintendent of Building Inspection for Dayton, were proposing to approve the change, unless a majority of the City Commission were to direct them to do otherwise. J.A. at 365 (Def.'s Ex. D). Yet, on April 27, 1995 WMO's Division President, Robert Downing, Jr., was notified that Woodie and Cromartie had decided to reject the requested relocation. J.A. at 211 (Downing Aff. at 3 with Ex. E).

FN1. When WMO and the City could not reach an agreement as to Items 1-3 (setback, height, slope), WMO filed a Motion for Clarification of the Consent Decree and for Supplemental Relief Pursuant to the Settlement Agreement. J.A. at 115 (Motion for Clarification, filed May 31, 1994). The district court sustained WMO's motion as to Item 1 but overruled its motion as to Items 2 and 3. J.A. at 179 (Decision and Entry, filed Mar. 30, 1995). These conclusions were based on the district court's interpretation of what revised PD-69 had specifically designated for each of these design requirements since it was the court's belief that under "the Settlement Agreement . . . WM[O is required to] construct the landfill in accordance with revised PD-69." J.A. at 195 (Decision and Entry, filed Mar. 30, 1995, at 17). This decision and order was not appealed by WMO and is not a subject of this appeal.

When the City filed a motion for an order releasing certain funds that had been placed in escrow pending resolution of other disputes [FN2] between WMO and the City, WMO objected, claiming that the City had breached the Settlement Agreement and Consent Decree by changing its position regarding the location of the Stony Hollow Landfill buildings when it was estopped from doing so. J.A. at 203 (Pl.'s Mem. in Opp'n to Mot. to Release Escrowed Funds, filed May 2, 1995). On July 26, 1996 the district court ordered the release of the escrowed funds upon deciding that it only had subject matter jurisdiction to determine "whether [the] Settlement Agreement and the Consent Decree permit WM [O] to locate the buildings on the south side" and could not address the impact of any state law claims in answering this question. J.A. at 41 (District Ct. Op. at 10). The scope of the district court's subject matter jurisdiction over this dispute is the narrow issue now on appeal before this court.

FN2. See supra note 1 for background on these collateral issues.

The district court had jurisdiction over the action that ended with entry of the Consent Decree pursuant to 28 U.S.C. § 1331 (federal question). This court has appellate jurisdiction, pursuant to 28 U.S.C. § 1292(a)(1), over the district court's July 26, 1996 interlocutory order refusing to modify a consent decree which is injunctive in nature. See *Carson v. American Brands, Inc.*, 450 U.S. 79, 86-87, 101 S.Ct. 993, 997-98, 67 L.Ed.2d 59 (1981); *Lorain NAACP v. Lorain Bd. of Educ.*, 979 F.2d 1141, 1147 (6th Cir.1992), cert. denied, 509 U.S. 905, 113 S.Ct. 2998, 125 L.Ed.2d 691 (1993).

II. ANALYSIS

This court should review de novo the district court's jurisdictional ruling. See In re Dow Corning Corp., 86 F.3d 482, 488 (6th Cir.1996), cert. denied, Official Comm. of Tort Claimants v. Dow Corning Corp., 519U.S. 1071, 117 S.Ct. 718, 136 L.Ed.2d 636 (1997), and cert. denied, Breast Implant Tort Claimants v. Dow Corning Corp., 519 U.S. 1071, 117 S.Ct. 718, 136 L.Ed.2d 636

(1997); accord Greater Detroit Resource Recovery Auth. v. United States EPA, 916 F.2d 317, 319 (6th Cir.1990). Furthermore, while factual findings must be accepted unless clearly erroneous, any application of legal principles to these subsidiary factual determinations will also be reviewed de novo. See Waxman v. Luna, 881 F.2d 237, 240 (6th Cir.1989); accord Alaska v. Babbitt, 75 F.3d 449, 451 (9th Cir.), cert. denied, 519 U.S. 818, 117 S.Ct. 70, 136 L.Ed.2d 30 (1996).

WMO claims that the district court does possess subject matter jurisdiction over the buildings relocation issue even as it may implicate post-settlement actions by the City, the equitable principle of estoppel, and WMO's inability to obtain approval for the relocation through a procedure provided for under the city zoning code. Both jurisdictional bases asserted by WMO hinge on the district court's continued jurisdiction over the terms and conditions of the Settlement Agreement and Consent Decree. Under either theory, we conclude that jurisdiction exists.

