1-19-2016

Reply Brief. Frew v. Traylor, 136 S.Ct. 1159 (2016) (No. 15-483)

Eric Schnapper
University of Washington School of Law

Timothy B. Garrigan

Timothy David Craig

Jane Swanson

No. 15-483

In The Supreme Court of the United States

CARLA FREW, et al.,

Petitioners,

v.

CHRIS TRAYLOR, Commissioner of the Texas Health and Human 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

REPLY BRIEF

ERIC SCHNAPPER
Counsel of Record
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@uw.edu

TIMOTHY B. GARRIGAN
TIMOTHY DAVID CRAIG
STUCKEY, GARRIGAN & CASTETTER
2803 North St.
P.O. Box 631902
Nacogdoches, TX 74963
(936) 560-6020

JANE SWANSON
1408 Bentwood Rd.
Austin, TX 78722
(512) 220-0678

Counsel for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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The state acknowledges that in most circuits "considering the purpose of an injunctive order in interpreting that order ... states an interpretation principle...." Br.Opp. 25 (emphasis omitted).[1] The brief in opposition quotes decisions in the Second, Tenth and District of Columbia Circuits setting out that "accepted interpretive principle" in those circuits. Br.Opp. 26.[2]

The state contends that in the instant case the Fifth Circuit applied this interpretive principle. That characterization of the court of appeals' opinion is manifestly the opposite of what occurred in the court below. This mischaracterization highlights the circuit conflict and calls attention to the unsoundness of that decision.

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[1] The state suggests that petitioners contend that a party seeking dismissal of a decree under Fed. R. Civ. P. 60(b)(5) must show not only that it complied with the provisions of the decree (as properly construed), but also that the party's actions "achieved the order's 'objective' in a more nebulous sense." Br.Opp. 25, 30. But the Question Presented concerns how to construe the decree itself. Pet. i.

[2] The state disagrees about whether the decisions discussed at pages 26-40 of the brief in opposition also state this rule. Br.Opp. 26-30. But the state does not deny that in most circuits the purpose of a consent decree, or of a particular provision, is an important factor in interpreting the document.

(1) Petitioners sought additional relief in the district court under – and argued that dismissal was inappropriate because of – Bullet 12 of CAO 637-8, which provides that if the parties do not agree about whether "further action is required" in light of the effect of the state's actions on the practices of Medicaid pharmacies, "the dispute will be resolved by the Court...." Pet.App. 54a-55a. Petitioners contend that this provision authorizing judicial relief based on a finding that "further action is required" should be construed in light of the purpose of the CAO and Consent Decree.

The court of appeals curtly and expressly refused to consider the purpose of the relevant provisions in interpreting Bullet 12. "There is nothing ... instructing the court to resolve the dispute [under Bullet 12] with reference to the Decree's overall purpose." Pet.App. 19a n.40.

(2) The court of appeals was emphatic in explaining why it would not consider the purpose of the Decree when interpreting paragraph 129 of the Decree, which requires the state to take actions "to effectively inform pharmacists about EPSDT." Pet.App. 58a.

The Fifth Circuit clearly understood the expressly stated purpose of the Decree. The introductory paragraphs of the Decree, the court recognized, "show that the Decree is aimed at supporting EPSDT recipients in *obtaining* the health care services they are entitled to...." Pet.App. 15a (emphasis added). In the case at

hand, "the health services [EPSDT-covered children] are entitled to" is the emergency 72-hour supply of the prescribed medication.

Yet the Fifth Circuit insisted that, in deciding the meaning of "effectively inform," it would not consider that clearly identified purpose. The meaning of the requirement of "effective[ness]," the court of appeals asserted, could not involve consideration of whether pharmacies were actually providing – and children were receiving – the 72-hour emergency supply of medicine required by federal law. Any such purpose-based standard, the Fifth Circuit objected, would be impracticable because the Decree and CAO did not "establish any objective standard that pharmacists must achieve before Defendants' educational efforts may be considered successful." Pet.App. 16a. The provision could not be interpreted in light of the decree's express purpose, the appellate court insisted, because (as would be true under at least most consent decrees) the achievement of that purpose would be a matter of degree.

