No. 02-628

IN THE
Supreme Court of the United States

LINDA FREW, on behalf of her daughter, Carla Frew, *et al.*,

Petitioners,

v.

ALBERT HAWKINS, Commissioner of the Texas Health and Human Services Commission, *et al.*,

Respondents.

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

REPLY BRIEF

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After lengthy negotiations, the parties agreed to a consent decree. The Respondents ("State officials") asked the district court to enter the decree. It creates "mandatory, enforceable" obligations and allows the parties to "request relief" from future violations in the district court. L.; ¶¶302, 303.

The State officials did not argue that they were immune from decree enforcement until after they violated the order and faced efforts to enforce it.[1] It would be unfair and anomalous to allow them to: (1) seek entry of an order that preserves the district court's jurisdiction to relieve Petitioners ("children") from decree violations; and (2) later argue that the court lacks jurisdiction to enforce its own order, particularly in an *Ex parte Young* case to prevent ongoing violations of federal law.

I. SOVEREIGN IMMUNITY HAS BEEN WAIVED

A. The State Officials' Litigation Conduct Waived Sovereign Immunity. "When a State submits itself without reservation to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has by its act of submission allowed to be done." *Hagood v Southern*, 117 U.S. 52, 68 (1886). Since the Eleventh

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1. Enforcement was required. *See* Pet. App. D. The State officials' report on a statewide sample of medical charts found that less than three percent of the children got even one check up that "met the essential criteria of an . . . EPSDT visit." Decree Enforcement Hearing Transcript Vol. IV at 657, lines 18-22. 42 U.S.C. § 1396d(r)(1)(B). Even immunization rates dropped in the two years before the motion to enforce the decree was filed. Plaintiffs' Exhibit OM-9 at 6. 42 U.S.C. § 1396d(r)(1)(B)(iii) (immunizations). More than one million children got no dental care at all. Pet. App. at 92a.

Things are getting worse. The State officials' reports show a steady decline in the ratio of children who get medical check ups. Defendants' Quarterly Report for January, 2002, Ex. W, Medical Statewideness Report at 7 (entered February 20, 2002). *See also id.* at 46 (methods). The decline is all the more troubling because the reported "participation ratios" are "inflated indicators of the [children's] actual participation rates." Pet. App. 90a and n.34.

The dental "participation ratio" and dental "exam utilization rate" did not improve from SFY1999 to SFY2000. Ex. W, *supra*, Dental Statewideness Report at 6.

Amendment has been waived in this case, the district court had jurisdiction to enforce the consent decree.[2]

1. *Lapides* Controls And *Ford* Does Not. This case is controlled by *Lapides v Board of Regents of the University System of Georgia*, 535 U.S. 613 (2002). In *Lapides*, the State of Georgia voluntarily invoked the federal court's jurisdiction by removing a case, and thus waived all Eleventh Amendment objections to the exercise of jurisdiction over the State. *Id*. at 620.

As in *Lapides*, here the State officials' litigation conduct waived sovereign immunity even though State law does not authorize the Texas Attorney General to waive immunity. Response at 43-46. In *Lapides*, removal waived sovereign immunity because State law authorized the State's Attorney General to represent the State in court, even though State law prohibited the State's Attorney General from waiving sovereign immunity. 535 U.S. at 622-23.[3] In this regard, *Lapides*

2. The children's argument about waiver of immunity is properly presented. "The issue . . . is important, the parties have briefed it," and the Court should address it. *Vance v Terrazas*, 444 U.S. 252, 258-59 n.5 (1980). The Court of Appeals ruled on the issue. *Virginia Bankshares, Inc. v Sandberg*, 501 U.S. 1083, 1099 n.8 (1991); *see* Pet. App. at 41a. Also, this Court should address the question, which is "'in a state of evolving definition and uncertainty and one of importance to the administration of federal law" *Id*. (citations omitted). *See*, *e.g.*, *Wisconsin Dept. of Corrections v Schacht*, 524 U.S. 381, 397-98 (1998) (Kennedy, J., concurring). Moreover, the children urged their points promptly in supplemental briefs. The officials responded. *See Lebron v Nat'l R.R. Pass. Corp.*, 513 U.S. 374, 377-80 (1995). Finally, "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Harris Trust and Savings Bank v Salomon Smith Barney*, 530 U.S. 238, 245-46 n.2 (2000) (citation omitted); *Lebron*, 513 U.S. at 379-80. Response at 34.

3. Texas law authorizes the Attorney General to represent the State and its employees, to act before trial and to settle litigation. Children's Brief at 30 n.17, n.18. The Texas legislature has not "repudiate[d] the conduct of the . . . Attorney General" of this case. *See Gunter v Atlantic Coast Line R.R.*, 200 U.S. 273, 289 (1906). Indeed, in June, 2003, the legislature re-authorized the Texas Attorney General to represent the State and its employees, to act before trial and to settle cases. General Appropriations

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overrules *Ford Motor Company v Department of Treasury*, 323 U.S. 459 (1945). *Lapides*, 535 U.S. at 623. In *Ford*, a taxpayer filed suit in federal court against the State of Indiana. Since State law did not allow the officials to waive immunity, immunity was regained when it was raised for the first time in this Court. *Ford*, 323 U.S. at 468-70.

