

**PETITION FOR A WRIT OF CERTIORARI**

Petitioners, members of the class in the cases of *Ricci v. Patrick*, Civ. Act. Nos. 72-0469-T, 74-2768-T, 75-3910-T, 75-5023-T and 75-5210-T (D.Mass), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in these proceedings on October 1, 2008, with an amended judgment issued on November 14, 2008.

**OPINIONS BELOW**

The opinion of the First Circuit is reported at 544 F.3d 8 (1<sup>st</sup> Cir. 2008) and is reproduced in Appendix A at App. 1-34. The final amended judgment of the Court is unreported and is reproduced in Appendix E at App. 80-81. The opinion of the District Court reopening the Disengagement Order at issue in this case is reported at 499 F.Supp.2d 89 (D.Mass. 2007) and is reproduced in Appendix B at App. 35-45. A subsequent order of the District Court is reported at 535 F.Supp.2d 229 (D.Mass. 2008) and is reproduced in Appendix C at App. 46-47. The Final Order issued by the District Court providing for the disengagement of the court and return of the facilities to management of the Commonwealth authorities (with a provision for reassertion of jurisdiction by the court), is reported at 823 F.Supp. 984, 986-989 (D.Mass 1993) and is reproduced in Appendix D at App. 48-79.

## **JURISDICTION**

The judgment of the Court of Appeals was issued on October 1, 2008. Following a motion for rehearing, the First Circuit issued an amended judgment on November 14, 2008. (App. 80-81). This Court has jurisdiction under 28 U.S.C. § 1254(1).

## **STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE**

Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq. and the Fifth and 14<sup>th</sup> Amendments to the Constitution were at issue in the underlying litigation, but are not implicated in the judgment.

## **STATEMENT OF THE CASE**

The decision below is the latest example of an irreconcilable conflict among all twelve regional courts of appeals on an important and recurring issue of appellate review, namely the review standard to be applied to a district court's interpretation of consent decrees and its own orders springing from such decrees. All twelve regional courts of appeals have reached square holdings on the issue, and the only touchstone among them is deep division. The First Circuit, here, like several other courts (including the Second, Third, Fifth, Tenth, Eleventh and D.C. Circuits) have held that pure *de novo* review

applies. Others (including the Sixth, Seventh, Eighth and Ninth Circuits) apply a deferential review standard depending on whether the district court entered the original consent decree or administered it over a long period of time. Other Circuits (including the Fourth) adopt a more deferential standard in public interest, institutional reform cases. Not only is this Circuit split broad, it is acknowledged. In the very case upon which the court below purported to rely in adopting its *de novo* standard of review, the First Circuit earlier had acknowledged the conflict that existed on this issue. See *F.A.C. v. Cooperativa de Seguros de Vida de P.R.*, 449 F.3d 185, 192. n. 4 (1st Cir. 2006),

The abuse of discretion standard is the most appropriate standard to apply because the district court's review is not akin to the interpretation of a contract negotiated between parties at arms length, as the courts who have established a *de novo* review standard have held. Rather, the district court's interpretations are framed by its experience in having closely overseen the litigations for years (decades in this case) and turn upon findings of fact made on the basis of extensive evidentiary hearings, the application of the facts to orders it drafted, and the underlying purpose of the orders and decrees it entered.

The result of the disparate standards applied across the circuits is that materially

different results occur in similar cases. Indeed, had the First Circuit applied abuse of discretion review here or even some deferential review, there would have been no basis to overturn the finding of the District Court that the Commonwealth of Massachusetts had violated its Disengagement Order, thus permitting it to reopen the case and to enforce the underlying consent decree that it had imposed in the preceding years. Because it is clear that the First Circuit's *de novo* review was essential to its decision to reverse the district court, this case presents an excellent vehicle for this Court to resolve the disarray in the lower courts over this recurring issue of federal appellate review. The petition should be granted.

## **PROCEDURAL BACKGROUND**

### **A. Underlying Litigation**

A class action was filed in the District of Massachusetts in 1972 on behalf of the mentally retarded residents at Belchertown State School, one of the state mental retardation facilities. Similar suits were filed in the next three years involving other state facilities, including, in 1974, the Fernald Development Center in Waltham, Massachusetts. The basis of the suits was that services, programs and conditions at the facilities were so inadequate that they violated the residents' constitutional and statutory rights under the federal Rehabilitation Law and the Social Security Act. All of the cases

were assigned to District Court Judge Joseph L. Tauro, who consolidated the five institutional cases. In 1977, the parties entered into a consent decree, crafted by Judge Tauro, requiring the Commonwealth to improve the physical facilities and employ additional professional and direct care staff to operate and maintain the facilities in a manner consistent with the standards imposed by Title XIX of the Social Security Act. See *Ricci v. Callahan*, 97 F.R.D. 737 (D. Mass. 1983).

