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Petition for a Writ of Certiorari. Frew v. Traylor, 136 S.Ct. 1159 (2016) (No. 15-483), 2015 U.S. S. Ct. Briefs LEXIS 3632, 2015 WL 6083505

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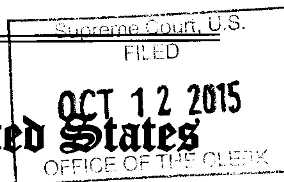

In The Supreme Court of the United States

CARLA FREW, et al.,

Petitioners,

v.

CHRIS TRAYLOR, Commissioner of the Texas Health and Services Commission, etc., and Kay Ghahremani, State Medicaid Director of the Texas Health and Human Services Commission,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Litigation regarding the legal responsibilities of large institutions, such as schools or prisons, is frequently resolved by consent decree.* The widespread use of such consent decrees regularly gives rise to inter-related disputes about how to interpret provisions of those decrees, and about when the decrees themselves have been satisfied and may thus be dissolved. In the instant case the Fifth Circuit, expressly disagreeing with the standards applied in the Sixth and Ninth Circuits, interpreted in a narrow manner, and then ordered dissolution of, key provisions earlier agreed to by Texas that protect the rights of millions of indigent children to medical care under the Medicaid law.

The questions presented are:

(1) In interpreting the provisions of a consent decree, and in deciding whether those provisions should be dissolved, should a court consider the purpose for which the provisions were adopted?

(2) In interpreting the provisions of a consent decree, and in deciding whether those

* The litigation in this case involved two types of agreed-upon orders, one denoted a Consent Decree, and the others denoted as Corrective Action Orders. In the Questions Presented we use the phrase "consent decree" generically to refer to any form of agreed-upon order.

QUESTIONS PRESENTED – Continued

provisions should be dissolved, should a court give weight to the interpretation of the provisions by the judge who originally approved them?

PARTIES

The plaintiffs in this action are Carla Frew, Maria Ayala, and Nicole Carroll, Mary Jane Garza, and Charlotte Garvin as next friends of their minor children, and the class of all Texas Medicaid recipients under the age of 21 who are eligible for EPSDT services but are not receiving the services to which they are entitled.

The defendants are Chris Traylor, M.D.,* Commissioner of the Texas Health and Human Services Commission, and Kay Ghahremani, State Medicaid Director of the Texas Health and Human Services Commission, who are sued in their official capacities.

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* Chris Traylor is substituted as a defendant in place of Kyle Janek pursuant to Rule 25(d), Federal Rules of Civil Procedure.

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Petitioners Carla Frew, et al., respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on March 5, 2015.

OPINIONS BELOW

The March 5, 2015, opinion of the court of appeals, which is reported at 780 F.3d 320 (5th Cir. 2015), is set out at pp. 1a-23a of the Appendix. The July 14, 2015, order of the court of appeals denying rehearing en banc, which is not officially reported, is set out at pp. 47a-48a of the Appendix. The December 18, 2013, opinion of the district court, which is reported at 5 F.Supp.3d 845 (E.D.Tex. 2013), is set out at pp. 24a-46a of the Appendix.[1]

JURISDICTION

The decision of the court of appeals denying rehearing en banc was entered on July 14, 2015. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

[1] Earlier phases of this litigation are summarized *infra*, pp. 5-8.

STATUTORY PROVISION AND RULE INVOLVED

Section 1396r-8(d)(5), 42 U.S.C., provides:

> A State plan under this subchapter may require, as a condition of coverage or payment for a covered outpatient drug for which Federal financial participation is available in accordance with this section, ... the approval of the drug before its dispensing for any medially accepted indication ... only if the system providing for such approval –
>
> (A) provides response by telephone or other telecommunication device within 24 hours of a request for prior authorization; and
>
> (B) ... provides for the dispensing of at least 72-hour supply of a covered outpatient prescription drug in an emergency situation (as defined by the Secretary).

Rule 60(b) of the Federal Rules of Civil Procedure provides in pertinent part:

> Grounds for Relief From a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> * * *
>
> (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed

> or vacated; or applying it prospectively is no longer equitable....

STATEMENT

This is an action brought under the Medicaid Act to protect the rights of Texas children entitled to medical benefits under that federal law. The class of plaintiffs includes more than 3.5 million indigent Texas children.[2] In 1996 Texas officials agreed to a Consent Decree designed to address massive and complex violations of the Act. Two years later, in the face of pervasive violations of the Decree, the plaintiffs moved to enforce the decree. Despite district court decisions in 2000 and 2005 finding repeated violations of the Decree, the state repeatedly appealed, refusing to agree to further compliance measures until 2007. Finally in that year the parties agreed on, and the court approved, a series of Corrective Action Orders (CAOs) to address the proven violations of the Consent Decree.

In the current litigation, the plaintiffs contend the state is in violation of certain portions of the

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[2] See *Frew v. Hawkins*, 2007 WL 2667985 at *8 (E.D.Tex. Sept. 5, 2007) (2.8 million Texas children in Medicaid in 2007); Record on Appeal ("RAO") 14-40048.59164. According to information submitted by Texas for the year 2014 there were 3.7 million children in the state eligible for the Medicaid services at issue in this case. http://www.medicaid.gov/medicaid-chip-program-information/by-topics/benefits/downloads/fy-2014-epsdt-data.zip.

Consent Decree and one of the CAOs, and seeks further relief. Conversely, the state seeks dismissal of those same provisions, contending that it has fully complied with them. The relevant facts are largely undisputed; the outcome turns on the interrelated questions of how to interpret, and when to dissolve as satisfied, the provisions of a consent decree or other agreed-upon order.

In rejecting plaintiffs' interpretation of the relevant provisions of the Consent Decree and CAO, and instead dissolving those provisions, the Fifth Circuit expressly disagreed with the legal standards applied in the Sixth and Ninth Circuits.