Lapides controls — and *Ford* does not — because "[i]n this case [the State officials] *voluntarily* invoked the federal court's jurisdiction" by asking the court to enter the consent decree. *See Lapides*, 535 U.S. at 620.[4] Their unanimous request — after so many months of negotiations and time to think about the proposed order — indicates that the State officials voluntarily invoked the district court's jurisdiction when they asked the court to enter the decree during the December, 1995 hearing.

Lapides overruled *Ford* for the important reason that rules "governing voluntary invocations of federal jurisdiction . . . [rest . . .] upon the problems of inconsistency and unfairness that a contrary rule of law would create." 535 U.S. at 622. In *Lapides*, it would have been unfair to let a State ask a district court to exercise jurisdiction over a case and then later urge

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Act, H-B 1, Office of the Attorney General, Goal A.1 and Item 8, available at www.lbb.state.tx.us/Bill_78/6_Conf/78-6_Art01-a_0603.pdf.

Perry v Del Rio, 67 S.W.3d 85 (Tex. 2001) further approves the Texas Attorney General's authority under State law. Response at 46. In *Perry*, the Attorney General proposed to settle a redistricting case, over the objection of the Speaker of the Texas House and others. Although the State district court may reject the Attorney General's proposal, the Attorney General has "authority to *propose* and *suggest* remedies," as occurred in this case. 67 S.W.3d at 93 (original emphasis). *Perry* does not control here because the district court adopted the decree urged by Texas' Attorney General.

Of course, in this case, the federal district court could have rejected the proposed decree. *Evans v Jeff D.*, 475 U.S. 717, 726-27 (1986). If so, the waiver of sovereign immunity from decree enforcement would have had no effect because no decree would have been entered.

4. In *Lapides*, Georgia voluntarily invoked the federal court's jurisdiction even though it was a defendant. The State officials' mere status as defendants does not defeat their voluntary invocation of federal court jurisdiction. Response at 37.

that the district court lacks jurisdiction over that same case. *Id* at 619. In this case, it would be unfair to let State officials ask a district court to exercise its jurisdiction to enter a consent decree and then urge that the district court lacks jurisdiction to enforce that order.

2. *Gunter* Establishes That State Officials Sued As Officials May Waive Sovereign Immunity. Ever since *Gunter v Atlantic Coast Line R. Co.*, 200 U.S. 273 (1906) (*cited with approval in Lapides*, 535 U.S. at 623), it has been possible for State officials' litigation conduct to waive the State's sovereign immunity from suit. Response at 38.[5] In the earlier, related *Pegues* case, the "nominal defendants" were considered State officials. *Id*. at 285. Even though the "suit against state officers to enjoin them from . . . [violating] . . . the Constitution of the United States is not a suit against a State within the prohibition of the Eleventh Amendment," *id*. at 283, the State officials had authority to waive the State's immunity. The relevant question was: "Did the State, through the authority which it had conferred upon the defendant officers, voluntarily submit to judicial determination the question raised in the *Pegues* case?" *Id*. at 284-85.

Here, as in *Gunter*, the answer is, "Yes." First, under State law, the county officials acted on behalf of the State. *Id*. at 285. In this case, the Texas Health and Human Services Commissioner and the Texas Commissioner of Health have authority under Texas law to administer the Medicaid program and EPSDT. Second, as in this case, the State's Attorney General was authorized to defend the suit. *Id*. at 286. *See* Children's Brief at 29-30; *supra*, n.3.

In the *Pegues* case the State submitted to the federal court's jurisdiction through the acts of its authorized treasurers and Attorney General. Since they waived sovereign immunity in

5. Throughout the first section of their Response, Respondents argue about "the State." Response at 9-32. They do not revert to being "State officials" until they argue that they cannot waive immunity. If they do not have authority to act on the State's behalf, how can the officials make arguments for "the State" throughout most of their Response?

the *Pegues* case, their successors were bound later in *Gunter*. 200 U.S. at 292.[6]

3. Constructive Waiver Doctrine Does Not Apply To Litigation Conduct. The doctrine of constructive waiver of immunity does not apply here because this case does not ask whether Congress could abrogate a State's immunity from suit. *See College Sav. v Fla. Prepaid Postsecondary*, 527 U.S. 666, 669 (1999). Response at 35. "*College Savings Bank* distinguished the kind of constructive waivers repudiated there from waivers effected by litigation conduct. . . . The relevant 'clarity' here must focus on the litigation act the State takes that creates the waiver." *Lapides* , 535 at 620. Here, the clear "act" occurred when the State officials asked the district court to enter the consent decree in December, 1995.[7]

B. The Officials Waived Immunity From Decree Enforcement By Asking The Court To Enter A Decree That Creates "Mandatory, Enforceable" Obligations And That Allows The Parties To "Request Relief" From The Court If Violations Occur. The decree clearly shows that the State officials waived immunity from efforts to enforce the order if they violate it. Response at 39; National Conference of State Legislatures, *et al. Amicus* Brief at 22-24 ("NCSL"). First, regardless of the decree's language, the State officials' actions at the December, 1995 hearing suffice to waive their immunity from enforcement efforts. *See above*.

