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, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF IN OPPOSITION


KEN PAXTON
Attorney General of Texas

CHARLES E. ROY
First Assistant Attorney General

SCOTT A. KELLER
Solicitor General
*Counsel of Record*

J. CAMPBELL BARKER
Deputy Solicitor General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
scott.keller@texasattorneygeneral.gov
(512) 936-1700

## QUESTION PRESENTED

Whether the district court erred in finding that the State satisfied certain paragraphs of a consent decree, along with a subsequent injunctive order implementing those paragraphs, and therefore dissolving those provisions under the "satisfied" clause of Federal Rule of Civil Procedure 60(b)(5).

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 780 F.3d 320. The opinion of the district court (Pet. App. 24a-46a) is reported at 5 F. Supp. 3d 845.

### JURISDICTION

The judgment of the court of appeals was entered on March 5, 2015. A petition for rehearing was denied on July 14, 2015. The petition for a writ of certiorari was filed on October 12, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATEMENT

1. Medicaid is a joint federal–state program that provides for medical assistance to low-means individuals and families. Enacted under Congress's Spending Clause authority, Medicaid requires States that wish to accept its federal funds to submit a state plan and periodic reports to a federal agency charged with oversight: the Centers for Medicare and Medicaid Services (known as CMS), a component of the U.S. Department of Health and Human Services. *See Douglas v. Indep. Living Ctr.*, 132 S. Ct. 1204, 1208 (2012). A state plan approved by CMS assures the state program's compliance with federal law so that federal matching funds may be claimed. *See id.* at 1208.

This case concerns the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) component of Medicaid, which assists Medicaid recipients under age 21 with obtaining periodic checkups and follow-up care. *See* 42 U.S.C. § 1396a(a)(43). In Texas, the EPSDT program is known as Texas Health Steps and is administered by the Texas Health and Human Services Commission (HHSC), formerly the Texas Department of Health. *Frew v. Gilbert*, 109 F. Supp. 2d 579, 587-88 (E.D. Tex. 2000).

2. In 1993, certain plaintiffs alleged that the Medicaid Act confers private rights and that the State was depriving them of those rights under color of law, in violation of 42 U.S.C. § 1983. Plaintiffs brought six claims. First, plaintiffs alleged that the State did not "provide

or arrange for" EPSDT screening services. R.1173;[1] *see* 42 U.S.C. § 1396d(r) (defining EPSDT services to be provided). Second, plaintiffs alleged that Texas Medicaid did not meet "annual participation goals" set by the Secretary of Health and Human Services. R.1174. Third, plaintiffs alleged that the Medicaid program failed to "effectively inform" eligible beneficiaries of the "availability of EPSDT services." R.1173-74; *see* 42 U.S.C. § 1396a(a)(43)(A) (stating that federal reimbursement requires a state Medicaid plan to provide for "informing all persons in the State who are under the age of 21 and who have been determined to be eligible for medical assistance . . . of the availability of [EPSDT] services"). Fourth, plaintiffs alleged that the State failed to provide and arrange for "other necessary health care, diagnostic services, treatment, and other measures" responsive to medical issues found in screening. R.1174; *see* 42 U.S.C. § 1396d(r)(5). Fifth, plaintiffs alleged that the State failed to provide "case management services to all EPSDT recipients as needed." R.1174. Finally, plaintiffs alleged that EPSDT services "do not exist, operate, and function uniformly in all political subdivisions of the state." R.1174; *see* 42 U.S.C. § 1396a(a)(1) (requiring, for federal funding, that a state Medicaid plan "provide[s] that it shall be in effect in all

[1] Citations to "R.*p*" are to page *p* of the electronic record on appeal.

political subdivisions of the State, and, if administered by them, be mandatory upon them").

Plaintiffs asked for certification of a class of "all present and future Texas Medicaid recipients who are under the age of 21, and therefore eligible for EPSDT services, but who have not received the entire range of EPSDT services to which they are entitled." R.911. The district court certified that class with the qualification that it excludes persons who reject those services, and the court then assigned the State the burden to prove "that any particular individual is not a member of the class based on a knowing and voluntary rejection of the EPSDT services." R.911 n.1.[2] Over the years, the parties have at times referred to the "class" as the population of all Texas Medicaid recipients under age 21 (despite the fact that the class is more narrowly defined), due to the practical difficulties associated with identifying discrete individuals who are "entitled to" but have not "received the entire range" of EPSDT services because they desired but were denied those services, as opposed to not seeking those services. *See, e.g.*, Pet. 5 (inaccurately describing the class as "all Texas children eligible for Medicaid").

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[2] The district court's class-certification order predates *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), and much of its analysis is inconsistent with that ruling. *Compare, e.g.*, R.919-20, *with Wal-Mart*, 131 S. Ct. at 2551 & n.6 (requiring "rigorous analysis" that "[f]requently . . . will entail some overlap with the merits of the plaintiff's underlying claim").

3. Shortly after a class was certified, state officials agreed to settle the case and, in 1996, entered into a 308-paragraph consent decree. R.1589-666. Much of the decree is descriptive and includes provisions that merely summarize federal-law requirements, describe Texas Medicaid policies as they existed before the decree, or explain plaintiffs' and defendants' competing contentions. Other provisions, however, impose legally enforceable obligations. In paragraph 302, the parties agreed that the term "will" sets apart legally enforceable obligations from merely descriptive or aspirational provisions. R.1664 ("The term 'will' creates a mandatory, enforceable obligation.").