B. The District Court Administers the Consent Decree

The consent decree was administered by Judge Tauro thereafter. For the next several years, Judge Tauro made numerous on-site visits to all the mental retardation facilities; conducted frequent extensive hearings; issued several orders; established a quality control mechanism, staffed by, and responsible to, the District Court, and he effectively managed all services related to, and required for, the mentally retarded residents. See 576 F.Supp. 415 (D. Mass. 1983), 646 F.Supp. 378 (D.Mass 1986). 781 F.Supp. 826 (D. Mass. 1992), 1992 WL 163215 (D. Mass. June 24, 1992), 1992 WL 175509 (D.Mass July 21, 1992). Some of those orders were reviewed by the First Circuit. See *Massachusetts Association for Retarded Citizens v. King*, 643 F.2d 899 (1<sup>st</sup> Cir. 1981)(refusing to review monitoring orders issued by district court); *Massachusetts Association for Retarded Citizens v. King*, 668

F.2d 602 (1<sup>st</sup> Cir. 1981)(reversing District Court decision invalidating new state law on charge-for-care); *Ricci v. Okin*, 978 F.2d 764 (1<sup>st</sup> Cir. 1992)(Breyer, J.)(refusing to review interlocutory order of District Court );

C. The District Court Issues a Disengagement Order

In 1993, the district court issued a final disengagement order, returning management of the mental retardation facilities to the state of Massachusetts, noting the progress that had been made in improving the facilities, due to federal court supervision. (See Appendix D, App. 48-79).

The District Court then issued an order supplanting and replacing each of the consent orders that it had previously issued. See App. 53. Central to the Final Order were requirements that each resident be afforded an individual service plan (“ISP”). The court stated:

2.. . . (a) Defendants shall substantially provide services to each class member on a lifetime basis. The specific services to be provided to each class member to meet this obligation, and defining this obligation, shall be set forth in an Individual Service Plan (“ISP”) that details each class member's capabilities and needs for services, pursuant to the regulations governing the preparation of

ISP's, as currently set forth in 104 CMR 20, *et seq.* (the "ISP Regulations") (App.54)

The order also required that certain steps must be taken before any patient is transferred to another facility.

4. Defendants shall not approve a transfer of any class member out of a state school into the community, or from one community residence to another such residence, until and unless the Superintendent of the transferring school (or the Regional Director of the pertinent community region) certifies that the individual to be transferred will receive equal or better services to meet their needs in the new location, and that all ISP-recommended services for the individual's current needs as identified in the ISP are available at the new location. (App. 57)

The Commonwealth defendants were ordered not to "undermine the progress achieved during the period of this litigation." In particular they were required to "maintain[] and implement[] the basic principles of the ISP." (App. 58)

Further, Judge Tauro crafted a provision in the Disengagement Order to allow the District Court to reassert jurisdiction if the

Commonwealth failed to follow the requirements in the Order:

7. a. If the defendants substantially fail to provide a state ISP process in compliance with this Order, or if there is a systemic failure to provide services to class members as described in this Order, the plaintiffs may seek enforcement of the Order pursuant to this paragraph. Individual ISP disputes shall be enforced solely through the state ISP process. (App. 59-60).

D. The District Court Finds Its Disengagement Order Violated and Reasserts Its Jurisdiction

In 2003, the Commonwealth announced its plan to close the Fernald Development Center together with all other Department of Mental Retardation (“DMR”) development centers and to move the residents to five other residential facilities or to a community based setting.

In 2006, after numerous residents had been voluntarily transferred from Fernald to other DMR facilities and community residences, Petitioners sought relief from the District Court, in accordance with the Final Order, claiming that the Commonwealth had failed to provide a proper ISP procedure in accordance with that Order.

The District Court preliminarily enjoined the Commonwealth from transferring any more residents from Fernald, pending further investigation. Without reopening the underlying case, the District Court appointed U.S. Attorney Michael Sullivan as court monitor to investigate and prepare a report on the voluntary transfers of Fernald residents to other Commonwealth facilities or community residences.

After more than a year of “exhaustive and meticulous study” of all alternative facilities, the Court Monitor concluded in a March 6, 2007 report that “Fernald residents should be allowed to remain at the Fernald facility, since for some, many or most, any other place would not meet an ‘equal or better’ service outcome.” (App. 37-38).

The District Court reviewed the court monitor’s report and the Monitor’s conclusion that “for some Fernald residents, a transfer ‘could have devastating effects that could unravel years of positive non-abusive behavior,’” (App. 39-40). The District Court concluded that “the Commonwealth’s stated global policy judgment that Fernald should be closed had damaged the Commonwealth’s ability to adequately assess the needs of the Fernald residents on an individual, as opposed to a wholesale basis.” (footnote omitted)(App. 39).