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6. In *Richardson v Fajardo Sugar Co.*, 241 U.S. 44, 47 (1916), the Treasurer of Puerto Rico belatedly argued that sovereign immunity prevented suit against him. "[H]aving solemnly appeared . . . [the Treasurer] could not thereafter deny the court's jurisdiction."

In *Hagood v Southern*, State officials were sued in their official capacities. 117 U.S. at 67. Even so, the Court noted that if the State had submitted to the court's jurisdiction, it would have waived immunity and the State's officers could be "coerced" by federal court order. *Id*. at 68.

7. The officials' "intent" or motive is not relevant. Response at 36. "Motives are difficult to evaluate, while jurisdictional rules should be clear." *Lapides*, 535 U.S. at 621.

1. The Decree Waives Immunity Because It Subjects The State Officials To Future Court Proceedings If They Violate It. Even if the State officials' actions alone did not waive immunity, the decree very clearly does. The decree "contemplates that Defendants' future activities will comport with the terms and intent of this Decree. If this proves to be incorrect, the parties may request relief from this Court." L.; ¶303.

It is beside the point that ¶303 does not "determine whether relief will be available." Response at 39; NCSL at 23. By agreeing that the children "may request relief," the State officials waived "the central benefits of . . . immunity — avoiding the costs and general consequences of subjecting public officials to the risks of discovery and trial. . . ." *Puerto Rico Aqueduct v Metcalf & Eddy*, 506 U.S. 139, 143-44 (1993).

Although clarification is not needed, the decree provides it. It creates "enforceable obligation[s]." L.; ¶302. "Ordinary usage suggests that 'enforcing' the Agreement might entail one party suing the other, which would be impossible unless . . . [the officials'] consent . . . embodied a waiver of . . . Eleventh Amendment immunity." *Watson v Texas*, 261 F.3d 436, 442 (5th Cir. 2001). Other than erasing "enforceable" from the decree, there is no way to urge that the district court cannot enforce the decree's "enforceable" obligations.

2. The Decree Does Not Imply That Immunity Exists. The State officials waived sovereign immunity even though the children did not "concede the validity of Defendants' defenses. . . ." L.; ¶301. That quote, from the second sentence of ¶301, says nothing about the State officials. It only mentions the children. When the decree discusses the State officials, it discusses them specifically. *See*, third sentence of ¶301. ("*Defendants* do not concede liability.") (emphasis added). When the decree discusses both parties, the decree is so phrased; the first sentence of ¶301 discusses "the parties," not the "Plaintiffs" or the "Defendants."

Further, reading the first and second sentences of ¶301 together clarifies their meaning. The children did not concede

the validity of the Defendants' defenses to liability. Immunity is not the same as liability. *See* Children's Brief at 29.

A reader would have to take ¶301 out of context to be confused about whether the district court maintained authority to resolve disputes about decree compliance. When ¶301 says that the parties intended to "resolve many of the issues in this litigation amicably . . . without the need for the Court's intervention," it means that since the parties had agreed to a decree, the district court would not need to take evidence on the merits, decide whether the State officials were liable or craft its own equitable order. Nonetheless, the parties could still "request relief" from decree violations. ¶303.[8]

3. "Forum Immunity" Does Not Limit Waiver Here. In *Lapides*, the United States argued that removal only waives choice of forum, so other forms of immunity might still apply. Response at 42 n.31. Sovereign immunity is a "personal privilege which [the State] may waive at pleasure," *Clark v Barnard*, 108 U.S. 436, 447 (1883), so the scope of waiver may vary from case to case, depending on the acts that effect the waiver. *See Regents of Univ. of New Mexico v Knight*, 321 F.3d 1111, 1125-26 (Fed. Cir. 2003); *Watson*, 261 F.3d at 443.

Here, by asking the district court to enter an agreed order, the State officials waived immunity only from further actions to enforce the decree. Certainly, by asking the district court to enter a consent decree, the State officials waived their immunity objections to enforcing it. This is the nature of an order; it can be enforced. *Jones v Montague*, 194 U.S. 147, 152 (1904) ("a judgment which can be carried into effect"); *see also Watson*, 261 F.3d at 442.[9]

Waiver is clear in this case because of the decree's language. The decree specifically: (1) creates "mandatory,

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8. If the State officials had wanted to "end the litigation" when the decree was entered in 1996, they would not have urged the district court to enter a decree that allows the parties to "request relief" from the district court for future decree violations. ¶303. Response at 36.

9. A federal court cannot enter an advisory order that has no effect, or that cannot be enforced. *Local No. 8-6, OCA Workers Int'l. Union v Missouri*, 361 U.S. 363, 367 (1960).

enforceable obligation[s]" L.; ¶302 (emphasis added); and (2) allows the parties to "request relief" from the district court if disputes arise about decree compliance. ¶303.