This appeal involves seven consent-decree paragraphs now dissolved by the district court: paragraphs 124 through 130. They relate to pharmacy benefits provided through the EPSDT program. *See* R.1623-25. The first five of those paragraphs simply recite the parties' positions regarding EPSDT pharmacy benefits and do not define obligations. Paragraphs 129 and 130 then establish enforceable obligations, providing:

> 129. By January 31, 1996, Defendants will implement an initiative to effectively inform pharmacists about EPSDT, and in particular about EPSDT's coverage of items found in pharmacies. The effort will include presentations at meetings of the Texas Pharmaceutical Association and other appropriate organizations, if possible, articles in the TPA newsletter, if possible,

> and at least one mail out to all pharmacists who participate in the Medicaid program. The mail out will be designed to attract pharmacists' attention, explain EPSDT coverage clearly and encourage pharmacists to provide the full gamut of covered pharmaceutical products to recipients as needed.
>
> 130. By July 31, 1996, Defendants will conduct a professional and valid evaluation of pharmacists' knowledge of EPSDT coverage of items commonly found in pharmacies. They will report the results of the evaluation to Plaintiffs by September 1, 1996. If the parties agree that pharmacists' understanding of the program is acceptable, Defendants will continue the initiative described above to inform pharmacists about EPSDT. If the parties do not agree, or if pharmacists' understanding is unacceptable, Defendants will conduct an initiative to orally inform pharmacists about EPSDT's coverage. Plaintiffs will not unreasonably disagree about whether pharmacists' understanding is acceptable.

R.1624-25. These detailed obligations go beyond the federal Medicaid Act's requirements.

In 2007, to settle disagreements about the meaning of and compliance with consent-decree provisions, the parties agreed on 11 particularized orders, as roadmaps for compliance with aspects of the consent decree. *See*

Pet. App. 4a. The district court entered those eleven Corrective Action Orders (CAOs), which the district court and parties cite by docket number.

This appeal involves Corrective Action Order 637-8, entitled "Prescription and Non-prescription Medications; Medical Equipment and Supplies." R.15890. This CAO focuses chiefly on the provision of 72-hour "emergency" allotments of prescriptions. *Id.* The need for these emergency allotments can arise if a physician prescribes a medication that does not appear on the State's Preferred Drug List. In these situations, the prescribing doctor must obtain prior authorization in order for the pharmacy to be reimbursed for fulfilling the prescription. *See* 42 U.S.C. § 1396r-8(d)(5). The Medicaid Act permits state plans with prior-authorization programs so long as the state plan provides, as Texas's does, "for the dispensing of at least [a] 72-hour supply of a covered outpatient prescription drug in an emergency situation (as defined by the Secretary)." 42 U.S.C. § 1396r-8(d)(5)(B); *see* Pet. App. 50a (stipulating that the State's rules follow this federal standard). This 72-hour "emergency" allotment ensures that Medicaid enrollees are not deprived of needed medication while a request for prior authorization is pending.

The CAO requires state officials to take certain acts to educate pharmacists about the State's policy that pharmacies should dispense and will be reimbursed for 72-hour emergency allotments of prescriptions, as well

as to encourage pharmacies to become Medicaid-enrolled providers of durable medical equipment (DME). R.15891-94. The CAO uses bullet points to list specific steps for the State to take toward those ends. *Id.* These steps include mailing a letter to all Medicaid-enrolled pharmacies explaining the 72-hour-emergency-allotment policy, analyzing data regarding issuance of 72-hour emergency allotments by Medicaid-enrolled pharmacies, and providing "intensive, targeted educational efforts" to pharmacies for which the data suggest unawareness of the 72-hour-emergency-allotment policy. *Id.* The CAO obligates the State only to take steps within its immediate control; it does not impose any threshold for some measure of benefits utilization. *See, e.g.*, R.1624 (decree paragraph 129, requiring officials to "*explain* EPSDT coverage clearly and *encourage* pharmacists to provide the full gamut of covered pharmaceutical products") (emphases added).

CAO 637-8's final paragraph states that the parties will confer after a final analysis, and the court will resolve whether any further action is required. R.15894. The CAO thus provides a clear potential end to judicial oversight: "Once Defendants comply with that part of the Decree and the related section of the Corrective Action Order, then the Court may terminate that part of the Consent Decree and the Corrective Action Order." R.18278.

4. Before the 2007 CAOs, the State on two occasions sought to limit or vacate the entire consent de-

cree, and each effort was unsuccessful. The first occasion began in 1998, when plaintiffs alleged noncompliance with the consent decree and moved for enforcement. R.2928-48. The State responded that, among other things, the decree could not be enforced to the extent it imposes obligations beyond the specific requirements of the federal Medicaid Act, because the Eleventh Amendment and *Ex parte Young* permit injunctive relief against state officials only to the extent those officials have violated "supreme" federal law. *See Ex parte Young*, 209 U.S. 123, 167 (1908).

The district court disagreed, ruling in 2000 that the State had failed to fulfill certain obligations in the decree. *Frew*, 109 F. Supp. 2d 579. The Fifth Circuit reversed, holding that the Eleventh Amendment bars courts from enforcing a consent decree against state officials unless a consent-decree violation is also a federal statutory violation. *See Frazar v. Gilbert*, 300 F.3d 530, 543 (5th Cir. 2002). This Court, however, held that the Eleventh Amendment does not bar federal courts from enforcing consent-decree provisions that extend beyond the requirements of federal law, so long as the consent decree springs from a federal dispute and furthers the objectives of federal law. *Frew v. Hawkins*, 540 U.S. 431, 438 (2004).

This Court recognized that the State raised "legitimate" concerns that the consent decree "may improperly deprive future officials of their designated legislative and executive powers" and "may also lead to federal-

court oversight of state programs for long periods of time even absent an ongoing violation of federal law." *Id.* at 441. But the Court held that the State had used the wrong procedural vehicle to raise those concerns—they are to be remedied by a Rule 60(b)(5) motion to amend or terminate decree provisions, not an Eleventh Amendment defense. *Id.* This Court thus instructed lower courts to "give significant weight" to the views of government officials when those officials move to amend a consent decree. *Id.* at 441-42.