The circumstances in which these legal questions arise are complex, as is true of many problems arising under the Medicaid law. But once that context is understood, the ultimate legal questions are straightforward, and are broadly applicable to disputes about consent decrees generally.

Legal Background

Medicaid is a cooperative federal-state program that provides federal funding for state medical services to the poor. 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 42 U.S.C. §§ 1396a(a)(43), 1396d(r). "EPSDT programs

provide health care service to children to reduce lifelong vulnerability to illness or disease." *Frew v. Hawkins*, 540 U.S. 431, 433-34 (2004). EPSDT is "intended to be the nation's largest preventative health program for children" and "is among the most important programs that the Texas Department of Health runs." *Frew v. Hawkins*, 401 F.Supp.2d 619, 623 (E.D.Tex. 2005). In exchange for federal Medicaid Funds, the State of Texas obligated itself to provide healthcare to eligible children under EPSDT. There are millions of children in Texas poor enough to be eligible for EPSDT who depend on it for health care.

Early Stages of the Litigation

The case was initiated in 1993, alleging that in the administration of the Medicaid program Texas had systematically violated numerous provisions of the federal law. The plaintiffs sued on behalf of a class of all Texas children eligible for Medicaid.

The litigation led in 1996 to a consent decree that dealt with many of those problems. The Consent Decree guarantees class members all of the medical services required by the Medicaid law. Paragraph 3 of the Consent Decree provides that "[r]ecipients are ... entitled to all needed follow up health care services that are permitted by federal Medicaid law." App. 57a. Similarly, paragraph 190 provides that "EPSDT recipients served by managed care organizations are entitled to timely receipt of the full range of EPSDT

services...." App. 59a. The Decree mandates a substantial number of changes and procedures for the EPSDT program "[t]o address the parties' concerns, to enhance recipients' access to health care, and to foster the improved use of health care services by Texas EPSDT recipients...." App. 57a (Paragraph 6). Texas administers the Medicaid law in part by contracting with a number of private individuals and entities, including the pharmacies that provide medicines required by the law. Paragraph 300 provides that the "[d]efendants may contract with individuals and entities to provide EPSDT services. But, Defendants remain ultimately responsible for the administration of the EPSDT program in Texas and compliance with federal EPSDT law." App. 59a.

In 1998 plaintiffs commenced proceedings to enforce the Consent Decree, asserting that the state defendants were in violation of many of its requirements. In 2000 the District Court made lengthy findings detailing systemic violations of the decree by the state defendants.[3] *Frew v. Gilbert*, 109 F.Supp.2d 579 585-660 (E.D.Tex. 2000). Defendants appealed, arguing that enforcement of the Decree was barred by the state's sovereign immunity. This Court rejected

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[3] See 109 F.Supp.2d at 653 ("Defendants show their unilateral disregard for [the] Consent Decree by seeking to be excused from compliance by blaming their contractors."), 684 (defendants "have not made reasonable efforts to comply with [the Consent Decree]").

that contention. *Frew v. Hawkins*, 540 U.S. 431, 435-36 (2004).

On remand in 2005, the District Court again found the defendants in violation of the Consent Decree. *Frew v. Hawkins*, 401 F.Supp.2d 619 (E.D. Tex. 2005).[4] The defendants again appealed that finding, in this instance arguing unsuccessfully that a change in circumstances warranted termination of the decree. *Frazar v. Hawkins*, 376 F.3d 444 (5th Cir. 2006), cert. denied, 127 S.Ct. 1039 (2007).

On remand in 2007, the state relented and agreed to obey the Consent Decree and to take steps intended to correct the violations identified by the district court in 2000 and 2005. The parties resolved the compliance disputes by entry of a number of Corrective Action Orders ("CAOs"), compliance with which, it was hoped, would result in compliance with the Consent Decree itself, which remained in effect.[5] *Frew v. Hawkins*, 2007 WL 2667985 at *24 (E.D.Tex. Sept. 5, 2007). In approving those CAOs, the court noted that it had "twice found Defendants in violation

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[4] See 401 F.Supp.2d at 684 ("the Court finds that Defendants have not made reasonable efforts to comply with the judgment.... Defendants have failed, and continue to fail, even to attempt compliance with certain provisions"), 685 ("Defendants have violated, and continue to violate, multiple consent Decree provisions, ... and the court finds that they have not exerted reasonable efforts to comply with all, or substantially all, of the judgment.").

[5] ROA 14-40048.18308 (2007 Fairness Order) and ROA 14-40048.15875-15946 (Corrective Action Order).

of the Decree.... [O]n March 30, 2007, Defendants' lead trial counsel informed the Court that Defendants accepted that they had lost." *Frew v. Hawkins*, 2007 WL 2667985 at *5 (E.D.Tex. Sept. 5, 2007).

The Prescription CAO

The current litigation concerns the CAO related to prescription drugs ("the Prescription CAO") and the related provisions of the Consent Decree. See App. 46a-55a (CAO 637-8; "Corrective Action Order: Prescription and Non-Prescription Medications; Medical Equipment and Supplies") and App. 56a-60a (Consent Decree). The Prescription CAO concerns the pharmacies that provide children in the ESPDT program with the medication and medical supplies required by the Medicaid law. Although Texas contracts with those pharmacies to meet the state's legal responsibilities under Medicaid, paragraph 300 of the Consent Decree specifies that the state itself remains responsible for compliance.

The particular focus of this new round of litigation is the federally mandated 72-hour emergency drug prescriptions.

The Medicaid law requires that children in the EPSDT program be provided with medically necessary medications. The law permits a participating state to have a Preferred Drug List ("PDL"). States typically put particular drugs on their PDL because the manufacturers have agreed to give the state a rebate whenever those particular drugs are purchased

through Medicaid. A child can only receive a non-PDL drug if his or her physician (or other medical provider) obtains prior authorization; in the past that prior authorization would have come from state EPSDT officials, while today it would come from one of the health maintenance organizations that administer EPSDT in Texas. If a parent or child seeks to fill a prescription for a non-PDL drug without prior authorization, the state computer system – on which pharmacists check each proposed prescription – will reject that prescription.