In the courts below, the parties advanced conflicting evidence regarding whether the state's actions had satisfied, or even advanced, the purposes of the decree. Petitioners offered evidence that many of the Medicaid-participating pharmacies still did not know they were required to provide the 72-hours supply of medicine, and that large numbers of EPSDT-covered children were not receiving the emergency medication required by federal law. Pet. 34-35. But the Fifth

Circuit deliberately adopted an interpretation of the "effectively inform" clause specifically crafted to assure that it would be irrelevant whether pharmacies did not know what they were legally required to do or whether covered children were not receiving the legally mandated medications. The state correctly observes that under the Fifth Circuit opinion, "even if the disputed factual premise were true" (Br.Opp. 18), that would be irrelevant to whether the actions taken were "effective[ ]" within the meaning of paragraph 129.

The Fifth Circuit, intentionally putting aside any concern for the purpose of the Decree, held that "the word 'effectively' ... applies to the Defendants' communications obligation, not to the participating pharmacies' compliance." Pet.App. 23a. In applying this purpose-blind interpretation of the Decree, it considered only whether the materials the state had mailed to Texas pharmacies contained any language which mentioned that the 72-hour supply was mandatory. Inclusion of such a sentence, the court insisted, was all that was required under its interpretation of the phrase "effectively inform." The "effective[ness]" required by paragraph 129, the Fifth Circuit insisted, had nothing to do with the what effect that sentence had on the number of pharmacists who understood the requirements of federal law, or on the proportion of covered children who were being given the mandated emergency 72-hour medication, the avowed purpose of the decree.

(3) Whether purpose is a relevant interpretive consideration was also of dispositive importance to the dispute about the meaning of the training requirement in CAO Bullet 10. That provision states that "Defendants will train staff at their ombudsman's office about ... what steps to take to *immediately address* class members' problems when pharmacies do not provide emergency medicines...." Pet.App. 54a (emphasis added).

If Bullet 10 were interpreted in light of the acknowledged purpose of the Decree – to assist EPSDT recipients in obtaining the health care services they are entitled to – the meaning of this provision would be obvious. When a pharmacy violates its legal obligation to "provide emergency medicines," the ombudsman's office would "immediately address" the problem by directly calling the pharmacy and telling it that the emergency medicine is legally required. On this interpretation "address ... [the] problem[ ]" would mean "solve the problem," and "immediately" would mean "immediately." The training required by Bullet 10 would thus instruct the staff to respond in this way.

But the state does not claim that the ombudsman staff was trained to respond in that manner. To the contrary, under the practice described in the brief in opposition, the ombudsman staff are trained *not* to themselves contact the pharmacy or anyone else, at least not when a parent first calls. Instead, "ombudsman-office personnel ... explain to callers that managed-care organizations have initial responsibility

to help recipients access necessary care.... [I]f a Medicaid recipient's managed-care organization was unable to resolve an issue, the ombudsman office ... would intervene with the managed-care organization or healthcare provider." Br.Opp. 35.[3] In other words, under the training reflected in the state-described practice, callers initially are not assisted at all by ombudsman staff, but are instead merely referred to their HMO. The HMO, however, has no authority or responsibility to direct pharmacies to obey federal law, and cannot pay for non-PDL medication without special authorization. If, after a predictably futile contact with the HMO, a parent persists and calls the ombudsman a second time, the staff still do not contact the pharmacy. There is little possibility that what ombudsman staff are trained to do will ever "address [the] problem[ ]," and almost no chance that what they are trained to do will address the problem "immediately."

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(4) In the circuits that interpret a consent decree in light of its purpose, a court will first identify the purpose of the decree, then consider whether the various possible alternative interpretations would or would not have the effect of advancing that purpose, and finally weigh that effect in selecting the correct interpretation.