After that ruling, the State sought to amend or terminate the consent decree, this time by moving for relief under Rule 60(b)(5). R.10413-39. The State noted that it spends more on outreach to EPSDT recipients than any other State, and that the State's participation rates were well above national averages. R.10419-20. The district court denied relief, disagreeing that compliance with federal law alone is a sufficient basis to dissolve a consent decree. *Frew v. Hawkins*, 401 F. Supp. 2d 619, 635-37 (E.D. Tex. 2005). The Fifth Circuit affirmed. *Frazar v. Ladd*, 457 F.3d 432 (5th Cir. 2006). It held that Rule 60(b)(5)'s third clause, which allows modification when a decree's prospective application "is no longer equitable," states a flexible test that allows a trial court to deny modification notwithstanding compliance with federal law. *Id.* at 436. The Fifth Circuit noted, however, that the "federalism mandates" emphasized in this Court's *Frew* decision will inform application of that test. *Id.* at 438.

5. The Fifth Circuit's 2006 decision was followed by entry of the 2007 CAOs, settling the parties' disagreements about decree compliance. In 2009, the case was transferred by Judge Justice, who had overseen the case from inception, to Judge Schell. Pet. App. 4a n.12.

In 2013, the district court granted the State's motion to terminate certain paragraphs of the consent decree and the associated CAO 637-3, entitled "Check-Up Reports and Plans for Lagging Counties." R.57897-913. After receiving evidence and argument, the district court found that the State fully complied with its obligations under those provisions and that the statewide managed-care model now used in Texas, *see* Pet. App. 7a n.14, supported termination of the provisions. R.57913. Plaintiffs did not appeal.

6. In 2013, the State moved to dissolve the consent-decree paragraphs and CAO at issue here. *See* Pet. App. 24a, 29a. Plaintiffs, in turn, moved to "enforce" the decree, asking that the State be ordered to negotiate and submit to new injunctive commands compelling yet further action. *See id.*

The State's motion explained that it had satisfied all of its relevant obligations and was therefore entitled to relief under the first clause of Rule 60(b)(5). *See* R.64973-5017. The State provided over 800 pages of evidence showing that it not only fulfilled all of its requirements but in many instances went beyond its obligations. *See* R.65018-893. The State also showed that its educational efforts increased the number of 72-hour

emergency allotments of prescriptions provided to Medicaid recipients under age 21. In the two studies of pharmacies required by the CAO, the average number of 72-hour emergency prescriptions rose from 0.71 per pharmacy before the test period to 6.75 per pharmacy by the final quarter of the second study. *See* R.64732. And the number of pharmacies that submitted no 72-hour-emergency-prescription claims decreased from 3,465 in the pre-test period to 2,286 in the final quarter tested. *Id.*

After discovery, motion briefing, and a hearing, the district court found that the State fulfilled its obligations under decree paragraphs 124-130 and CAO 637-8. Pet. App. 24a-46a. It therefore denied plaintiffs' motion and granted the State relief under the first clause of Rule 60(b)(5). *Id.*

a. The district court first addressed compliance with CAO paragraph later numbered as bullet-point 6, *see* Pet. App. 53a, which required state officials to "provide intensive, targeted educational efforts to those pharmacies for which the data suggest a lack of knowledge of the 72-hour emergency prescriptions policy." R.15893. The district court noted, among other things, the testimony of the provider-outreach specialist at the relevant state agency. Pet. App. 40a. That specialist explained that, after conducting the first analysis required by the CAO, state officials identified 822 pharmacies to be targeted for educational efforts. *Id.* Officials sent a certified letter, return receipt request-

ed, to the pharmacist-in-charge at each identified pharmacy, urging the pharmacy to dispense 72-hour emergency supplies of non-prior-authorized non-PDL drugs, as covered by the State's Medicaid program. *Id.* Pharmacists that did not sign for the letter were contacted by telephone or visited by one of the state agency's Medicaid Regional Pharmacists. *Id.* Because over half of the pharmacies identified by the analysis were corporate chains, state officials also scheduled conference calls with the corporate offices and relevant training staff of CVS, HEB, Walgreens, and Walmart. *Id.*

The State further explained that it hired a consultant to identify any patterns specific to the pharmacies that data suggested might lack knowledge of the 72-hour-emergency-supply policy, and the State then used that information to develop possible remedies and additional targeted education for a specific area, pharmacy, or drug-prescribing healthcare provider. Pet. App. 41a. The State also explained its ongoing statewide efforts to educate pharmacists, such as sending newsletters, fax notices, and email notifications; providing computer-based training and website information; and arranging visits from Medicaid Regional Pharmacists, one-on-one education via a pharmacy-resolutions help desk, and targeted follow-up with pharmacies that are the subject of complaints. Pet. App. 41a-42a.

Based on that evidence, the district court found that the State performed its obligations under this CAO bullet-point. Pet. App. 35a, 43a. The district court ex-

plained that the evidence plaintiffs offered on this issue was either irrelevant or simply amounted to "Plaintiffs' belief that Defendants could do more," which the court noted did not disprove that the State met its commitments. Pet. App. 35a.

b. The district court then turned to the second CAO paragraph in dispute, later numbered as bullet-point 10, *see* Pet. App. 54a, which required state officials to "train staff at their ombudsman's office about the emergency prescription standards, what steps to take to immediately address class members' problems when pharmacies do not provide emergency medicines, and DME standards and common problems." R.15894. The ombudsman's office provides a line Medicaid recipients can call for help with questions regarding their benefits, although recipients can also resolve questions through their MCOs. R.65503-05; *see* R.65002-04.

The district court noted the State's evidence that it provided the required training of ombudsman office staff, covering the required topics. Pet. App. 43a-44a. Indeed, the State's evidence showed that it repeatedly trained ombudsman office staff, beyond the one-time training required by the CAO. Pet. App. 44a.

