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Federal Consent Decree Fairness Act
&
Sunshine for Regulatory Decrees and Settlements Act

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Chairman Coble, Ranking Member Cohen, Members of the Subcommittee, thank you for inviting us to testify today.

Federal Consent Decree Fairness Act

Senator Lamar Alexander, the initiating sponsor of the Federal Consent Decree Fairness Act, stated that it was based on our book, *Democracy by Decree: What Happens When Courts Run Government* (Yale University Press, 2003).

Our book is in turn based upon four premises.

I. The people have individual rights, constitutional and statutory, that courts should effectively enforce.

II. The people also have a collective right to elect state and local officials with the power to make government policy.

III. When necessary to enforce individual rights, courts should be able override the policy choices of these democratically-elected state and local officials.

IV. However, in enforcing rights, courts should intrude as little as possible on the policy choices of these elected officials.

A year after the book came out, a unanimous Supreme Court made the same points when it wrote:

> 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. . . . 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. *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 441-442 (2004).

Why there is a problem

Despite the Supreme Court's dicta in *Frew*, the everyday reality is that private litigants in federal court do use consent decrees to intrude on policy making of elected state and local officials far more than necessary to protect rights. The decrees are entered by consent after being negotiated and drafted by the plaintiffs' attorneys, defendant officials, and government attorneys.

Each has ideas about how to improve the program that is the target of litigation. Through horse trading, this group constructs a detailed plan to change the government program that is target of litigation. Each member of this controlling group has reasons to consent to a decree broader than needed to protect rights that gave rise to the suit. Plaintiffs' attorneys get to turn their policy preferences into court orders. The unelected officials who operate the program under reform get to broaden their power and grow their budget by court order, thus trumping the prerogatives of governors, mayors, or legislatures.

Governors and mayors have own reasons to go along with the deal negotiated by the controlling group. Contested litigation makes them a target of criticism, while the consent decree lets them take credit for a solution. The consent decree can often be constructed so that the most onerous requirements fall due are after next election. The Supreme Court, citing our book in *Horne v. Flore*, wrote that

> Scholars have noted that public officials sometimes consent to, or refrain from vigorously opposing, decrees that go well beyond what is required by federal law. . . . ("Government officials, who always operate under fiscal and political constraints, `frequently win by losing'" in institutional reform litigation). 129 S. Ct. 2579, 2594 (2009).

Judges understandably sign the consent decrees because no one objects and otherwise they will have to write the decrees themselves, which would mean the judges themselves would have to make the policy choices.

The problem comes chiefly because the consent decree binds not only the elected officials who consented to the decree, but also their successors in office, who find it hard to change the policy embedded in court orders by their predecessors. Court rules applied in consent decree cases against government official have a common origin with rules applied in consent decree cases against private business officials. The cases against private business officials are, however, different because there is no need to take account of the people's right to elect policy makers.

In response to this difference, the Supreme Court in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992) allowed government defendants to get a decree modified if they could show changed circumstances. This adjustment has proved in practice to be wholly inadequate, as illustrated by *Escalera v. New York City Housing Authority*, 924 F.Supp. 1323 (S.D.N.Y. 1996). The litigation began in 1967 with a class action complaint that the New York City Housing

Authority failed to give adequate procedural due process to tenants who were delinquent. The consent decree negotiated in 1971 mandated the elaborate procedures that went well beyond the requirements of due process. In 1993, after crack cocaine had emerged as a serious issue and caused great violence and fear in public housing, individual tenants demanded that the Housing Authority promptly evict those tenants who dealt drugs from their apartments. It complied by invoking a special procedure available under state law that would allow rapid eviction of proven drug dealers. The procedure complied with due process, but the Legal Aid attorneys who had brought the original class action objected that the procedure violated the twenty- two year old consent decree. To oppose lawyers technically representing them as tenants, the elected leaders of the tenants association hired other lawyers to fight on the side of the Housing Authority. It took two years of intensive litigation before the judge ruled that the decree could be modified under *Rufo*. Meanwhile, the tenants, the purported beneficiaries of the old decree, lived with the danger and intimidation of drug dealers next door.

Rufo is inadequate, in part, because it limits modification of decrees to changed circumstances. That approach denies voters their right to elect officials who can change policy simply because a new policy is thought to be a better policy. As Justice William Brennan wrote:

> 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. . . . [N]othing 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. *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 45 (1977) (Brennan, J., dissenting).

The Supreme Court acted upon this principle in *Horne v. Flores*, where it held in effect that state officials could change policy quite apart from changed circumstance, so long as the new policy complies with federal rights.

It was hoped that *Frew* and *Horne* had solved the problem of antique decrees frustrating the ability of newly-elected officials to change government policy in light of experience and the changing wishes of voters. This hope has, however, been dashed. In fact, less than thirty reported cases since *Horne* invoke the Court's opinion in dealing with motions by state and local officials

to change a consent decree. There may be some additional motions adjudicated in unreported opinions, but experience suggests that these Supreme Court cases has left untouched the vast majority of the many thousands of consent decrees against state and local government.