The Fifth Circuit below proceeded in precisely the opposite manner. First, that court dismissed the expressly stated purpose of the Decree because it did not "guarantee specific outcomes." Then the court adopted avowedly purpose-blind interpretations. Finally the court announced as a matter of law that implementing the provisions so construed would ipso facto further the purpose of the decree, not based on any evaluation of the actual impact of those constructions, but relying instead on an *a priori* assumption that the correct interpretation (however arrived at) *always* advances the purpose of a decree. "Defendants ... fulfill the purpose of the Decree by implementing the ... initiatives memorialized in the Decree." Pet.App. 15a (footnote omitted).

II. THERE IS A CIRCUIT CONFLICT REGARDING WHETHER DEFERENCE SHOULD BE ACCORDED TO THE INTERPRETATION OF A CONSENT DECREE BY THE JUDGE WHO APPROVED IT

The state candidly acknowledges that the circuits are divided about whether, in construing a consent decree, deference should be paid to the interpretation by the judge who originally approved the decree in question. "[N]ot all courts agree on what weight is due to a district court's view of an order it approved...." Br.Opp. 33.

The state acknowledges that in the instant case the Fifth Circuit rejected the deference doctrine applied in other circuits. "The Fifth Circuit ... rejected plaintiffs' view that the interpretation of paragraph 129 [ ] ... should be decided with deference to statements by the district judge who originally approved the consent decree." Br.Opp. 10. "The Fifth Circuit offered multiple reasons for rejecting plaintiffs' argument that something other than de novo review applies...." Br.Opp. 19. The state notes that the decision below is in this respect the same as prior Fifth Circuit opinions, and the rule in the Third Circuit. Br.Opp. 33.

Conversely, the state candidly recognizes that at least three circuits – the First, Sixth, and Ninth – require that deference be paid to the views of that district judge. Br.Opp. 22 ("the Sixth Circuit ... noted a need for respectful consideration of a district court's interpretation of decree language" in *Brown v. Neeb*,

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The state suggests that in these circuits deference is given, not to the views of the judge who approved a disputed decree, but to the judge who entered the particular order under review on appeal. Br.Opp. 32. That is clearly incorrect. See *Shy*, 701 F.3d at 528 (deference "where that judge oversaw and approved the consent decree"); *Officers for Justice*, 934 F.3d at 1094 (deference "based on the court's extensive oversight of the decree from the commencement of the litigation...."); *Brown*, 644 F.2d at 558 n.12 (deference to "the judge who oversaw and approved [the decree]"); *Langston*, 928 F.3d at 1222 (deference "[c]onsidering the district court's prolonged institutional involvement").

The state argues that resolution of this circuit conflict would not affect the outcome of this case because, they assert, Judge Schell interpreted the relevant portions of the Consent Decree and CAO in his 2013 order dismissing those provisions. Br.Opp. 23, 30. That is palpably incorrect.[4] Although the state

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(Continued on following page)

asserts in broad, non-specific language that the 2013 opinion involved an "interpretation," the state never points to any passage in that opinion which it asserts constitutes an interpretation, and never identifies any specific provision of the Decree or CAO which it contends the 2013 opinion interpreted. The lengthy summary of the 2013 district court opinion set out at pages 12-16 of the brief in opposition never characterizes any portion of that opinion as an interpretation of the language of the provisions in question. The 2013 district court opinion could not be an interpretation of the term "effective" in the Decree; as the petition notes, and the state does not deny, the district judge mistakenly believed that this term was not in the Decree. Pet. 15-16.