Plaintiffs objected that the office's phone-call-disposition records showed that some Medicaid recipients raising issues about prescriptions were, in the first instance, referred to their managed-care organization or referred to their primary-care provider to obtain a prior authorization. *See* Pet. App. 35a-36a. Plaintiffs as-

sumed that these dispositions were somehow improper, to the point of proving that the required one-time training of ombudsman staff had not been performed in any meaningful sense. *See id.* The district court found otherwise, ruling that the State had demonstrated its substantial compliance. Pet. App. 36a, 45a. The court noted that the referrals about which plaintiffs complained did not disprove delivery of the required training, as the referrals were "designed and intended to immediately address class members' problems." Pet. App. 36a. The court explained that plaintiffs were simply demanding more than the CAO required. Pet. App. 45a.

c. Third, the district court examined paragraph 129 of the consent decree, in which state officials committed to "implement an initiative to effectively inform pharmacists" about EPSDT's pharmacy benefits, specifically by making presentations at Texas Pharmacy Association meetings, publishing articles in that Association's newsletter, and sending at least one mailer to pharmacists. *See* Pet. App. 36a-37a. The State showed that it furnished the contemplated presentations, articles, and mailer, which the State had reported to the district court in periodic Quarterly Monitoring Reports. *See* Pet. App. 37a n.22. Plaintiffs did not take issue with any specific presentation, article, or mailer. Rather, plaintiffs argued that what they viewed as unsatisfactory instances of shortcomings in the system meant that the State must have fallen short in fulfilling its commitments. *See* Pet. App. 37a-38a.

The district court rejected plaintiffs' contention: "Plaintiffs' argument would require the court to create and read into the Decree and the CAO more than what is required by the agreed-upon terms." Pet. App. 37a. The court noted that it is the State's consent as expressed in the consent decree "that serves as the source of the court's authority to enter" a consent decree at all, and that courts cannot import atextual requirements into a decree by additionally requiring satisfaction of broader goals that a party hoped to achieve in the litigation. Pet. App. 37a-38a.

7. The court of appeals affirmed, without dissent. Pet. App. 1a-23a. The court reviewed the history of the case, noting this Court's admonition in *Frew* about the federalism concerns with federal-court orders managing state officials' administration of state programs. Pet. App. 3a; *accord* Pet. App. 12a.

a. The court of appeals rejected plaintiffs' three interpretation arguments. First, plaintiffs argued that the district court erroneously rejected their view that the decree and CAO require some unstated (but unmet) improvement in healthcare utilization measures. *See* Pet. App. 14a-15a. Plaintiffs argued that the district court must have failed to construe the decree with reference to its purposes as stated in certain paragraphs. *See* Pet. App. 14a.

Contrary to the petition's repeated claim that the court of appeals held the purpose of decree provisions "legally irrelevant," *e.g.*, Pet. 15, the court of appeals

agreed with the legal principle that decree interpretation must consider "the objective intent evidenced" by the decree as a whole and consider "the entire writing in an effort to harmonize and give effect to all the provisions" of the decree. Pet. App. 14a. *Contra, e.g.*, Pet. 17-18 (incorrectly stating that the Fifth Circuit held a trial court "could not consider" and must "refuse[] to consider" purpose in interpreting a decree provision). The court of appeals simply explained that "interpreting the Decree as an entire writing does not give Plaintiffs the victory they seek." Pet. App. 15a. The court held that, while the decree's introductory paragraphs explain the *aim* of the specific obligations created by the decree's enforceable provisions, those "introductory paragraphs do not guarantee specific outcomes." *Id.*

Hence, the court rejected plaintiffs' view that the consent decree requires some "secondary assessment of the impact of each action item." Pet. App. 16a. Although plaintiffs argued that the decree's obligations could not be found satisfied unless some measure of Medicaid system operation crossed some undefined threshold, the Fifth Circuit explained that state officials "fulfill the purpose of the Decree by implementing the broad range of supportive initiatives memorialized *in the Decree*." Pet. App. 15a-16a ("The whole point of negotiating and agreeing on a plethora of specific, highly detailed action plans was to establish a clearly defined roadmap for attempting to achieve the Decree's purpose.").

Reading into the decree atextual results-based milestones, the Fifth Circuit held, would "introduce a new requirement to which the parties never agreed." Pet. App. 16a. The court criticized plaintiffs' view because they "have not pointed to any discrete endpoint for CAO 637-8 or these Decree paragraphs" and "[i]ndeed, they may *never* be satisfied." *Id.* The court thus held that "[n]either the rules of contract interpretation nor *Frew III*'s instruction to 'promptly' return state programs to state control countenance this rewriting of the Decree." *Id.*

b. Second, the Fifth Circuit rejected plaintiffs' argument that a "results-oriented reevaluation" of the State's compliance is appropriate under decree paragraph 129's requirement that the State "implement an initiative to effectively inform pharmacists about EPSDT" by means including specific presentations, newsletter articles, and mailings. Pet. App. 17a. Plaintiffs contended that pharmacy-benefit claims data showed that some Medicaid recipients were not receiving pharmacy benefits, and that this fact meant that the State's educational efforts failed an effectiveness test that plaintiffs perceived in the consent decree. *See id.* The court of appeals explained that, even if the disputed factual premise were true, the word "effectively" in paragraph 129 modifies "inform" and thus indicates that what must be effective is how the presentations and written materials convey information. *Id.* The court noted that paragraph 129 even provides specific guide-

lines for effective communication, such as that mailings must be designed "to attract pharmacists' attention" and "explain EPSDT coverage clearly." *Id.* (quoting decree). Plaintiffs' view, the court reasoned, takes the word "effectively" out of context and "would be wholly inconsistent with the rules of contract interpretation." *Id.*

