# EXAMINING "SUE AND SETTLE" AGREEMENTS: PART II

## JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON
INTERGOVERNMENTAL AFFAIRS

AND THE

SUBCOMMITTEE ON
THE INTERIOR, ENERGY, AND ENVIRONMENT

OF THE

COMMITTEE ON OVERSIGHT
AND GOVERNMENT REFORM
HOUSE OF REPRESENTATIVES

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# EXAMINING "SUE AND SETTLE" AGREEMENTS: PART II

**Tuesday, July 25, 2017**

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INTERGOVERNMENTAL AFFAIRS, JOINT
WITH THE SUBCOMMITTEE ON THE INTERIOR, ENERGY,
AND ENVIRONMENT,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
*Washington, D.C.*

The subcommittees met, pursuant to call, at 10:05 a.m., in Room 2154, Rayburn House Office Building, Hon. Gary J. Palmer [chairman of the Subcommittee on Intergovernmental Affairs] presiding.

Present from Subcommittee on Intergovernmental Affairs: Representatives Palmer, Grothman, Duncan, Foxx, Walker, Demings, DeSaulnier and Clay.

Present from Subcommittee on the Interior, Energy, and Environment: Representatives Farenthold, Gosar, Ross, Palmer, Gianforte, Plaskett, and Raskin.

Also Present: Representative Womack.

Mr. PALMER. The chair notes the presence of our colleague, Congressman Womack of Arkansas. We appreciate your interest in this topic and welcome your participation today.

I ask unanimous consent that Congressman Womack be allowed to fully participate in today's hearing. Without objection, so ordered.

This hearing is the second part of a set of hearings to examine the impact of certain Federal settlements referred to as "sue and settle." The sue-and-settle phenomenon refers to a process where an outside group will sue a Federal agency, State, or local government for an alleged violation of Federal law or constitutional right. The parties will often choose to settle by entering into a consent decree agreement rather than face a long and costly trial. These legally binding consent decree agreements are then approved by a judge and enforceable by contempt and can only be modified by court order.

Consent decrees can last for decades and end up costing more than if the parties had gone to trial because the parties can use consent decrees to set provisions that extend beyond the scope of the original violation of law, they have become an effective tool to circumvent policymaking by elected representatives in order to push a political agenda across governmental institutions. These actions place an enormous burden on States, local governments, industry stakeholders, and taxpayers, who may be shut out of the negotiations but are left to foot the bill.

Under the threat of enforcement by contempt charge, State budgets are being reorganized. Local governments across the country are spending multiple decades and billions of dollars to comply with impossible mandates through never-ending Federal oversight. Penalties for the inevitable violation of decrees redirect funds from these communities to Washington. Worse, some feel afraid to speak to Congress about what they are experiencing. Multiple State and local leaders cited fear of political retaliation from Federal court monitors if they were to appear to testify before the committee on this issue. This is unacceptable and a threat to the principles of Federalism.

Unfortunately, I have witnessed this firsthand in my home State of Alabama. I watched as a consent decree between Jefferson County and the Environmental Protection Agency ballooned from a $1.5 billion estimate to cost over $3 billion to address the storm sewer issue in Jefferson County. Sewer rates quadrupled over four years in order to pay for the project, and Jefferson County became the Nation's largest municipal bankruptcy in history until Detroit filed in 2013.

Because of incomplete data and the lack of proper categorization, we are unable to fully evaluate the total amount taxpayers spend as a result of collusive settlement agreements. For example, in my previous experience leading an Alabama think tank, I was unable to obtain a complete list of all Federal consent decrees that apply to the State from the Department of Justice because of inadequate recordkeeping.

This lack of transparency limits our constitutional duty to conduct oversight of the management of taxpayer resources. It is time for the Federal Government to move away from emphasizing its role as prosecutor or political monitor and return to serving as the American people's partner in setting priorities that best represent their interest.

Recently, Congressman Doug Collins introduced the Sunshine for Regulations and Regulatory Decrees and Settlements Act of 2017 to increase transparency and public engagement by ensuring opportunity for public notice and comment on consent decrees and other settlement agreements. I thank Congressman Collins for his leadership on this issue, and I look forward to exploring additional solutions with our panel today.

Mr. PALMER. I now recognize Mrs. Demings, ranking member of the Subcommittee on Intergovernmental Affairs, for her opening statement.

Mrs. DEMINGS. Thank you so much, Mr. Chairman, and thank you for our witnesses for being here. Thank you for holding this hearing today.

Today, we have the opportunity to discuss the Federal Government's responsibility to ensure that Americans can buy safe food, have clean air and water and access to the ballot box. Our great democracy has many ways to do this, but perhaps the most fundamentally "little D" democratic tool is concerned citizens working together to hold Federal agencies, the watchers, accountable under the law.

Unfortunately, some of my colleagues view these citizen actions as irrelevant annoyances that slow down progress. The result is

legislation that seeks to make harder and more expensive for Americans to use the courts to compel government agencies to uphold and comply with the law.

These are not small stakes. One of the most frequent reasons for suits is missed deadlines that leave the public unprotected. A 2012 study of public health and safety rulemaking with congressionally mandated deadlines showed, and I quote, "most rules are issued long after their deadlines, which ultimately are putting American lives at risk," unquote.

I would like to take this opportunity to highlight just one rule criticized as, quote, "too expensive," which was long delayed until, ultimately, a lawsuit pushed the final rule over the finish line. In 2008, the House and Senate unanimously passed a bill to help prevent back-over accidents, which tragically kill more than 200 Americans and injure more than 15,000 every year. Most often the person injured or killed is a young child, too small to be seen in a rearview or sideview mirror. Despite a statutory deadline in 2011, a final rule would not come until 2014, and then only because of public outrage, and yes, litigation.

When will new passenger vehicles be required to have cameras? In 2018, 10 years after the bill became law and several years after auto manufacturers voluntarily installed cameras on virtually every new car.

Mr. Weissman, I look forward to hearing more about Public Citizen's work to finalize this long-delayed rule.

When it comes down to it, some in Congress and the administration would be fine with indefinitely slowing the rulemaking process, leaving Americans, the people that we swore to represent, particularly the most vulnerable at risk of injury from unsafe products and unscrupulous corporations. Please be assured that won't happen without a fight.

I thank our witnesses for sharing their testimony today, and I look forward to this very important discussion.

Thank you very much, Mr. Chairman, and I yield back.

Mr. PALMER. Thank you. I will hold the record open for five legislative days for any members who would like to submit a written statement.

We will now recognize our panel of witnesses. I am pleased to welcome the Honorable John Engler, former Governor of the State of Michigan; Dr. David Sanders, executive vice president of systems improvement for the Casey Family Programs, Seattle Washington; and Mr. Robert Weissman, president of Public Citizen, Washington, D.C.

I now recognize Congressman Womack to introduce our last witness.

Mr. WOMACK. Thank you, Mr. Chairman, and my thanks to the chairman and to the ranking members for allowing for this testimony here today. At the outset, I would just like to associate myself with the remarks of the chairman in his opening comment.

It is not my job here today to pass judgment on the subject matter of the activities that are under consideration here today. Moreover, it is my intent to introduce a friend and somebody that I have an enormous amount of respect for because he happens to be the

city administrator of the largest city in the 3rd District of Arkansas, that being the city of Fort Smith.

His name is Carl Geffken, and he is no stranger to the subject matter today because he was hired by the city of Reading, Pennsylvania, as a director of finance, and in 2011, just for the benefit of the audience here this morning, Reading was deemed the poorest city in the United States of America. In slightly less than two years' time and after entering the Pennsylvania Fiscally Distressed Municipalities Program, the city of Reading had a $12 million general fund reserve and a revitalized plan to manage its consent decree. The cost of the consent decree was reduced from $475 million to $200 million.

Now, Carl, in his quest to get back into municipality government after some time in Berks, Pennsylvania, as a chief operating officer, accepted the job as city administrator in the city of Fort Smith, Arkansas, and inherited a pretty egregious consent decree that has strapped the people and the administration of the city of Fort Smith.

It's nearly a half-a-billion dollars in improvements to its wastewater treatment facilities over a 12-year period of time, and already the citizens of Fort Smith have endured three, three rate increases. Median household income is going down, the price to pay for its sewer facilities going up.

So, we are delighted that Carl is here to speak on this subject. He speaks with great authority, and we are proud to know that he is running the show in the city of Fort Smith, Arkansas.

And with that, Mr. Chairman, I yield back my time.

Mr. PALMER. I thank the gentleman.

I would like to recognize the gentlewoman from the Virgin Islands, Ms. Plaskett, who is the ranking member on the Subcommittee for Interior, Energy, and Environment for her opening statement.

Ms. PLASKETT. Thank you, Mr. Chairman, and thank you for calling today's hearing.

The practice we are discussing today is really very unremarkable: enforcement actions by government agencies. Congress passes the Nation's Federal laws, and Federal agencies must implement them by issuing regulations and enforcing them. When those agencies fail to do that, they are in jeopardy of a court order requiring them to do so.

Congress has passed laws allowing citizens to sue Federal agencies when they fail to enforce the laws that Congress has passed. Because of citizen suits, Americans have had recourse when their right to vote has been threatened. Because of citizen suits, Americans have had recourse when housing discrimination threatened their chance at attaining their piece of the American dream. Because of citizen suits, doors have literally been open to Americans with disabilities to create a more inclusive and accommodating society.

My colleagues would like to diminish citizens' access to court to enforce Federal statutes. Today, the Republican justification is that Federal regulations and citizen suits to enforce them impose a burden on State Governments. Instead, they would leave States alone to comply with Federal law to the extent that it is convenient for

those States. I say ask the people of Flint, Michigan, if that makes sense to them because if we have learned nothing else from the tragedy of water poisoning in Flint, Michigan, it is that State Governments should not be left to their own devices to enforce health and safety regulations.

The Governor's own Health Department director, a member of his inner circle and cabinet, has been charged with felonies that contributed to the poisoning, so has the Governor's appointee who ran the city of Flint under an emergency management law. And the Governor has accepted responsibility for that tragedy.

Voting rights, housing laws, education, discrimination, in terms of disabilities, all of these things, because of the right of citizens to sue to enforce Federal regulations.

Some States do need help to comply with Federal rules, and the Federal Government should provide that support and help. An infrastructure bill and funding that addresses the funding problems of State and local governments would be a step in the right direction. But curbing Federal health and safety regulations is not.

Contrary to what my Republican colleagues might say, Federal regulations have a positive impact on the economy. A 2016 study conducted by OMB looked at a range of regulations across the economy and found that their benefits far outweighed their costs. OMB said, quote, "found that a decade's worth of major Federal regulations had produced annual benefits to the U.S. economy of between $269 billion and $872 billion, while imposing aggregate costs between $74 billion to $110 billion."

In spite of these facts, congressional Republicans aim to diminish the use of citizen suits. That is why I believe we are called here to today's hearing, but what we should learn from the hearing is the incredible value to the public's health, welfare, and environment that Federal regulations and citizen suits have had. I really look forward to the lively discussion that I know we are going to be having, and thank you again, Mr. Chairman, for calling us all to this hearing.

Mr. PALMER. I thank the gentlewoman and now would like to welcome our witnesses.

Pursuant to committee rules, all witnesses will be sworn in before they testify. Please rise and raise your right hands.

[Witnesses sworn.]

Mr. PALMER. Thank you. Please be seated. Let the record reflect that the witnesses answered in the affirmative.

In order to allow time for discussion, we would appreciate it if you would please limit your testimony to five minutes. Your entire written statement will be made part of the record.

I would like to recognize now Governor John Engler for his testimony.