The parties disagree about whether the analysis of the term "effectively" in paragraphs 31 and 52 of the Consent Decree in Judge Justice's 2000 opinion sheds light on the meaning of the term "effectively" in paragraph 129 of that Decree, the provision at issue in this case.[5] But the Fifth Circuit, believing that Judge Justice's interpretation would be entitled to no weight even if on point, never evaluated the relevant portion of Judge Justice's 2000 opinion. If this Court holds that Judge Justice's interpretation would be entitled to a degree of deference, the state can raise

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review while 'deferring' to some earlier interpretation." Br.Opp. 31. The petition manifestly advances no such contention.

[5] *Compare* Pet. 36 *with* Br.Opp. 23, 30, 34.

on remand its contentions regarding the meaning of his opinion.

This case provides an ideal vehicle for addressing this recurring legal question. Judge Justice approved the original Consent Decree only after a detailed fairness hearing that involved more than a score of witnesses and thousands of pages of exhibits, and resulted in a 35-page order. Judge Justice's 99-page order regarding the state's violations of the original Decree was issued in 2000 following 5 days of hearings, and consideration of the testimony of 15 witnesses and many thousands of additional pages of documentary evidence. Judge Justice's approval of the CAO at issue followed further hearings in 2005 and 2007, totaling another 8 days, with 26 witnesses and additional thousands of pages of exhibits. Judge Justice's analysis of the Decree and the CAO grew out of a detailed understanding of the complex Medicaid regulatory scheme, of the medical and insurance institutions involved, and of the practical significance and interrelationship of the many provisions of the Decree. This is precisely the sort of complex problem and litigation history that weigh heavily in favor of deferring to the views of the judge who approved the decree and CAO at issue.

III. THE QUESTIONS PRESENTED ARE EXCEPTIONALLY IMPORTANT

The proper interpretation of consent decrees is more than a question of central significance to sound judicial administration; it is also a matter of great

public importance. Litigation that affects only the individual litigants is most often resolved by private agreements which result in the dismissal of the underlying action. A mistaken interpretation of a contract typically impacts only the immediate parties. Consent decrees, on the other hand, are utilized primarily when a dispute affects a large number of people and the terms of those decrees are often intended to last well into the future.

This case, affecting the availability of emergency medication to more than 3 million indigent Texas children, illustrates the compelling importance of interpreting consent decrees in a sound and predictable manner. At some point in their lives, many of those children, like the children of their more affluent neighbors, are taken ill or injured, and need medication that very day, not three or four days later when some dispute among insurers, providers, HMOs and pharmacies may finally have been resolved. The members of the panel below would never permit children in their families to go for days without needed antibiotics, asthma inhalers, anti-seizure medicine, or other emergency medications; they could, and would, use their own funds to pay without delay for a disputed prescription. But the class members in this case, and their families, usually lack the means to address on their own such pressing medical needs. It was for that reason that Congress, in enacting the Medicaid statute, expressly mandated an emergency 72-hour supply of medicine. The text of the consent decree in this case recites that its very purpose is to enable eligible children to obtain EPSDT benefits, and the

Corrective Action Order is the outcome of years of work and supervision by Judge William Wayne Justice to end systemic violations of that decree.

The state of Texas earnestly insists that Medicaid-participating pharmacies in that state today are generally complying with the commands of federal law. But the Fifth Circuit below held that the state was entitled to escape its obligations under the Consent Decree and CAO even if there are still widespread violations, and that it simply did not matter to the resolution of this controversy whether large numbers of indigent children in Texas are enduring the pain and dangers of illness or injury without the protections and comfort that modern medicines can provide and that federal law mandates. This Court should grant review and hold that when a Consent Decree expressly states that its purpose is to assure compliance with a specific federal statute, the provisions of that Decree must be construed accordingly.