The Fifth Circuit also rejected plaintiffs' view that the interpretation of paragraph 129's requirement to "implement an initiative to effectively inform pharmacists about EPSDT" had been settled by or should be decided with deference to statements by the district judge who originally approved the consent decree. *See* Pls.' C.A. Br. 48-49. Specifically, plaintiffs cited Judge Justice's 2000 opinion addressing a different decree provision (paragraph 52), which required oral outreach to Medicaid recipients to effectively inform them about EPSDT benefits. Pls. C.A. Br. 48-49 (citing *Frew*, 109 F. Supp. 2d at 595-99). Plaintiffs' argument did not address the different context and phrasing of that provision, much less the fact that Judge Justice did not reach an interpretation of "effectively" there. *See Frew*, 109 F. Supp. 2d at 595-99 ("the precise meaning of 'effective' need not be determined"). The Fifth Circuit offered multiple reasons for rejecting plaintiffs' argument that something other than de novo review applies to the interpretation of paragraph 129: a district court opinion on legal matters does not bind an appellate court, plaintiffs' suggestion of "deferential de novo" review of legal

issues lacks support in circuit case law, and none of the Fifth Circuit's prior opinions in this case interpreted decree paragraph 129. Pet. App. 10a-11a.

c. Third, the court of appeals rejected plaintiffs' view that "satisfaction" of an injunctive provision within the meaning of the first clause of Rule 60(b)(5) requires not just completing the required conduct, but also that the conduct achieved some broader and nebulous "objectives of the consent decree." Pls. C.A. Br. 44; Pet. App. 18a. Plaintiffs cited *Jeff D. v. Otter*, 643 F.3d 278 (9th Cir. 2011), which reversed the vacatur of a consent decree. The Ninth Circuit in *Jeff D.* stated that assessing "substantial compliance" with a decree requires "attention" to the purposes of the decree. *Id.* at 288. Plaintiffs interpreted *Jeff D.* as further holding that a decree cannot be terminated under Rule 60(b)(5)'s first clause, notwithstanding performance of all required conduct, unless a court additionally finds that the broader "objectives of the consent decree" have been met. Pls.' C.A. Br. 43-44.

The Fifth Circuit held that *Jeff D.* is inapposite. First, the court noted uncertainty about whether *Jeff D.*'s discussion of a "flexible" test even addresses Rule 60(b)(5)'s first clause as opposed to Rule 60(b)(5)'s third clause. Pet. App. 18a. Second, the court noted that the consent decree in *Jeff D.* folded the plaintiffs' litigation objectives into the decree itself, by providing for continuing jurisdiction by the district court until the district court determined that the plaintiffs' claims as al-

leged in the complaint were adequately addressed. Pet. App. 18a; *see Jeff D.*, 643 F.3d at 281. The Fifth Circuit noted that no similar provision exists in the consent decree or CAO here, as the CAO's dispute-resolution provision deals with compliance with enforceable CAO and decree provisions, not amorphous "purposes" of the decree. Pet. App. 19a & n.40.

d. Upon affirming the interpretation of the relevant provisions, the Fifth Circuit sustained the district court's finding that the State satisfied its obligations under the provisions. Pet. App. 20a-23a. The Fifth Circuit first held that the record confirmed the district court's observation that plaintiffs conceded substantial compliance with all but two paragraphs of the CAO. Pet. App. 20a-21a.

And the court of appeals held that the evidence supports the district court's finding of satisfaction of the disputed CAO and decree paragraphs. Pet. App. 21a-23a. First, the Fifth Circuit found "no basis" for plaintiffs' complaint about satisfaction of one CAO paragraph. Pet. App. 22a. Contrary to the petition's characterization, the Fifth Circuit did not hold that "a single sentence in a single flyer" satisfied this CAO requirement. Pet. 20. Rather, the court focused on that specific sentence because it rebutted plaintiffs' specific complaint during oral argument about that specific flyer. Pet. App. 22a (also noting other educational efforts). As to the other CAO paragraph in dispute, the Fifth Circuit held that petitioners raised only "unsubstantiated

accusations of bias" that did not prevent the district court from crediting the State's evidence. Pet. App. 22a-23a.

8. Without dissent, the court of appeals denied plaintiffs' petition for rehearing en banc. Pet. App. 48a.

## ARGUMENT

The Fifth Circuit's fact-bound decision does not conflict with any decision of this Court or any other court of appeals. Petitioners' claim of a conflict with the Ninth Circuit's decision in *Jeff D.* was correctly rejected by the Fifth Circuit, which noted that *Jeff D.* does not require judging satisfaction of an injunctive provision by something in addition to what the provision requires. But neither did the Fifth Circuit hold a provision's purpose irrelevant to interpreting what the provision requires. The Fifth Circuit correctly held that provisions must be interpreted in context and with reference to the consent decree as a whole. Petitioners simply disagree with the fact-bound interpretation of the provisions at issue here.

Petitioners' other claim—that this appeal would come out differently under a "deferential de novo" standard of review attributed to the Sixth Circuit—is similarly unpersuasive. The Sixth Circuit agrees with the Fifth Circuit that interpretation of consent-decree language is a legal issue; it has simply noted a need for respectful consideration of a district court's interpretation of decree language. Petitioners' proposed standard

of review would also have no consequence here because the district court did not previously interpret the provision at issue and because the district court's interpretation in the ruling below comports with the court of appeals' de novo interpretation.

## I. The Fifth Circuit's Fact-Bound Decision Does Not Implicate Any Circuit Conflict.

Federal Rule of Civil Procedure 60(b)(5) allows dissolution of an order if it "[1] has been satisfied, released or discharged; [2] it is based on an earlier judgment that has been reversed or vacated; or [3] applying it prospectively is no longer equitable." The clauses have independent force. *Horne v. Flores*, 557 U.S. 433, 454 (2009) (holding as to dissolution of a consent decree under Rule 60(b)(5): "[E]ach of the provision's three grounds for relief is independently sufficient and . . . relief may be warranted even if petitioners have not 'satisfied' the original order. As petitioners argue, they may obtain relief if prospective enforcement of that order 'is no longer equitable.'"). Whereas the third clause states a "flexible standard" that allows dissolution of even an unsatisfied order based on considerations such as compliance with federal law, the first clause turns on whether the defendant has "complied with the original" order. *Id.* at 450-51.