A. Expressly Retained Subject Matter Jurisdiction

WMO first points out that, under the Consent Decree, the district court "retains jurisdiction over this cause for all purposes" and that either party may "move [the district court] for clarification of th[e] Decree and for supplemental or corrective relief in addition to and/or in lieu of any and all remedies provided for in the aforementioned Settlement Agreement." J.A. at 86-87 (Consent *1145 Decree at 3-4). While this provision clearly provides the district court with continued ancillary jurisdiction over the terms and conditions of the Settlement Agreement and Consent Decree, see Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 381, 114 S.Ct. 1673, 1677, 128 L.Ed.2d 391 (1994), the real question before this court is whether a claim that estoppel has altered a party's obligations and duties under a consent decree should be considered an issue concerning the terms and conditions of the Settlement Agreement and Consent Decree.

WMO came before the district court in essence to assert the following: WMO believes constructing the buildings on the south side of the property will be in substantial compliance with PD-69 as incorporated into the Consent Decree (and the City at one point agreed with this); however, if the court does not agree, WMO believes its obligations under the Consent Decree should be modified in light of certain equitable considerations, and, quite frankly, WMO believes it needs clarification of its obligations given the City's recent denial under the zoning code of its request for the relocation. This was the basic crux of WMO's plea, and this falls squarely within the district court's explicitly retained jurisdiction under the Consent Decree. That WMO's claim invokes equitable principles does not change this observation. Equitable considerations are clearly factors a district court can address when they are related to a court's power and duty to modify, interpret, and oversee a consent decree. In fact, a closer look at WMO's second argument below reveals that equitable considerations are an inherent part of this power and duty. Confronted with a jurisdiction retention clause similar to the one at issue before this court, the Seventh Circuit rejected the argument that pursuant to a provision in the consent decree which required parties to execute any documents reasonably necessary to effectuate the purposes thereof, the reasonableness of the terms of such documents was a state law issue not within the court's jurisdiction. See DiMucci v. DiMucci, 91 F.3d 845, 847-48 (7th Cir.1996). The City's argument here that a district court may not consider whether the principle of estoppel has made a requirement of a consent decree unenforceable must similarly be rejected.

Finally, the fact that WMO initially attempted to obtain approval for the relocation by relying on a procedure provided for in the city zoning code is irrelevant to the issue of jurisdiction since we are

not requiring the district court to rule on the propriety of a zoning decision in a vacuum, but rather to determine a party's rights and obligations under a consent decree. There is no logical reason for the district court, in carrying out its duty of overseeing and enforcing the Consent Decree, to be prohibited completely from dealing with a city ordinance like § 150.289; as WMO has pointed out, the Consent Decree itself specifically refers to Dayton Zoning Code § 150.289 as a mechanism for modification of dimensions specified in PD-69. J.A. at 107 (Attach. A of Consent Decree at 3). Our decision that continuing ancillary jurisdiction exists does not, of course, suggest any particular resolution of the merits of the underlying arguments or issues.

B. Inherent Subject Matter Jurisdiction

WMO also claims that the district court has jurisdiction over the relevant dispute by virtue of the court's inherent jurisdiction over its judgments that have prospective effect. WMO is correct that a consent decree has "attributes of both a contract and of a judicial act" and is "essentially a settlement agreement subject to continued judicial policing." Williams v. Vukovich, 720 F.2d 909, 920 (6th Cir.1983); accord Vanguards of Cleveland v. City of Cleveland, 23 F.3d 1013, 1017 (6th Cir.1994). In fact, " '[o]nce approved, the prospective provisions of a consent decree operate as an injunction.' " Vanguards, 23 F.3d at 1018 (quoting Williams, 720 F.2d at 920); see also Carson v. American Brands, Inc., 450 U.S. 79, 101 S.Ct. 993, 67 L.Ed.2d 59 (1981). This court has recognized that this injunctive quality requires courts to: "1) retain jurisdiction over the decree during the term of its existence; 2) protect the integrity of the decree with its contempt powers; and 3) modify the decree should 'changed circumstances' subvert its *1146 intended purpose." Williams, 720 F.2d at 920 (citations omitted); see also United States v. Swift & Co., 286 U.S. 106, 114, 52 S.Ct. 460, 462, 76 L.Ed. 999 (1932) ("If the reservation [of power to modify] had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need."). Courts, therefore, have a duty to enforce, interpret, modify, [FN3] and terminate their consent decrees as required by circumstance. This court has further found that

> FN3. It is interesting to note that the City itself characterized WMO's actions before the district court as a request for a modification of PD-69. J.A. at 323 (Tr. of District Ct. proceedings at 4).