## WITNESS STATEMENTS

### STATEMENT OF JOHN ENGLER

Mr. ENGLER. Thank you very much, Mr. Chairman. Chairman Palmer, Chairman Farenthold, ranking members, subcommittee members of the committee—two committees on Oversight and Government Reform, thank you for the invitation to appear this morn-

ing as you continue your examining of sue-and-settle agreements. And I appreciate the work of the two subcommittees on this important topic, and I'm certainly appreciative of the excellent staff who's helped to make the logistics of my appearance here this morning so easy.

I want to begin this morning by quoting from a foreword to a publication, Mr. Chairman, you're very familiar with because it was prepared by the Alabama—or for the Alabama Policy Institute located in Birmingham, Alabama. And I brought a copy of it that I—it's entitled "Consent Decrees in Institutional Reform Litigation: Strategies for State Legislatures." And I think, given that I'm—my background is 20 years as a State lawmaker and then 12 years as Governor, I have a distinctly State perspective and a strong bias toward a robust Federalist system and the role that States and local government play in that. And I would like to leave one for the staff so that it might be added to the record. I think that it is an important document.

Mr. ENGLER. And the foreword that I want to quote was written in 2008 by then-Senator, now Attorney General Jeff Sessions, and maybe it's good to show him some love today. It seems maybe in short supply. But Sessions in 2008 wrote this, and this is quoting extensively from him: "One of the most dangerous and rarely discussed exercises of raw power is the issuance of expansive court decrees. Consent decrees have a profound effect on our legal system as they constitute an end run around the democratic process. Such decrees are particularly offensive when certain governmental agencies secretly delight in being sued because they hope a settlement will be reached, resulting in the agency receiving more money than what the legislative branch or other funding sources would otherwise have deemed justified. Thus, the taxpayers ultimately fund the settlement enacted through this undemocratic process.

"A consent decree is the equivalent of a legislative enactment created at the hands of the courts, often less subject to modification. By entering into the decrees, current State executives such as Governors or Attorneys General can bind the hands of future State executives and legislatures. A predecessor's consent decree is difficult to alter or end, and, in practice, a decree can last for many years, longer than the remedy that was needed."

Sessions actually went on to describe a remarkable in my view and somewhat unimaginable example that he personally dealt with when he became Attorney General in Alabama. His predecessor had somehow agreed to a consent decree that mandated an increase in the number of justices on the State Supreme Court in that State. I thought that went pretty far, and Sessions viewed that as essentially amending the Alabama Constitution. Now, he was, as a new Attorney General, successful in taking an appeal and eventually having the Eleventh Circuit Court of Appeals reject that consent decree.

While the Alabama example, pretty creative example, it is the tip of the iceberg, representing merely hundreds of consent decrees that cover an array of subjects. And for the most part they remain in force today. And the cost of compliance and the usurping of State and local decision-making I think will be truly stunning when the true scope of the abuse is made known by the work that

your committees are doing, and that's why I was pleased to be able to join you today to put a spotlight on the end run around accountability that this litigation often represents.

And I certainly look forward to discussing some of the judicial battles that we were engaged in when I was elected Governor of Michigan as we sought to end costly consent decrees and restore public policymaking to those who were elected to the legislative and executive branches.

Now, winning reform is not going to be easy. Activists, they always insist institutional reform litigation, merely their effort to impose broad, long-term reform of government programs and laws on backward or recalcitrant States or local governments, but often the reality is quite a bit different. These same activists have made their case, given their arguments, and then lost either in elections or in legislative forums, and so their last shot at achieving their policy objectives is litigation. And then these lawsuits are designed to convince State and local governments now to settle through a consent decree and you can avoid the long, expensive trial. But as I point out in my testimony, there are some real weaknesses in that approach.

Congress has grappled with this in the past. I cite a proposal from some years back, but I will not—I'll save that for the questions. But I want to just say the bottom line I think for Federal policymakers, the State and local governments you represent are asking for help, the restoration of their right to exercise the powers reserved for them under the Constitution. They'd like to be held accountable for their own decisions and have those decisions made by men and women who actually are elected, and they want policy choices according to the wishes of their constituents and set the spending priorities based on those choices and be freed from having unelected judges, you know, controlling and reporting for years to court-appointed monitors who have no accountability.

Thank you, Mr. Chairman.

[Prepared statement of Mr. Engler follows:]

**TESTIMONY OF JOHN ENGLER, FORMER GOVERNOR OF MICHIGAN, PREPARED FOR THE SUBCOMMITTEE ON THE INTERIOR,ENERGY AND ENVIRONMENT AND THE SUBCOMMITTEEE ON INTERGOVERNMENTAL AFFAIRS---TUESDAY, JULY 25, 2017**

Chairman Palmer, Chairman Farenthold, Ranking Members and Subcommittee members of the Committee on Oversight and Government Reform-----

Thank you for inviting me to appear here this morning as you continue your examination of "Sue and Settle" agreements. I appreciate all the work by the members of the two Subcommittees on this important topic. Also, I am grateful to your excellent staff in helping to make the logistics work smoothly.

I want to begin this morning by quoting from a foreword to a publication written for the Alabama Policy Institute located in Birmingham, Alabama. In fact, I have brought a copy of that document entitled: **Consent Decrees in Institutional Reform Litigation: Strategies for State Legislatures**. I would like to leave one with staff so that it might be added to the committee records.

The foreword was written in 2008 by then-Senator, now-**Attorney General Jeff Sessions**. He wrote: "One of the most dangerous, and rarely discussed, exercises of raw power is the issuance of expansive court decrees. Consent decrees have a profound effect on our legal system as they constitute an end run around the democratic process. Such decrees are particularly offensive when certain governmental agencies secretly delight in being sued because they hope a settlement will be reached resulting in the agency receiving more money than what the legislative branch or other funding source would otherwise have deemed justified. Thus, the taxpayers ultimately fund the settlement enacted through this undemocratic process.

A consent decree is the equivalent of a legislative enactment created at the hands of the courts, and often less subject to modification. By entering into these decrees,

current state executives, such as Governors or Attorneys General, can bind the hands of future state executives and legislatures. A predecessor's consent decree is difficult to alter or end; in practice, a decree can last for many years – longer than the remedy that was needed."

Sessions then described one remarkable and somewhat unimaginable example he personally had to confront. His predecessor as Alabama Attorney General had somehow agreed to a consent decree that mandated an increase in the number of justices on the state supreme court by two seats. Sessions viewed this as essentially amending the Alabama constitution. As the new Attorney General, he objected to the agreement, filed an appeal and was eventually successful in having the Eleventh Circuit Court of Appeals reject it.

While the Alabama example was highly creative, it merely represents hundreds of consent decrees, decrees covering an array of subjects and decrees for the most part which remain in force today. The cost of compliance and the usurping of state and local decision-making will be truly stunning when the true scope of this abuse is made known by the work you are doing. That is why I am so pleased to join you as you attempt to examine these practices, make known the costs and put the spotlight on the end run around accountability that this litigation often represents.

I am happy to discuss the judicial battles we fought when I was Governor in Michigan as we sought to end costly consent decrees and restore public policymaking to those who were elected to Legislative and Executive positions.

Winning reform will not be easy. Activists insist that "**institutional reform litigation**" represents merely their effort to impose broad and long-term reform of government programs and laws on "backward" or "recalcitrant" state or local governments.

Often the reality is a bit different. These same activists have made their case and lost in elections or legislative forums. The last remaining hope for achieving their policy objectives is litigation. A lawsuit

designed and brought to convince state and local governments to settle the case through a consent decree. The seductive argument is: "avoid a long and expensive trial that could last for years and which you will likely lose. Settle and we can work this out".

This is where the problems with consent decrees really become clear. I realize one person's problem is sometimes another person's preferred outcome so it matters greatly who is involved in the litigation. Plaintiffs can look for an opportunity to enact reforms well beyond what the law would require. By expanding beyond the scope of the requirements of the law, a consent decree can enact a public policy agenda that otherwise would have little or no public support.
Further, once a consent decree has been entered into, they are much easier to enforce than other judgments and they are very difficult to terminate.

Given the possibility of such burdensome outcomes, you might ask why would any Governor or Mayor or Attorney General ever negotiate a consent decree? As I stated, it depends on who the parties are and what their agendas might be at the time of negotiation.
For example, I seem to recall as a state legislator, a situation where the head of the prison system was frustrated by a lack of budgetary support in the legislature. Next thing we know, litigation is brought by prisoner rights activists against the state corrections agency. The lawsuit makes many demands so the agency agrees to a consent decree. Then the agency is right back in the appropriations process stating they are "under court order" and the money must be appropriated by the legislature.

Solving this conundrum will not be easy, but getting the facts made public will build support. Some years ago, Congress considered what was known as the **Federal Consent Decree Fairness Act (FCDFA).**

The purpose of the FCDFA was to facilitate the modification and termination of consent decrees by
(1) permitting state or local defendants to apply for modification or vacation of a consent decree four years after its entry or upon a change in the elected government;
(2) imposing on the plaintiffs the burden of proof to demonstrate that the decree is still necessary to uphold a Federal right, rather than requiring the defendants to demonstrate the necessity for

modification; and

(3) providing for automatic termination if the court fails to rule on the motion to modify or vacate within ninety days.

These provisions were designed to get at two pervasive and profoundly problematic institutional practices: "institutional reform litigation," and the private enforcement of federal programs against state and local governments.

*[The scholar,* ***Dr. Michael S. Greve (John G. Searle Resident Scholar and Director of the AEI Federalism Project****) has written extensively about the private enforcement of federal programs against state and local governments. He points out that "...state or local governments that accept federal funds must of course abide by the funding conditions and, in the event of noncompliance, countenance the prospect of unilateral federal enforcement action, either by legal or fiscal means. (The quid pro quo is that the recipients can terminate the bargain at any time.) Third-party enforcement, however, places the bargain--more often than not, a highly complex regulatory regime--at the discretion of private litigants and federal courts. Given the vagaries of that process, no state or local government can fairly be said to have been on notice as to what its acceptance of the funds might entail. Statutes that fail to state the recipients' exposure to suit with clarity and specificity expose the states to unforeseeable liabilities.*

*That risk, moreover, is entirely one-sided. Private enforcement that transforms grant conditions into irreducible entitlements changes the "mix" of funds and obligations to the recipient governments' disadvantage. But there is (generally speaking) no recognizable legal claim to make the federal government adjust its end of the bargain correspondingly--e.g., to pony up more money. For these reasons, third-party enforcement systematically erodes the position of state and local governments in the federal scheme".*

*Greve also hits on the accountability issue which is central to much of the political discord in America today. He says that "...private enforcement greatly exacerbates the most troublesome feature of intergovernmental programs--the erosion of political responsibility and accountability at all levels."*

*He described "... a cottage industry of lawsuits under the Individuals With Disabilities and Education Act, for example, has created severe fiscal and disciplinary problems for local school districts. No one, however, appears responsible. School administrators complain about rigid federal mandates and inadequate funding. Legal advocacy groups protest that they won their clients' entitlements fair and square in Congress, and that the enforcement of those entitlements is a matter of simple justice. Judges assert that they are only enforcing the will of the Congress. Congress, in turn turn, blames "activist judges" for the untoward consequences of its legislation. In short, political actors up and down the chain get to shift blame--and parents have no way of assigning responsibility.*

*While accountability problems can arise under any intergovernmental program, third-party enforcement greatly increases the risk by conferring substantial power and authority upon two sets of actors--advocacy groups and federal judges--that are beyond any political control. Careful studies have shown that litigation is often the linchpin of an unaccountable political process."]*

**I think the "bottom line" for federal policymakers is that the states and local governments that you represent are asking for help. They seek restoration of their right to exercise the powers reserved to them under the constitution. They want to be held accountable for their own decisions and they seek to**

**have those decisions made by men and women who were elected. They want to make policy choices according to the wishes of their constituents and set spending priorities based on those choices. They want to be freed from having decisions imposed on them by unelected judges and reporting for years to court-appointed monitors who have no accountability to the public.**

I look forward to discussing these issues with the committee today and pledge my support for the overdue reform of consent decrees.