Plaintiffs offered evidence that prescriptions for non-PDL drugs are rejected in hundreds of thousands of cases a year.[6] The problem arises for a number of reasons. This appears to be particularly common for emergency room doctors, who may not have the time to check whether the prescription they prefer is on the PDL list, or to call and obtain prior authorization. The state has established an electronic system which indicates which drugs are on the PDA list; the record suggests, however, that this system may not indicate that only a particular dosage (e.g. 10 mg., but not 5 mg.) or a particular form of the drug (e.g., tablet, rather than liquid) is on the PDL list.[7] The list of drugs (or dosage or form) that are on the PDL changes several times a year, and the distinction is

[6] Plaintiffs' Response to Defendants' Rule 60(b)(5) Motion (Doc. 1004) 15 n.14 (93,126 prescriptions rejected in a single quarter for lack of prior authorization).

[7] Brief of Plaintiffs-Appellants, 27, 28, 30.

not predictable; sometimes the PDL list includes only a brand name drug, but not its generic equivalent.

In framing the Medicaid law, Congress anticipated that this problem would arise. Accordingly, federal law provides that a state may not require preauthorization of any prescription unless the state expressly provides an emergency 72-hour supply of the non-authorized medicine. 42 U.S.C. § 1396r-8(d)(5)(B). "Under the PDL system, class members may receive non-preferred drugs that are prescribed, but only with Defendants' prior approval. However, if prior authorization is delayed, federal law requires Defendants to provide a 72-hour emergency allotment of non-preferred drugs so that class members are not deprived of needed medicines. When pharmacies fail to follow this rule, class members go without emergency medications." *Frew v. Hawkins*, 2007 WL 2667985 at *24 (Sept. 5, 2007). "The purpose of the 72-hour 'emergency' prescription is to ensure that class members are not deprived of medicine that they need while prior authorization is requested, particularly (but not only) on weekends. Further, the 'emergency' allotment provides time for a new prescription to be requested if the off-PDL medicine is not approved." CAO 637-8, App. 50a. The legal right of EPSDT participants to this emergency 72-hour medication is not in dispute; Texas policy expressly includes the same requirement as section 1396r-8(d)(5)(B). App. 50a.

In 2005 the plaintiffs contended that pharmacies participating in the EPSDT program regularly failed

to provide the 72-hour emergency medication required by federal law, in substantial part because the dispensing pharmacists did not know that federal law required them to do so. Texas was obligated to prevent such violations, because the pharmacies are state contractors for whose actions the state is legally responsible. App. 59a. The Prescription CAO, agreed to by the parties and ordered by the district court, contains several provisions to deal with this problem.

First, in the paragraph referred to as "Bullet 6,"[8] the CAO provides that "Defendants, will provide intensive, targeted educational efforts to those pharmacies for which the data suggest a lack of knowledge of the 72-hour emergency prescriptions policy." App. 53a. That provision was similar to broader language of paragraph 129 of the original Consent Decree, which required the state to "implement an initiative to *effectively* inform pharmacists about EPSDT, and in particular about EPSDT's coverage of items found in pharmacies." App. 58a (emphasis added).

Second, Bullet 10 of the CAO requires that "[b]y January 2008, Defendants will train staff at their ombudsman's office about the emergency prescription standards, [and] what steps to take to immediately address class members' problems when pharmacies

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[8] The CAO has a series of paragraphs preceded by bullets. Although these paragraphs are not numbered, in the lower courts the courts and the parties assigned them numbers for ease of reference. In the Appendix we have indicated those numbers in brackets.

do not provide emergency medicines...." App. 54a. The Ombudsman's Office is the Texas agency which EPSDT participants can call if they are unable to obtain needed medicine or services.

Third, Bullet 12 provides that

> [w]hen the two analyses [of pharmacy practices required by Bullet 5] are complete, counsel will confer to determine what, if any, further action is required. Counsel will begin to confer no later than 30 days following completion of the second analysis ('completion'). If the parties agree, they will so report to the Court within 120 days of completion. If the parties cannot agree within 90 days of completion, the dispute will be resolved by the Court upon motion to be filed by either party. If the parties cannot agree, either party will file their motion within 30 days of the conclusion of discussions among counsel.

App. 54a-55a.

The Current Litigation

(1) In 2012 plaintiffs moved to enforce the Prescription CAO, contending that the defendants were in violation of that CAO and of the related provisions of the Consent Decree. Plaintiffs filed their motion under Bullet 12 of the Prescription CAO, contending that despite the steps the state had taken that further action was required. With regard to the requirements of the CAO and Decree that the defendants educate pharmacists about the 72-hour

emergency prescription requirement, plaintiffs contended that the limited steps Texas officials had taken left large numbers of pharmacists unaware of that requirement of federal law, and thus resulted in continued widespread violations of section 1396r-8(d)(5)(B). See pp. 31-33, *infra*. With regard to the CAO requirement that the state train Ombudsman officials to "immediately" address the problems of class members denied non-PDL medicines, plaintiffs contended that the training failed to comply with the CAO because those officials were not instructed to respond to that problem by informing the pharmacy which had rejected a non-PDL prescription that it was required to immediately provide a 72-hour supply of the medicine in question. See pp. 33-34, *infra*. Plaintiffs offered evidence, including statements from a former President of the Texas Pediatric Association, that the failure of pharmacies to provide children with the federally required 72-hour supply of medication had caused suffering to and endangered individual patients.[9]

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[9] The detailed accounts and other documents were filed under seal, in order to avoid questions about the privacy requirements of the Health Insurance Portability and Accountability Act. Declaration of Dr. Stephen Whitney (immediate past president of the Texas Pediatrics Association); Declaration of Dr. Jane Rider (chair from 2007 to 2012 of the Texas *Frew* advisory committee established by Texas Medicaid Officials); Declaration of Dr. Pamela Wood (Clinical Professor Pediatrics at the School of Medicine at the University of Texas Health Science Center in San Antonio).