[a]lthough interpretation of a consent decree is to follow the general rules prescribed in contract law, the courts, in effectuating the purposes or accomplishing the goals of a decree, are not bound under all circumstances by the terms contained within the four corners of the parties' agreement. Lorain NAACP v. Lorain Bd. of Educ., 979 F.2d 1141, 1148 (6th Cir.1992) (emphasis added), cert. denied, Lorain Bd. of Educ. v. Ohio Dep't of Educ., 509 U.S. 905, 113 S.Ct. 2998, 125 L.Ed.2d 691 (1993). At the very least, even if the structure, language, and context of the decree d[o] not combine to render the district court's interpretation of the text permissible, the district court "has [the] inherent equitable power to modify a consent decree if satisfied that the decree 'has been turned through changing circumstances into an instrument of wrong.' " United States v. Knote, 29 F.3d 1297, 1302 (8th Cir.1994) (quoting United States v. City of Fort Smith, 760 F.2d 231, 233 (8th Cir.1985) (quoting Swift, 286 U.S. at 114-15, 52 S.Ct. at 462-63 (1932))); accord Lorain, 979 F.2d at 1148. [FN4] Whether the situation presented here rises to the level where judicial modification is appropriate is a factual issue for the district court to decide in the first instance.

FN4. Based on the above principles of inherent jurisdiction, Federal Rule of Civil Procedure 60(b)(5) specifically provides a mechanism for obtaining a modification of a consent decree when "it is no longer equitable that the judgment should have prospective application."

Under Rule 60(b)(5), a modification may be granted "on motion and upon such terms as are just." The Supreme Court has stated that a significant change in factual conditions can be the basis for a court's granting of a modification under this rule. See Agostini v. Felton, 521 U.S. 203, ----, 117 S.Ct. 1997, 2006, 138 L.Ed.2d 391 (1997) (quoting Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384, 112 S.Ct. 748, 760, 116 L.Ed.2d 867 (1992)). In fact, the basis for a Rule 60(b) modification may be state law claims: mutual mistake, fraud, misrepresentation, etc., and it is clear that equitable principles may be taken into account by a court in its exercise of discretion under this provision. See 11 charles alan wright, arthur r. miller, and mary kay kane, federal practice and procedure § 2863 at 336 (2d ed.1995). In United States v. City of Fort Smith, the Eighth Circuit found that the district court should at the very least have held an evidentiary hearing to determine the validity of appellant's claim of mutual mistake, asserted under Rule 60(b), even though the language of the consent decree provided no basis for modification. Id. at 760 F.2d 231, 233 (8th Cir.1985).

III. CONCLUSION

Without reaching the merits of the underlying cause of action or giving any opinions as to whether WMO has presented new factual considerations or events which have rendered the strict enforcement of a consent decree so inequitable that a modification would be justified, this court concludes that the district court does possess the subject matter jurisdiction to address such an issue. Case law clearly suggests that a district court is not required to remain blind to all but the words contained in the four corners of a consent decree and that equitable considerations can properly be considered when they relate to the terms or conditions of a consent decree over which a district court has continuing jurisdiction. [FN5] The judgment of the district court is REVERSED, and this case is REMANDED for further proceedings consistent with this opinion.

FN5. In fact, "[r]elief from a judgment on the ground that it no longer is equitable should come from the court that gave the judgment." 11 charles alan wright, arthur r. miller, and mary kay kane, federal practice and procedure § 2863 at 350 (2d ed.1995).

NATHANIEL R. JONES, Circuit Judge, concurring.