Thank you.

Mr. PALMER. I thank the gentleman for his testimony.
Dr. Sanders?

**STATEMENT OF DAVID SANDERS**

Mr. SANDERS. Good morning. I'm David Sanders, executive vice president of Systems Improvement at Casey Family Programs. Casey Family Programs is the Nation's largest operating foundation focused on foster care and child protection. We work directly with child welfare systems in all 50 States, the District of Columbia, two U.S. territories, and 16 tribal nations.

Before coming to Casey, I led the child protection systems in both Los Angeles and Minneapolis, and I recently served as chair of the Federal Commission to Eliminate Child Abuse and Neglect Fatalities.

Today, I'd like to provide a national perspective on the topic of child protection consent decrees and offer observations about system reform, oversight, and support, and successful opportunities for improvement.

Casey Family Programs convened three meetings in 2011, 2014, and 2016 to discuss this issue. These meetings, including—included leaders and staff from child protection agencies who had been sued who were under consent decrees, in-house counsel, Attorney General offices, and others. Before I share what we learned during these meetings, I'd like to provide some context.

Over a period of 40 years, class-action lawsuits have governed some aspect of child welfare or child protection practice in nearly 30 States. Numerous jurisdictions have had multiple lawsuits filed against them. The consent decrees have an average lifespan of 16.8 years, but some have been in place for decades.

Currently, about 15 States are operating under a consent decree. Only two have exited successfully—Alabama and Utah—and most recently, Tennessee just announced its exit from Federal oversight after 17 years. However, the terms of Tennessee's exit agreement include oversight of the agency by an independent commission for 18 months.

Here are some important insights from States. First, consent decrees can place large demands on State in terms of both cost and time. We estimate that the legal monitoring and consulting fees can reach or surpass $15 million on average.

Second, States often felt the consent decrees were cookie-cutter agreements that didn't adequately address the unique challenges facing their communities and systems.

Third, the measures that systems are obliged to monitor are often inconsistent with current best practices defined under the Child and Family Service Reviews developed by the U.S. Department of Health and Human Services. In many cases, it's because the measures predate these critical Federal benchmarks. At the same time, the measures are significantly more difficult to achieve than the Federal measures.

In working with States, it's become clear that, by their very nature, consent decrees are based on process measures instead of outcomes measures, in other words, how things are done versus what the outcomes actually are for children. And more importantly, because the decrees essentially lock child welfare services in place,

the eight States are unable to use system flexibility and adopt new and improved practices.

The bottom line is this: Consent decrees have not led to improved outcomes for children. We believe a better-balanced approach that recognizes the right of States and plaintiffs and uses alternative oversight mechanisms will be important.

Overall, we should create a more productive path for child welfare agencies to address the needs of their system in a problem-solving approach that involve Governors, legislators, the judiciary, other agencies, the community, and advocates. The use of evidence-based practice, knowledge of brain science and trauma, the special attention needed for certain populations like very young children, the need for cross-agency coordination, the importance of partnerships with the community, and the ever-evolving use of technology and data, including to help us identify who's at greater risk—at greater risk for maltreatment in the future are fundamentally changing the path to success for child welfare systems. Reform efforts should have processes in place to adapt to these new opportunities.

Which brings me to my final point. Child welfare cannot serve the needs of all children and families who are or may become at risk. Many of the children and families who are involved with child welfare agencies are already known to other agencies beyond the child protection system itself. But consent decrees place responsibility for performance and improvement solely on the child welfare agency. Child safety is a community responsibility, and any discussion of the merit or challenges of consent decrees ought to consider how to best support collaboration and shared responsibility as a means of achieving successful reform without the necessity of a lawsuit.

Thank you.

[Prepared statement of Mr. Sanders follows:]

**Testimony of David Sanders**
**Executive Vice President of Systems Improvement**
**Casey Family Programs**
**Joint hearing of the U.S. House Committee on Oversight and Government Reform**
**Subcommittee on Intergovernmental Affairs and**
**Subcommittee on Interior, Energy and the Environment**
**July 25, 2017**

**Child Welfare Consent Decrees - Context and Opportunities for Improvement**

Good morning. I'm David Sanders, Executive Vice President of Systems Improvement at Casey Family Programs. Casey Family Programs is the nation's largest operating foundation focused on safely reducing the need for foster care and building communities of hope for children and families across America.

Casey Family Programs was founded in 1966 and has been analyzing, developing and informing best practices in child welfare for 50 years. We work with child welfare agencies in all 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and with 16 American Indian tribal nations, and with the federal government on child welfare policies and practices. We partner with child welfare systems, policymakers, families, community organizations, American Indian tribes and courts to support practices and policies that increase the safety and success of children and strengthen the resilience of families.

Before coming to Casey Family Programs, I led the child welfare systems in both Los Angeles and Minneapolis. And I'm familiar with, and in fact, have visited a large number of, state, county and tribal child welfare agencies over the past ten years during my tenure at Casey Family Programs. Most recently, I had the honor of serving as the Chair of the President's Commission to Eliminate Child Abuse and Neglect Fatalities.

Today, I would like to provide a national perspective around the topic of child welfare consent decrees and to offer observations based on my own experience, as well as what we have learned from jurisdictions across the country, about system reform, oversight and support, and successful opportunities for improvement.

Beginning in 2011, Casey Family Programs convened three meetings to provide a forum to discuss improving outcomes for children and families while operating under a consent decree.

At the first convening in 2011, we gathered participants from 19 states that had the shared experience of operating under consent decrees. It provided the first opportunity for communication, support and connectivity with other states and leaders operating in the same environment.

We held two additional meetings, one in 2014 with 17 jurisdictions participating, and a third in 2016 with 18 jurisdictions participating. At each convening, attendees included leaders and staff from child welfare agencies, in-house counsel, attorney general offices and human service associations, as well as data experts and advocates. The meetings brought together a range of participants, from those who have considerable experience leading agencies through consent decrees to those who had never been in litigation or were in the initial stages.

Before I share some of what we heard and learned during these meetings, I'd like to provide some context for what consent decrees mean in a child welfare environment. Similar to consent decrees in other fields, a consent decree is a judge's order enforcing a voluntary agreement

between parties to a lawsuit. Beginning in the 1970s, consent decrees became more common as a means to resolve class action lawsuits in an effort to reform state government programs or agencies. Cases are typically built around an argument that a federal statutory or constitutional provision has been violated. However, consent decrees are unlike ordinary judgments in that there is no relief provided nor a dismissal of the case. Rather, a consent decree gives a judge ongoing supervisory power to enforce the decree.

Over a period of 40 years, class-action lawsuits have governed some aspect of child welfare practice in nearly 30 states. A survey from Casey Family Programs' first convening shows that 23 jurisdictions have had lawsuits filed against their child welfare agencies. While one state, Massachusetts, went to trial and was successful in fighting off a lawsuit both at trial and in appeal, numerous jurisdictions have had multiple lawsuits filed against them, and a number of these consent decrees have been in place for decades. The consent decrees have an average lifespan of 16.8 years. Some of the longest lasting include: Illinois where there are currently multiple lawsuits in place, some of which reach back 30 years; Ohio, where Roe v. Staples has also been in place for 30 years; Baltimore, where L.J. v. Massinga has been in place for 28 years; and Connecticut, where Juan F vs. Malloy has been in place for 25 years.

Currently, about 15 states are implementing consent decrees related to the reform of their child welfare systems. Only three states have successfully been released or exited from their consent decrees: Alabama, Utah and Massachusetts. A fourth, Tennessee, just announced its exit from federal oversight on July 18 after 17 years. The terms of Tennessee's exit agreement include oversight of the agency by an independent commission for 18 months.

States largely agree that what is common across these agreements is that both the process of agreeing to a consent decree and the decree itself are very labor-intensive and can demand significant time and resources. Also, despite the reality that each of these decrees is individually negotiated, the agreements still follow a "cookie-cutter" template that fails to recognize the unique nature of each state, locality and child welfare system and their distinct challenges in achieving better outcomes for their children and families.

At the same time, the requirements in many decrees are inconsistent with current federal or national benchmarks or measures.In some cases, they are significantly more difficult to achieve than current federal measures. With the development of the third round of the federal Child and Family Services Reviews (CFSR) by the U.S. Department of Health and Human Services (HHS), there is now a standardization of expected outcomes — with guidance, training and technical assistance provided through the HHS Resource Centers — that was not in existence at the outset of many of the current consent decrees.

It is often the case that those negotiating the agreements may not be the same who have the responsibility for executing the changes and achieving compliance with the measures. If decisions are made without a true understanding of the challenges inherent to a particular child welfare agency or system, then the goal of achieving sustainable change over time is unrealistic.

A great deal has changed in the child welfare field since the onset of most of these agreements. Thanks to critical developments in our understanding of brain science, the impact of trauma, and the growing number of evidence-based and promising practices that achieve positive and lasting outcomes for children and their families, we have a better idea of the practices and approaches that can improve outcomes for children and families. And yet the context, rationale and methodology captured in these dated consent decrees has not changed to reflect these developments.

Many consent decrees are focused on process measures instead of outcome measures. We know from our work with states that this leads to a focus on compliance — meaning that the objective becomes checking off the frequency of activities or services rather than having a focus on the quality or effectiveness of programs or services. In other words, the consent decree measures themselves become the objective.

In order for child welfare systems to effectively meet the needs of the children and families they serve, I believe they must focus instead on effective approaches and services that are tied to improved outcomes — and those outcomes for children and families must be measurable.

The other critical consideration regarding consent decrees is the significant cost that is associated with maintaining them. While funds often do enter a system at the onset of a consent decree, Experts estimate that about two-thirds of new expenditures related to implementing consent decrees go directly to plaintiff fees, and not to investments in improving agency capacity or the provision of services for families. The cost of legal fees, monitoring and consulting fees is estimated to reach or surpass $15 million over the lifetime of a single agreement - and these costs come from limited state general fund dollars, not federal funds. There is often a "hidden cost" to the consent decrees as well, such as the allocation of case workers' time spent on completing paperwork required for compliance and time lost that could be spent with children and families in the field.

States also found that consent decrees can cause barriers to adopting new service approaches because of the rigidity of the measures. In effect, states are restricted — or frozen in time — by the specific intent and requirements of consent decree language. Absent those restrictions, agencies might prioritize utilizing new approaches to achieve improved outcomes for children and families. Outdated requirements may not allow for the best services for a particular child or case — those based on our understanding of brain science and the impact of trauma and separation — or evidence-informed practices that can better achieve desired outcomes.

Another challenge for states is that exit from the consent decree is not realistic. They typically require compliance with all measures at once — often totaling more than 100 measures — for a sustained period of time, such as six months or two years, before exit is considered. This can reinforce the focus on compliance above all else. Finally, the measures and the targets themselves often continue to move, resulting in a broadening of the agreement over time. In many cases, the consent decree takes on a life of its own.

So what lessons have we learned or what ideas for change have we gleaned through our work with states?

First, robust data analysis should be used to shape the intent and scope of any agreements or renegotiations of existing consent decrees. Data can help determine what areas of practice are deficient and what measures best capture improvement. Data can be used to quantify and measure the outcomes that are desired and to frame and specify the scope of the consent decree itself.

Second, it is valuable to agree to shared definitions of what is being measured and how. For example, how one jurisdiction defines a "visit" may vary from how another jurisdiction does and may vary from the methodology a monitor will use to measure compliance on visits.