On that basis, the District Court found that the Commonwealth had engaged in a

“systemic failure’ to provide a compliant ISP process,” reasserted jurisdiction over the case and issued a mandatory injunction to remedy this failure: (App. 40). He issued the following order:

Any further communication from defendant Commonwealth of Massachusetts Department of Mental Retardation to Fernald residents and their guardians which solicits choices for further residential placement shall include Fernald among the options which residents and guardians may rank when expressing their preferences. (App.42)

Explaining the importance of the ISP process, the District Court stated:

An essential function of the ISP process is to give residents and guardians a voice in important decisions. It is intended to provide an individual and personalized analysis of each resident. Administering this process under the global declaration that Fernald will be closed, however, eviscerates this opportunity for fully informed individualized oversight. To dismiss the benefit of hearing the voices and wishes of those most directly impacted invites the devastating effects about which the Monitor has warned. The DMR declaration not only disenfranchises the

participants in the ISP process, it also deprives the DMR itself of valuable information, thereby undermining the efficacy of the ISP process. As a consequence, such administration of the ISP process amounts to a “systemic failure” to provide a compliant ISP process, within the meaning of the Final Order (App. 40).

The District Court explained why the decision to close Fernald and exclude it as a possible continued alternative for Fernald residents was a “systemic failure.”

As this court oversaw entry of the Final Order, it is uniquely competent to declare that “systemic” simply was intended to have its plain dictionary meaning—“of or relating to a system.” Webster's II New College Dictionary 1120 (2001). Accordingly, a systemic failure need not be catastrophic in and of itself. Rather, it may simply be a problem of any magnitude, which manifests itself on a system-wide basis, across a number of ISP processes (App. 41).

Judge Tauro's decision did not mandate that Fernald be kept open indefinitely but simply required that the residents and their guardians be permitted to participate in the ISP process in the manner mandated in the 1993 Final Order. It allows the residents and their

guardians to express a preference to remain at Fernald when the DMR solicits choices for further residential placements, and it mandates that Fernald be part of the discussion in the ISP process for families that express such a preference. That is, rather than simply ranking the choices offered by the DMR, the resident or guardian may, under Judge Tauro's order, express an opinion as to whether any proposed transfer would meet or fail to meet the equal or better standard and would provide all ISP mandated services for that resident. To the extent that the ISP process, prior to the August 2007 order, omitted Fernald as a choice in the placement discussion, that process effectively failed to consider whether the proposed transfer is or is not opposed by the resident or guardian. It also failed to provide an opportunity to consider whether any proposed alternative placement would meet the "equal or better" standard and would provide all ISP mandated services compared to Fernald.

Ultimately, the Court pointed out, the preference of a resident or guardian to remain at Fernald may not carry the day, and Judge Tauro made it clear that he was "simply ensuring that the DMR use the ISP process to adequately assess whether the setting is appropriate *and* whether it 'is not opposed by the affected individual.'" (App. 43). His order restored to the ISP process the right of the resident or guardian to be heard, it effectively provides the required constitutional safeguards, and it mandates that

the DMR demonstrate that any alternative placement meets the “equal to or better” standard and that all ISP mandated services be provided. It does not give families absolute veto power over any proposed transfer or the ultimate closure of Fernald.

E. The First Circuit Decision

On appeal, the Court of Appeals found that there was no basis for the District Court to reassert jurisdiction in this case.

First, the Court established the legal rule to apply in cases of this kind.

The terms of the consent decree embodied in the Disengagement Order, like any contract construction issue, present an issue of law that we review *de novo*. See generally *F.A.C., Inc. v. Cooperativa de Seguros de Vida de P.R.*, 449 F.3d 185, 192 (1st Cir. 2006). Our view of the proper construction is different from the district court's. (App. 21)

Reviewing the District Court decision *de novo*, it concluded that the order reasserting jurisdiction was incorrect. It noted that the Final Order contemplated that the DMR would be able to close institutions (par. 7(b), (App. 22) and in fact several DMR facilities were consolidated and some were closed (App. 22).

The Court of Appeals also found that there was no systemic failure by the DMR to “discharge its ISP duties for any Fernald resident between 2003 . . .and 2007” (App. 23). It rejected the District Court’s conclusion that the closing of Fernald constituted a systemic failure under the terms of the Final Order. The Monitor and the Court had already accepted the transfer of 49 residents of Fernald, “it cannot follow that the fact of the announcement caused a systemic failure.” (App.24).

The Court of Appeals concluded that the removal of one of several available residential facilities does not mean that there was a failure of the ISP process: “the ISP process focuses only on the services a resident is to receive; the ISP process does not specify where those services are to be delivered.” (App. 25). The Court of Appeals rejected the District Court’s conclusion that categorically rejecting Fernald as a possible alternative, undermined the ISP process. Other residential facilities could be adequate. “Under the Disengagement Order, the question of whether a transfer will result in an equal or better placement is separate from the question whether the Commonwealth has correctly implemented the ISP process.” (App. 26)

If individual Fernald residents are concerned that the ISP process will not result in their receiving equal or better service, then the solution, according to the Court of Appeals, is to request a conference and an adjudicatory

hearing in state court, pursuant to the Final Order.