*1147 I concur in the result reached by my colleague that a district court has subject matter jurisdiction to determine whether changed circumstances have altered the obligations of parties to a consent decree. I write separately to emphasize that this general statement of law does not grant courts and parties who have formerly agreed upon the terms of a consent decree, the ability to tamper with its express provisions absent clear proof of a significant change of factual circumstances that either: 1) "make compliance with the decree substantial more onerous," or 2) "when a decree proves to be unworkable because of unforseen obstacles," or 3) "when enforcement of the decree without modification would be detrimental to the public interest." Vanguards of Cleveland v. City of Cleveland, 23 F.3d 1013, 1013 (quoting Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384-85, 112 S.Ct. 748, 760-61, 116 L.Ed.2d 867 (1992)). Modification of a consent decree is an extraordinary remedy that should not be undertaken lightly.

Brown v. Neeb, 644 F.2d 551, 560 n.17 (6th Cir.1981) (citing United States v. Work Wear, 602 F.2d 110 (6th Cir.1979); U.S. Steel Corp. v. Frat'l Ass'n of Steel Haulers, 601 F.2d 1269, 1273-74 (3rd Cir.1979); Mayberry v. Maroney, 558 F.2d 1159, 1163 (3rd Cir.1977)). While I do not disagree that "equitable" considerations may sometimes be a factor in that determination, the standard that must be met is clearly a high one. Thus, a decision to modify a consent decree requires a complete hearing and findings of fact which establish the necessity of the relief requested. Vanguards, 23 F.3d at 1017 (citation omitted).

Here, WMO did not seek a modification of the Consent Decree due to "changed circumstances" under Fed. R. Civ. Pro. 60 and did not allege any of the facts necessary to justify the granting of one. [FN1] WMO couched their request entirely in terms of the Ohio state law of equitable estoppel, seeking to bind the City to a letter it had previously written. [FN2] If WMO had desired a modification of the Consent Decree, it should have asked for one in the court below, giving the district court an opportunity to consider the factors necessary in granting such a request. By attempting to bypass the rigorous standard applied when a party seeks to modify a consent decree and focusing entirely on the Ohio state law of equitable estoppel, WMO clouded the issue and caused the result reached in the court below. I agree, that the district court does have subject matter jurisdiction in this case, to decide the narrow issue of whether changed circumstances have altered WMO's obligation under the Consent Decree. I, however, emphasize that in order to justify a modification in this case, WMO must allege and prove much more than mere equitable estoppel under Ohio state law.

> FN1. Indeed, WMO did not even invoke the modification provision of the PD-69 itself, which is incorporated into the Consent Decree and provides that amendments may be made by the City Plan Board.

> FN2. Thus, WMO's request does not entail a clarification, interpretation or enforcement of the Consent Decree because the court below already determined that WMO was bound by the terms of PD-69 (which specified the location of the buildings at issue), and that the denial of WMO's request for a change in the location of the buildings did not violate the Consent Decree.

C.A.6 (Ohio),1997.
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LETTER FROM MARCIA ROBINSON LOWRY, FOUNDER AND EXECUTIVE DIRECTOR, CHILDREN'S RIGHTS

Marcia Robinson Lowry
President &
Executive Director

Board of Directors
Alan C. Myers
Chairman & Treasurer
Robin L. Dahlberg
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Daniel H. Galpern
Jeffrey B. Gracer
Howard M. Maisel
Alice Rosenwald
Melissa G. Salten
Hershel B. Sarbin
Carol Wilson Spigner
Anne Strickland Squadron

March 15, 2005

By Facsimile and Electronic Mail

Senator Edward M. Kennedy
315 Russell Senate Office Building
Washington, DC 20510

Dear Senator Kennedy:

We write in opposition to S. 489, the "Federal Class Action Fairness Act," recently introduced by Senator Lamar Alexander. If passed, this bill would interfere with the ability of the abused and neglected children we represent, and that of many other vulnerable Americans, to protect their constitutional and federal statutory rights. The legislation may be raised as an amendment to the Senate's budget resolution as soon as this week. We strongly urge you to oppose this unfair and harmful bill and, at a minimum, vote against it as a rider, as this legislation would so alter existing federal court case practice that it needs a full review and hearing before the Judiciary Committee.