The decision below rests solely on the first clause. Pet. App. 23a. The injunctive provisions in dispute state discrete obligations capable of completion. Pet. App.

16a-23a, 35a-45a. Petitioners raise only fact-specific disagreements with the interpretation of those provisions and with the district court's finding of their satisfaction.

### A. Petitioners demonstrate no circuit split on interpreting consent-decree provisions with reference to their purpose.

Petitioners attempt to repackage their case-specific disagreements as unsettled disputes about legal standards. The petition repeatedly mischaracterizes the decision below as holding that consent-decree provisions "are now to be construed without regard to their purpose." Pet. 22; *accord* Pet. 15, 17, 18, 23, 25, 30, 33, 36.

The Fifth Circuit agreed with all parties that consent decrees are interpreted according to general principles of contract interpretation. Pet. 13a; *see, e.g.*, Pet. C.A. Br. 35, 47. The Fifth Circuit explained that the interpretive goal is to ascertain what the parties intended to commit themselves to do, as determined by the language of the instrument. Pet. App. 14a. And the Fifth Circuit held that this inquiry requires "interpreting the Decree as an entire writing," including the introductory paragraphs' recitation of broader goals. Pet. App. 15a. The Fifth Circuit thus considered the decree's "broader goals" as stated in paragraphs 3, 6, and 190, noting that they show that the decree's enforceable paragraphs are "aimed at *supporting* EPSDT recipients." Pet. App. 14a, 15a.

The Fifth Circuit, however, determined that this approach "does not give Plaintiffs the victory they seek." Pet. App. 15a. That fact-bound application of accepted interpretation standards is no basis for a grant of certiorari. And the interpretation standards applied by the court of appeals do not conflict with those of any other circuit.

In claiming otherwise, petitioners conflate two distinct concepts: (i) considering the purpose of an injunctive order in *interpreting* that order, to determine whether its commands have been fulfilled, and (ii) petitioners' view that Rule 60(b)(5)'s first clause requires *not just* performance of an order but *also* some additional finding that performance of the bargained-for conduct achieved the order's "objectives" in a more nebulous sense. *See, e.g.*, Pet. C.A. Br. 55 ("Because the district court did not find, and could not have found, that Defendants[']remedial efforts responsive to the CAO achieved the pertinent objectives of the Decree, it was legal error to find that Defendants had complied with the CAO and related Decree provisions . . . ."). Each of those two concepts might be described as involving a decree's "purpose," "aim," or "objective" in some sense. But the first concept simply states an interpretation principle, whereas the second concept argues that a fully satisfied decree may not be dissolved without some additional finding.

Petitioners cite no decision conflicting with the court of appeals' rejection of that second concept. Three of

the decisions petitioners cite simply recite the first concept, which is an accepted interpretive principle. For example, the cited passage (Pet. 25) in *Pigford v. Vilsack*, 777 F.3d 509 (D.C. Cir. 2015), states that a district court may look to a provision's aims "to ensure that its interpretation" of the text "corresponded to the parties' understanding of their bargain." *Id.* at 515. Likewise, *EEOC v. Safeway Stores, Inc.*, 611 F.2d 795 (10th Cir. 1979), upheld the "district court's *interpretation* of [the provisions at issue]" as "reasonable in light of the language and purpose of the decree." *Id.* at 798. And the Second Circuit's decision (Pet. 26) in *Broadcast Music, Inc. v. DMX, Inc.*, 683 F.3d 32 (2d Cir. 2012), also unremarkably approved "the district court's interpretation of a consent decree" with reference to its language, purpose, and overall context. *Id.* at 43.

In the same vein is *Jeff D. v. Otter*, 643 F.3d 278 (9th Cir. 2011), with which petitioners wrongly claim the decision below conflicts (Pet. 23-24). There, the Ninth Circuit explained that the consent decree at issue (entered by a court in Idaho) should be construed like contracts governed by "the contract law of Idaho as well as familiar contract principles." 643 F.3d at 284. That is consistent with the decision below. *See* Pet. App. 13a-14a & n.28. *Jeff D.* concerned the test for "substantial compliance"—that is, when an obligation may be found satisfied despite some deviation or omission in its performance. 643 F.3d at 284. That test required that "any

deviation from literal compliance did not defeat the essential purposes of the decrees." *Id.*

The Ninth Circuit reversed the district court's dissolution of a consent decree because, in addressing the plaintiffs' claim that the defendants had failed to perform their obligations, the district court applied the contempt standard (focusing on individual officials' fault) and did not address whether obligations imposed on the officials collectively were substantially complied with: "that question simply has not been answered." *Id.* at 286. Nothing in that holding conflicts with the decision below. The Fifth Circuit did not apply the contempt standard. It explained the principle of substantial compliance: that any deviation from a provision must not vitiate its purpose. Pet. App. 20a. And the Fifth Circuit found no clear error in the district court's finding that the state officials "demonstrated that they have substantially complied with the terms of CAO 637-8 and Decree paragraphs 124-130." Pet. App. 45a.

Petitioners appear to misunderstand (Pet. 24) a sentence in *Jeff D.* stating that, "[i]f the purposes of the consent decrees and the Implementation Plan have not been adequately served, the decrees may not be vacated." 643 F.3d at 289. Read in context, that sentence just restates the Ninth Circuit's direction that substantial compliance requires attention to the effect on the decree's purposes of any deviation in performance—hence the use of the term "adequately." That sentence concludes a discussion in which the Ninth Circuit explained

that it remanded because the district court did not examine substantial compliance. *Id.* ("that finding or conclusion has not been made"). In contrast, the district court here did find substantial compliance, and the Fifth Circuit affirmed. *Jeff D.* is distinguishable for that straightforward reason, among others.[3]