The defendants responded by moving to dissolve both the Prescription CAO and the related Decree provisions, claiming that the steps they had taken satisfied the requirements of both.

The litigation in the courts below turned on the legal standard governing the interpretation of the requirements of a consent decree (including the CAO), and on the related legal standard governing when a decree can be dissolved under Rule 60(b) on the ground that the defendant has fully complied with its requirements.

The state noted in the court below, that "[t]here are no factual disputes regarding the State's actions to implement this provision of the corrective-action order." Appellees' Brief, 31. Plaintiffs offered evidence that a large number of pharmacies and pharmacists in Texas are unaware of the 72-hour supply requirement in section 1396r-8(d)(5)(B), and that violations of that federal law are widespread. See pp. 31-32, *infra*. It is unclear to what extent the state disagrees with those contentions. However, under the legal standards advanced by the state and applied by the courts below those contentions were deemed legally irrelevant; for the purpose of this appeal, they are assumed to be correct.

The resolution of both motions turned largely on disputes about the meaning of several provisions of the Prescription CAO and the Consent Decree: (1) What constitute "intensive, targeted education efforts" under Bullet 6 of the CAO? (2) What are initiatives

that "effectively inform pharmacists" under paragraph 129 of the Consent Decree? (3) What constitute "steps to take to immediately address class members' problems" under Bullet 10 of the CAO? (4) What standard governs the authority of the court to resolve a dispute regarding whether there is a need for "further action" under Bullet 12 of the CAO?

The central legal issue about which the parties disagreed, and which was of controlling importance in the court below, is whether in interpreting a consent decree (or other agreed upon order), and in deciding whether to dismiss a decree or provision, a court should consider the purpose of the provision at issue.[10] Expressly rejecting the contrary view of the Ninth Circuit (and others), the Fifth Circuit insisted that that purpose is legally irrelevant to a judicial decision to interpret, or dissolve, a consent decree.

(2) The district court denied the plaintiffs' motion to enforce the Prescription CAO, and granted the state's motion to dissolve the CAO and paragraphs 124-30 of the Consent Decree. The district court decision rested in significant part on reasoning which neither the state nor the court of appeals defended. The district court held that it could not inquire or determine whether the state had "effectively" educated pharmacists because the state had never

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[10] Brief of Plaintiffs-Appellants, 10, 42-44, 48-52, 56-57, 61; Appellees' Brief, 14-15, 18-28; Reply Brief of Plaintiffs-Appellants, 8, 11, 17, 22.

agreed to any effectiveness requirement. App. 37a-38a. However, paragraph 129 of the Consent Decree expressly uses the term "effectively." The district court believed that under federal law and the CAO providing an emergency 72-hour supply of medication is optional. App. 34a ("allowed to dispense"), 34a ("can dispense"), 40a ("encouraged to dispense"). To the contrary, providing that 72-hour emergency medication is required by federal law. App. 7a. The district court applied a subjective standard in construing Bullet 10, holding that the issue was whether the state had taken steps with the intent of assuring immediate compliance with section 1396r-8(d)(5)(B), rather than whether the steps taken actually did or were likely to assure immediate compliance. App. 36a ("designed and intended").

(3) The court of appeals repeatedly recognized the specific purposes of the Decree and CAOs, which in several instances are spelled out in their text.[11]

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[11] App. 4a ("the parties agreed on eleven corrective action orders, each aimed at bringing Defendants into compliance with a specific portion of the Decree. CAO 637-8 ... implemented ¶¶ 14-30 of the Decree, which concerned deficiencies in Medicaid-participating pharmacies understanding of the EPSDT."), 6a ("¶ 6 [of the Consent Decree] ... describes the purpose of the Decree as '[t]o address the parties' concerns, to enhance recipients' access to health care, and to foster the improved use of health care services by Texas EPSDT recipients.'"), 7a ("To remedy the pharmacists' misunderstanding [that providing the 72-hour emergency supply is optional, or unreimbursed], CAO 637-8 established a series of detailed action items, elaborating on and expanding the requirements found in ¶¶ 124-30 of the

(Continued on following page)

The Fifth Circuit, however, emphatically refused to consider the purposes of the CAO and paragraph 129 of the Consent Decree in determining the manner in which those provisions should be interpreted.[12]

Interpreting a consent decree (or other agreed-upon provision) in light of its purpose, the Fifth Circuit reasoned, would be dealing with the issue backwards. Every consent decree provision, the court insisted, embodies an unstated agreement between the parties that the provision (however it might subsequently be interpreted) fully achieves the purposes of the decree, including (as in the instant case) purposes spelled out in the very text of the decree. The Prescription CAO, the Fifth Circuit held, was by its very nature "a clearly defined roadmap for attempting to achieve the Decree's purpose. In other words, the parties *already agreed* that substantial compliance with this roadmap would achieve their common goal." App. 16a (Emphasis in original; footnote omitted). "[T]he district court did not err in interpreting [the Prescription] CAO ... and ¶¶ 124-30 [of the Consent Decree] to mandate specific actions only, the performance of which would automatically

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Decree."), 15a ("The introductory paragraphs [of the Consent Decree] ... show that the Decree is aimed at supporting EPSDT recipients in obtaining the health care services they are entitled to, by addressing concerns, enhancing access, and fostering use of services." (emphasis omitted)).

[12] See App. 14a (sufficient that the defendants "perform the required action items mechanically").

satisfy the parties' intent in concluding these agreements." App. 19a. "[T]he parties never agreed" that whether an action by the state satisfied paragraph 129 or the CAO would involve an "assessment" of whether interpreting those provisions in that manner would meet, or defeat, their purpose. App. 16a.