Children's Rights is a national not-for-profit organization that uses its expertise to build the political, public and legal pressure needed to compel state and local child welfare agencies to do a better job for abused, neglected and abandoned children. We put failing foster care systems under close scrutiny, identify problems and generate solutions. When a system fails to respond, we bring class action litigation on behalf of children in the system to force reform through court order – not money damages – and then monitor implementation of those orders to ensure that children's lives actually get better and the benefits Congress envisioned for these children are actually delivered to them. A key tool in our efforts to protect the rights of children is the consent decree, a settlement between the parties that is approved and adopted by a federal court, thereby making it court-enforceable. Children's Rights has fought for and obtained consent decrees benefiting foster children around the country. As the child welfare systems Children's Rights seeks to reform have typically been under-funded and otherwise neglected for decades, the decrees themselves likewise often take years to fully implement, something well known to defendants at the time they choose to enter into them.

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S. 489 – which would apply to all existing and future consent decrees – would undermine civil rights plaintiffs, including the children we represent, in a number of ways.

First, the proposed legislation seeks to limit the duration of consent decrees by giving governmental defendants the right to petition the court for modification or outright dismissal *with each change in state or local government administration and in all events four years after entry of the decree.* Compounding matters, S. 489 would not require any showing whatsoever of compliance from a governmental defendant making such an application. Rather, the bill would require *plaintiffs* to demonstrate – each time the state or local government changed – "that the continued enforcement of [the] consent decree is necessary to uphold a Federal right." Thus, contrary to legal norms, the bill would shift the burden of proof to civil rights plaintiffs seeking only to preserve the terms upon which a litigation settled, and away from the governmental defendants seeking to modify the deal or have it struck entirely.[1]

Second, in effectively prohibiting consent decrees that provide for relief beyond that specifically set forth in a federal statute, the bill is attempting to "overrule" the U.S. Supreme Court's recent unanimous decision in *Frew v Hawkins*, 124 S.Ct. 899 (2004). To be useful, consent decrees must be tailored to meet local needs. As the Supreme Court recognized in *Frew* and earlier cases, often there are many ways to comply with federal law. One of the strengths of consent decrees is that they allow parties to agree to remedies that meet the particular problem at hand. S. 489 would prohibit parties from entering into such agreements, limiting the parties instead to generic statutory language, the enforcement of which may not actually improve outcomes for the plaintiffs at issue.

Third, if passed, the impact of the legislation will be profound and would add to the already overloaded dockets of our federal courts. Not only would the legislation unfairly change the terms of settlements already obtained for the hundreds of thousands of abused and neglected children, disabled persons, mental health patients, and other vulnerable plaintiffs currently protected by consent decrees, S. 489 will make it very difficult for the attorneys at Children's Rights and other civil rights attorneys to recommend that our clients enter into settlements in the future. As a result, there would likely be costly and time-consuming trials even in those cases where all parties agree that a binding court-enforceable plan for improvement is preferable to continued litigation.

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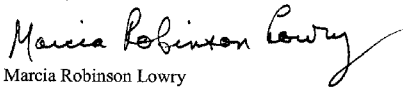
[1] There are already established legal standards for when a change in factual or legal conditions should permit a government defendant to modify a consent decree. *See* Fed. R. Civ. P. 60(b)(5); *Rufo v. Inmates of Suffolk Co. Jail*, 502 U.S. 367, 384-93 (1992). Courts considering requests for modification that meet these standards must "defer to local government administrators . . . to resolve the intricacies of implementing a decree modification." *Rufo*, 502 U.S. at 392.

Thank you for your attention to this. We would be happy to answer any questions you might have about the bill and its probable impact.

Sincerely,



Marcia Robinson Lowry

Founder and Executive Director

Letter to the Senate and House in opposition to the Alexander-Blunt legislation

To: Medicaid Coalition

Please join us in signing the following letter to the Senate and House in opposition to the Alexander-Blunt legislation that would destroy the Federal consent degree system, thus creating severe problems for the timely and efficient resolution of many Medicaid controversies between the States and beneficiaries.

Please let us know if you will sign by noon, Friday, April 22nd. Reply to _____.

Dear Senator/Congressman:

The undersigned health, disability, and senior organizations urge you to oppose the Alexander-Blunt consent decree bills (S. 489/HR 1229), which would allow state and local governments to renege on **[void, or avoid ??]** their contractual obligations simply because time has passed or new officials have been elected. These bills would have an immediate negative impact on the health, and in some cases the very lives, of many of our clients, and we therefore cannot emphasize enough how important it is that this ill advised concept not become law.