C. It Is Fair To Allow Enforcement Of A Consent Decree That State Officials Urge Should Be Entered, Especially When The Decree Itself Permits Enforcement In The Event Of Future Violations. It would be unfair and anomalous if the district court could not enforce a decree that State officials ask the court to enter, particularly when the decree itself specifically envisions "mandatory, enforceable" obligations and allows the parties to "request relief" from future violations.

1. The State Officials Had Fair Warning That Their Acts Would Waive Immunity. Surely the State officials were on notice that the decree could be enforced; they helped to draft an order that creates "mandatory, enforceable obligation[s]," and that allows the parties to "request relief" from violations. L.; ¶¶302, 303. Response at 38. Further, *Lapides* itself held that Georgia waived its immunity by removing a case, even though presumably Georgia did not expect that result.

2. It Is Fair To Hold The Officials To The Terms Of Their Bargain. In exchange for the decree, the State officials "bought peace" with a class of "present and future" indigent Texas children who qualify for Medicaid. Order (filed July 18, 1994). The class includes about 1.5 million children, who are all precluded from initiating new suits concerning the matters resolved by the decree.

The decree was entered more than seven years ago, in early 1996. The children expected the decree to relieve them from the State officials' ongoing violation of Congress' promise of comprehensive health care, including preventive care.

If the children had known that the State officials would seek to disable the decree as soon as they violated it, the children would not have agreed to the decree. They would have pursued trial. In the intervening seven years, trial would have occurred and an injunction would have issued to protect the children and their access to health care.

II. A FEDERAL COURT HAS AUTHORITY TO ENFORCE CONSENT DECREES ENTERED INTO BY STATE OFFICIALS IN *EX PARTE YOUNG* CASES

A. A District Court Need Not Find A Violation Of Law To Enforce A Consent Decree, But The District Court Did Find Federal Law Violations In This Case. The State officials argued below that "[b]efore the Court evaluates . . . compliance with the consent decree, it must determine what, if any, rights created by the decree are enforceable in federal court." Appellants' Brief at 9 (No. 00-41112, filed February 22, 2001). This argument succeeded. The Court of Appeals held: "[b]efore the district court can remedy a violation of a provision of the consent decree, plaintiffs must demonstrate that any such consent decree violation is also a violation of a federal right." Pet. App. at 27a-28a.[10]

Despite their success below, the State officials now backtrack from their "rights" analysis of immunity and consent decree enforcement. They argue that the point of comparison is federal law, not federal rights protected by 42 U.S.C. § 1983. They now urge that a motion to enforce a consent decree against State officials must allege ongoing violations of federal law. Response at 12.

1. The District Court Found Violations Of Federal Law; Pleadings, Motions And The Decree Also Sufficiently State Violations. First, the officials' argument fails because the district court found ongoing violations of the federal Medicaid Act before it issued its enforcement order. "The court . . . has

10. The Utah *amici* argue that the decree should not be enforced because a violation of the decree is not necessarily a violation of a federal right. Utah Brief at 1; *see also* Response at 3, 5-6, 14-15 n.10. While Congress has limited consent decree enforcement in this manner in prison litigation, 18 U.S.C. § 3626, *et seq.*, it has not done so in cases like this one.

Absent Congress' "'clearest command,'" this Court should not displace the district court's age-old equitable discretion to enforce the decree in this case. *See Miller v French*, 530 U.S. 327, 340 (2000) (*citation omitted*). Congressional efforts along these lines have failed. S.248, § 3, 106th Cong. 1st Sess. (1999) (consent decrees involving State or local officials); S.2163, § 3, 105th Cong. 2d Sess. (1998) (consent decrees involving State or local officials); H.R. 4304, § 2(c), 104th Cong. 2d Sess (1996) (school desegregation consent decrees).

found defendants in violation . . . for failing to meet the requirements of 42 U.S.C. § 1396a(a)(43) based on the overwhelming evidence cited in Part One" of its memorandum opinion. Pet. App. at 272a-73a.

Second, the State officials' legal theory is wrong. The Eleventh Amendment does not bar this suit because the "*complaint alleges* an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md. v Pub. Serv. Comm'n.*, 535 U.S. 635, 645 (2002) (emphasis added). This is a classic *Ex Parte Young* case because the complaint alleges serious ongoing violations of the federal Medicaid Act and the children seek only prospective relief.

