The Association of the Bar of the City of New York

Office of the President

PRESIDENT
Bettina B. Plevan
(212) 382-6700
Fax: (212) 768-8116
bplevan@abcny.org
www.abcny.org

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The Honorable Jeff Sessions
Chairman
U.S. Senate Committee on the Judiciary
Subcommittee on Administrative Oversight and the Courts
335 Senate Russell Office Building
Washington, D.C. 20510-0104

The Honorable Charles E. Schumer
Ranking Member
U.S. Senate Committee on the Judiciary
Subcommittee on Administrative Oversight and the Courts
313 Hart Senate Building
Washington, D.C. 20510

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

The Honorable Howard L. Berman
Ranking Member
House of Representatives Judiciary Committee
Subcommittee on Courts, the Internet and Intellectual Property
2221 Rayburn House Office Building
Washington, D.C. 20515-6219

Dear Senators Sessions and Schumer, Congressmen Smith and Berman:

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 (S. 489/HR 1229). The Association is an independent non-governmental organization with a membership of more than 22,000 lawyers, judges, law professors, and government officials. Founded in 1870, the Association is amongst the nation's largest and oldest bar associations, with a long history of protecting and promoting civil rights and the just and efficient operation of the federal courts.

The Association believes that the proposed legislation serves no useful purpose and would unjustifiably diminish the efficacy of consent decrees as a means of resolving civil rights litigation against state and local authorities, leaving costly, protracted and unnecessary litigation as the sole means of remedying civil rights violations. The proposed legislation would thereby impose unnecessary burdens on federal courts and seriously undermine the effective enforcement of the civil rights laws.

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). In order for a consent decree to continue, 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 90 days of the government's motion or else the consent decree would automatically lose effect until the court rules on the motion. See Section 3(b)(3)-(4).

The Act Will Undermine Enforcement of Federal Civil Rights Laws And Burden Federal Courts with Unnecessary Litigation

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. As a result, 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. Thus, 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.

Federal courts will thus be burdened with unnecessary, costly, and protracted litigation that could have been fairly and effectively avoided. Congress should be wary of any proposed legislation that will further clog already heavily burdened federal court dockets.

Most importantly, pursuing judgment through trial may be infeasible for attorneys with indigent clients or limited budgets, with the result that meritorious civil rights claims may be abandoned. These unfortunate results would apply in a wide range of cases because the Act would apply to all claims for injunctive relief against state or local defendants with the exception of school desegregation claims (and, in HR 1229, also with

the exception of racial discrimination claims under Title VI or Title VII of the Civil Rights Act of 1964).

The Act would create an unfair and impractical system in other significant ways. First, 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 plaintiffs' legitimate expectations concerning the long-term remedial effectiveness of the decree as a basis for settlement.

Second, in many cases, the Act's provision that a consent decree lapses 90 days after the defendants move to vacate or modify unless the court reaches a decision 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 and motions, while the number of witnesses and broad scope of testimony that will typically be necessary to evaluate a decree's continuing efficacy could result in a protracted trial. It therefore will be impossible in many cases for a court to issue a decision within 90 days. Moreover, if the Court then decides later than 90 days, that the decree should continue, inconsistent government action and confusion could result, when the decree lapses and is then 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).

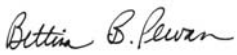
Second, there is an existing mechanism for parties to seek relief from consent decrees that have become unnecessary or overly burdensome. Under Rule 60(b)(5) of the Federal Rules of Civil Procedure, a court may relieve a party from compliance with an order if "it is no longer equitable that the judgment 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 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). 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., 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).

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. We, therefore, urge that Congress reject the proposed legislation.