If in an individual case there is a failure to provide through the ISP process “an individualized and personalized analysis of each resident,” a concern expressed by the district court, then the remedy is provided by state regulations, which inform the ISP process. . . . This concern then, does not satisfy the conditions for reopening the decree or warrant federal intervention in state proceedings. (App.28)

On that basis, it reversed the decision of Judge Tauro reopening the consent decree and applying the Disengagement Order. It concluded:

The issue this court decides concerns the limits on the jurisdiction of the federal courts. We do not decide the issue of what path best serves the interests of the residents of Fernald and the other parties who have a stake in this matter. People of good faith can and do passionately differ about the Commonwealth's intention to close the Fernald Center. We hold only that the district court lacked authority to reopen the consent decree in this case and that it lacked jurisdiction on that or any other basis to reopen and to enter the orders it did. (App. 33-34)

## REASONS FOR GRANTING THE WRIT

### **Review Is Warranted To Resolve a Conflict That Divides All Twelve Regional Courts Of Appeals Regarding the Correct Standard Of Review Of Fact-Bound Consent Decrees.**

- A. There is a Split in Authority Among the Circuits as to What Deference Should be Given to the Interpretation of a Consent Decree by the District Court Which Negotiated the Decree and/or Administered That Decree for Many Years.

The question what standard of review applies to a district court's interpretation of a consent order has divided the courts of appeal around the country, largely because this Court has itself given conflicting signals as to the proper standard. Thus this Court wrote in *United States v. ITT Continental Baking Co*, 420 U.S. 223, 238 (1975) that “. . . a consent decree or order is to be construed for enforcement purposes basically as a contract,” thus suggesting that a *de novo* standard should be applied. However, elsewhere this Court has acknowledged the importance of a district court's interpretation of a decree that it helped fashion and administer. In *United States v. Atlantic Refining*, 360 U.S. 19, 23-24 (1959), this Court noted:

We merely hold that where the language of a consent decree in its normal meaning

supports an interpretation; where that interpretation has been adhered to over many years by all the parties, including those government officials who drew up and administered the decree from the start; and *where the trial court concludes that this interpretation is in fact the one the parties intended*, we will not reject it simply because another reading might seem more consistent with the Government's reasons for entering into the agreement in the first place. (emphasis added).

This Court recognized the dual nature of consent decrees in *Local No. 93, International Association of Firefighters AFL-CIO v. City of Cleveland*, 478 U.S. 501, 519 (1986).

To be sure, consent decrees bear some of the earmarks of judgments entered after litigation. At the same time, because their terms are arrived at through mutual agreement of the parties, consent decrees also closely resemble contracts [citations omitted]. More accurately, then, as we have previously recognized, consent decrees “have attributes both of contracts and of judicial decrees,” a dual character that has resulted in different treatment for different purposes [citing *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 235-237, (1975)]

That “dual character” has produced a major split in the Circuits on the deference to be given a district court’s interpretation of the consent decree.

1. The Fourth, Sixth, Seventh, Eighth and Ninth Circuits Apply a Deferential Rule.

At least five other Circuits have concluded, contrary to the decision below, that considerable deference must be given to the court’s interpretation of a consent decree that was fashioned by the district court judge and/or administered by him or her over a period of time, particularly in public interest litigation.

The Sixth Circuit has adopted a “deferential *de novo*” standard for review of a consent decree, depending on whether the district judge interpreting the consent decree was involved in the original negotiation of that decree. The Court explained:

Where as here, though, we are reviewing the interpretation of a consent judgment by the district court that crafted the consent judgment, it is probably more accurate to describe our standard of review as “deferential *de novo*” It is only sensible to give the court that wrote the consent judgment greater deference when it is parsing its own work. As this Court has noted: “[a]t first blush, giving

substantial deference to the district court's interpretation of the [consent] decree appears to be inconsistent with *de novo* review. Yet, in *Brown v. Neeb*, 644 F.2d 551, 558 n. 12 (6th Cir.1981), we explained that the district court's reading of the decree was merely an additional tool for contract interpretation.” *Huguley v. General Motors Corp.*, 52 F.3d 1364, 1369-70 (6th Cir.1995). As the Court noted in *Brown*, “[f]ew persons are in a better position to understand the meaning of a consent decree than the district judge who oversaw and approved it.” 644 F.2d at 558 n. 12. We agree, and we will review the district court's decision accordingly.

*Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 371-72 (6<sup>th</sup> Cir. 1998)

In this case, it was the “the court that wrote the consent judgment” that is now interpreting the meaning of that decree. Under those circumstances the interpretation made by that judge “should be given greater deference” since it “is parsing its own work.”