Consideration of whether an interpretation of a decree was consistent with its purpose would also be inherently impractical, the Fifth Circuit insisted, because it would never be clear how much was necessary to satisfy that purpose. "The Decree ... sets no results-based milestones; neither do ¶¶ 124-30 establish any objective standard that pharmacists must achieve before Defendants' educational efforts may be considered successful. Plaintiffs have not pointed to any discrete endpoint for [the Prescription] CAO ... or these Decree paragraphs." App. 16a The purpose of a provision could be considered only if a decree provided "an objective standard" for determining when the purpose had been achieved. App. 19a.

Although Bullet 12 of the CAO expressly authorized the court to "resolve" a dispute about whether "further action is required," the Fifth Circuit insisted that in resolving a motion for further relief under Bullet 12 (the procedural posture of this case) a court could not consider the purpose of the CAO, because Bullet 12 (which does not list *any* standard for resolving such a dispute) does not specifically list the purpose of the CAO or the Consent Decree as a permissible consideration. "CAO 637-8[ ] instruct[s] ... 'counsel ... [to] confer to determine what, if any,

further action is required' after Defendants complete the second study of pharmacists' claims history. If the parties cannot agree, then the court may step in. There is nothing, however, instructing the court to resolve the dispute with reference to the Decree's overall purpose." App. 19a n.40.

The Fifth Circuit acknowledged that in *Jeff D. v. Otter*, 643 F.3d 278 (9th Cir. 2011), the Ninth Circuit had held that before dissolving a consent decree – the action the Fifth Circuit was directing – a court must consider whether the defendant's steps have achieved the purpose of the decree. But the court of appeals below expressly disagreed with the Ninth Circuit's holding, dismissing the Ninth Circuit's analysis in *Jeff D.* as not "persuasive[ ]." App. 18a.[13] "The Ninth Circuit's reasoning rested on two school desegregation cases, which present unique issues in consent decree jurisprudence, and on a case that appears to have considered the flexible standard for modifying consent decrees, a standard associated with the third clause of Rule 60(b)(5)." App. 18a. The Fifth Circuit also sought to distinguish *Jeff D.* by pointing to a provision in the decree in that case regarding whether the plaintiffs' claims had been satisfied, but conceded that the Ninth Circuit's holding had not itself relied on that provision. App. 19a.

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[13] Appellees' Brief, 22 ("*Jeff D.* was wrong to impose this ... requirement, and it made no effort to reconcile its holding with ... Supreme Court[ ] [precedent]."), 23 n.5 ("*Jeff D.* was wrong to impose this additional requirement on States ... and its analysis is irreconcilable with [controlling Supreme Court precedent].").

The Fifth Circuit also rejected Sixth Circuit decisions holding that in construing a consent decree deference should be accorded to the interpretation of that consent decree by the judge who originally approved that decree. "Plaintiffs urge that [the manner] in which Judge Justice construed various provisions of the Decree, is entitled to deference.... They appear to find this rule in a line of Sixth Circuit cases that apply 'deferential de novo' review to interpretations of consent decrees by the judges who initially approved them. We have never followed this rule." App. 10a.[14] The Fifth Circuit's interpretation of the Consent Decree and the CAO were materially inconsistent with the interpretation of those orders by Judge Justice, who had presided over this case between 1993 and 2009. See pp. 33-34, *infra*.

Having concluded that the disputed portions of the Decree and CAO should be interpreted without regard to the purpose for which they were adopted, the Fifth Circuit applied those provisions in a purposeless manner. The Consent Decree requirement that pharmacies be informed "effectively," and the CAO requirement of "intensive ... educational efforts," it held, were both satisfied simply by disclosing in a single sentence in a single flyer the existence of the requirement of a 72-hour emergency supply of medication. App. 22a. It was irrelevant whether that

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[14] See Appellees' Brief, 27 n.6 ("the Sixth Circuit [decision] in *Shy* [*v. Navistar Intern. Corp.*, 701 F.3d 523 (6th Cir. 2012)] ... should not be followed.").

disclosure had actually educated the pharmacists, or was likely to do so. The CAO requirement that Ombudsman office staff be trained about the steps to take to "immediately address" the denial of a non-PDL prescription was satisfied, it held, as long as there was training. App. 22a-23a. The court of appeals saw no reason to consider or resolve plaintiffs' contention that the *content* of the training in question directed the staff to do something that would not address that problem immediately, or perhaps at all. That would have impermissibly involved consideration of the purpose of the CAO requirement: actually helping parents get medicine for their sick or injured children.[15]

Plaintiffs filed a petition for rehearing en banc, emphasizing that the panel had expressly disagreed with precedents in the Ninth and Sixth Circuits. On July 14, 2015, rehearing was denied. App. 47a-48a.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit decision in this case rests on a clear and emphatic rejection of contrary precedents in the Ninth and Sixth Circuits. Other circuits generally agree that the purpose of a consent decree should be considered in interpreting that decree, and in deciding the related question of whether a decree should be dissolved because the defendant has complied with

[15] See pp. 32a-33a, *infra*.

it. But in the instant case the court of appeals held that it would be improper and unworkable for a court to attempt to consider the purpose of a decree in deciding how to interpret or whether a defendant had satisfied the decree. There is a well recognized 5-2 circuit split about whether appellate courts should accord deference to a district judge's interpretation of a consent decree which that district judge had approved.

At an earlier phase of this litigation, this Court held that a decree should be dissolved "when the objects of the decree have been attained." *Frew v. Hawkins*, 540 U.S. 431, 442 (2004). Here the Fifth Circuit has dissolved provisions of the very Consent Decree at issue in *Frew v. Hawkins*, while insisting – as the state itself argued below – that courts asked to dissolve a consent decree have no business considering whether the objects of that decree have been attained.