Third, communication and collaboration with the monitor is key, not only in setting expectations, definitions and agreement on what and how things are being measured, but also regarding the capacity and skill set of those on the monitoring team. Are there data experts? Practice experts?

Legal experts? And likewise, what is the skillset of those who interface with the monitoring team so that they can be speaking the same language? There should also be a centralized point of contact and routine interface between the monitor and the jurisdiction leader. There is a need to regularly assess and reassess the process: Are we tracking the right measures? Does the methodology still make sense? What was the original intent and is the measure still needed? What does success look like? All of these factors should connect directly to the data and what the data show about the outcomes.

In addition to communication between the monitor and the jurisdiction leader and staff, we know that internal agency communication is critically important to ensure clarity and help staff to understand that their objective is to achieve improved outcomes, not compliance. And external communication, using data to show insight into the agency, is also critical to build greater community and public support.

As mentioned earlier, Tennessee just negotiated an exit to federal oversight after 17 years. But many other systems remain under consent decrees and are considering renegotiation or paths to exit. To be successful, a case has to be built as to the rationale for a renegotiation such as: changing times tell us new things about desired outcomes or how to achieve them; or the majority of measures have already been met so there is a need to "retire" some requirements and narrow the focus of work. Jurisdictions also have to be prepared with data, have a strong understanding of performance on all measures, and be able to articulate a clear vision for improved outcomes and how to achieve them.

We know that utilizing science and data to inform child welfare work is critical. The knowledge base of child welfare has changed significantly from 20 years ago when many of these agreements were determined. The use of evidence-based practices, knowledge of brain science and trauma, the special attention needed for certain populations like very young children, the need for cross-agency coordination, the importance of partnerships within the community, and the ever-evolving use of technology and data — including to help us identify who is at greatest risk for maltreatment in the future — have fundamentally changed the path to successful outcomes.

In addition to — or perhaps, ultimately, in place of — consent decrees, it is critical to create a self-learning and self-correcting agency that can continuously improve its direction and progress based on the production, analysis and use of data over time, both to inform progress and to set goals directly related to desired outcomes. We have seen the value in building an internal capacity to use data, creating systems able to diagnose issues and trends as they emerge, and systems with the sustained vision and ability to make changes today and in the future. In addition to the consistency and support provided by the federal CFSR measures, there is additional expertise and support available, from Casey Family Programs and others, to help jurisdictions use data to create robust continuous quality improvement (CQI) programs to self-correct in real time and into the future. These developments further render aspects of the justification for consent decrees obsolete and inconsistent with current realities.

In conclusion, the question to be considered is how best to balance the potential benefits that consent decrees can bring — such as increased funding to the agency, increased attention on the need to serve children and families correctly, and a focus on needed reforms in a child welfare system — with the limitations or restrictions that can inhibit innovation, flexibility and real time self-assessment. And above all, we should be sure that the goal of improving outcomes for children and families ultimately is prioritized and achieved.

While there may be a continued need and value in the ability of a lawsuit to compel the appropriation of resources for a system in need of reform, might there not be a more viable alternative to the consent decree process for systems in need of support and reform? How can we create a more productive path for child welfare agencies to demonstrate the health and needs of their systems directly and engage in productive problem-solving with governors, legislators, the judiciary, other agencies, the community and advocates at the table?

In addition to attention paid to creating a robust data and CQI process, we know that new and growing knowledge from brain science and what works for children and families mandates a new approach to reform. As I highlighted earlier, there is a fundamental difference between what we knew at the genesis of many of these lawsuits and resulting consent decrees, some 20 years ago and more, and what we know now about best practices, evidence-based programs, family centered services, trauma, brain science, and outcomes of children in families versus outcomes of children in foster care.

But the final point I want to leave you with is this: child welfare alone cannot serve the needs of all children and families who are or may become at risk. Many of the children and families who become involved with child welfare have previously been or are currently known to others beyond the child welfare agency itself. Other agencies involved through health, mental health, domestic violence, substance abuse, law enforcement and education are critical in this work. However, child welfare consent decrees place responsibility for performance and improvement solely with the child welfare agency. Child safety is a community responsibility and, as you consider the merits or challenges of the consent decree process, we ought to consider how best to support collaboration and shared responsibility as a path to successful reform without the necessity of a lawsuit.

Mr. PALMER. I thank the gentleman.

The chair recognizes Mr. Weissman for his testimony.

**STATEMENT OF ROBERT WEISSMAN**

Mr. WEISSMAN. Thank you, Mr. Chairman.

In 2002, Dr. Greg Gulbransen was backing his SUV into his driveway. As he did every evening, he paused, looked in his rearview mirror, looked over his shoulder, saw nothing behind him, and backed into the driveway. What he didn't see was that his two-year-old son Cameron had run into the driveway behind him, and he backed over his son and killed him. It's unimaginable.

Dr. Gulbransen I would say is a hero of mine. I don't think I could have survived that, but he did and chose to turn his tragedy into a crusade to make sure that other parents didn't suffer the same horror that he did. He lobbied this Congress and in 2008 succeeded in getting passed the Cameron Gulbransen Act, which required automakers to adopt technologies to prevent that from every happening again. That technology existed then and it exists now. We're familiar with it. It's effectively rearview cameras in cars.

The legislation that this Congress adopted required the Department of Transportation to adopt a rule by 2011 to force automakers to install this technology and to prevent this horror from happening in the future.

The Department of Transportation did not act by 2011. Instead, it gave itself four extensions, although it was unable to show, as the statute requires, that there was some reason for those extensions.

In 2013, my organization Public Citizen sued the Department of Transportation to force it to comply with the rule and the deadline established by this Congress.

In 2014, although we did not settle the case, it was dismissed because the agency finally committed to do what the Congress had required it to do, years later.

The consequence of that delay is that we have a lot more Cameron Gulbransens. We have hundreds of children. We may not know their names, as we do Cameron, but they were run over in preventable accidents. That's what it means when regulations aren't issued on time, as required by this Congress. Now, this is actually a small example, but it's a heart-wrenching one.

As I explain in my written testimony, regulations adopted pursuant to congressional action save this country enormous amounts of money, they make our economy stronger, they protect the lives of Americans, prevent corporate rip-offs, and achieve a variety of social aims.

Unfortunately, agencies are growing slower in issuing new regulations. My written testimony discusses research we've done on this. For substantial regulations, it is very difficult for an agency to get a rule done in the course of a single presidential term.

Delays aren't just growing; they are the norm when it comes to statutory deadlines. Those are deadlines required by this Congress. The agencies routinely fail to meet those deadlines. When they do fail to meet the deadlines established by this Congress, organizations like mine are proud to step in and enforce the standards, the

deadlines that you have established. We did that in the Cameron Gulbransen case. We do it in others.

Those deadline suits or enforcement suits hold agencies accountable to the Congress and help achieve the important objectives that Congress has sought to do. They do not lock the agencies into any substantive outcome. They only force the agencies to comply with schedules already determined by this Congress. They don't actually comply; they just comply less slowly than they otherwise would. These are lawsuits that the Congress should both embrace and appreciate as enforcement mechanisms for the laws that you have passed.

I want to say just a final quick word on the issue generally of settlements apart from enforcement or deadline suits. As I discuss in my testimony, I think there are some serious issues at the Department of Justice regarding where is an enforcement agency and entering into settlements or not prosecuting corporations for wrongdoing. I think there is bipartisan—there's been expressed bipartisan concern about that issue, whether it's civil settlements or deferred or non-prosecution agreements regarding big banks and other large corporations, and I think that would be an area of very fruitful investigation by this committee.

Thank you very much.

[Prepared statement of Mr. Weissman follows:]

Written Testimony of

**Robert Weissman**
**President, Public Citizen**

before the

**Subcommittees on Interior, Energy and the Environment and on Intergovernmental Affairs**

of the

**The Committee on Oversight and Government Reform**

**on**

"Examining Sue and Settle Agreements: Part II"

July 25, 2017

Mr. Chairman and Members of the Committee,

Thank you for the opportunity to testify today on regulatory policy issues. I am Robert Weissman, president of Public Citizen. Public Citizen is a national public interest organization with more than 400,000 members and supporters. For more than 45 years, we have advocated with some considerable success for stronger health, safety, consumer protection and other rules, as well as for a robust regulatory system that curtails corporate wrongdoing and advances the public interest.

Public Citizen co-chairs the Coalition for Sensible Safeguards (CSS). CSS is an alliance of more than 75 consumer, small business, labor, scientific, research, good government, faith, community, health and environmental organizations joined in the belief that our country's system of regulatory safeguards provides a stable framework that secures our quality of life and paves the way for a sound economy that benefits us all. Time constraints prevented the Coalition from reviewing my testimony in advance, and today I speak only on behalf of Public Citizen.

Over the last century, and up to the present, regulations have made our country stronger, better, safer, cleaner, healthier and more fair and just. Regulations have made our food supply safer; saved hundreds of thousands of lives by reducing smoking rates; improved air quality, saving hundreds of thousands of lives; protected children's brain development by phasing out leaded gasoline; saved consumers billions by facilitating price-lowering generic competition for pharmaceuticals; reduced toxic emissions into the air and water; empowered disabled persons by giving them improved access to public facilities and workplace opportunities; guaranteed a minimum wage, ended child labor and established limits on the length of the work week; saved the lives of thousands of workers every year; protected the elderly and vulnerable consumers from a wide array of unfair and deceptive advertising techniques; ensured financial system stability (at least when appropriate rules were in place and enforced); made toys safer; saved tens of thousands of lives by making our cars safer; and much, much more.

The benefits of rules adopted during the Obama administration, as with rules adopted during the Bush administration, vastly exceed the costs, even when measured according to corporate-friendly criteria.

We have also seen in recent years with great clarity the impact of regulatory failure – lack of regulatory enforcement, regulations delayed or rolled back, and insufficient regulatory standards and protections in place. Most notably, it was regulatory failure that was significantly responsible for the Great Recession, which imposed far greater costs on the economy and cost far more jobs than regulations ever could.

This is the context in which all regulatory policy debates should be placed. Today's hearing requires additional context: the problem of unacceptable and life-threatening delay in the issuance of new regulatory protections. Deadline suits, the subject of this hearing, aim to do nothing more than address unreasonable delays that occur in contravention of Congressional instruction.

The first section of this testimony argues that regulatory benefits vastly exceed costs and that

regulatory failure – inadequate rules, and too little regulatory enforcement – should be understood as a key cause of the Great Recession and ongoing economic weakness. The second section of the testimony focuses on the issue of regulatory delay, showing that is becoming a worsening problem, with case study illustrations showing both the problem and its consequences. The third section clarifies issues surrounding deadline suits. The concluding section directs attention to a real problem with Department of Justice settlement policy – completely distinct from deadline suits: sweetheart deals for corporate wrongdoers.

## I. Regulations are Economically Smart

### A. Regulatory benefits vastly exceed costs

Rhetorical debates and cost-benefit abstractions can obscure the dramatic gains our country has made due to regulation. Regulation has:

- Made our food safer.[1]
- Saved tens of thousands of lives by making our cars safer.[2]
- Made it safer to breathe, saving hundreds of thousands of lives annually.[3]
- Protected children's brain development by phasing out leaded gasoline and dramatically reducing average blood levels.[4]
- Empowered disabled persons by giving them improved access to public facilities and workplace opportunities, through implementation of the Americans with Disabilities Act.[5]
- Guaranteed a minimum wage, ended child labor and established limits on the length of the work week.[6]

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[1] American Public Health Association. (2010, November 30). *APHA Commends Senate for Passing Strong Food Safety Legislation*. Available at: http://www.makeourfoodsafe.org/tools/assets/files/APHA_Senate-Passage-Food-Act_FINAL2.pdf.