The Seventh Circuit has also adopted the proposition that deference must be given to the interpretation of the consent decree by the judge who negotiated and crafted the decree. Thus it noted in *United States v. Alshabkhoun*, 277 F.3d 930, 933-34 (7<sup>th</sup> Cir. 2002):

Because a consent decree is a form of contract, we generally review a district court's interpretation of the consent decree *de novo*. . . . However, where, as here, the district court oversaw and approved the consent decree, we give “some deference” to the district court’s interpretation. *Id.*

Judge Posner explained why deference should be given to judges who were present from the beginning in the formation of a consent decree. See *Foufas v. Dru*, 319 F.3d 284, 286 (7<sup>th</sup> Cir. 2003): “When a judge is interpreting his own order, such as a consent decree that he entered, his interpretation is entitled to greater weight than when he is interpreting a contract with the formation of which he had nothing to do.”

The Eighth Circuit has held in *United States v. Knote*, 29 F.3d 1297, 1300 (8<sup>th</sup> Cir. 1994): “We therefore give a large measure of deference to the interpretation of the district court that actually entered the decree.”

In this case, there is no doubt that the District Court did participate in the fashioning of the decree. The Court explained:

For the past two decades, literally thousands of hours have been devoted to fashioning a comprehensive remedial program that has included multi-million dollar capital improvements, establishment of a responsible program of

community placement, as well as significant staffing increases geared to meeting the individual service plans and overall needs of those with mental retardation.

The result is that, working together, we have created an environment for persons with mental retardation that is now characterized by human dignity and opportunity for growth. And we have done so in a way that consistently ensured a full measure of value for every tax dollar spent.

Given this progress, and the demonstrated good will and dedication of Governor Weld to the mission of safeguarding the health, safety and well-being of people with mental retardation, I am today signing a comprehensive Order closing the federal court's oversight of these cases (App. 50-51).

In addition, considerable deference has been given by other courts to the interpretation of a consent decree if the district court has supervised and administered the decree over a long period of time, as in this case.

Thus the Ninth Circuit held in *United States v. FMC Corp*, 531 F.3d 813, 818-19 (9<sup>th</sup> Cir. 2008):

We review *de novo* the district court's interpretation of a consent decree. *Gates v. Gomez*, 60 F.3d 525, 530 (9th Cir.1995). We generally “give deference to the district court's interpretation based on the court's extensive oversight of the decree from the commencement of the litigation to the current appeal.” *Id.* (internal quotation marks omitted).

See also *Officers for Justice v. Civil Service Commission for the City and County of San Francisco*, 934 F.2d 1092, 1094 (9th Cir. 1991): “We review *de novo* the district court's interpretation of the consent decree. . . . However, we give deference to the district court's interpretation based on the court's extensive oversight of the decree from the commencement of the litigation to the current appeal.” See also *Nehmer v. Veterans Administration*, 284 F.3d 1158, 1160 (9th Cir. 2002)(applying test).

That is precisely the situation before the Court now, and the Ninth Circuit rule should be adopted.

Even within the circuits, they sometimes apply one rule (*de novo*) and then in other situations, they apply the other (deferential).

Thus the Court of Appeals in this case cited an earlier case *F.A.C., Inc. v. Cooperativa de Seguros de Vida de Puerto Rico*, 449 F.3d 185 (1st Cir. 2006) for the proposition that the

interpretation of a consent order “presents an issue of law that we review *de novo*.” In fact, the cited case states just the opposite. The Court noted in that case:

The law is a shade unsettled as to the standard of review we should apply—specifically, as to what weight, if any, is to be given to the district judge's construction of a settlement agreement or consent decree. Our own precedent, perhaps surprisingly, suggests that in this circuit review of the interpretation of settlement agreements (as well as consent decrees) is ordinarily *de novo*. But our precedents also recognize that this cannot be a hard and fast rule. *See Navarro-Ayala v. Hernandez-Colon*, 951 F.2d 1325, 1337-38 (1st Cir.1991) (exception for “public interest” consent decrees).

449 F.3d at 192.

In the *F.A.C.* case, the court added :

The present situation -- *no evidentiary hearing but personal knowledge by the judge based on his judicial participation in negotiations* -- argues for some deference. Indeed, some of our cases say that an exception may exist where the district judge has “special knowledge concerning the parties' intentions.” *Navarro-Ayala*, 951 F.2d at 1339 n. 17; *cf. Malave v.*

*Carney Hosp.*, 170 F.3d 217, 221 (1st Cir.1999). We think this is only common sense.