The precedential Fifth Circuit decision in this case threatens a profound disruption of the use of consent decrees to resolve civil litigation. If existing decrees are now to be construed without regard to their purpose, the settlements previously embodied in those decrees may now prove meaningless; a defendant may be able to effectively get out of its bargain by engaging in pro forma actions that accomplish virtually nothing. The immediate effect of the Fifth Circuit decision has been to trigger the systematic dismantling of other orders in this case without regard to whether Texas officials had taken actions that satisfied

the purposes of those orders. Prospectively, the Fifth Circuit decision in this case demands that future consent decrees regulate a defendant's conduct in excruciating detail, and impose exacting and highly specific standards of success, if those decrees are to be enforceable. By holding that courts may disregard the interpretation of a consent decree by the very judge who earlier approved it, the Fifth Circuit invites litigants to reopen all consent decree litigation whenever a case is assigned to a new judge.

This case presents an ideal vehicle for addressing, and correcting, the misguided precedents established by the Fifth Circuit.

I. THE FIFTH CIRCUIT DECISION CONFLICTS WITH DECISIONS IN NUMEROUS COURTS OF APPEALS

(1) The panel opinion rested on its insistence that in construing a consent decree (or other agreed-upon order), and in deciding the related issue of whether a decree should be dissolved because the defendant has complied with a decree, courts are not to consider the purpose of the decree. The Fifth Circuit acknowledged that its decision conflicted with the Ninth Circuit decision in *Jeff D.* Numerous other circuits have also held that courts should consider the purpose of a consent decree.

In *Jeff D.* the Ninth Circuit correctly insisted that a decree could not be dissolved without consideration of whether its purposes had been achieved.

> [Compliance with the specific terms of a decree] while clearly relevant, [is] not the only matter[ ] to be considered in determining whether the consent decrees have served their purpose. The status of compliance in light of the governing standards require[s] overall attention to whether the larger purpose of the decrees have been served. Indeed, this requirement is inherent in the very nature of 'substantial compliance.' ... It may be that compliance with [specific decree provisions] was all that was required for ... the overall purposes of the decrees ... , but that finding or conclusion has not been made [by the district court in this case]. Before the consent decrees may be vacated, there must be careful attention to their purposes.... If the purposes of the consent decrees ... have not been adequately served, the decrees may not be vacated.... Explicit consideration of the goals of the decrees and ... whether those goals have been adequately served, must be part of the determination to vacate the consent decrees.

643 F.3d at 288-89. Similarly, in *Youngblood v. Dalzell*, 925 F.2d 954, 961 (6th Cir. 1991), the Sixth Circuit held that "[b]efore the district court dissolves the decree, it must determine that the goals of the consent decree have been achieved...." The Sixth Circuit took the same position in *Gonzalez v. Galvin*, 151 F.3d 526, 531 (6th Cir. 1998):

> A district court must look to the specific terms of a consent decree in determining

> whether ... to terminate ... jurisdiction over it.... Factors to be considered include ... the consent decree's underlying goals.... [A] district court may not terminate its jurisdiction until it finds both that Defendants are in compliance with the decree's terms and that the decree's objective have been achieved.

In *United States v. Louisville and Jefferson County Metropolitan Sewer District*, 983 F.2d 1070 (7th Cir. 1993), the Seventh Circuit agreed that a "consent decree should terminate when the purpose of the decree has been fulfilled." The Eleventh Circuit also insists on consideration of the purpose of a consent decree. "A court faced with a motion to terminate ... a consent decree must begin by determining the basic purpose of the decree.... [A] decree may not be changed 'if the purposes of the litigation as incorporated in the decree ... have not been fully achieved.'" *United States v. City of Miami*, 2 F.3d 1497, 1505 (11th Cir. 1993) (quoting *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 247 (1991)).

Decisions in numerous circuits also hold – unlike the Fifth Circuit in the instant case – that the purpose of a consent decree is an important factor in interpreting its provisions. In *Pigford v. Vilsack*, 777 F.3d 509, 515 (D.C.Cir. 2015), the District of Columbia Circuit held that it would be improper to construe the provisions of a consent decree in a manner that "would frustrate the purpose" of those provisions. "The District Court was clearly justified in looking to

the ... provision's aims to ensure that its interpretation of the ... text corresponded to the parties' understanding of their bargain." In interpreting the section in question, "the District Court reasonably looked to the parties' purpose." *Id.* In *EEOC v. Safeway Stores, Inc.*, 611 F.2d 795, 798 (10th Cir. 1979), the Seventh Circuit held that "[t]he district court's interpretation of the ... provision of this consent decree was reasonable in light of the language and purpose of the decree." (Footnote omitted). The Second Circuit applies the same rule. "When the language of a decree is ambiguous, ... a court may consider ... extrinsic evidence to determine the parties' intent, including the purpose of the provision.... " *Broadcast Music, Inc. v. DMX, Inc.*, 683 F.3d 32, 43 (2d Cir. 2012).

(2) The panel decision was also emphatic in holding that an appellate court should interpret a consent decree or order without giving any weight to the interpretation of that decree or order adopted by the trial judge who had approved the decree or order. App. 10a-11a. The Fifth Circuit candidly acknowledged that its holding was inconsistent with the rule in the Sixth Circuit. App. 11a.

The Sixth Circuit has repeatedly approved the very deference rule rejected by the panel in this case. "[T]he district judge's interpretation of a consent decree deserve[s] deference where that judge oversaw and approved the consent decree." *Shy v. Navistar Intern. Corp.*, 701 F.3d 523, 528 (6th Cir. 2012). "[W]e give some deference to a district court's interpretation of a consent decree where that court was involved in

creating the decree." *G.G. Marck and Associates, Inc. v. Peng*, 309 Fed.Appx. 928, 935 (6th Cir. 2008). "Few persons are in a better position to understand the meaning of a consent decree than the judge who oversaw and approved it." *Brown v. Neeb*, 644 F.2d 551, 558 n.12 (6th Cir. 1981). "Where ... we are reviewing the interpretation of a consent judgment by the district court that crafted the consent judgment, ... [i]t is only sensible to give the court that wrote the consent judgment greater deference when it is parsing its own work." *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 371 (6th Cir. 1998).