Federal law is relied on throughout the proceedings, not just in the complaint. The decree was "reached within the framework of federal law related to the EPSDT and Medicaid programs." L.; ¶308. The motion to enforce states "that the Defendants have violated the decree *and relevant law*. . . ." Plaintiffs' Prehearing Motion to Enforce Consent Decree at 48 (filed March 8, 2000) (emphasis added). Finally, as the Court of Appeals recognized, when the district court found that the State officials had violated the decree, the court often referred "to statutory requirements and the consistency of the consent decree with the Medicaid Act." Pet. App. at 13a. *See also* Pet. App. at 244a, 264a-66a, 267a-69a, 272a-74a.[11]

2. A Liability Finding Is Not Required To Enter Or Enforce A Consent Decree Against State Officials. Even though legislative redistricting is at the heart of sovereignty and our representative government, settlement may be entered without

11. There is no need for a separate "basis for jurisdiction" for the district court's enforcement order in this case. Response at 12, *citing Kokkonen v Guardian Life Ins. Co.*, 511 U.S. 375, 378 (1994). First, unlike this case, *Kokkonen* addresses enforcement *after* a case was dismissed. 511 U.S. at 377. Second, *Kokkonen* required a separate basis for jurisdiction because the dismissal order did not include the settlement terms or retain jurisdiction over the settlement. 511 U.S. at 381. In this case, the consent decree both includes the terms of the agreement within its four corners and retains jurisdiction to resolve disputes about decree compliance. L.; ¶ 303. A "breach of the agreement [is] a violation of the order, and ancillary jurisdiction to enforce the agreement . . . therefore exist[s]." 511 U.S. at 381.

a liability finding. *Lawyer v Department of Justice*, 521 U.S. 567, 578-79 n.6 (1997), *citing Firefighters v Cleveland*, 478 U.S. 501, 522 (1986).

The State officials do not cite any decisions that hold that a district court must find a violation of federal law — or that a motion must allege a violation of federal law — to enforce a consent decree. This is because there is no "rule 'insisting on a public *mea culpa*.'" *Lawyer*, 521 U.S. at 574. This is particularly true when the district court finds a substantial likelihood that the plaintiffs would succeed at trial before entering the decree, Order Concerning Fairness of Consent Decree at 25 (filed January 25, 1996) ("Fairness Order"), and then finds that the State officials have violated the law before ordering enforcement. Pet. App. at 272a-73a.

Once a consent decree is entered, it is entitled to the same respect as any other federal court order. *Rufo v Inmates of Suffolk County Jail*, 502 U.S. 367, 378 (1992). It is treated according to the same rules as any other federal court order. *Id*.

B. A Federal District Court Has Jurisdiction to Enforce A Consent Decree, Which Is A Court Order, Not A Mere Contract. A consent decree "is an agreement that the parties desire and expect will be reflected in, and be *enforceable as*, *a judicial decree*. . . ." *Rufo*, 502 U.S. at 378 (emphasis added); *see also Railway Employees v Wright*, 364 U.S. 642, 650-51 (1961). Even federal equitable orders that are "subject to substantial constitutional question" must be obeyed unless modified or dissolved. *Walker v City of Birmingham*, 388 U.S. 307, 317-19, 321 (1967). Unless it is held unlawful, "the consent decree stands as a binding court judgment." Michael W. McConnell, *Why Hold Elections?*, 1987 U. Chi. Legal F. 295, 305 (1987).

For good reason, a consent decree is just as enforceable as a fully disputed order. Response at 17-18; Utah at 19. A consent decree incorporates State officials' "prerogatives . . . since of course [they] proposed . . . [the decree] . . . in the first place." *Milliken v Bradley*, 433 U.S. 267, 281 (1977).

1. The *Firefighters* Standards For Decree Entry Assure That Enforcement Is Also Proper. The children urge that if a consent decree can be entered, it can be enforced. Children's Brief at 42-43. The test to determine if a decree should be entered — or enforced — is consistent with *Ex parte Young* because it requires (1) the district court to have jurisdiction over the dispute and (2) the decree to relate to federal law. *Firefighters*, 478 U.S. at 525.

To be properly entered a consent decree must "'spring from and serve to resolve a dispute within the court's subject-matter jurisdiction'; . . . and must 'further the objectives of the law upon which the complaint was based.'" *Id*. at 525 (citation omitted). The first *Firefighters* factor ensures that the district court has jurisdiction to enter the decree, in this case federal question jurisdiction.[12] The third *Firefighters* factor ensures that the proposed remedial decree sufficiently relates to the federal law that underlies the suit. *See also Wright*, 364 U.S. at 651 (modify decree if it is "in conflict with *statutory objectives*") (emphasis added).

The *Firefighters*' test protects the Eleventh Amendment's values by requiring remedial decrees to "further the objectives of the law." When a court enters disputed injunctive relief, the order must "address and relate to" a violation of federal law and be "tailored to cure" the condition that violates federal

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12. The State officials rely on *Evans v City of Chicago*, 10 F.3d 474 (7th Cir. 1993) (en banc), *cert. denied*, 511 U.S. 1082 (1984) to urge that separation of powers concerns counsel against enforcement of the consent decree in this case. Response at 23-24. In *Evans*, the plaintiffs claimed no violation of federal law. *Id*. at 482-83. The consent decree could not be enforced because "entry and continued enforcement of a consent decree regulating the operation of a governmental body depend on the existence of a substantial claim under federal law." *Id*. at 480 (plurality per Easterbrook, J.)

