

A Better Partnership®



Federalism – A National Strategy to Address Class Action Lawsuits

June 22, 2015

John Bursch

Why we're here

Merriam-Webster: “**Consent decree**”

An injunctive order that allows federal courts and court-appointed monitors to oversee a state or local governmental program for a period roughly equivalent to the life expectancy of the Aldabra giant tortoise (150-250 years)



Problem

“Substantial Compliance”



Options

Standards for vacating a consent decree



- Plaintiffs are no longer able to prove today a violation of constitutional rights (e.g., a “shocks the conscience” standard)
- Circumstances have changed since the court entered the consent decree
- The State has satisfied the consent decree’s purpose
- The State has substantially complied with the consent decree’s terms
- The State has complied with *all* of the consent decree’s terms



Solution

No ongoing constitutional violation



No ongoing constitutional violation

Connor B. ex rel. Vigurs v. Patrick

- Program administration demonstrates lack of professional judgment
- Government behavior “shocks the conscience”



Federalism themes

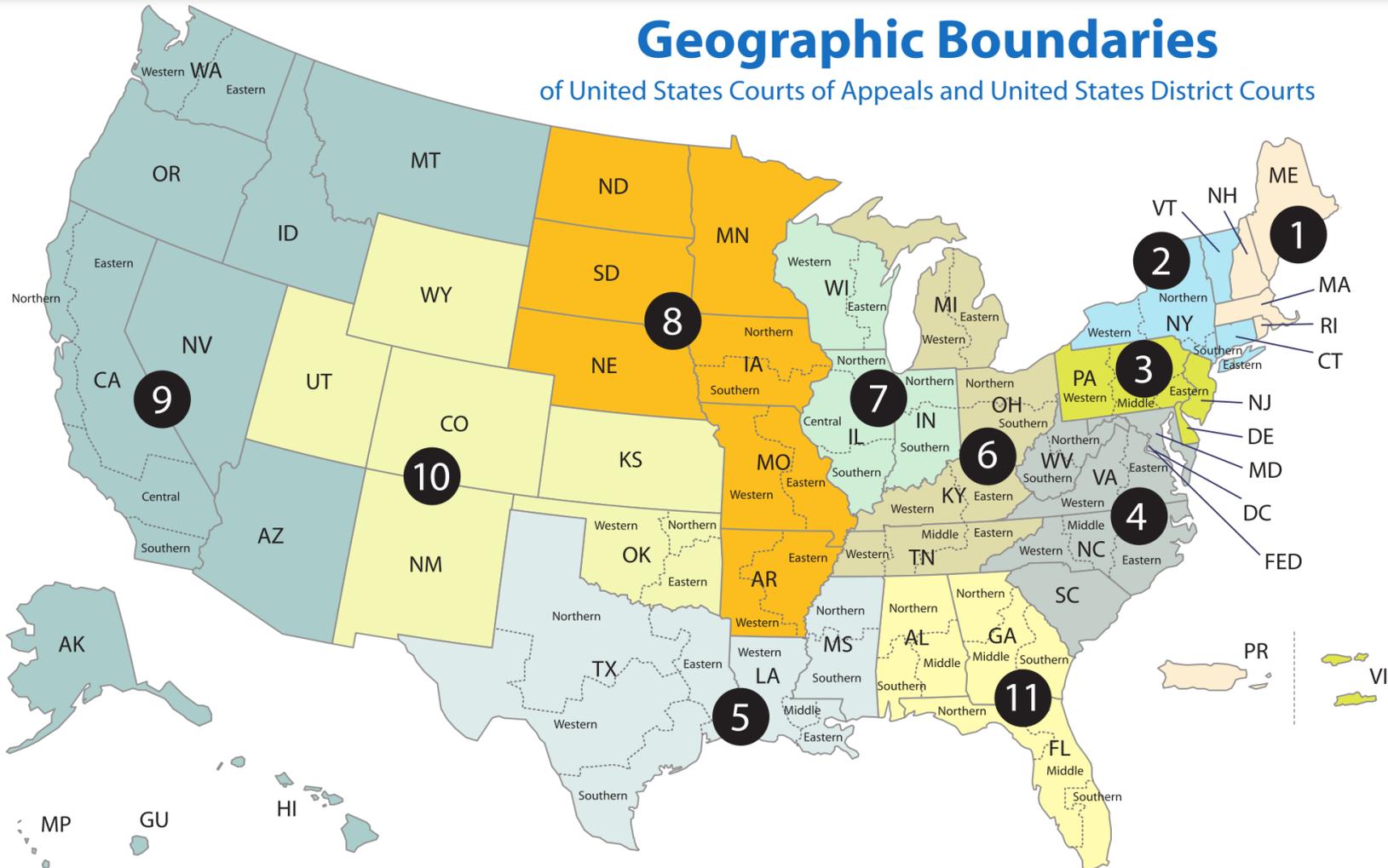
- “[E]nforcement of consent decrees can undermine the sovereign interest and accountability of state governments.” *Frew v. Hawkins*, 540 U.S. 431, 441 (2009).
- As a result, federal courts must ensure that “responsibility for discharging the State’s obligations is returned promptly to the State and its officials.” *Frew*, 540 U.S. at 442.
- “If a durable remedy has been implemented, continued enforcement of a [consent decree] order is not only unnecessary, but improper.” *Horne v. Flores*, 557 U.S. 433, 448 (2009).



