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The Honorable Lamar S. Smith
Chairman
House of Representatives Judiciary Committee
Subcommittee on Courts, Commercial, and Administrative Law
2409 Rayburn House Office Building
Washington, D.C. 20515

RE: H.R. 3041, the Federal Consent Decree Fairness Act

Dear Congressman Smith:

I am writing on behalf of the Association of the Bar of the City of New York to express our opposition to the proposed Federal Consent Decree Fairness Act (H.R. 3041). The Association is an independent non-governmental organization with a membership of more than 23,000 lawyers. Founded in 1870, the Association is among the nation's largest and oldest bar associations, with a long history of protecting and promoting civil rights. The Association also has long been involved in efforts to promote and protect the just and efficient operation of the federal courts.

The Association is deeply concerned that the proposed legislation will unjustifiably diminish the use of consent decrees to resolve civil rights lawsuits against state and local authorities in the federal courts, seriously undermining the effective enforcement of the federal civil rights laws. The use of consent decrees in these suits has long served to reduce the burdens and costs for all parties. Allowing motions to vacate consent decrees based on the mere passage of time or a change in state or local administration, without allegations of a meaningful change in the conduct that the decrees address, will significantly burden the courts and undermine the effectiveness of consent decrees as a tool to effectively resolve disputes.

The Proposed Legislation

The proposed Federal Consent Decree Fairness Act (the "Act") would allow a state or local government or official to file a motion to modify or vacate a federal consent decree – defined as a "final order imposing injunctive relief against a State or local government or a State

or local official sued in their official capacity entered by a court of the United States that is based in whole or part upon the consent or acquiescence of the parties" – four years after the decree is entered or after the expiration of the term of office of the top state or local official who authorized the consent decree, whichever occurs first. See Section 3(a), (3)(b)(1). The Act would reverse the general rule that the party seeking relief from the court should bear the burden of persuasion by requiring that the original plaintiff would bear the burden of proving that continued enforcement of the decree is necessary. See Section 3(b)(2). Moreover, the federal court would have to rule within 180 days of the government's motion or else the consent decree could automatically lose effect until the court rules on the motion. See Section 3(b)(3)-(4).

The Act Will Burden the Federal Courts and Undermine the Enforcement of Federal Civil Rights Laws

The Act, while removing flexibility for state and local defendants to negotiate workable solutions, would also impose substantial additional burdens on the courts and lead to more protracted litigation in civil rights cases. The federal courts already have substantial dockets, and Congress should be wary of any proposed legislation that will further clog the federal courts. Because the Act would allow a defendant to renege on a consent decree after four years or even just months (if new officials were elected to replace the decree's signatories) without showing that the decree is no longer necessary, plaintiffs would be forced to undergo the expensive and burdensome task of relitigating their claims to prove the continuing necessity of the consent decree. This is the very process parties seek to avoid by entering into a settlement rather than going to trial.

The inevitable effect of the Act would be to undermine the purpose and value of consent decrees and eliminate plaintiffs' incentive to enter into settlements. Plaintiffs' attorneys in civil rights case will understandably advise their clients to pursue judgment through trial instead of resolving litigation through innovative consent decrees. This disincentive to settle will only increase the cost of litigating civil rights claims by state and local governments. Litigation costs will increase due to the need to prepare for trial and to the increased legal fees that the governments will pay successful plaintiffs. See 42 U.S.C. § 1988 (authorizing an award of legal fees for successful civil rights plaintiffs). Moreover, pursuing judgment through trial may be infeasible for some attorneys with indigent clients or limited budgets, with the result that meritorious civil rights claims may be abandoned.

The Act would create an unfair and impractical system in other significant ways. First, because the Act would apply to all cases for injunctive relief against state or local defendants with the exception of school desegregation issues, the Act would harm the goal of enforcing rights by means of consent decrees in a wide range of cases.

Second, the Act's retroactive application to consent decrees entered into before its enactment would be fundamentally unfair, especially regarding decrees that explicitly require long-term or permanent injunctive relief. It would upset the legitimate expectations of the plaintiffs and all those who were to benefit by the consent decree over the long term.

Third, and finally, in many cases, the Act's provision that a consent decree may lapse 180 days after the defendants move to vacate or modify unless the court decides their request within that time is likely to result in the decree becoming unenforceable without any decision about its continuing necessity. This follows because, as a practical matter, development of evidence concerning the continuing necessity for the decree may require extensive investigation, discovery, pretrial preparation, motions, and trial, and it may be impossible in many cases for a court to issue a decision within 180 days. Moreover, inconsistent or arbitrary government action and confusion is likely to result when a court fails to decide the defendants' request within 180 days and the decree lapses – so that the defendants may cease following policies required by the decree – but determines several months later that the decree continues to be necessary, and that the lapsed policies must be reinstated.