Showing even the mildest deference, it is easy to sustain the district court's construction of the settlement. (emphasis added). 449 F.3d at 192

The *F.A.C.* court noted that in “public interest” litigation, deference is often given to the interpretation of a consent decree by the district court. Other courts have come to the same conclusion. The Court of Appeals in *Thompson v. United States Department of Housing and Urban Development*, 404 F.3d 821, 827 (4<sup>th</sup> Cir. 2005) noted the special role of the district court in institutional litigation:

The rule of broad discretion in public interest cases is designed *to give the district court flexibility in deciding exactly how the numerous conditions of a complex consent decree are to be implemented in practice.* In overseeing broad institutional reform litigation, the district court becomes in many ways more like a manager or policy planner than a judge. *Over time, the district court gains an intimate understanding of the workings of an institution and learns what specific changes are needed within that institution in order to achieve the goals of the consent decree.* (emphasis added)

That is precisely the situation here. The district court must be given great deference “*in deciding exactly how the numerous conditions of a complex consent decree are to be implemented in practice.*” The District Court in this case has indeed gained “*an intimate understanding of the workings of an institution and learns what specific changes are needed within that institution in order to achieve the goals of the consent decree.*” Yet the Court of Appeals paid no attention whatsoever to his conclusions on that issue.

Thus in view of the fact that Judge Tauro fashioned and entered the consent decree in this institutional reform case and administered and supervised the decree over 16 years, considerable deference should have been given to his interpretation of the decree and the orders issued pursuant to that decree.

2. The First Circuit (in this case) and the Third, Fifth, Tenth, Eleventh and D.C. Circuits Apply a Strict *Do Novo* Rule in Interpreting a Consent Decree

The reason for the opposite *de novo* review standard was explained by the D.C. Circuit. It held in *Richardson v. Edwards*, 127 F.3d 97, 101 (D.C. Cir. 1997): “We customarily review decisions interpreting consent decrees and the agreements underlying them *de novo*, in the

same manner as we review decisions interpreting contracts. . . . We do so because a consent decree is a form of contract.”

Consent decrees are like contracts, the Court held, since usually both are documents that the district court had no role in creating. “It is approved on its face by a court presumably not privy to the details of negotiation, or the parties' subjective intentions. . . . But ultimately the question for the lower court, when it interprets a consent decree incorporating a settlement agreement, is what a reasonable person in the position of the parties would have thought the language meant. . . . That too is the question on appeal and it is a question of law, which is why review is *de novo*.” 127 F.3d at 101.

But if a district court was “privy to the details of negotiation or the parties' subjective intention” and further interpreted and applied the consent decree over a long period of time, then the *de novo* rule should not be applied, as many other courts have held.

Other circuits have also adopted the “consent decree is a contract” rule. The Second Circuit has held: “We review a district court's interpretation of a settlement agreement *de novo* ... mindful that the consent decree is a contract between the parties, and should be interpreted accordingly,” *Tourangeau v. Uniroyal, Inc.*, 101 F.3d 300, 307 (2d Cir.1996); see also *Barcia v. Sitkin*, 367 F.3d 87 (2d Cir. 2004)(same).

The Fifth Circuit held that “the district court's interpretation of the terms of a consent decree, including whether the decree is ambiguous, is reviewed *de novo*.” *Walker v. U.S. Department of Housing and Urban Development*, 912 F.2d 819, 825 (5<sup>th</sup> Cir. 1990).

Similarly, the Tenth Circuit has held, that “We construe the terms of a consent decree *de novo* using traditional principles of contract interpretation.” *Joseph A. ex rel. Corinne Wolfe v. Ingram*, 275 F.3d 1253, 1266 (10<sup>th</sup> Cir. 2002)

The Eleventh Circuit concurred with this analysis in *Reynolds v. McInnes*, 338 F.3d 1201, 1211 (11<sup>th</sup> Cir. 2003): “We apply the same rules that govern contract interpretation when we interpret a consent decree, because a consent decree is essentially a form of contract.”

The Third Circuit held in *Holland v. New Jersey Dep't of Corrections*, 246 F.3d 267, 277-278 (3d Cir.2001), that “a district court's construction and interpretation of a consent decree is subject to straightforward plenary or *de novo* review,” citing a series of earlier Third Circuit cases that uphold such a standard.<sup>1</sup> It

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<sup>1</sup> See e.g., *Washington Hosp. v. White*, 889 F.2d 1294, 1299 (3d Cir.1989)(*de novo* review applied) See also *McDowell v. Philadelphia Housing Authority*, 423 F.3d 233, 235 (3d Cir. 2005)(Alito, J)(court of appeals must interpret the “plain

rejected the “deferential *de novo*” standard adopted by many other circuits as an “oxymoron.”