Evans contradicts the State officials' argument that a motion to enforce a decree must assert ongoing violations of law. A "claim" of a violation of federal law is sufficient to support both entry and enforcement of a decree. *Id*. at 480. A "claim" in made in a pleading, such as a complaint. Fed. R. Civ. P. 7(a) (complaint is a pleading); Fed. R. Civ. P. 8(a) (claims in pleadings). A motion is not a pleading. *See* Fed. R. Civ. P. 7(b). *Evans* requires a "claim" of a violation of law, and "claims" are made in pleadings, not motions.

law. *Milliken*, 433 U.S. at 282. Stated differently, the remedy must "further the objectives of the law" at issue in the case. *Firefighters*, 478 U.S. at 525.[13]

The *Firefighters* test fits with the concept that the district court's authority to enter a consent decree stems from the federal statute at issue in the case. Response at 18, *citing Wright*, 364 U.S. at 651. By requiring the decree to "further the objectives of the law," *Firefighters* ensures the requisite tie between the decree and the underlying statute.

C. Federalism Does Not Prevent Enforcement Of The Decree. Consonant with federalism and our government's structure, federal courts may enforce consent decrees against State officials. Admittedly, *Alden v Maine*, 527 U.S. 706, 751 (1999) mentions federalism and the integrity of the branches of State government in its discussion of whether to require State courts to adjudicate damages claims against States. Response at 23. But, *Ex Parte Young* is not inimical to the integrity of State government and its branches; *Alden* itself emphasizes that *Ex parte Young* remains a vital aspect of our nation's law. 527 U.S. at 757. *Ex Parte Young* is critical to our constitutional scheme because it implements the Supremacy clause. *Green v Mansour*, 474 U.S. 64, 68 (1985).

1. Exceptions to *Ex parte Young* Are Rare And Do Not Apply Here. Exceptions to *Ex parte Young* should be few and far between because *Ex parte Young* is an essential aspect of our government's structure. *Harris v Owens*, 264 F.3d 1282, 1293 (10th Cir. 2001), *cert. denied*, 535 U.S. 1097 (2002) (No unique sovereignty interest in Medicaid). Nonetheless, the Eleventh Amendment prohibits rare suits for prospective relief from State officials. For example, despite *Ex parte Young*, prospective relief is not available when disputes "uniquely implicate

13. The State officials incorrectly argue that since after trial plaintiffs could only get an "injunction against ongoing violations of federal law, . . . it would be a perverse incentive indeed to offer greater relief from settlement than from full victory on the merits." Response at 31; NCSL at 28. An invalid assumption underlies the State officials' argument. An injunction entered after a trial on the merits need not be limited strictly to the terms of the federal law at issue. *Milliken*, 433 U.S. at 281-82; *see also* Children's Brief at 38-40.

sovereign interests," such as submerged lands related to navigation. *Idaho v Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 284 (1997).

Despite the "unique sovereignty" exception, this Court has "never doubted the importance of state interests in cases falling squarely within our past interpretations of the *Young* doctrine." *Coeur d'Alene*, 521 U.S. at 296 (O'Connor, J., concurring). Even though Medicaid is very important, it does not involve essential aspects of sovereignty. A "state's interest in administering a welfare program at least partially funded by the federal government is not such a core sovereign interest as to preclude the application of *Ex parte Young*." *J.B. ex rel. Hart v Valdez*, 186 F.3d 1280, 1287 (10th Cir. 1999) (Medicaid, including EPSDT, and other statutes). Even though a State

> may retain a special sovereignty interest in choosing whether to participate in the Medicaid program, once it elects to participate, . . . it face[s] the risk of being ordered by a federal court to correct the problems in its system. If the State did not want to face this federal involvement, it was free to decline federal [Medicaid] funds.

Antrican v Odom, 290 F.3d 178, 190 (4th Cir.), *cert. denied*, 123 S. Ct. 467 (2002) (EPSDT dental).[14]

a. District Courts May Enforce Decrees Despite An Impact On State Government Or Legislatures. Since the nation's inception, courts have been "an intermediate body between the people and the legislature, . . . to keep the latter within the limits assigned to their authority." THE FEDERALIST, NO. 78 at 492 (Benjamin Wright ed. 1961); *see also id*., No. 48. Federal courts may resolve cases much more directly "political" than this one, even if they "touch matters of state governmental organization." *Baker v Carr*, 369 U.S. 186, 229 (1962). Response at 22-29.

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14. Since administration of a Medicaid program does not create a unique sovereign interest worthy of Eleventh Amendment protection, it also does not involve a "residual and inviolable" interest that requires immunity protection. Response at 49-50.

Despite the respect due them, State legislatures do not have authority to "undo" valid federal court orders. As Chief Justice Marshall explained in a suit against a State Treasurer,

> If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery; and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all. . . . [and] . . . the citizens of every . . . state . . .must feel a deep interest in resisting principles so destructive of the union. . . .

United States v Peters, 9 U.S. 115, 136 (5 Cranch) (1809). Even when State officials are sued, it is important for federal courts to have authority to interpret federal law. *Coeur d'Alene*, 521 U.S. at 293 (O'Connor, J. concurring).