[2] NHTSA's vehicle safety standards have reduced the traffic fatality rate from nearly 3.5 fatalities per 100 million vehicles traveled in 1980 to 1.41 fatalities per 100 million vehicles traveled in 2006. Steinzor, R., & Shapiro, S. (2010). *The People's Agents and the Battle to Protect the American Public: Special Interests, Government, and Threats to Health, Safety, and the Environment*: University of Chicago Press.

[3] Clean Air Act rules saved 164,300 adult lives in 2010. In February 2011, EPA estimated that by 2020 they will save 237,000 lives annually. EPA air pollution controls saved 13 million days of lost work and 3.2 million days of lost school in 2010, and EPA estimates that they will save 17 million work-loss days and 5.4 million school-loss days annually by 2020. *See* U.S. Environmental Protection Agency, Office of Air and Radiation. (2011, March). *The Benefits and Costs of the Clean Air and Radiation Act from 1990 to 2020*. Available at: http://www.epa.gov/oar/sect812/feb11/fullreport.pdf.

[4] EPA regulations phasing out lead in gasoline helped reduce the average blood lead level in U.S. children ages 1 to 5. During the years 1976 to 1980, 88 percent of all U.S. children had blood levels in excess of 10μg/dL; during the years 1991 to 1994, only 4.4 percent of all U.S. children had blood levels in excess of that dangerous amount. Office of Management and Budget, Office of Information and Regulatory Affairs. (2011). *2011 Report to Congress on the Benefits and Costs of Federal Regulations an Unfunded Mandates on State, Local, and Tribal Entities*. Available at: http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf.

[5] National Council on Disability. (2007). *The Impact of the Americans with Disabilities Act*. Available at: http://www.ncd.gov/publications/2007/07262007.

[6] There are important exceptions to the child labor prohibition; significant enforcement failures regarding the minimum wage, child labor and length of work week (before time and a half compensation is mandated). But the quality of improvement in American lives has nonetheless been dramatic. Lardner, J. (2011). *Good Rules: 10 Stories*

- Saved the lives of thousands of workers every year.[7]
- Saved consumers and taxpayers billions of dollars by facilitating generic competition for medicines.[8]
- Protected the elderly and vulnerable consumers from a wide array of unfair and deceptive advertising techniques.[9]
- For half a century in the mid-twentieth century, and until the onset of financial deregulation, provided financial stability and a right-sized financial sector, helping create the conditions for robust economic growth and shared prosperity.[10]

These are not just the achievements of a bygone era. Regulation continues to improve the quality of life for every American, every day. Ongoing and emerging problems and a rapidly changing economy require the issuance of new rules to ensure that America is strong and safe, healthy and wealthy. Consider a small sampling of rules recently issued, pending, or that are or should be under consideration:

- **Fuel efficiency standards.** Pursuant to the Energy Policy and Conservation Act, the Energy Independence and Security Act and the Clean Air Act, the National Highway Safety and Transportation Agency and the Environmental Protection Agency have proposed new automobile and vehicular fuel efficiency standards. The new rules, on an average industry fleet-wide basis for cars and trucks combined, establish standards of 38.3 miles per gallon (mpg) in model year 2021, and 46.3 mpg in model year 2025. The agencies estimate that fuel savings will far outweigh higher vehicle costs, and that the net benefits to society from 2017-2025 will be hundreds of billions of dollars. The auto industry was integrally involved in the development of these proposed standards, and supported their promulgation. However, the industry has seen opportunity with the Trump administration to block adoption of heightened fuel efficiency standards for the 2021-2025 period, and a substantial portion of the potential gains to consumers – nearly $100 billion – may be lost.[11]

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*of Successful Regulation*. Demos. Available at: http://www.demos.org/sites/default/files/publications/goodrules_1_11.pdf.

[7] Deaths on the job have declined from more than 14,000 per year in 1970, when the Occupational Safety and Health Administration was created to under 4,500 at present. *See* AFL-CIO. (2015, April.) Death on the Job: The Toll of Neglect. p. 1. Available at: http://www.aflcio.org/content/download/154671/3868441/DOTJ2015Finalnobug.pdf. Mining deaths fell by half shortly after creation of the Mine Safety and Health Administration. Weeks, J. L., & Fox, M. (1983). Fatality rates and regulatory policies in bituminous coal mining, United States, 1959-1981. *American journal of public health, 73*(11), 1278.

[8] Through regulations facilitating effective implementation of the Drug Price Competition and Patent Term Restoration Act of 1984 ("Hatch-Waxman"), including by limiting the ability of brand-name pharmaceutical companies to extend and maintain government-granted monopolies. Troy, D. E. (2003). *Drug Price Competition and Patent Term Restoration Act of 1984 (Hatch-Waxman Amendments)*. Statement before the Senate Committee on the Judiciary. Available at: http://www.fda.gov/newsevents/testimony/ucm115033.htm.

[9] See 16 CFR 410-460.

[10] See Stiglitz, J. E. (2010). *Freefall: America, free markets, and the sinking of the world economy*: WW Norton & Co Inc.; Kuttner, R. (2008). *The Squandering of America: how the failure of our politics undermines our prosperity*: Vintage.

[11] EPA, California Air Resources Board and NHTSA, "Draft Technical Assessment Report: Midterm Evaluation of Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards for Model Years 2022-2025 Executive Summary, July 2016, available at: https://www.nhtsa.gov/corporate-average-fuel-economy/light-duty-cafe-midterm-evaluation.

- **Food safety rules.** In 2010, with support from both industry and consumer groups, and in response to a series of food contamination incidents that rocked the nation, Congress passed the Food Safety Modernization Act. The Act should improve the safety of eggs, dairy, seafood, fruits, vegetable and many processed and imported foods, but its effective implementation depends on rulemaking. Not so incidentally, food contamination incidents have major harmful economic impact on the agriculture and food industries and job creation and preservation in those industries.

- **Energy efficiency standards.** Pursuant to the Energy Security and Independence Act, the Department of Energy has proposed energy efficiency standards for a range of products, including Metal Halide Lamp Fixtures, Commercial Refrigeration Equipment, and Battery Chargers and External Power Supplies, Walk-In Coolers and Walk-In Freezers, Residential Clothes Washers.[12] The Department of Energy estimates the net savings from implementation of the Energy Security and Independence Act to be $48 billion - $105 billion (in 2007 dollars),[13] although it is now unclear if the Trump administration will implement all of the rules.[14]

- **Rules to avert workplace hazards.** By way of example, consider the case of beryllium, a toxic substance to which workers in the electronics, nuclear, and metalwork sector are exposed. The current OSHA beryllium standard, based on science from the 1950s, allows workers to be exposed at levels that are ten times higher than those allowed by Department of Energy for nuclear power plant workers. Public Citizen petitioned OSHA to update the standard in 2001. In response, the agency began a rulemaking in November 2002. Finally, in June 2016, OSHA issued a final rule, which would avert thousands of cases of serious disease.[15] Unfortunately, the Trump administration now aims to undermine crucial protections in that rule.[16]

- **Generic competition for biotech medicines.** An overlooked component of the Affordable Care Act was the creation of a process for the Food and Drug Administration to grant regulatory approval for generic biologic pharmaceutical products – essentially generic versions of biotech medicines. Because the molecular composition of biologic drugs is more complicated than traditional medicines, FDA had adopted the position that, with some exceptions, it could not grant regulatory approval for biologics under its

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[12] List of Regulatory Actions Currently Under Review. Available at: http://www.reginfo.gov/public/jsp/EO/eoDashboard.jsp.

[13] U.S. Department of Energy. (2007). *Energy Independence and Security Act of 2007 Prescribed Standards.* Available at: http://www1.eere.energy.gov/buildings/appliance_standards/m/eisa2007.html.

[14] Timothy Cama, Dem AGs, Green Groups Sue Trump Over Paused Energy Efficiency Rules, The Hill, June 13, 2017, available at: http://thehill.com/policy/energy-environment/337631-dem-ags-greens-sue-trump-over-paused-energy-efficiency-rules.

[15] U.S. Occupational Safety and Health Administration. (2007). *Preliminary Initial Regulatory Flexibility Analysis of the Preliminary Draft Standard for Occupational Exposure to Beryllium.*

[16] Emily Gardner and Sammy Almashat, "The Trump Administration's Beryllium Rule Would Poison Workers," Real Clear Health, June 30, 2017, available at: http://www.realclearhealth.com/articles/2017/06/30/the_trump_administrations_beryllium_proposal_would_poison_workers_110655.html.

previously existing authority. In an important provision of the Affordable Care Act – supported by the biotech industry – FDA was explicitly granted such authority. The provision wrongly grants extended monopolies to brand-name biologic manufacturers, but belated generic competition is better than none. Implementation of the new regulatory pathway for biogenerics, however, depends on issuance of rules by the FDA. Biogeneric competition will save consumers and the government billions of dollars annually.

- **Crib safety.** Pursuant to the Consumer Product Safety Improvement Act of 2008, the Consumer Product Safety Commission (CPSC) finalized updated safety standards for cribs that halted the manufacture and sale of traditional drop-side cribs, required stronger mattress supports, more durable hardware and regular safety testing. These new crib safety standards mean "that parents, grandparents, and caregivers can now shop for cribs with more confidence – confidence that the rules put the safety of infants above all else."[17]

- **The Physician Payment Sunshine Act.** This component of the Affordable Care Act requires the disclosure of payments and gifts by pharmaceutical and medical device companies to physicians and hospitals. The mere fact of disclosure should curtail the improper influence of industry over research, education and clinical decision making. Putting the Act into place required implementing rules.[18]

- **Other examples.** The list of regulatory benefits is almost endless. Other recent examples from the wide spectrum include rules to address invasive species, require labeling of gluten in food, and specifying the migratory bird hunting season.

Although most regulations do not have economic objectives as their primary purpose, in fact regulation is overwhelmingly positive for the economy.

While regulators commonly do not have economic growth and job creation as a mission priority, they are mindful of regulatory cost, and by statutory directive or on their own initiative typically seek to minimize costs; relatedly, the rulemaking process gives affected industries ample opportunity to communicate with regulators over cost concerns, and these concerns are taken into account. To review the regulations actually proposed and adopted is to see how much attention regulators pay to reducing cost and detrimental impact on employment. And to assess the very extended rulemaking process is to see how substantial industry influence is over the rules ultimately adopted – or discarded.

There is a large body of theoretical and non-empirical work on the cost of regulation, some of which yields utterly implausible cost estimates. There is also a long history of business complaining about the cost of regulation – and predicting that the next regulation will impose unbearable burdens. More informative than the theoretical work, anecdotes and allegations is a review of the actual costs and benefits of regulations, though even this methodology is

[17] Consumer Federation of America. (2011, June 28). *Senators, CPSC, Consumer Advocates Applaud Strong Crib Safety Standards to Prevent Infant Deaths and Injuries*. Available at: http://www.consumerfed.org/pdfs/crib-standards-press-release-6-28-11.pdf.

[18] 42 CFR Parts 402 and 403. February 8, 2013.

significantly imprecise and heavily biased against the benefits of regulation. Every year, the Office of Management and Budget analyzes the costs and benefits of rules with significant economic impact. The benefits massively exceed costs.

The principle finding of *OMB's draft 2016 Report to Congress on the Benefits and Costs of Federal Regulation* is:

> The estimated annual benefits of major Federal regulations reviewed by OMB from October 1, 2005, to September 30, 2015, for which agencies estimated and monetized both benefits and costs, are in the aggregate between $208 billion and $672 billion, while the estimated annual costs are in the aggregate between $57 billion and $85 billion, reported in 2001 dollars. … These ranges reflect uncertainty in the benefits and costs of each rule at the time that it was evaluated.[19]

In other words, even by OMB's most conservative accounting, the benefits of major regulations over the last decade exceeded costs by a factor of more than two-to-one. And benefits may exceed costs by a factor of 12.