One difficulty is that *Horne* did not provide a clear roadmap for changing decrees. To the contrary, the Court found itself divided 5-4, the divisions were on a multitude of issues, and the resulting opinions are complicated and long – almost 26,000 words in total. The lack of a clear roadmap is a product of the Court's nature as a collective body obligated to decide cases based upon an inventory of precedent. Under that precedent, securing a modification is a time consuming process. For example, although *Horne* itself went back to the district court in 2009, discovery and hearings have dragged on and the lower court has yet to decide the motion.

Congress, in contrast, can write a clear, prospective rule.

Why the Federal Consent Decree Fairness Act is the right rule

In response to the need to modify and terminate consent decrees in light of both changing circumstances and changing policy, the bill provides a procedure that protects plaintiff's rights while still deferring appropriately to the choices made by state and local officials. The bill sets out the timing of motions, the burden of persuasion, and the standard to be applied.

Timing: Elections provide the public an opportunity to assess past policies and official competence and to democratically signal the need for changes. Consent decrees, however, typically last longer than the terms of the officials consenting and have the anti-democratic effect of limiting choices of newly elected officials. Long term contracts constraining the choice of newly elected officials undermine the core purpose of regular elections of officials, as Justice Brennan noted . The bill explicitly acknowledges the state and local election cycles and permits the newly elected or re-elected officials to move to modify or terminate the old consent decree as a function of the election process.

Burden: The justification for continuing a consent decree is that it is still needed to prevent future violation of federal constitutional or statutory rights. Current law places the burden on the state or local official to prove a negative – that the decree is no longer needed.

Placing this burden on the state or local officials is wrong as a practical matter because it is an almost impossible burden under most of the decrees, which enforce federal statutes on education, mental health, child protection and the like. The nature of governmental duties with

respect to such programs are such that they can never be perfectly performed or shown to be totally without risk of failure. Placing the burden of disproving the likelihood of future violations on the state and local officials is a formula for perpetual court supervision. This has happened in every state. Consent decrees of 30 and 40 years of age are common.

Placing this burden on the state or local officials is also wrong as a matter of principle. The core constitutional principles of separation of powers and federalism require judges to place the burden on plaintiffs who assert that a government official threaten them with illegal harm before entering an order against the official. In many institutional reform cases, plaintiffs never need to shoulder this burden because the official consented to be bound by a decree, but their successors in office have not. In other institutional reform cases, plaintiffs did prove that an official then in office did threaten illegal harm, but have not shown that their successors in office would. Imputing the threat from predecessor officials to their successors makes no sense, especially when the consent decree enforces statutes with broad majoritarian support. Most consent decrees today enforce statutes that Congress passed because voters favor the statute's purpose.

The burden of persuasion is defined as the risk of non-persuasion. In this case the burden should be on the plaintiff to show that the decree is still needed to vindicate plaintiff's rights. But once the plaintiff has made a prima facie showing that the decree or parts of the decree are still needed, the state or local government would have to respond. This allocation of burden and response has litigation efficiency. The focus of the litigation sticks to the statutory or constitutional right at issue rather than on the bargains written into consent decrees often years and decades earlier. Secondly, a state or local official who cannot respond persuasively to the plaintiff's proof, ought to lose and, under this statute, will lose.

Standard: the Supreme Court in *Frew* ruled unanimously that the federal courts should defer to the choices made by state and local officials. As shown by *Horne*, this includes policy choices on how best to comply with federal requirements. *Horne* involved federal requirement for the teaching of English to non-English speaking children. The issue in the case involved the best method of achieving that goal. The bill sets the standard in terms of allowing officials to make policy choices so long as they comply with the underlying constitutional and statutory requirements.

A legitimate concern of plaintiffs is that a state or local government may take years to come into compliance with federal law, and that the time may well exceed the fixed terms of the elected officials initially sued. Plaintiffs have a legitimate concern that their rights not be lost due to administrations change; the bill protects the plaintiffs from that risk.

With respect to modifications, the baseline applicable to all consent decrees is federal law. No modification sought by a subsequently elected official may change the duty actually spelled out in federal law. This is the core holding of *Rufo*, *Frew* and *Horne*. If the modification complies or will comply with federal law then, but only then, the state or local official is entitled to a modification. What would be lost would be duties and obligations written into the consent decree which are no longer needed to comply with federal law, or which represent policies not embraced by current officials in the management of their obligation to comply with federal law.

With respect to termination, the standard in the bill is equally clear: compliance with federal law. Since a significant majority of decrees involved statutes, Congress is, in effect, the final arbiter of when it is appropriate to terminate a decree. It should be a major concern of Congress that the practice of the courts is not consistent with Congressional authority.