The Current System for Relief from Consent Decrees Works

These adverse consequences would be particularly unfortunate because the Act seeks to remedy a problem that does not exist. It is based on the incorrect premise that the judicial system lacks safeguards to ensure that consent decrees are fair and that relief from decrees that have become unnecessary, obsolete or overly burdensome is unavailable. Under the current system, there are substantial safeguards to ensure that unnecessary, obsolete or overly burdensome consent orders do not remain in force. First, before a consent decree is approved and entered as a final order, federal courts typically conduct a hearing to determine whether the terms of the settlement are fair, adequate and reasonable - indeed, in class actions such a hearing is compelled by Rule 23(e) of the Federal Rules of Civil Procedure. See, e.g., Frew v. Hawkins, 540 U.S. 431, 434-35 (2004); Johnson v. Florida, 348 F.3d 1334, 1337 (11th Cir. 2003); United States v. New Jersey, 194 F.3d 426, 431 (3d Cir. 1999).

Second, there is an existing mechanism for parties to seek relief from consent decrees that have become unnecessary or overly burdensome. Under Rule 60(b)(5) of the Federal Rules of Civil Procedure, a court may relieve a party from compliance with an order if "it is no longer equitable that the judgment should have prospective application," and under Rule 60(b)(6) for "any other reason justifying relief from the operation of the judgment." When the party seeking this type of relief is a governmental unit, courts are required to afford its views considerable deference. See Horne v. Flores, 557 U.S. 433, 129 S. Ct 2579, 2595 (2009)(holding that a "flexible approach" is required in deciding a state or local government's motion for relief from a judgment to "ensure that responsibility for discharging the State's obligations is returned promptly to the State and its officials") (internal quotations omitted); Frew v. Hawkins, 540 U.S. 431, 441-42 (2004) (when reviewing whether consent decree should be modified in light of changed circumstances, "principles of federalism and simple common sense require the [district] court to give significant weight to the views of government officials") (internal quotations omitted). Further, under current law, federal courts already use virtually the same standard as the Act to determine whether a consent decree should be vacated or modified. Compare Horne, 129 S.Ct at 2597 (reversing Court of Appeals' denial of Rule 60(b)(5) motion because it failed "to ascertain whether ongoing enforcement of the original order was supported by an ongoing violation of federal law") (internal quotations omitted), with H.R. 3041 3, 3(b)(2)(A)(requiring plaintiff to demonstrate that "the consent decree or any part of the consent decree is necessary to prevent the violation of a requirement of Federal law" in order to preserve consent decree).

There are numerous examples of cases in which parties have successfully returned to court to vacate a consent decree that is no longer necessary, obsolete, or overly burdensome. See, e.g., Doe v. Briley, 562 F.3d 777 (6th Cir. 2009) (affirming vacatur of consent decree prohibiting city and state from releasing arrestee information in light of changed law); Handshu v. Special Services Div. 273 F.Supp.2d 327 (S.D.N.Y, 2003) (finding that changed circumstances warranted significant revision of consent decree governing police surveillance of lawful political activity); Gilmore v. Housing Auth., 170 F.3d 428 (4th Cir. 1999) (finding vacatur of consent decree proper because housing authority established that law requiring administrative hearings before eviction proceedings had been changed and housing authority's proposed revision of decree was suitably tailored to changed circumstances); Small v. Hunt, 98 F.3d 789 (4th Cir. 1996) (granting department of corrections' motion to modify consent decree under which prisoners were to be given certain-sized living spaces, because department showed that compliance with decree was substantially onerous and detrimental to the public interest); Watts v. McFaul, 158 F.R.D. 598 (N.D. Ohio 1994) (vacating consent decree because it had achieved its primary purpose of alleviating jail overcrowding, and defendants had substantially complied with decree's other requirement).

Conclusion

In sum, the Act, if enacted, would not make federal consent decrees fairer and would undermine the effective use of consent decrees to resolve civil rights litigation by injecting unfairness, uncertainty, and unnecessary expense into a system that already works.

Respectfully,

Samuel W. Seymour

Cc: Hon. John Conyers, Jr.
Hon. Jim Cooper