Subsequent State legislation cannot interfere with enforcement of prospective relief that is ancillary to an order where the district court had jurisdiction. In *Humphrey v Pegues*, 83 U.S. 244, 249 (16 Wall.) (1872), a federal court enjoined South Carolina officials from taxing a railroad. The officials did not raise sovereign immunity. *Gunter*, 200 U.S. at 292. Years later, the State legislature required taxation of the same railroad. Despite the new legislation, the earlier federal court order was enforceable. "[T]he proposition that the Eleventh Amendment . . . control[s] a court of the United States in administering relief, although the court was acting in a matter ancillary to a decree rendered in a cause over which it had jurisdiction, is not open for discussion." *Id*. at 292, *see also In re Harleston*, 331 F.3d 699, 703 (9th Cir. 2003).

Even in matters of State legislative budgeting, federalism concerns do not prohibit *Ex parte Young* suits. Response at 24, 46-47. In *Milliken*, 433 U.S. 267, the district court ordered State officials to share in the future cost of education programs in Detroit. "[P]rinciples of federalism [are not] abrogated by the

decree. The District Court has . . . [not] . . . attempted to . . . mandate a particular method or structure of state . . . financing." *Id*. at 291.[15]

b. District Courts May Enforce Decrees Against Successor Executive State Officials. The very nature of *Ex parte Young* litigation is that the suit runs against the *office*, not the individual who sits in that office for the time being.[16] Response at 23-24. *Ex parte Young* itself emphasizes that Mr. Young "was complained of as an officer." 209 U.S. 123, 159 (1908).

Second, "[i]n an official-capacity action in federal court, death or replacement of the named official will result in the automatic substitution of the official's successor in office." *Kentucky v Graham*, 473 U.S. 159, 166 n.11 (1985); *citing* Fed. R. Civ. P. 25(d). In *Ex parte Young* cases, prospective orders bind successors in office. *See*, *e.g.*, *Ganther v Ingle*, 75 F.3d 207, 210 (5th Cir. 1996) (per curiam); *Hoptowitz v Spellman*, 753 F.2d 779, 781 (9th Cir. 1985); *ACLU of Miss. v Finch*, 638 F.2d 1336, 1341-42 (5th Cir. 1981); *Torres v Toledo*, 586 F.2d 858, 859-60 (1st Cir. 1978).[17]

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15. In *United States v Bd. of Educ. of City of Chicago*, 799 F.2d 281, 284 (7th Cir. 1986), both parties urged entry of a decree that required them to in good faith seek desegregation funding. During the course of the suit, the national administration changed. *See Evans*, 10 F.3d at 479. Nonetheless, the United States was held to the terms of the decree, despite its sovereign discretion concerning funding. 799 F.2d at 294-95.

16. The Utah *amici* rely on decisions about the contracts clause of the United States Constitution, not the Eleventh Amendment, to argue that decrees should not bind successors in office. Utah Brief at 18-19. Further, the decisions address contracts, not valid federal court orders, as in this case. *See*, *e.g.*, *Rufo*, 502 U.S. at 378 (consent decree is "a judicial decree").

17. These cases rely on Fed. R. Civ. P. 25(d) and *Ex parte Young* to hold that equitable relief runs to successor State officials. This Court modified Rule 25(d) to require orderly succession of public officials sued in their official capacities, including State officials. Advisory Committee Notes to 1961 Amendment. This Court would not have applied the Rule to State officials in violation of the Eleventh Amendment's limits on federal court jurisdiction, especially when the Court clearly considered *Ex Parte Young* and the Amendment at the time. *Id.*

The same is true with consent decrees.[18] When plaintiffs and State officials "stipulate to a disposition" of a suit, the equitable order is binding "even though the particular officers named in the order may at some time be replaced by others. . . . [A]ny other result would undermine the strong policy in favor of enforcing federal law, a policy that originally impelled the courts to create the fictional distinction between officer and government." *Maria Santiago v Corporacion de Renovacion, Etc.*, 554 F.2d 1210, 1211, 1213 (1st Cir. 1977).[19]

Further, imagine the practical problems if consent decrees cannot extend past the term of the officials who agree to them. More complex cases will go to trial because plaintiffs will not agree to a short-lived decree that cannot be expected to resolve complicated problems. Second, plaintiffs may be forced to file new litigation if a short-lived decree expires before the dispute is resolved. This will simply result in more litigation, possibly before a new district judge who will not have the benefit of the district judge's experience in the first case. Finally, how long will the decree continue if — as in this case — there are several defendant-State officials whose terms end at different times?

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18. State officials even bind their successors when they settle criminal cases, despite the sovereign's strong interest there. *Santobello v New York*, 404 U.S. 257 (1971). Settlement of criminal cases is favored, but it "presuppose[s] fairness in securing agreement." *Id*. at 260-261.