For example, Congress invoked its spending power to compel states to provide non-English speaking children with instruction so that they may learn English. Congress did not specify the method of teaching or how much money the state had to spend in support of the language programs. Yet that is exactly what the plaintiffs in the *Horne* case asked the federal court to enforce via a consent decree; their preferred method of instruction and a specified allocation of public funds. Congress never agreed to nor placed such demands on the state of Arizona. Why should the controlling group, in the name of Congress, have the power to do precisely what Congress did not choose to do? The bill would insure that congressional choices written into law will not be altered through backdoor consent decree bargains brokered by the controlling group.

The bill thus protects the rights of plaintiffs and, within that constraint, restores policy making power to elected officials. Plaintiffs' attorneys will thereby have less power and earn less attorneys fees, but they have had a good thing that has gone on for too long.

Why Congress needs to act now

Congress has a special responsibility to address federal consent decrees against state and local officials because most of the decrees enforce statutes enacted by Congress. Most of those statutes left state and local government with discretion, but the consent decrees take it away. The lack of discretion prevents states and localities from adapting to the financial crises that so many of them now face.

Sunshine for Regulatory Decrees and Settlements Act

The justification for the Sunshine for Regulatory Decrees and Settlements Act is illustrated by the "Toxics Consent Decree" entered in *Natural Resources Defense Council et al. vs Train*, 6 ELR 20588 (D.D.C. June 9, 1976), a case under the Clean Water Act of 1972. In the Clean Water Act Congress had classified water pollutants into two major categories: ordinary and toxic. For ordinary pollutants Congress told EPA to adopt rules that were economically and technically feasible. But for toxic pollutants, Congress directed EPA to issue rules that fully protected public health. When EPA set about to issue the rules, it made much progress in issuing rules only for ordinary pollutants, but little progress on toxic pollutants. Perversely, the statutory command to fully protect public health from the worst water pollutants adopted by Congress with laudatory purposes frustrated even modest efforts to reduce exposure to those pollutants. In a nutshell, the statute was the problem.

NRDC with other environmental advocates sued. The plaintiffs and EPA came up with a solution: change the statute by agreement, and then legitimize that change by a consent decree. The consent decree reversed the Congressional enactment and allowed EPA to issue rules for toxic pollutants based on feasibility rather than health. At both the politically-appointee level and the career level, the agency welcomed the suit rather than fight it. Various businesses objected without success. The result: EPA in a private law suit successfully amended the statute without a bill passed by Congress and signed by the president.

Changing the standard for regulating toxic pollutants may have made sense, but the manner in which that change was made did not. The lesson that we draw from the Toxics Consent Decree is that consent decrees entered in cases against a federal agency can change decisions that Congress has made – both in setting standards and granting policy making

discretion – and that those changes can have profound impacts not only on the parties to the lawsuit but other members of the public .

Consent decrees entered in cases against federal regulatory agencies are legion and they routinely change the legal status quo by modifying statutory standards or restricting the policy making authority that Congress has conferred on agencies. Under Democratic and Republican president alike, agencies frequently fail to meet the deadlines set by Congress. Professor Richard Lazarus reported twenty years ago that EPA had met only 14 percent of the hundreds of deadlines set for it by Congress. Richard J. Lazarus, "The Tragedy of Distrust in the Implementation of Federal Environmental Law," 54 *Law and Contemporary Problems* 311, 323 (1991). The problem remains, and is often one of time and resources. Congress requires agencies to do more than they can with the time allowed and dollars appropriated. The failure to achieve mandatory deadlines makes the agencies defendants in open-and-shut lawsuits.

A consent decree in such a case can accelerate the promulgation of one type of regulation, but may also delay the promulgation of other regulations. The late federal judge Gerhard Gesell noted that an order requiring an agency to devote limited resources to one regulation means less of the agency's limited resources are available to deal with other regulations: "The Court cannot and should not ignore the fact that not only does EPA have other responsibilities in the regulatory area, but that is presently under exacting demands in other proceedings to accomplish its regulatory functions." *Illinois v. Costle*, 9 Envtl. L. Rep. (Envtl. L. Inst.) 20243 (D.D.C. 1979).

How is a court to know that the consent decree is in the public interest – that it allocates scarce resources to the problem that most requires attention? One response is that the decree has the blessing of the agency at the time it is entered. But the rigidity of court decrees makes it hard for the agency to change policy later in the light of new information, new priorities, and new elections. In addition the agency has no say as to which lawsuits are brought. As a result, its consent to the entry of a decree is reactive rather than a positive affirmation as to what is the agency's highest priority. Another response is that the decree has the blessing of the advocacy organization that brought the lawsuit. But that response is even less satisfying. Advocacy organizations have private interests in attorney fees and in achieving power over policy, and suffer from the all too human penchant to think that their issue is the most important.

This bill provides Congress with an opportunity to establish procedures through which members of the public are given notice of, and an opportunity to participate in decisions embedded in consent decrees. This change is overdue. Were the same decisions made in a rulemaking governed by administrative procedures, members of the public would have the right to notice and comment, and a right to appeal to the courts. The public also deserves protection when an agency changes its mandate from Congress through a consent decree.

Thank you again for the opportunity to testify today. I look forward to answering any questions you may have.