Although the bills suggest otherwise, consent decrees are not ever imposed by courts on state or local governments. Rather, they are bargains worked out by the parties to litigation, almost always at the suggestion of the very states and localities that these bills would allow to walk away from their agreements. During these negotiations, both sides sacrifice rights or defenses they may have in order to resolve the dispute in a manner of their own making. Only when, and to the extent that, the parties have reached an agreement does a court so order that bargain. Thus, the court's order does not impose any terms on the parties, but only helps to insure that the terms they have agreed to are observed.

Consent decrees therefore promote prompt resolution of many disputes that would otherwise go to trial and produce the same results, only many months or even years later. While justice unnecessarily delayed in this way is always harmful, in the health care arena the consequences can be especially harsh.

Under the Civil Rights of Institutionalized Persons Act, the Department of Justice more than occasionally must sue states or localities because of appalling conditions that exist in state- or county-run nursing homes or institutions for those with mental illness or mental retardation. It is common practice for such litigation to end by way of a consent decree, not only to preserve the resources of the parties, but more importantly to achieve a resolution that both sides can live with and that quickly begins to address the harm to which the elderly and disabled are being subjected. S. 489 and H.R. 1229 would effectively eliminate this approach to insuring humane treatment for the elderly and disabled, as any newly elected official could walk away from his government's obligations and force the Justice Department to start all over again. In the meantime, the elderly and disabled to whom we owe respect, not dishonesty, would continue to suffer.

The bills would have an equally detrimental effect on many cases that now protect the health and well being of children and others on Medicaid. Confronted with the prospect of losing at trial, states often request consent agreements to avoid a finding of liability and to have a voice in fashioning the remedy to their illegal conduct. Never is a state forced to enter into such decree. Pursuant to these agreements, children get screened for potentially debilitating diseases, people warehoused in nursing homes and institutions get to rejoin their families in the community, and often desperate applicants have their Medicaid applications considered in a timely fashion. Under S. 489 and H.R. 1229, these

existing protections would disappear overnight and new ones will take additional years to acquire.

We therefore urge you in the strongest possible terms not to support these bills that seek to address a "problem" that does not exist. The current system works well, and more or less equally, for both state and local governments and those to whom they have denied federally protected rights. S. 489 and H.R. 1229 would simply tilt the playing field in favor of state and local governments in a manner that reflects raw power more than any sense of equity. Please do allow this bad idea to become law.

PREPARED STATEMENT OF THE CONSERVATION LAW FOUNDATION (CLF)

The Conservation Law Foundation (CLF), New England's foremost regional environmental advocacy group, strongly opposes the proposed Federal Consent Decree Fairness Act. CLF has a long history of protecting New England's communities and environment by using law, economics, and science to create innovative strategies to conserve natural resources and protect public health. Long term consent decrees have been a critical tool in ensuring environmental progress in New England.

CLF has entered into several long term consent decrees that have resulted in major environmental gains. One notable example is the cleanup of the Boston Harbor. In *U.S. v. Metropolitan District Commission* and its companion case *Conservation Law Foundation v. Metropolitan District Commission,* the United States and the Conservation Law Foundation sued the State of Massachusetts under the Clean Water Act to stop sewage discharges to the Boston Harbor. The parties to that case signed a consent decree that initiated a large-scale infrastructure improvement project that is scheduled for completion in 2015, which is 29 years after the initial project schedule was ordered. Without a predictable, long term enforceable schedule, the cleanup of the Boston Harbor would not have been successful.

Likewise, in *Conservation Law Foundation v. Fall River,* the court found that the City of Fall River, Massachusetts was in violation of the Clean Water Act due to unauthorized combined sewer overflow (CSO) discharges. In 1992, the court ordered the City to design and implement a CSO facilities plan, which is scheduled to be complete in 2018. This project has drastically reduced CSO discharges and immeasurably improved water quality for the citizens of Fall River.

In complex environmental litigation, a consent decree is very often the only way to ensure consistent progress on a complex project subject to pressure from various political interests. Premature curtailment of such consent decrees would result in significant public expenditures with little or no environmental benefit. The uncertainty inherent in the consent decrees envisioned by the Federal Consent Decree Fairness Act would compromise future innovative solutions to clean up our air, land, and waterways. In sum, this Act would undermine CLF's ability to ensure compliance with federal and state laws and protect New England's environment as well as the health and well-being of its residents.