We also think that the Third Circuit position is the more reasonable one, because the concept of “deferential *de novo*” (or “deferential plenary”) review seems to be an oxymoron. Black's Law Dictionary defines “*de novo*” as “[a]new, afresh, a second time,” and defines “plenary” as “[f]ull, entire, complete, absolute, perfect, unqualified.” Black's Law Dictionary 392, 1038 (5th ed.1979). These are, of course, familiar notions to appellate judges, the sinews of our everyday work. It strains imagination to conceive how our review could be both “anew, complete, absolute and unqualified,” while at the very same time deferential to the District Court's interpretation. Review that gives deference to the decision that is under review is simply not absolute and unqualified review. The courts that apply “deferential *de novo*” do not explain how they amalgamate these two seemingly incompatible standards. We decline to follow these other courts and instead adhere to the long tradition in this Circuit

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text” of the decree).

of reviewing a district court's interpretation of a consent decree *de novo*.

In view of the split in the Circuits described above, review should be granted.

Secondary sources have noted the conflict in this area:

As with any other contract, interpretation of a consent decree is a question of law, and thus the appellate court reviews the order *de novo*. Appellate courts recognize a variation of the standard rule of *de novo* review for consent decrees in instances where interpretation involves a fact-dependent legal standard, or supervision of litigation, particularly in a public law context. Thus, while a trial court's views on the construction of consent judgments are entitled to deference, the interpretation of a consent judgment's provisions are a matter of law subject to full review on appeal. However, there is authority that a court reviews a trial court's construction of such an agreement as an issue of fact subject to the clearly erroneous standard. In such circumstances, a trial court may be better positioned to decide the issue in question, therefore warranting deferential review. [citations omitted]

(2008), § 196

See also James Lindsay Freeze, “United States v. Western Electric; The Deference Difference,” 21 *Cap. Univ. L. Rev.* 321 (1992)(explaining different standards applied by the Circuits on the deference to be given district court’s interpretation of a consent decree).

B. Deference Must be Given to a District Court’s Interpretation of a Consent Decree When It is Based upon New Factual Findings

In addition, some courts have adopted a more deferential rule if the district court’s interpretation of a consent decree is based on factual findings.

Thus the Second Circuit has held that a Court of Appeals reviews the meaning of a consent decree *de novo*, but it adds that any factual findings made by the district court can only be reviewed for “clear error.” See *United States v. Broadcast Music, Inc.*, 275 F.3d 168, 175 (2d Cir. 2001).

See also *Labor/Community Strategy Center v. Los Angeles County Metropolitan Transit Authority*, 263 F.3d 1041, 1048 (9<sup>th</sup> Cir. 2001):

This court reviews *de novo* the district court's interpretation of the consent decree, *but must defer to the district*

*court's factual findings underlying the interpretation unless they are clearly erroneous.* (emphasis added) <sup>2</sup>

In this case, factual findings were made by the Court Monitor to the effect that “Fernald residents should be allowed to remain at the Fernald facility, since for some, many or most, any other place would not meet an ‘equal or better’ service outcome.” (App.38). Yet no deference was made by the Court of Appeals with respect to that factual finding adopted by the District Court.

To the extent that Judge Tauro’s order could be considered a modification of the Disengagement Order, great deference is generally awarded to such modification. The Fourth Circuit has explained in *Thompson v. United States Department of Housing and Urban Development*, 404 F.3d 821, 827 (4<sup>th</sup> Cir. 2005)

We review the district court's decision to

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<sup>2</sup> The Court added: “We must “give deference to the district court's interpretation based on the court's extensive oversight of the decree from the commencement of the litigation to the current appeal.” *Gates [v. Gomez]*, 60 F.3d [525] at 530 [9<sup>th</sup> Cir. 1995] (quoting *Officers for Justice v. Civil Serv. Comm'n*, 934 F.2d 1092, 1094 (9<sup>th</sup> Cir.1991)). *Id.*

modify the Consent Decree for abuse of discretion, *see Thompson I*, [*v. HUD*] 220 F.3d [241,] at 246 [(4<sup>th</sup> Cir. 2001)] , and “we accept the factual findings on which the district court's decision is based unless they are clearly erroneous,” *Small v. Hunt*, 98 F.3d 789, 796 (4th Cir.1996). Such a deferential standard of review is warranted in view of the nature and purpose institutional-reform consent decrees:

*Id.* (emphasis added).

Thus under any of the standards applied by the courts, some deference must be given to the district court's interpretation of the consent decree and the Disengagement Order. Even assuming that some courts have adopted a *de novo* standard, there is certainly a split in the Circuits over the proper deference that must be given to the district court's interpretation. Certainly there is some deference given to a district court's interpretation of a consent decree that it originally entered. Even more deference is given if the district administered the consent decree over a long period. This is certainly true in institutional reform litigation, which is present here. This Court should grant review to resolve that conflict.

D. The First Circuit Erred In Holding That It Could Interpret the Disengagement Order Issued Pursuant to the Consent Decree *De Novo* With No Deference To the District Court's Interpretation Of Its Own Order.