Respectfully,



Bettina P. Plevan

cc:

The Honorable Arlen Specter
Chairman of the Senate Judiciary Committee
SH-711 Hart Senate Office Building
Washington DC 20510-3802
fax (202) 228-1229
arlen_specter@specter.senate.gov

The Honorable Patrick Leahy
Ranking Member
United States Senate Judiciary Committee
433 Russell Senate Office Building
Washington, D.C. 20510
senator_leahy@leahy.senate.gov

The Honorable James Sensenbrenner
Chairman of the House Judiciary Committee
2449 Rayburn House Office Building
Washington DC 20515-4905
fax (202) 225-3190
sensenbrenner@mail.house.gov

The Honorable John Conyers, Jr.
Ranking Member of the House Judiciary Committee
2426 Rayburn Building
Washington, D.C. 20515
fax (202) 225-0072
john.conyers@mail.house.gov

The Honorable Sam Brownback
Chairman
United States Senate Committee on the Judiciary
Subcommittee on The Constitution, Civil Rights and Property Rights
303 Hart Senate Office Building
Washington, D.C. 20510
fax (202) 228-1265

The Honorable Russell D. Feingold
Ranking Member
United States Senate Committee on the Judiciary
Subcommittee on The Constitution, Civil Rights and Property Rights
506 Hart Senate Office Building
Washington, DC 20510-4904
fax (202) 224-2725

The Honorable Steve Chabot
Chairman
House of Representatives Committee on the Judiciary
Subcommittee on the Constitution
129 Cannon House Office Building
Washington, D.C. 20515
fax (202) 225-3012

The Honorable Jerrold Nadler
Ranking Member
House of Representatives Committee on the Judiciary
Subcommittee on the Constitution
2334 Rayburn House Office Building
Washington, D.C. 20515
fax (202) 225-6923
jerold.nadler@mail.house.gov

The Honorable Melvin L. Watt
Chairman
Congressional Black Caucus
2236 Rayburn House
Washington, D.C. 20515-3312
fax (202) 225-1512

The Honorable Elijah E. Cummings
Congressional Black Caucus
2235 Rayburn H.O.B.
Washington, D.C. 20515
fax (202) 225-3178

The Honorable Edward M. Kennedy
317 Russell Senate Office Building
Washington, D.C. 20510
fax (202) 224-2417

The Honorable Hillary Clinton
SR-476 Russell Senate Office Building
Washington DC 20510-3202
fax (202) 224-6821
clinton.senate.gov/email_form .html

The Honorable Gary Ackerman
2243 Rayburn House Office Building
Washington DC 20515-3205
fax (202) 225-1589
gary_ackerman@mail.house.gov

The Honorable Gregory Meeks
1710 Longworth House Office Building
Washington DC 20515-3206
fax (202) 226-4169

The Honorable Anthony Weiner
1122 Longworth House Office Building
Washington DC 20515-3209
fax (202) 226-7253
weiner@mail.house.gov

The Honorable Edolphus Towns
2232 Rayburn House Office Building
Washington DC 20515-3210
fax (202) 225-1018
congressmantowns@mail.house.gov

The Honorable Major R Owens
2309 Rayburn House Office Building
Washington DC 20515-3211
fax (202) 226-0112
major.owens@mail.house.gov

The Honorable Nydia Velazquez
2241 Rayburn House Office Building
Washington DC 20515-3212
fax (202) 226-0327
nydia.velazquz@mail.house.gov

The Honorable Vito Fossella
1239 Longworth House Office Building
Washington DC 20515-3213
fax (202) 226-1272
vito.fossella@mail.house.gov

The Honorable Carolyn Maloney
2331 Rayburn House Office Building
Washington DC 20515-3214
fax (202) 225-4709
rep.carolyn.maloney@mail.house.gov

The Honorable Charles Rangel
2354 Rayburn House Office Building
Washington DC 20515-3215
fax (202) 225-0816
rangel@mail.house.gov

The Honorable Jose Serrano
2227 Rayburn House Office Building
Washington DC 20515-3216
fax (202) 225-6001
jserrano@mail.house.gov

The Honorable Eliot Engel
2264 Rayburn House Office Building
Washington DC 20515-3217
fax (202) 225-5513

The Honorable Alberto Gonzales
Attorney General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001
askdoj@usdoj.gov

The Honorable Bradley J. Schlozman
Acting Assistant Attorney General
United States Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, NW
Washington, D.C. 20530
fax (202) 514-0293