PREPARED STATEMENT OF BARBARA LOTT-HOLLAND, A TRANSIT-DEPENDENT BUS RIDER IN LOS ANGELES, AND MEMBER AND CO-CHAIR, BUS RIDERS UNION (BRU)

My name is Barbara Lott-Holland and I am a transit-dependent bus rider in Los Angeles. I am also a member and co-chair of the Bus Riders Union, which in 1996 signed a Consent Decree with the MTA. This Consent Decree was signed after we sued the MTA for transit racism under Title VI of the 1964 Civil Rights Act. There are several components of the Consent Decree but the overall objective of it is to require the MTA to improve the bus system and therefore increase the county-wide mobility for LA's transit dependent.

Before we signed the Consent Decree, conditions of the bus system were terrible and only getting worse. Lines were so overcrowded, that we would be packed in like sardines—sometimes as many as 50 people standing. Buses would frequently pass you by because they were so overcrowded. Buses would break down all the time because they were so old. You would wait forever at a bus stop—sometimes more than an hour—trying to get to work, to school, to pick up your kids.

Riding on an overcrowded bus is really dangerous. Being a women especially we are more likely to be robbed and pressed up against someone and sexually violated. If there is an accident or the bus stops short, and there are so many people standing, there is nothing to hold to so people can fall and get really hurt. When it's really crowded, you can't always get to the exit in time. Mental anguish is high when buses are overcrowded and continuously late. You always worry about being late to work and possibly fired. If there are more buses, it means less overcrowding and also that they will come with greater frequency, which means less stress and most importantly, more opportunities for jobs, housing education, health as well as recreational because you know you can there more easily.

Because of the poor condition of the transportation system, I have to choose jobs and housing based on transportation access. This means I have had to limit which jobs I can even apply for, even if it means taking a job for less pay. The poor transportation system also means you have to spend a lot of your day getting to and from work, time that is not compensated for and time that could be spent with your family. Many domestic workers, for example, travel 2–3 hours one-way. My aunt was a domestic and she had to wake up much earlier in order to catch the bus to her job, because the next bus, which comes an hour later, will get her there too late.

As the MTA announces, "things are getting better on the bus." Some of the lines I ride, like the 204, are noticeably less crowded than they were before. The frequency of some lines is also a lot greater. By having the Rapid buses, you are able to get from places faster. Also, for seven years, the fares did not increase, which for us bus riders, who are mostly poor and working class, was very important.

Don't get me wrong, there is still A LOT of improvements that need to happen—overcrowding persists, many lines stop running after 9 pm, there are still very long headways on many lines, and so on. If the MTA would simply uphold the Consent Decree to its fullest, we would have the first class bus system we deserve.

Buses are what move people in Los Angeles. The MTA put billions of dollars into the rail system, but these rail lines barely take you anywhere! LA is so big, that you have to go miles and miles. Whenever I do take the rail, I have to get off and get on a bus! We need more buses, not fewer, and the MTA has a moral and legal obligation to provide bus service for the transit dependent.

This consent decree has been really important. It has given us a very important legal tool to hold the MTA accountable to its responsibility to provide good bus service for the transit dependent. It has given us bus riders a tool to make the MTA honor its legal and moral responsibilities to provide transportation for the transit dependent.

Since the MTA signed the Consent Decree, they have never wanted to honor it. For the first four years of it, they didn't buy one single bus to reduce overcrowding. We've had to work in making the Consent Decree actually result in material changes for people. What's been really important is the length of the Consent Decree. The purpose of a Consent Decree is to ensure long-lasting changes. You want to make sure that whatever improvements are made are institutionalized, not just short-term. If S. 489/H.R. 1229 passes, and the Consent Decree had expired after four years, we wouldn't have gotten anything. We would have had to go to file for an extension of the Consent Decree, which would have meant an exhaustion of our time since the burden of proof would have been on us.

Before the Consent Decree, the average person didn't feel they could get anything from the MTA. It is a multi-billion dollar agency with a lot of power. People felt they had no power to fight for their right to bus service. For the working and poor, majority Black, Latino, and Asian bus riders, the improvements in bus service that have come out of the Consent Decree have been very important in providing increased access to school, jobs, health care, and ensuring our civil right to public transportation.

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