The Court of Appeals held that it could interpret the Disengagement Order with no deference to the analysis made by the District Court which issued the order. This is contrary to the decision of many Circuits that hold that *orders* issued pursuant to the consent decree (as opposed to the decree itself) are subject to a different standard. In this case, the Disengagement Order -- the decision of the district court to remove federal court supervision of the mental retardation facilities and to return management of the facilities to state bodies -- was completely crafted by the District Court judge. As the district court explained:

As this court oversaw entry of the Final Order, it is uniquely competent to declare that “systemic” simply was intended to have its plain dictionary meaning—“of or relating to a system.” (App. 41).

Many courts, including the First Circuit, have agreed with the proposition that “the district court is in the best position to explain the meaning of its own order.” *Aranov v. Chertoff*, 536 F.3d 30, 38 (1<sup>st</sup> Cir. 2008). See also *Harvey v. Johanns*, 494 F.3d 237, 242 (1<sup>st</sup> Cir.2007) (“We must, of course, accord deference to the district

court's interpretation of the wording of its own order"); *see also Lefkowitz v. Fair*, 816 F.2d 17, 22 (1st Cir.1987) (“[U]ncertainty as to the meaning and intendment of a district court order can sometimes best be dispelled by deference to the views of the writing judge.”).

Other courts have come to the same conclusion, even those courts which purportedly apply a *de novo* standard to the interpretation of the consent decree itself. *See SEC v. Sloan*, 535 F.2d 679, 681 (2d Cir.1976) (finding “no basis for substituting our judgment for that of the district judge in interpreting his own order”), *In re Cintra Realty Corp.*, 373 F.2d 321, 322 (2d Cir.1967) (expressing “satisf[action] with [district judge's] interpretation of his own order” “[e]ven if the order be deemed ambiguous”); *Gibbs v. Frank*, 500 F.3d 202, 2006 (3d Cir. 2007)(“We review a district court’s interpretation of its own order for abuse of discretion”); *United States v. Moussaoui*, 483 F.3d 220, 231 (4<sup>th</sup> Cir. 2007)(“a district court’s interpretation of its own order is for obvious reasons afforded great weight”); *Kendrick v. Bland*, 931 F.2d 421, 423 (6<sup>th</sup> Cir.1991)(stating that a district court's interpretation of its own order containing the phrase “major violations of the consent decree” “is certainly entitled to great deference”); *Hastert v. Illinois State Board of Election Commissioners*, 28 F.3d 1430, 1438 (7<sup>th</sup> Cir. 1994 )(the court's interpretation of its order will not be disturbed “absent a clear abuse of discretion”); *Graefenhain v. Pabst Brewing Co, Inc.*, 870 F.2d 1198 (7<sup>th</sup> Cir. 1989)(“To the extent

Pabst's argument is premised on the district court's misinterpretation of one of its own orders, Pabst faces an equally heavy burden -- the district court's interpretation will not be upset unless it constitutes a clear abuse of discretion, since "[f]ew persons are in a better position to understand the meaning of a [court order] than the district judge who oversaw and approved it." *United States v. Board of Educ.*, 717 F.2d 378, 382 (7th Cir.1983)); *United States v. Soderling*, 958 F.2d 1222, 1992 WL149562 \*3 (9th Cir. 1992)("We defer to the district court's interpretation of its own orders.") *Kendrick v. Bland*, 931 F.2d 421, 423 (6th Cir.1991)(stating that a district court's interpretation of its own order containing the phrase "major violations of the consent decree" "is certainly entitled to great deference"); *Cave v. Singletary*, 84 F.3d 1350, 1354-55 (11th Cir.1996) ("The district court's interpretation of its own order is properly accorded deference on appeal when its interpretation is reasonable."); *Nix v. Billington*, 448 F.3d 411, 414 (D.C. Cir. 2006)("district court's interpretation and enforcement of its own orders is typically subject to review only for abuse of discretion"); *Sims v. Johnson*, 505 F.3d 1301, 1305 (D.C. Cir. 2007)("The district court's interpretation and enforcement of its orders is entitled to deference, for our review is limited to determining whether there was an abuse of discretion"); *Amado v. Microsoft*, 517 F.3d 1353, 1358 (Fed. Cir. 2008)("A district court's interpretation of its order is entitled to deference unless the interpretation is unreasonable or is

otherwise an abuse of discretion.”)

Here the First Circuit ignored this well-accepted proposition, established not only by prior decisions in its own Circuit, but in the 2d, 3rd, 4th, 6th, 7th, 9th, 11th and the D.C. and Federal Circuits as well. It held that orders issued pursuant to a consent decree should be subject to the same analysis as the decree itself, a conclusion that many other courts have rejected. That issue is of prevailing importance in the administration of the federal courts, not merely in the context of institutional litigation. This Court should therefore grant the writ and examine this issue.

**CONCLUSION**

For the reasons stated above, this Court should grant the petition for certiorari.

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