These results are consistent year-to-year as the following table shows.

[19] Office of Management and Budget, Office of Information and Regulatory Affairs. (2016). Draft *2016 Report to Congress on the Benefits and Costs of Federal Regulations an Unfunded Mandates on State, Local, and Tribal Entities. Table 1-4,* p.2. Available at: https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/legislative_reports/draft_2016_cost_benefit_report_12_14_2016_2.pdf

**Total Annual Benefits and Costs of Major Rules by Fiscal Year (billions of 2001 dollars)**[20]

| Fiscal Year | Number of Rules | Benefits | Costs |
|---|---|---|---|
| 2001 | 12 | 22.5 to 27.8 | 9.9 |
| 2002 | 2 | 1.5 to 6.4 | 0.6 to 2.2 |
| 2003 | 6 | 1.6 to 4.5 | 1.9 to 2.0 |
| 2004 | 10 | 8.8 to 69.8 | 3.0 to 3.2 |
| 2005 | 12 | 27.9 to 178.1 | 4.3 to 6.2 |
| 2006 | 7 | 2.5 to 5.0 | 1.1 to 1.4 |
| 2007 | 12 | 28.6 to 184.2 | 9.4 to 10.7 |
| 2008 | 11 | 8.6 to 39.4 | 7.9 to 9.2 |
| 2009 | 15 | 8.6 to 28.9 | 3.7 to 9.5 |
| 2010 | 18 | 18.6 to 85.9 | 6.4 to 12.4 |
| 2011 | 13 | 34.3 to 98.5 | 5.0 to 10.2 |
| 2012 | 14 | 53.2 to 114.6 | 14.8 to 19.5 |
| 2013 | 7 | 25.6 to 67.3 | 2.0 to 2.5 |
| 2014 | 13 | 8.1 to 18.9 | 2.5 to 3.7 |
| 2015 | 21 | 19.6 to 36.9 | 4.2 to 5.3 |

The reason for the consistency is that regulators pay a great deal of concern to comparative costs and benefits (even though there is, we believe, a built-in bias of formal cost-benefit analysis against regulatory initiative.[21] Very few major rules are adopted where projected costs exceed projected benefits, and those very few cases typically involve direct Congressional mandates.

Moreover, the empirical evidence also fails to support claims that regulation causes significant job loss. Insufficient demand is the primary reason for layoffs. In extensive survey data collected by the Bureau of Labor Statistics, employers cited lack of demand roughly 100 times more frequently than government regulation as the reason for mass layoffs![22] (Unfortunately, in response to budget cuts, the BLS ceased producing its mass layoff report in 2013.)

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[20] Office of Management and Budget, Office of Information and Regulatory Affairs. (2016). Draft *2016 Report to Congress on the Benefits and Costs of Federal Regulations an Unfunded Mandates on State, Local, and Tribal Entities. Table 1-4*, pp. 20-21. Available at: https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/legislative_reports/draft_2016_cost_benefit_report_12_14_2016_2.pdf ; 2001-2003 data from: Office of Management and Budget, Office of Information and Regulatory Affairs. (2011). *2011 Report to Congress on the Benefits and Costs of Federal Regulations an Unfunded Mandates on State, Local, and Tribal Entities. Table 1-3*, p. 19-20. Available at: http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf.

[21] *See, e.g.*, Shapiro, S. et al., *CPR Comments on Draft 2010 Report to Congress on the Benefits and Costs of Federal Regulations* 16-19 (App. A, Pt. C.) (2010), Available at: http://www.progressivereform.org/articles/2010_CPR_Comments_OMB_Report.pdf ; Steinzor, R. et al., *CPR Comments on Draft 2009 Report to Congress on the Benefits and Costs of Federal Regulations* 16-19 (App. A, Pt. C.) (2009), Available at: http://www.progressivereform.org/articles/2009_CPR_Comments_OMB_Report.pdf.

[22] U.S. Department of Labor, Bureau of Labor Statistics. (2012, November). *Extended Mass Layoffs in 2011. Table 5. Reason for layoff: extended mass layoff events, separations, and initial claimants for unemployment insurance, private nonfarm sector, 2009-2011.* Available at: http://www.bls.gov/mls/mlsreport1039.pdf.

**Reason for layoff: 2008-2012**[23]

| | 2008 | 2009 | 2010 | 2011 | 2012 |
|---|---|---|---|---|---|
| **Business Demand** | 516,919 | 824,834 | 384,564 | 366,629 | 461,328 |
| **Governmental regulations/intervention** | 5,505 | 4,854 | 2,971 | 2,736 | 3,300 |

It is also the case that firms typically innovate creatively and quickly to meet new regulatory requirements, even when they fought hard against adoption of the rules.[24] The result is that costs are commonly lower than anticipated.

**B. Job-destroying regulatory failure and the Great Recession**

Missing from much of the current policy debate on jobs and regulation is a crucial, overriding fact: The Great Recession and the ongoing weak jobs market and national economy are a direct result of too little regulation and too little regulatory enforcement.

A very considerable literature, and a very extensive Congressional hearing record, documents in granular detail the ways in which regulatory failure led to financial crash and the onset of the Great Recession. "Widespread failures in financial regulation and supervision proved devastating to the stability of the nation's financial markets," concluded the Financial Crisis Inquiry Commission.[25] "Deregulation went beyond dismantling regulations," notes the Financial Crisis Inquiry Commission. "[I]ts supporters were also disinclined to adopt new regulations or challenge industry on the risks of innovations."[26]

The regulatory failures were pervasive, the Financial Crisis Inquiry Commission concluded:

> The sentries were not at their posts, in no small part due to the widely accepted faith in the self-correcting nature of the markets and the ability of financial institutions to effectively police themselves. More than 30 years of deregulation and reliance on self-regulation by financial institutions, championed by former Federal Reserve Chairman Alan Greenspan and others, supported by successive administrations and Congresses, and

[23]U.S. Department of Labor, Bureau of Labor Statistics. (2012, November). *Extended Mass Layoffs in 2011. Table 5. Reason for layoff: extended mass layoff events, separations, and initial claimants for unemployment insurance, private nonfarm sector, 2010-2012.* Available at: http://www.bls.gov/mls/mlsreport1043.pdf. U.S. Department of Labor, Bureau of Labor Statistics. (2013, September). *Extended Mass Layoffs in 2011. Table 4. Reason for layoff: extended mass layoff events, separations, and initial claimants for unemployment insurance, private nonfarm sector, 2009-2011.* Available at: http://www.bls.gov/mls/mlsreport1039.pdf ; U.S. Department of Labor, Bureau of Labor Statistics. (2011, November). *Extended Mass Layoffs in 2010. Table 6. Reason for layoff: extended mass layoff events, separations, and initial claimants for unemployment insurance, private nonfarm sector, 2008-2010.* Available at: http://www.bls.gov/mls/mlsreport1038.pdf.

[24] Mouzoon, N., & Lincoln, T. (2011). *Regulation: The Unsung Hero in American Innovation.* Public Citizen. Available at: http://www.citizen.org/documents/regulation-innovation.pdf.

[25] Financial Crisis Inquiry Commission. (2011). *The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States.* Washington, D.C.: Government Printing Office. p. 30.

[26] *The Financial Crisis Inquiry Report.* p. 53.

> actively pushed by the powerful financial industry at every turn, had stripped away key safeguards, which could have helped avoid catastrophe. This approach had opened up gaps in oversight of critical areas with trillions of dollars at risk, such as the shadow banking system and over-the-counter derivatives markets. In addition, the government permitted financial firms to pick their preferred regulators in what became a race to the weakest supervisor.

The regulatory failure story can perhaps be summarized as follows: Financial deregulation and non-regulation created a vicious cycle that helped inflate the housing bubble and an interconnected financial bubble. Weak mortgage regulation enabled the spread of toxic and predatory mortgages that helped fuel the housing bubble. Deregulated Wall Street firms and big banks exhibited an insatiable appetite for mortgage loans, irrespective of quality, thanks to insufficiently regulated securitization, off-the-books accounting, the spread of shadow banking techniques, dangerous compensation incentives and inadequate capital standards. Reckless financial practices were ratified by credit ratings firms, paving the way for institutional funders to pour billions into mortgage-related markets; and an unregulated derivatives trade offered the illusion of systemic insurance but actually exacerbated the crisis when the housing bubble popped and Wall Street crashed.

The costs of this set of regulatory failures are staggeringly high, and far outdistance any plausible story about the "cost" of regulation.

To prevent the collapse of the financial system, the federal government provided incomprehensibly huge financial supports, far beyond the $700 billion in the much-maligned Troubled Assets Relief Program (TARP). The Special Inspector General for the Troubled Assets Relief Program (SIGTARP) estimated that "though a huge sum in its own right, the $700 billion in TARP funding represents only a portion of a much larger sum – estimated to be as large as $23.7 trillion – of potential Federal Government support to the financial system."[27] Much of this sum was never allocated, and most of the TARP funds were paid back. However, the regulatory reform policy debate should acknowledge that such unfathomable sums were put at risk thanks to regulatory failure.

Even more significant, however, are the actual losses traceable to the regulatory failure-enabled Great Recession. These losses are real, not potential; they are at a comparable scale of more than $20 trillion; they involve an actual loss of economic output, not just a reallocation of resources; and they have imposed devastating pain on families, communities and national well-being.

A GAO study found that "[t]he 2007-2009 financial crisis, like past financial crises, was associated with not only a steep decline in output but also the most severe economic downturn since the Great Depression of the 1930s."[28] Reviewing estimates of lost economic output, GAO

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[27] Special Inspector General for the Troubled Assets Relief Program (SIGTARP) (2009, July 21.) Quarterly Report to Congress. p. 129. Available at: http://www.sigtarp.gov/Quarterly%20Reports/July2009_Quarterly_Report_to_Congress.pdf.

[28] U.S. Government Accountability Office. (2013, Jan. 13). *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* p. 12. Available at: http://www.gao.gov/products/GAO-13-180.

reported that the present value of cumulative output losses could exceed $13 trillion.[29] Additionally, GAO found that "households collectively lost about $9.1 trillion (in constant 2011 dollars) in national home equity between 2005 and 2011, in part because of the decline in home prices."[30]

The recession threw millions out of work, and left millions still jobless or underemployed. "The monthly unemployment rate peaked at around 10 percent in October 2009 and remained above 8 percent for over 3 years, making this the longest stretch of unemployment above 8 percent in the United States since the Great Depression," GAO noted.[31]

The economic impact on families is crushing, even leaving aside social and psychological consequences. "Displaced workers – those who permanently lose their jobs through no fault of their own – often suffer an initial decline in earnings and also can suffer longer-term losses in earnings," reports GAO. For example, one study found that workers displaced during the 1982 recession earned 20 percent less, on average, than their non-displaced peers 15 to 20 years later.[32] Thanks to lost income and especially collapsed housing prices, families have seen their net worth plummet. According to the Federal Reserve's Survey of Consumer Finances, median household net worth fell by $49,100 per family, or by nearly 39 percent, between 2007 and 2010.[33]

The foreclosure crisis stemming from the toxic brew of collapsing housing prices, exploding and other unsustainable mortgages and high unemployment devastated families and communities across the nation, with effects that remain pervasive throughout society.[34]

It should be noted that there are, to be sure, dissenting views to narratives that place regulatory failure at the core of the explanation for the Great Recession and financial crisis. Perhaps the most eloquent version of this dissent is contained in the primary dissenting statement to the Financial Crisis Inquiry Commission.