Respectfully submitted,

ERIC SCHNAPPER
Counsel of Record
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@uw.edu

TIMOTHY B. GARRIGAN
TIMOTHY DAVID CRAIG
STUCKEY, GARRIGAN & CASTETTER
2803 North St.
P.O. Box 631902
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TIMOTHY B. GARRIGAN
TIMOTHY DAVID CRAIG
STUCKEY, GARRIGAN & CASTETTER
2803 North St.
P.O. Box 631902
Nacogdoches, TX 74963
(936) 560-6020

JANE SWANSON
1408 Bentwood Rd.
Austin, TX 78722
(512) 220-0678

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COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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[5] *Compare* Pet. 36 *with* Br.Opp. 23, 30, 34.

on remand its contentions regarding the meaning of his opinion.

This case provides an ideal vehicle for addressing this recurring legal question. Judge Justice approved the original Consent Decree only after a detailed fairness hearing that involved more than a score of witnesses and thousands of pages of exhibits, and resulted in a 35-page order. Judge Justice's 99-page order regarding the state's violations of the original Decree was issued in 2000 following 5 days of hearings, and consideration of the testimony of 15 witnesses and many thousands of additional pages of documentary evidence. Judge Justice's approval of the CAO at issue followed further hearings in 2005 and 2007, totaling another 8 days, with 26 witnesses and additional thousands of pages of exhibits. Judge Justice's analysis of the Decree and the CAO grew out of a detailed understanding of the complex Medicaid regulatory scheme, of the medical and insurance institutions involved, and of the practical significance and interrelationship of the many provisions of the Decree. This is precisely the sort of complex problem and litigation history that weigh heavily in favor of deferring to the views of the judge who approved the decree and CAO at issue.

III. THE QUESTIONS PRESENTED ARE EXCEPTIONALLY IMPORTANT

The proper interpretation of consent decrees is more than a question of central significance to sound judicial administration; it is also a matter of great

public importance. Litigation that affects only the individual litigants is most often resolved by private agreements which result in the dismissal of the underlying action. A mistaken interpretation of a contract typically impacts only the immediate parties. Consent decrees, on the other hand, are utilized primarily when a dispute affects a large number of people and the terms of those decrees are often intended to last well into the future.

This case, affecting the availability of emergency medication to more than 3 million indigent Texas children, illustrates the compelling importance of interpreting consent decrees in a sound and predictable manner. At some point in their lives, many of those children, like the children of their more affluent neighbors, are taken ill or injured, and need medication that very day, not three or four days later when some dispute among insurers, providers, HMOs and pharmacies may finally have been resolved. The members of the panel below would never permit children in their families to go for days without needed antibiotics, asthma inhalers, anti-seizure medicine, or other emergency medications; they could, and would, use their own funds to pay without delay for a disputed prescription. But the class members in this case, and their families, usually lack the means to address on their own such pressing medical needs. It was for that reason that Congress, in enacting the Medicaid statute, expressly mandated an emergency 72-hour supply of medicine. The text of the consent decree in this case recites that its very purpose is to enable eligible children to obtain EPSDT benefits, and the

Corrective Action Order is the outcome of years of work and supervision by Judge William Wayne Justice to end systemic violations of that decree.

The state of Texas earnestly insists that Medicaid-participating pharmacies in that state today are generally complying with the commands of federal law. But the Fifth Circuit below held that the state was entitled to escape its obligations under the Consent Decree and CAO even if there are still widespread violations, and that it simply did not matter to the resolution of this controversy whether large numbers of indigent children in Texas are enduring the pain and dangers of illness or injury without the protections and comfort that modern medicines can provide and that federal law mandates. This Court should grant review and hold that when a Consent Decree expressly states that its purpose is to assure compliance with a specific federal statute, the provisions of that Decree must be construed accordingly.

Respectfully submitted,

ERIC SCHNAPPER
Counsel of Record
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@uw.edu

TIMOTHY B. GARRIGAN
TIMOTHY DAVID CRAIG
STUCKEY, GARRIGAN & CASTETTER
2803 North St.
P.O. Box 631902
Nacogdoches, TX 74963
(936) 560-6020

JANE SWANSON
1408 Bentwood Rd.
Austin, TX 78722
(512) 220-0678

Counsel for Petitioners