The circuit conflict on this issue is deeply entrenched and well recognized. The First, Second, Seventh and Ninth Circuits agree with the Sixth Circuit that deference should be given to the interpretation of a consent decree by the judge who originally approved that decree. *Langton v. Johnston*, 928 F.3d 1206, 1221 (1st Cir. 1991) (opinion joined by Breyer, J.); *County of Suffolk v. Alcorn*, 266 F.3d 131, 137 (2d Cir. 2001) (applying clear error standard to judge's interpretation of ambiguous language in decree he or she approved); *Foufas v. Dru*, 319 F.3d 284, 286 (7th Cir. 2003) (citing cases); *Officers for Justice v. Civil Service Commission of the City and County of San Francisco*, 934 F.3d 1092, 1094 (9th Cir. 1991). The United States has endorsed that view.[16] On the other hand, the Third Circuit has emphatically rejected any

[16] 2000 WL 340005403 at *23-*24.

such deference. *Holland v. New Jersey Dept. of Corrections*, 246 F.3d 267, 277 (3d Cir. 2001). The Third Circuit has been unsparing in its criticism of the majority rule:

> Numerous ... cases [in other circuits] take this seemingly contradictory "plenary, but deferential" approach to the review of a district court's interpretation or construction of a consent decree.... This Court, in contrast, has held many times that a district court's construction and interpretation of a consent decree is subject to straightforward plenary or de novo review.... We ... think that the Third Circuit position is the more reasonable one, because the concept of "deferential de novo"... review seems to be an oxymoron.... The courts that apply "deferential de novo" do not explain how they amalgamate these two seemingly incompatible standards. We decline to follow these other courts and instead adhere to the long tradition in this Circuit of reviewing a district court's interpretation of a consent decree de novo.

246 F.3d at 277-78 (footnote omitted); see *id.* at 278 n.9 (Sixth Circuit decision in *Sault Ste. Marie Tribe* is "a hodgepodge standard"). "Not all courts agree." *Foufas*, 319 F.3d at 286.

II. THE QUESTIONS PRESENTED ARE OF GREAT PRACTICAL IMPORTANCE TO THE VIABILITY OF RESOLVING LITIGATION BY CONSENT DECREE

The precedential decision of the Fifth Circuit in the instant case threatens to seriously undermine the use of consent decrees to resolve civil litigation, particularly in complex cases involving large institutions.

(1) The immediate effect of the decision below is to call into question the effectiveness and viability of existing consent decrees in the Fifth Circuit, and elsewhere. Under the reasoning of that decision, a defendant which has taken only nominal steps to comply with a consent decree may now be able to obtain dissolution of the decree, rather than face a possible finding of violation and an order of additional relief.

That is precisely what is now occurring in Texas regarding other important elements of the Consent Decree and the other Corrective Action Orders in this case.[17] On September 29, 2015, in two separate orders, the district court dissolved another 36 paragraphs of the Consent Decree in this case, as well as two Corrective Action Orders, one concerning the training of health care providers, and a second regarding compliance with Medicaid requirements for transportation of Medicaid-eligible patients. The district court,

[17] Documents 1396 and 1397.

applying the reasoning of the Fifth Circuit in the instant case, dismissed as irrelevant the plaintiffs' contentions the requirements of those provisions should be construed in light of their purposes, and that the limited steps taken by Texas officials had not achieved the purposes of those provisions or ended violations of the Medicaid law.[18]

The Fifth Circuit's decision is a road map for avoiding meaningful compliance with existing decrees, because a defendant's act of purported compliance need not be meaningful, in the sense that it need not actually resolve or even address the purposes of the consent decree provision at issue. As this case well illustrates, where a consent decree has been framed in broad language to accord an institutional defendant discretion in framing solutions, the Fifth Circuit decision invites the defendant to proffer a response that is not really a solution at all.

(2) Even more seriously, the Fifth Circuit decision threatens the viability of consent decrees for resolving future violations.

Under the reasoning of the court of appeals, the very flexibility accorded to state officials under the Consent Decree and the Prescription CAO became their fatal flaw. In the absence of highly particularized measures of success, the state was under no obligation to frame a response that actually worked.

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[18] Documents 1396 and 1397.

In the wake of this decision, plaintiffs will have to insist that any future consent decree set out for each problem it addresses a mandatory "results-based milestone[ ]" (App. 16a). In the absence of a specific and rigid "discrete end point" (App. 16a), a decree may be dissolved before it has accomplished much of anything. The provisions of a decree may prove toothless unless it "establish[es] an[ ] objective standard that [the defendant] *must* achieve." App. 19a (emphasis added). The principles of federalism are ill-served by forcing plaintiffs to demand such inflexible requirements.

The Fifth Circuit decision also incentivizes decree provisions that micromanage the actions of state officials. For example, Bullet 10 directed the state to train the Ombudsman staff about "what steps to take to immediately address class members' problems when pharmacies do not provide emergency medicines." In the absence of a more specific directive, Texas assertedly trained the staff to respond to that problem by giving the class members advice that was highly unlikely to work, rather than by simply calling the pharmacy and telling it to obey federal law. See pp. 35-36, *infra*. In future decrees, plaintiffs would have to spell out in exacting detail the content of each training session, as well as its timing and participants. Only a decree that contains such minutiae would be protected from what occurred in this case. The decision below thus effectively forces plaintiffs to seek decrees that leave institutional defendants with an absolute minimum of flexibility.

(3) Similarly untoward consequences will follow from the Fifth Circuit's insistence that no deference should be accorded to the interpretation of a consent decree by the judge who initially approved that decree. The judge who has done so, usually after a fairness hearing and reviewing considerable documentation, is likely to understand the decree far better than a later court. As Justice O'Connor noted in *Rufo v. Inmates of the Suffolk County Jail*,

> [o]ur deference to the District Court[ ] ... is heightened where ... the District Court has effectively been overseeing a large public institution over a long period of time.... [Such a judge] develop[s] an understanding of the difficulties involved ... that an appellate court, even with the best possible briefing, could never hope to match. In reviewing [such a] District Court's judgment, we accordingly owe substantial deference to "the trial judge's years of experience with the problem at hand."