The dissent explained that "we … reject as too simplistic the hypothesis that too little regulation caused the Crisis,"[35] arguing that the *amount* of regulation is an imprecise and perhaps irrelevant metric. This is a reasonable position (and it applies equally to those who complain about "too

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[29] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* p. 16.
[30] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* p. 21. There is necessarily a significant amount of uncertainty around such analyses. Other estimates have placed the loss somewhat lower. A recent Congressional Budget Office study estimates the cumulative loss from the recession and slow recovery at $5.7 trillion." (Congressional Budget Office. 2012. *The Budget and Economic Outlook: Fiscal Years 2012 to 2022.* p. 26.) One complicating issue is determining which losses should be attributed to the recession and which to other issues. For example, GAO notes, "analyzing the peak-to-trough changes in certain measures, such as home prices, can overstate the impacts associated with the crisis, as valuations before the crisis may have been inflated and unsustainable.[30] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* p. 17.
[31] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* pp. 17-18.
[32] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* pp. 18-19.
[33] Cited in *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* p. 16.
[34] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* pp. 23-24.
[35] *The Financial Crisis Inquiry Report.* (Dissenting Views By Keith Hennessey, Douglas Holtz-Eakin, and Bill Thomas.) p. 414.

much" regulation); what matters is the quality of regulation – both the rules and standards of enforcement.

The FCIC dissent began its explanation for the financial crisis with the creation of a credit bubble and a housing bubble, which it argued laid the groundwork for a financial crisis thanks to a series of other, interconnected factors, including the spread of nontraditional mortgages, securitization, poor functioning by credit rating firms, inadequate capitalization by financial firms, the amplification of housing bets through use of synthetic credit derivatives, and the risk of contagion due to excessive interconnectedness.

However, to review this list is to see how the FCIC dissent also implicitly argued that the crisis can be blamed in large part on regulatory failure. For all of these factors should have been tamed by appropriate regulatory action.

## II. Combating unreasonable delay

The corollary to understanding the value of regulatory protections in advancing health and safety, enhancing living standards, strengthening the economy, safeguarding the environment and making America fairer and more just is that we need a nimble and responsive regulatory system. Agencies need to move quickly and efficiently to adopt new rules in response to new technologies, market innovations, corporate scams, scientific discoveries and more.

Yet the current rulemaking process is the opposite of quick and nimble, with agencies routinely failing to issue rules not only by their own self-imposed targets but by Congressionally mandated deadlines.

Unreasonable delay permeates almost all aspects of the rulemaking process. The consequences of delay are serious. As opposed to issuance of new rules, delay creates the regulatory uncertainty that many business spokespeople denounce. Delay also means that lives are needlessly lost, injuries needlessly suffered, environmental harm needlessly permitted, consumer rip-offs extended, and more.

### A. Extensive regulatory delay is now normalized

Last year, Public Citizen unveiled a ground-breaking empirical analysis to identify both the length of these delays and the extent of the delays across different agencies.

The report, entitled Unsafe Delays,[36] examines regulatory delays by collecting and analyzing one of the most comprehensive data sets of rulemaking actions to date. Our report gathered data on all rules listed in the Unified Agenda over the previous 20 years, from the first Unified Agenda available electronically in 1995 to the spring 2016 Unified Agenda. In total, we studied a total of

[36] Public Citizen, Unsafe Delays: An Empirical Analysis Shows That Federal Rulemakings To Protect the Public Are Taking Longer Than Ever, June 28, 2016, available at: http://www.citizen.org/documents/Unsafe-Delays-Report.pdf. All data, charts and figures in this section of my testimony are drawn from this report. The study is based on data published in the federal government's Unified Agenda of rulemakings, which has been published twice annually in every year but one since 1996. The full methodology is discussed on pages 10-11 of the report.

24,311 rulemakings, of which 18,146 were actually completed. The picture of delay that emerges from the report is deeply troubling and highlights the dysfunction in our regulatory system – dysfunction that impedes regulatory agencies from acting to carry out congressionally assigned responsibilities and to protect Americans.

Overall, we found that the rules that are most important to protecting the environment as well as the public's health, safety, and financial security were also the rules that took the longest to finalize and encountered the most delays in the regulatory process. On the other hand, routine or technical rules that were not considered "significant," which comprised the vast majority of all rulemakings, encountered few delays and were usually finalized in a fairly efficient manner. In other words, the "economically significant" rules subject to the most procedural requirements in the rulemaking process are also the rules with the greatest delays.

It may not be surprising that rules which must go through more steps in the rulemaking process will take longer, but what is striking and worrisome is the extent of the delay we found.

- Overall, the average length of rulemakings for all economically significant rules is 2.4 years, 41 percent longer than the overall age for all rules (1.7) years.
- Economically Significant rules that required a Regulatory Flexibility Analysis (RFA) took on average 2.5 years to complete.
- Economically Significant rules that began with an Advanced Notice of Proposed Rulemaking (ANPRM) took on average 4.4 years to complete, almost twice as long as Economically Significant rules without ANPRMs.
- Economically Significant rules that included both ANPRMs and RFA analyses took almost five years to complete on average. Hence, the inclusion of major additional procedural requirements leads to substantial additional delay in the rulemaking process.

**Number of Rulemakings and Average Length - All Rulemakings Begun and Finished 1996 - 2016**

| | Number of Rules | Average Rulemaking Length |
|---|---|---|
| **All Rulemakings** | 24,311 | 2.1 |
| Uncompleted | 6,165 | 3.2 |
| Completed | 18,146 | 1.7 |

**Length of Completed Rulemakings (RM) With and Without Inclusion of ANPRM *and* RFA Analysis**

| Priority | ANPRM | | | | | Non ANPRM | | | |
|---|---|---|---|---|---|---|---|---|---|
| | RFA Required | | | No RFA Required | | RFA Required | | No RFA Required | |
| | # | Average RM Length | % Longer than non-ANPRM non-RFA | # | Average RM Length | # | Average RM Length | # | Average RM Length |
| Economically Significant | 24 | 4.7 | 114% | 27 | 4.1 | 235 | 2.3 | 450 | 2.2 |
| Other Significant | 30 | 4.5 | 105% | 162 | 3.3 | 388 | 2.4 | 3,319 | 2.2 |
| Substantive, Nonsignificant | 37 | 3.3 | 120% | 239 | 3.1 | 1,115 | 1.5 | 10,577 | 1.5 |

Among the agencies that took the longest to complete Economically Significant rules on average were the Department of Energy (5 years) and the Environmental Protection Agency (3.8 years) (the third and fourth slowest agencies). We also found that important sub-agencies within larger agencies are more prone to substantial rulemaking delays for Economically Significant rules. For example, two EPA sub-agencies, the office of Solid Waste and Emergency response and the Water office, both take longer than 5 years on average to complete Economically Significant rulemakings. Another sub-agency with noteworthy delays for Economically Significant rules is the DOE Energy Efficiency and Renewable Energy (5.1 years).

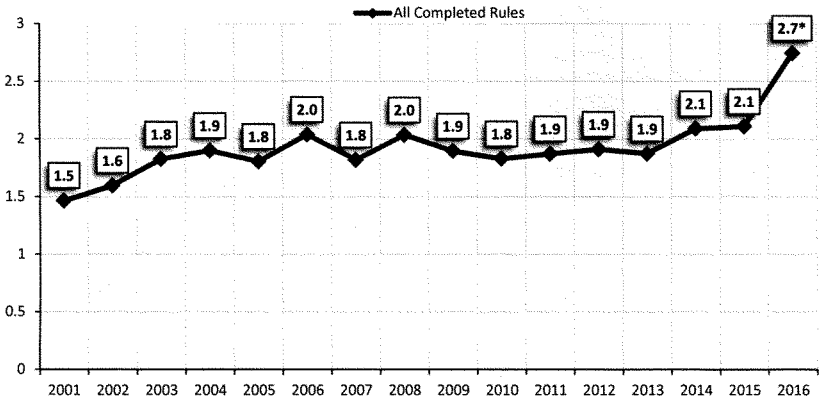
**Number and Average Rulemaking (RM) Length of Completed Rules**

| Agency | Name | Economically Significant | | Other Significant | |
|---|---|---|---|---|---|
| | | # | Average RM Length | # | Average RM Length |
| DOJ | Department of Justice | 6 | 5.5 | 173 | 3.0 |
| DOL | Department of Labor | 27 | 5.4 | 172 | 2.7 |
| DOE | Department of Energy | 28 | 5.0 | 40 | 2.8 |
| EPA | Environmental Protection Agency | 72 | 3.8 | 323 | 2.9 |
| DHS | Department of Homeland Security | 22 | 3.4 | 91 | 2.5 |
| TREAS | Department of the Treasury | 15 | 3.3 | 70 | 2.0 |
| DOT | Department of Transportation | 56 | 2.9 | 252 | 2.9 |
| HUD | Dept. of Housing and Urban Development | 8 | 2.6 | 166 | 2.6 |
| USDA | Department of Agriculture | 73 | 2.1 | 343 | 2.5 |
| DOC | Department of Commerce | 13 | 1.9 | 217 | 1.6 |
| HHS | Department of Health and Human Services | 262 | 1.7 | 468 | 2.2 |
| DOD | Department of Defense | 12 | 1.7 | 163 | 2.0 |
| DOI | Department of the Interior | 24 | 1.5 | 214 | 2.4 |
| ED | Department of Education | 27 | 0.9 | 89 | 1.2 |
| Other* | | 91 | 1.5 | 1,118 | 2.0 |
| Total | | 736 | 2.4 | 3,899 | 2.3 |

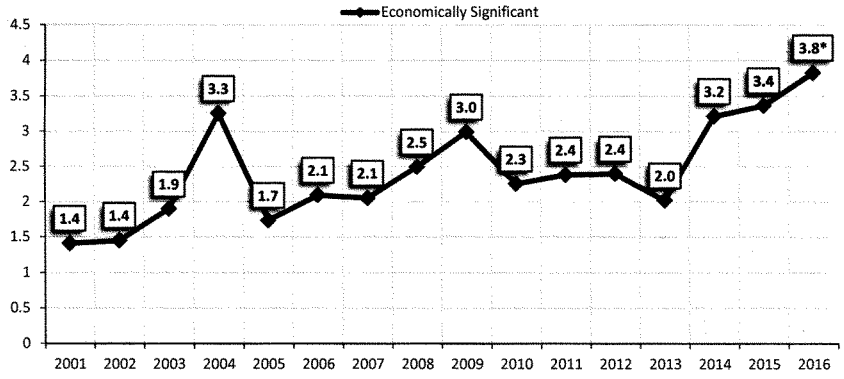
*This category, which includes 67 agencies, regards rulemakings for which the field in the Unified Agenda typically devoted to cabinet level agencies is blank and the agency conducting the rulemaking is listed in the Unified Agenda field normally devoted to sub agencies. Most agencies in this category are independent agencies. Two agencies included in this category – the State Department and Veterans Affairs Department – are cabinet level agencies.

The clear takeaway from our comprehensive empirical research is that many agencies are simply unable to complete Economically Significant rulemakings over the course of one presidential term. Unfortunately, the data in our report also shows that the trend is going in the wrong direction, with regulatory delay increasing. We found that the George W. Bush and Obama Administrations experienced similar rulemaking lengths for their first five years. Beginning in the sixth year of the Obama Administration, completed Economically Significant rulemakings became substantially longer than in the corresponding year in the Bush Administration. Over the last three years, the average length of rulemakings has increased steadily from 3.2 years in 2014 to 3.4 years in 2015 and now 3.8 years this year. In short, the rulemaking delays have reached new heights over the last few years. The data for other types of rules also reflects an increase in rulemaking lengths over the last few years. It has become clear that our current problems with regulatory delay are getting worse.