Legal strategy

Geographic Boundaries

of United States Courts of Appeals and United States District Courts



“Compliance” is not a binary inquiry



“Compliance” is not a binary inquiry

| | | | | | | | |
|-------------|--|----|-----|---|---------|--------|---|
| VI.B.2 | Implement a competency based supervisory training program at least 40 hours in length and address specific skills and knowledge. | 23 | Yes | DHS is compliant with this measure. | 100.00% | 0.00% |  |
| VI.B.3 | All supervisors promoted or hired must complete the training program and pass a written competency based exam within 3 months of assuming the supervisory position. Failure to achieve a passing grade on written portion within two sittings requires additional training within 45 days of last failed exam. A third failure renders individual ineligible for supervisory position. | 24 | Yes | DHS is compliant with this measure. | 93.40% | 6.60% |  |
| VI.B.4 | University-Based Training Opportunities: Develop and maintain relationships, joint programs with schools of social work to expand training and education for DHS and private CPS caseworkers and supervisors. | 23 | Yes | DHS is compliant with this measure. | 100.00% | 0.00% |  |
| VI.C | Licensing Workers Qualifications and Training: Requirements include bachelor's degree in social work or related human services field. | 22 | Yes | DHS is compliant with this measure- 120 out of 121 workers had the appropriate degree and the one person who did not have the appropriate degree was removed from their position. | 99.20% | 0.80% |  |
| VI.C | Licensing Workers Qualifications and Training: Requirements include training type and amount provided as indicated in plan submitted to MMT 3/5/09. | 22 | No | Although DHS did not meet this measure, 91% of the staff did complete the training in MSA 4 which is an increase in compliance from MSA 3. | 91.00% | 9.00% |  |
| VI.E.10 | Caseload Tracking and Reporting: DHS will provide quarterly reporting on the percentage of supervisors and caseworkers in each of the categories. Upon implementation of SACWIS, each worker's monthly average caseload will be used to determine compliance. | 16 | Yes | DHS submitted caseload counts on a quarterly basis and DHS is compliant. | 100.00% | 0.00% |  |
| VI.E.2.a | Supervisors: Each supervisor of foster care, CPS, adoption, POS, licensing will not be responsible for more than five caseworkers. | 19 | Yes | See next measure. | 100.00% | 0.00% |  |
| VI.E.2.b.ii | Supervisors: 80% of child welfare supervisors will supervise no more than 5 caseworkers. | 19 | Yes | DHS is 100% compliant with the MSA requirement. The requirement in the MSA is 80% and DHS exceeded the goal with 89.7% compliance. | 100.00% | 0.00% |  |
| VI.E.3.b | Foster Care Workers: 90% of foster care workers will have caseloads of no more than 15 children. | 17 | Yes | DHS is 100% compliant with the MSA requirement. The requirement in the MSA is 90% and DHS exceeded the goal with 90.1% compliance. | 100.00% | 0.00% |  |
| VI.E.4.b | Adoption Workers: 90% of adoption workers will have caseloads of no more than 15 children. | 18 | No | In MSA 1 DHS achieved 48.3% compliance and in MSA 4 DHS achieved 83.9%. | 83.90% | 16.10% |  |



Vacating a decree in part

Freeman v. Pitts, 503 U.S. 467 (1992)

- “full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn”
- “whether retention of judicial control is necessary or practicable to achieve compliance with the decree in other facets”
- whether defendant “has demonstrated . . . “good-faith commitment to the whole of the consent decree and to those provisions of the law and the Constitution that were the predicate for judicial intervention”



But isn't this a contract?

- “While a consent decree embodies an agreement of the parties and thus in some respects is contractual in nature, it is nonetheless subject to Rule 60(b) because it is a judicial decree that is subject to the rules generally applicable to other judgments and decrees.” *Ne. Ohio Coal. For Homeless v. Husted*, 695 F.3d 580, 601 (6th Cir. 2012)



Does it matter that this is a *consent* decree?

- No. See *John B. v. Emkes*, 710 F.3d 394, 412 (6th Cir. 2013) (vacating consent decree after analyzing, under Rule 60(b)(5), “whether the state has achieved compliance with the federal-law provisions whose violation the decree sought to remedy”).



Recent examples of leverage

- Michigan
- New Jersey



Questions & Answers



John Bursch

Warner Norcross & Judd LLP

(616) 752-2474 (w)

(616) 450-4235 (c)

jbursch@wnj.com

These materials are for educational use only. This is not legal advice and does not create an attorney-client relationship.