19. "Friendly adversaries" did not subvert our "republican form of government" by agreeing to the consent decree. Response at 25. This argument brings forth the specter of collusion. *See*, *e.g.*, *Arizonans for Official English v Arizona*, 520 U.S. 43, 71 (1997). Collusion was absent from the negotiations. Fairness Order at 22. This case was disputed until negotiations began, roughly a year after the case was filed. *Id*. at 23-24 ("extensive discovery"). The State officials' motion to dismiss was denied, *id*. at 23, so the law of the case was that plaintiffs had valid legal claims. *Id*. at 25 ("likelihood that Plaintiffs could have succeeded at trial").

Also, extensive notice allowed third parties to comment on the proposed decree. Fairness Order at 34 n.12 ("people who wanted to review the decree could do so;" "class members *and others* could call for more information") (emphasis added). The district court considered comments filed by third parties before entering the decree. *Id*. at 34.

c. *Jenkins* and *Dowell* Do Not Prevent Enforcement Because The State Officials Have Not Complied With The Decree. The district court was correct to enforce the decree despite federalism concerns raised in concurring opinions in *Missouri v Jenkins*, 515 U.S. 70 (1995) and *Bd. of Educ. of Okla. City Pub. Sch. v Dowell*, 498 U.S. 237 (1991). Response at 19, 23, 28-29. A district court should not dissolve a decree unless officials "have operated in compliance with it for a reasonable period of time." *Dowell*, 498 U.S. at 247; *Jenkins*, 515 U.S. at 89 . Here, the officials have not complied with the decree for a reasonable time. To the contrary, they are violating it.

2. District Courts Do Not Have Boundless Authority When Enforcing Consent Decrees. "Objective limitations" guide district courts when they enforce consent decrees. Response at 17; NCSL at 19-21. The district court must enforce the decree as written, using the rules normally used to interpret contracts. *United States v ITT Cont'l Baking Co.*, 420 U.S. 223, 236-38 (1975); *United States v Armour & Co.*, 402 U.S. 673, 682 (1971).[20] A district court's decision about whether a consent decree has been violated is limited by the terms of the decree itself — which state the parties' decisions about policy issues presented by the case. The court's further enforcement orders are limited by this Court's decisions about equitable relief in *Ex parte Young* cases against State officials. *Missouri v Jenkins*, 515 U.S. 70; *Rufo*, 502 U.S. 367; *Milliken*, 433 U.S. 267.

Here, the district court's actions belie the State officials' unfounded fear of the court's "limitless authority" to enforce the decree that they have violated. The district court did not fashion a remedial order. It ordered the State officials to propose their own plans to remedy the decree violations detailed in the district court's opinion. Pet. App. 276a-278a. This admirable restraint appropriately accommodates sovereignty concerns. *Milliken*, 433 U.S. at 281; *Taylor v Freeman*, 34 F.3d 266, 274 (4th Cir. 1994) (Luttig, J.); *Bd. of Educ. of City of Chicago*, 799 F.2d at 289-90.

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20. Appellate review is available to ensure that the district court's interpretation is proper. *See Armour*, 402 U.S. at 682-83. The officials urged below that the district court's interpretation was in error. Appellants' Brief at 15-60 (No. 00-41112, filed February 22, 2001).

3. The District Court's Ability To Modify Consent Decrees Provides A Practical Solution To The State Officials' Concerns. For the first time in this appeal, the State officials raise their concerns about federalism and their ability to bind successors. They also allege a host of potential problems concerning "budgeting, staffing, data collection, recruitment, administrative oversight, and monitoring." Response at 27-28; *see also* Utah at 13, 15-17.

If the decree had intolerably intruded into State affairs, the officials could have moved to modify it. Fed. R. Civ. P. 60(b). Modification is a "safety valve" to accommodate new circumstances. Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. CHI. LEGAL F. 19, 34 (1987). A district court should have the first opportunity to decide if its decree has become inequitable or unworkable because of significant changes in law or facts, so that modification is justified. *See*, *Rufo*, 502 U.S. at 383-84.

Agreed modifications have already avoided the very type of problem the State officials fear. When the decree was entered in 1996, it required discussions about EPSDT with almost all Medicaid applicants who qualified for EPSDT. L.; ¶19, *et seq*. In 2000, successor officials hoped to revise the eligibility process by eliminating many in-person interviews. The Texas legislature was also considering the issue. Joint Motion to Modify ¶19 of Consent Decree at 1-2 (filed October 18, 2000). Given these changes, the district court granted the parties' motion to clarify that the decree does not prevent "the Texas Medicaid Program or the Texas legislature from simplifying Texas' Medicaid eligibility system for children and teens." *Id*. at 4; Order (filed December 14, 2000).[21]

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21. The district court granted another joint motion to modify the decree after the State officials revised their medical check up schedule. L.; ¶35. Order (filed February 28, 2000); *see also* Pet. App. 86a n.30; First Joint Motion to Modify Paragraph 35 of the Consent Decree: Schedule for Medical Check Ups (filed January 31, 2000).

Finally, the State officials should not fear that the consent decree will permanently displace their administration of Medicaid and EPSDT. Response at 19 n.14; NCSL at 13. To be relieved of the decree in its entirety, they just have to comply for a reasonable length of time or, in other words, do what they asked to be ordered to do. *See Dowell*, 498 U.S. at 247.

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