Petitioners also wrongly claim (Pet. 24-25) a conflict with *Gonzalez v. Galvin*, 151 F.3d 526 (6th Cir. 1998). That decision turned on the trial court's failure to offer written reasons allowing appellate review of its finding of decree satisfaction. *Id.* at 533 ("But due to the court's complete failure to set forth the grounds for its ultimate conclusion that the City met its burden of proving that

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[3] *Jeff D.* also involved a consent decree that provided for continuing jurisdiction until the district court was satisfied that "the claims as alleged in the Complaint have been adequately addressed.'" 643 F.3d at 281. Thus, the decree itself required the district court's assessment of the "adequacy" with which plaintiffs' claims were redressed, unlike the decree here. *See* Pet. App. 19a n.40. And there is nothing remarkable about *Jeff D.*'s dictum noting the need to focus on purpose "[e]ven if the doctrine of substantial performance had not been employed." 643 F.3d at 288. That observation explains that, even if not applying the "satisfied" clause, the decree objective's is a consideration under the equitable test of Rule 60(b)(5)'s third clause. Pet. App. 18a (noting that this discussion in *Jeff D.* concerns the third clause, inapplicable here). *See generally Horne*, 557 U.S. at 450 (explaining that a critical question under the third clause was "whether the objective of [an injunctive] order—i.e., satisfaction of the EEOA's 'appropriate action' standard—has been achieved").

the Written Examination complies with the consent decree, we are wholly unable to determine whether this conclusion is clearly erroneous."). The Fifth Circuit did not confront or resolve any such issue.

Finally, petitioners cite several other decisions (Pet. 24-25) that deal not with Rule 60(b)(5)'s first clause, but rather the flexible test that allows dissolution of a decree if its continued application is not equitable. That is the test under Rule 60(b)(5)'s third clause. *See Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 383 (1992) (noting that "the prospective effect of such a judgment or decree will be open to modification where deemed equitable under Rule 60(b)" and requiring a "flexible" approach to such a determination). Petitioners cite decisions noting that this flexible test under Rule 60(b)(5)'s third clause should consider the objective of the decree. *See United States v. City of Miami*, 2 F.3d 1497, 1505 (11th Cir. 1993) (reversing a district court's view that *Rufo*'s flexibility principles did not apply in employment-discrimination class actions and thus disapproving the district court's refusal to modify a consent decree); *Youngblood v. Dalzell*, 925 F.2d 954, 960 (6th Cir. 1991) (upon noting that a decree had not been complied with, requiring that any dissolution consider decree objectives and remanding for that consideration: "[A benchmark was met but] not within the timetable set forth in the decree. As a result, the district court must also consider the more general goals of the decree."); *United States v. Louisville & Jefferson Cty.*

*Metro. Sewer Dist.*, 983 F.2d 1070 (6th Cir. 1993) (unpublished) (simply affirming the dissolution of a consent decree upon finding that the decree's purpose of compliance with federal law was met). None of these cases reject the dissolution of a satisfied injunctive order. None call into question the proposition that satisfaction is an independent basis to dissolve a consent decree, under the first clause of Rule 60(b)(5). The decision below rests on that first clause and not the Rule's third clause, which these final three cases address.

### B. The decision below does not implicate any circuit conflict on a "deferential de novo" standard of review.

Petitioners claim a circuit conflict over use of a "deference rule" when interpreting consent-decree provisions. Pet. 26. But they cite only authority that would not affect the decision below. The Fifth Circuit agreed—on de novo review—with the district court's order interpreting the decree. Giving formal deference to that interpretation, with which the Fifth Circuit independently agreed, would not change the outcome. Moreover, there was no prior interpretation by the district court of the disputed decree paragraph. This case therefore would not have been decided differently under the rule that petitioners advocate.

1. Petitioners cite four cases in attributing a "deference rule" to the Sixth Circuit, but none go as far as petitioners believe they do. In the first case, *Brown v.*

*Neeb*, 644 F.2d 551 (6th Cir. 1981), the Sixth Circuit noted that one "aid[] to contract interpretation" was the view of the district judge who entered the decree and interpreted it in the order under review. *Id.* at 558 & n.12. The Sixth Circuit expressly agreed with the Fifth Circuit's decision in *Eaton v. Courtaulds of North America, Inc.*, 578 F.2d 87, 90 (5th Cir. 1978), that a district court's interpretation of consent-decree language is, like contract interpretation, a legal matter reviewed de novo and not for clear error. *Brown*, 644 F.2d at 558 n.12. *Brown* did not, as petitioners suggest is appropriate, disregard the district court's interpretation in the order under review while "deferring" to some earlier interpretation.

Nor did the other cited Sixth Circuit cases defer to an interpretation not in the order under review. In *Sault Saint Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367 (6th Cir. 1998), the Sixth Circuit used the phrase "deferential de novo" review but cited *Brown* and explained that the district court's view is "merely an additional tool for contract interpretation." *Id.* at 371 (quotation marks omitted). Likewise, *G.G. Marck & Associates, Inc. v. Peng*, 309 Fed. App'x 928, 935 (6th Cir. 2008) (unpublished), cited *Brown* and, because the Sixth Circuit had already decided to remand, simply left "to the district court in the first instance" certain interpretive matters. And *Shy v. Navistar International Corp.*, 701 F.3d 523, 528 (6th Cir. 2012), held that *Brown*'s "deference" (which *Brown* explained

does not supplant de novo review but simply states a need for consideration) is due to a district court's interpretation of its consent decree even if the decree was originally entered by a different presiding district judge. In short, all of these cases cite *Brown*'s recognition that interpretation is a legal matter, and any respectful or "deferential" consideration concerns the district court's interpretation in the order under review, which would not change the outcome here.