502 U.S. 367, 394 (1992) (quoting *Hutto v. Finney*, 437 U.S. 678, 688 (1978)).

Frequently, as occurred in this case, a trial judge will have spent years overseeing the implementation of a decree, issuing a series of decisions construing its provisions and providing guidance on which the parties rely. Under the Fifth Circuit's holding, unless those earlier decisions were appealed, they will have no weight if and when the case is assigned to a new judge. The parties will be free to reopen questions

that were settled only so long as the original judge was still assigned to the case. Such a situation invites instability in the law, and provides a perverse incentive for defendants to postpone compliance with a decree in the hope that in the future they can relitigate those questions before a later judge who may construe it in a more favorable manner.

III. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THE QUESTIONS PRESENTED

(1) This case presents a compelling example of the type of case in which it matters whether the provisions of a decree are construed in light of its underlying purposes.

The CAO and Consent Decree required the state to provide "intensive ... educational efforts" and to "effectively inform pharmacists." The purpose of those provisions was to assure that the thousands of Texas pharmacists providing services to EPSDT children actually understand, and obey, the requirements of federal law. If the quoted language was construed in light of those purposes, there is no chance it would have been interpreted in a manner that would have been satisfied by the state's meager efforts. Measured against that purpose, and in light of the history of this problem in Texas, there was virtually no chance that the limited steps taken by the state could succeed, if (as most circuits hold) success were relevant to the meaning of those provisions.

Plaintiff offered evidence that even after those steps had been taken there was (unsurprisingly) still a pervasive lack of understanding among pharmacists about what federal law required, including whether providing a 72-hour emergency supply of medicine was mandatory, rather than optional. In response to a survey in the record, pharmacists gave detailed explanations of why they were still not providing that supply, a response that was highly unlikely if they understood they were violating the Medicaid law.

Plaintiff also adduced evidence that, because of this lack of understanding of the requirement of section 1396r-8(d)(5)(A), there were still pervasive violations for that provision. The state's own records indicated that non-authorized non-PDL prescriptions, which under the Medicaid law should have been filled on the very day submitted for (at least) 72 hours, were actually filled on the day submitted only about 44% of the time, and were never filled at all in about one quarter of all cases.[19] A study commissioned by the defendants themselves showed widespread violations of the 72-hour supply requirement. Of the pharmacy and pharmacy employees surveyed, 50% had seen emergency prescriptions denied in the previous month, and 21% had seen them denied one to five times a week.[20] Another study done by the

[19] The evidence regarding the lack of understanding and compliance by pharmacists is summarized in Brief for Plaintiffs-Appellants, 16, 20-24.

[20] Briefs for Plaintiffs-Appellants, 21-22.

defendants showed that in the last quarter analyzed 2,286 Medicaid-participating pharmacies, including hundreds of the highest volume pharmacies in the state, had provided no 72-hour supplies at all during that quarter.[21] Plaintiffs contended that the record showed that more than 75% of the high-volume pharmacies were in violation of the emergency supply requirement.[22]

Similarly, Bullet 10 required the state to provide to the staff of the Ombudsman's office training about the "steps to take to immediately address class members' problems when pharmacies do not provide emergency medicines." The purpose of that provision, of course, was to assure that the class members "immediately" received the medicine they needed. Plaintiff offered evidence, however, that the staff were not trained to call the pharmacy and tell it to obey federal law and state policy, but instead were instructed to advise callers to contact the health maintenance organization that provided their care.[23] Measured by the purpose of the provision, that training was clearly insufficient; a call to an HMO by a class member could not succeed, because an HMO will only authorize a non-PDL prescription at the request of a physician or other health care provider,

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[21] Plaintiffs' Motion to Enforce the Corrective Action Order: Prescription and Non-Prescription Medications, 21-22.

[22] *Id.* at 20. The defendants disagreed with that contention.

[23] The evidence regarding the content of this training is summarized in Brief for Plaintiffs-Appellants, 15, 25-26, 62-64.

not at a request of a patient (or his or her parent). On the other hand, the courts below – deliberately putting aside the actual purpose of Bullet 10 – thought this sufficient, because the subject matter of the training was literally (albeit pointlessly) about how the staff were to respond to class members who could not get needed medicine.

(2) The Fifth Circuit's refusal to give weight to the interpretation of the Consent Decree and Prescription by the judge who had approved them was also of controlling importance. The Fifth Circuit's interpretations of those orders is in several important respects contrary to the understanding of the judge who had issued them.

The Fifth Circuit held that the requirement that Texas officials "effectively" educate pharmacists required only a letter that included a flyer mentioning the requirement of the 72-hour emergency supply, regardless of whether that letter had any effect on what the pharmacists understood or did, or even whether the pharmacy that received the letter bothered to read it or mention the letter to its employees. App. 22a. The trial judge, on the other hand, understood "effective" education to encompass at least a resulting understanding, and perhaps also resulting action in conformity with that understanding. *Frew v. Gilbert*, 109 F.Supp.2d 579, 596-99 (E.D.Tex. 2000). The Fifth Circuit insisted that by agreeing to the Prescription CAO, the plaintiffs had agreed that compliance with the CAO and related Consent Decree provisions (however they might later be construed)

would in fact assure that class members receive the medical care and medication required by the Medicaid law and the Decree itself. App. 16a, 19a. The trial judge did not think the plaintiffs had agreed that was certain to occur, but merely expressed the hope, for example, that the CAO "should improve class members' access to medicines prescribed for them." *Frew v. Hawkins*, 2007 WL 2667985 at *24 (E.D.Tex. Sept. 5, 2007). The trial judge did not think that the plaintiffs were agreeing to accept whatever occurred pursuant to the CAO in place of their rights under the Consent Decree. *Id.* at 2007 WL 2667985 *30 n.1.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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