Petitioners claim that First, Second, Seventh, and Ninth Circuit opinions support their position, but that claim is similarly unavailing. The First Circuit in *Langston v. Johnston*, 928 F.2d 1206, 1222 (1st Cir. 1991), deferred to a finding of substantial compliance given the district court's "prolonged institutional involvement," even though that involvement was "in the person of a series of different judges." As noted, that standard would make reversal harder for petitioners, as the district court here ruled against them on interpretation and substantial compliance. The Second Circuit in *County of Suffolk v. Alcorn*, 266 F.3d 131, 137 (2d Cir. 2001), held that it would "review the district court's interpretation of the Settlement *de novo*" but that New York law treated the meaning of ambiguous provisions as a fact issue, the determination of which is reviewed for clear error. Of course, the provisions here were not held ambiguous and deferential review would not help petitioners anyway. The Seventh Circuit in *Foufas v. Dru*, 319 F.3d 284, 286 (7th Cir. 2003), perceived that

not all courts agree on what weight is due to a district court's view of an order it approved, but the court ultimately found that issue irrelevant and did "not rest [its] decision on the [district] judge's interpretive discretion"—just as the Fifth Circuit here did not. Lastly, the Ninth Circuit in *Officers for Justice v. Civil Service Commission of the City and County of San Francisco*, 934 F.2d 1092, 1094 (9th Cir. 1991), held that while it would give some deference to a district court's view of a decree it supervised, it "review[s] de novo the district court's interpretation."

In short, none of the cited cases accept petitioners' major premise that an appellate court should ignore the district court's interpretation of a decree provision in the order on review if a different district judge, who initially approved the decree, also interpreted the provision. The Fifth Circuit did not represent that any court follows this practice. Rather, it noted that petitioners "appear to find" this rule in the Sixth Circuit cases cited above, and then noted that its case law (which the Sixth Circuit endorsed in *Brown*, 644 F.2d at 558 n.12) does not recognize "deferential de novo" as a standard of review. The Third Circuit has held likewise. *Holland v. N.J. Dep't of Corr.*, 246 F.3d 267, 277 (3d Cir. 2001). Affording a district court's interpretation respect according to its power to persuade might be called "deference" or just respectful "consideration." But none of the decisions petitioners cite give no consideration to the interpretation in the order on appeal while giving such con-

sideration to the interpretation of a district judge previously presiding in the case.

2. In any event, petitioners' major premise would not change the outcome here because the district judge who initially approved the consent decree never interpreted decree paragraph 129. That is the only paragraph that petitioners assert makes their deference argument of "controlling importance." Pet. 36. Petitioners suggest that a prior interpretation of this provision was reached in Judge Justice's opinion for the district court in *Frew v. Gilbert*, 109 F. Supp. 2d 579, 596-99 (E.D. Tex. 2000). But that discussion addresses decree paragraphs 32 and 52, not paragraph 129. *Id.* Although paragraph 52 contains the word "effectively," the district court actually distinguished paragraph 52 from a federal regulation that is closer in phrasing to paragraph 129, in that it references materials "designed to" effectively inform recipients about benefits. *Id.* at 596. Nor did the district court's 2000 opinion purport to offer any insight about the parties' intent in entering into the decree years before. Ultimately, the district court's 2000 opinion did not interpret the term "effectively" in paragraph 52, finding no need to do so. *Id.* at 598 ("the precise meaning of 'effective' need not be determined"). Hence, petitioners' novel rule would not apply here even if some circuit had accepted it—which none have.

## II. Petitioners Raise Only Fact-Specific Disagreements With The Interpretation And Satisfaction Rulings Here.

Rather than identifying any relevant disagreement among the courts of appeals on legal principles, petitioners disagree with the Fifth Circuit's and district court's fact-bound interpretation of the injunctive provisions at issue and the finding of those provisions' satisfaction. For example, the petition asserts that the State took "only nominal steps" to comply with the decree. Pet. 29. But the district court found otherwise, holding that the State proved its substantial compliance and even went beyond what was required. *See* Pet. App. 41a, 43a, 45a. The State implemented numerous educational efforts, from computer-based training, to newsletters and presentations, to one-on-one visits and targeted follow-up with pharmacies. *See, e.g.*, Pet. App. 41a-42a. The State showed that these efforts increased the number of 72-hour emergency allotments provided to Medicaid recipients. *See supra* p. 11. Petitioners had a full chance to show that this was merely "nominal" or "insubstantial" compliance, and their criticisms were rejected.

Even if petitioners could properly relitigate these fact-bound issues on appeal, the attempt would fall short. For example, petitioners argue that it was somehow inappropriate for ombudsman-office personnel to explain to callers that managed-care organizations have initial responsibility to help recipients access necessary

care. Pet. 35. But that is entirely appropriate in light of the statewide transition to a managed-care model. The evidence explained that, if a Medicaid recipient's managed-care organization was unable to resolve an issue, the ombudsman office or another representative of the Texas Health and Human Services Commission would intervene with the managed-care organization or healthcare provider. R.71964.

Likewise, petitioners cite their district court motion briefing as allegedly showing "widespread violations" of the policy covering 72-hour emergency allotments of non-prior-authorized prescriptions for non-PDL drugs. Pet. 34-35 & nn.20-22. Of course, the consent decree and CAO commit the State to take only actions within its control. But petitioners did not show any widespread refusal to issue 72-hour emergency allotments. For example, one study on which petitioners relied (R.64723) was nothing more than an attempt to identify the pharmacies that were filling fewer 72-hour prescriptions than would be expected based on the volume of prescriptions filled. Its data do not indicate that *any* pharmacy "denied" *any* child access to *any* prescription. Pet. 34. The study did not measure whether pharmacies were "denying" prescriptions at all. Similar disputes exist about other statistics and implications cited in the petition, which fail to rebut the State's showing that it satisfied the relevant provisions.

In short, petitioners ask this Court to review the court of appeals' decision by relitigating fact-bound is-

sues implicating no circuit split. The Court should decline to do so.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

CHARLES E. ROY
First Assistant
Attorney General

SCOTT A. KELLER
Solicitor General
*Counsel of Record*

J. CAMPBELL BARKER
Deputy Solicitor General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
scott.keller@
texasattorneygeneral.gov
(512) 936-1700

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