**Length of Completed Rulemakings (in years)**




**Length of Completed Economically Significant Rules**



**Years in Which the Average Completed Rulemakings Were the Longest**

| A. All Completed Rules | | |
|---|---|---|
| **Year** | **President** | **Average Rulemaking Length** |
| 2016* | Obama | 2.745 |
| 2015 | Obama | 2.111 |
| 2014 | Obama | 2.089 |
| 2006 | Bush | 2.038 |
| 2008 | Bush | 2.034 |
| **B. Economically Significant Completed Rules** | | |
| **Year** | **President** | **Average Rulemaking Length** |
| 2016* | Obama | 3.826 |
| 2015 | Obama | 3.363 |
| 2004 | Bush | 3.251 |
| 2014 | Obama | 3.211 |
| 2009 | Obama | 2.990 |
| **C. Other Significant Completed Rules** | | |
| **Year** | **President** | **Average Rulemaking Length** |
| 2016* | Obama | 3.582 |
| 2015 | Obama | 3.027 |
| 2014 | Obama | 3.014 |
| 2006 | Bush | 2.751 |
| 2007 | Bush | 2.636 |

## B. Agencies routinely fail to meet statutory rulemaking deadlines

Five years ago, Public Citizen conducted an analysis of public health and safety rulemakings with congressionally mandated deadlines.[37] Our analysis showed that most rules are issued long after their deadlines have passed, needlessly putting American lives at risk. Of the 159 rules analyzed, 78 percent missed their deadline. Federal agencies miss these deadlines for a variety of reasons, including having to conduct onerous analyses, dealing with politically motivated delays, inadequate resources or agency commitment, and fear of judicial review.

A high proportion of pending rules with statutory deadlines are mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act. The financial regulatory agencies are far behind schedule. The most recent report from the law firm DavisPolk finds that, through July

[37] Mouzoon, N. (2012). *Public Safeguards Past Due: Missed Deadlines Leave Public Unprotected.* Public Citizen. Available at: http://www.citizen.org/documents/public-safeguards-past-due-report.pdf.

2016, regulators have still not complied with almost one quarter of the 271 statutory deadlines that have passed. This is six years after passage of the Act.[38]

### C. Regulatory delay is often extreme and costs lives

Although extended delay is arguably the defining feature of rulemaking, the extent, severity, causes and consequences of such delay are not well understood. I highlight several illustrative examples here to illuminate these matters.

#### 1. Backover rule[39]

One night in 2002, Dr. Greg Gulbransen was backing up his SUV in his driveway when his two-year-old son Cameron darted out into the driveway behind the vehicle. Too small to be seen by his father using any of the vehicle's rearview or sideview mirrors, Cameron was struck by the moving car and killed. Dr. Gulbransen's tragedy is not an isolated case; each week, 50 children are injured, two fatally, in these "backover" crashes, that is, collisions in which a vehicle moving backwards strikes a person (or object) behind the vehicle. Each year on average, according to the Department of Transportation, backovers kill 292 people and injure 18,000 more – most of whom are children under the age of five, senior citizens over the age of 75, or persons with disabilities. Backovers generally occur when the victim is too small to be seen in the rearview mirror of the vehicle or too slow to move out of the way of the vehicle, even one moving at slow speed.

To prevent the injuries and deaths caused by backovers, in 2008 Congress passed and the President signed the Cameron Gulbransen Kids Transportation Safety Act. The Gulbransen Act directed DOT to revise an existing federal motor vehicle safety standard to expand the area that drivers must be able to see behind their vehicles. (This can be done through the use of rear-view cameras, or other technologies.) The Gulbransen Act mandated that DOT issue the final rule within three years of the law's enactment – by February 28, 2011. The Act also allowed DOT to establish a new deadline for the rulemaking, but only if the otherwise-applicable deadline "cannot be met."

When it prepared a draft final rule in 2010, DOT estimated that the proposed rule, which specified an area immediately behind each light vehicle that a driver must be able to see when the car is in reverse gear, would prevent between 95 and 112 deaths and between 7,072 and 8,374 injuries each year.

DOT failed to meet the February 2011 deadline. Instead, DOT repeatedly set a new "deadline," failed to meet it, and then set yet another "deadline," although the agency never made a showing that the statutory deadline could not be met.

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[38] DavisPolk. (2016) *Dodd-Frank Progress Report*. Available at: https://www.davispolk.com/Dodd-Frank-Rulemaking-Progress-Report.

[39] A full account of this history is available from In Re Dr. Greg Gulbransen: Petition for a Writ of Mandamus, September 25, 2013. Available at: http://www.citizen.org/documents/In-re-Gulbransen-Backover-Petition.pdf.

In light of the extent of the delay, the repeated self-granted extensions, and the hundreds of preventable deaths and thousands of preventable injuries occurring while the public waited for the final rule, Public Citizen filed a petition with the United States Court of Appeals for the Second Circuit seeking a writ of mandamus compelling DOT to issue the rule within 90 days. The petition was filed September 25, 2013 on behalf of Dr. Gulbransen, Sue Auriemma (another parent who backed into her own child), and the consumer safety groups Advocates for Highway and Auto Safety, KidsAndCars.org, and Consumers Union. On March 31, 2014, one day before the Second Circuit was scheduled to hear argument in the case, DOT issued the rear visibility safety standard that petitioners sought.

The delay in finalizing this rule led to the pointless deaths of hundreds and tens of thousands of injuries. What a horrible tragedy it is for a parent to live with the knowledge that he or she ran over their child. But what a monstrous outrage for those tragedies to perpetuate because the Department of Transportation failed to comply with Congressional instructions to timely issue a corrective rule.

**2. Truck driver training.**

In 1991, Congress passed a law requiring a rulemaking on training for entry-level commercial motor vehicle operators. It took more than 25 years, three lawsuits, and another statutory mandate, before the Department of Transportation finally enacted regulations requiring entry-level drivers to receive training in how to drive a commercial motor vehicle.

In the Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991, Congress required the Secretary of Transportation to report to Congress on the effectiveness of private sector training of entry-level commercial motor vehicle drivers by December 18, 1992, and to complete a rulemaking proceeding on the need to require training of all entry level drivers of commercial motor vehicles by December 18, 1993. The required report, which was submitted to Congress on February 2, 1996 (slightly more than three years late), concluded that training of new commercial motor vehicle drivers was inadequate; in an accompanying analysis, the agency determined that the benefits of an entry-level driver training program would outweigh its costs. It requested comments on the studies and held one public hearing on training entry-level drivers. In the next six years, however, the agency took no steps towards issuing a rule on entry-level driver training.

In November 2002, organizations concerned about motor vehicle safety filed a petition for a writ of mandamus in the DC Circuit Court of Appeals, seeking an order directing the Secretary of Transportation to fulfill his statutory duty to promulgate overdue regulations relating to motor vehicle safety, including the regulation on entry-level driver training. As part of a settlement agreement between the organizations and DOT, DOT agreed to issue a final rule on minimum training standards for entry-level commercial motor vehicle drivers by May 31, 2004.

On August 15, 2003, almost 12 years after ISTEA was enacted, DOT (through the Federal Motor Carrier Safety Administration, FMCSA) published a notice of proposed rulemaking on minimum training requirements for entry-level commercial motor vehicle operators, and on May 21, 2004, it published a final rule.

Although the agency expressly acknowledged that training for entry-level drivers was inadequate and stated its belief that a 360-hour model curriculum developed by the Federal Highway Administration that includes extensive behind-the-wheel training "represents the basis for training adequacy," it proposed instead a weak rule that required only 10 hours of training.

Advocates for Highway and Auto Safety, among others, subsequently filed a petition for review of the final rule, arguing that the rule was arbitrary and capricious because it did not require entry-level drivers to receive any training in how to operate a commercial motor vehicle. The DC Circuit agreed, holding that the FMCSA had "adopted a final rule whose terms have almost nothing to do with an 'adequate' CMV [commercial motor vehicle] training program."

On December 26, 2007, approximately two years after the court ruling, FMCSA issued a stronger proposed rule. But, four years after the comment period had closed, the agency still had not issued a final rule.

In 2012, Congress again directed DOT to conduct a rulemaking on the issue, requiring a final rule by October 1, 2013.

Yet instead of moving forward, the FMSCA published notice in September 2013 that it was withdrawing its proposed rule.

The agency finally issued a rule, though an insufficiently robust one, in December 2016. After an additional Trump administration delay, it finally became effective on June 5 of this year, 26 years after passage of ISTEA, and 24 years after the Congressionally mandated deadline.

**3. Cranes and derricks.**

The Occupational Safety and Health Administration's cranes and derricks rule, adopted in 2010, is designed to improve construction safety. By the late 1990s, construction accidents involving cranes were killing 80 to 100 workers a year. OSHA later estimated that a modernized rule would prevent about 20 to 40 of those annual tragedies. Worker safety advocates and the construction industry alike wanted an updated rule.

Nonetheless, it took a dozen years to get a final rule adopted. "During the dozen years it took to finalize the cranes rule," a Public Citizen report summarized, "OSHA and other federal agencies held at least 18 meetings about it. At least 40 notices were published in the Federal Register. OSHA was required by a hodgepodge of federal laws, regulations and executive orders to produce several comprehensive reports, and revisions to such reports, on matters such as the makeup of industries affected by the rule, the number of businesses affected, and the costs and benefits of the rule. OSHA also was repeatedly required to prove that the rule was needed, that no alternative could work, and that it had done everything it could to minimize the effects on small businesses. The regulatory process afforded businesses at least six opportunities to weigh in with concerns that the agency was required to address."[40]

[40] Lincoln, T. and Mouzoon, N. (2011, April.) Cranes & Derricks: The Prolonged Creation of a Key Public Safety Rule. Public Citizen. p. 4. Available at: http://www.citizen.org/documents/CranesAndDerricks.pdf.

**4. Silica rule.**

More than two million workers in the United States are exposed to silica dust, with construction, foundry and metal workers most at risk. Inhaling the dust causes a variety of harmful effects, including lung cancer, tuberculosis, and silicosis (a potentially fatal respiratory disease). OSHA long ago acknowledged that its silica dust standard was obsolete.[41] The first concrete action it took to update the standard was in October 2003, when it convened a small business panel to review its proposed rule. In 2011, OSHA submitted to the Office of Information and Regulatory Affairs (OIRA) a draft proposed rule to reduce exposure to deadly silica dust. Although OIRA is supposed to complete reviews in three months, it took years for OIRA to complete the review. No explanation for this delay ever emerged. After OIRA finally released the rule, it was further delayed at OSHA. The rule was finally issued in June 2016. Enforcement was set to begin in June of this year, but has been delayed until September.[42]

As a result of this prolonged delay, people have died – and continue to die – needlessly. OSHA estimates that the rule "would prevent between 579 and 796 fatalities annually – 375 from non-malignant respiratory disease, 151 from end-stage renal disease, and between 53 and 271 from lung cancer – and an additional 1,585 cases of moderate-to-severe silicosis annually."[43] If the rule does go into effect this year, it will be almost a decade and a half from commencement of the rulemaking to implementation.

**III. Deadline Suits**

In the wake of pervasive regulatory delay, nonprofit enforcement litigation has emerged as a crucial instrument in facilitating agency action at least to meet Congressionally mandated rulemaking deadlines. Public Citizen regularly and proudly files such deadline or enforcement cases, for the purpose of combating unjustified delay.

Congress created the rights for deadline lawsuits, though the Administrative Procedure Act and an array of sector-specific statutes, and Congress should embrace such litigation, which has the purpose of enforcing Congressional mandates against recalcitrant agencies.

Nonetheless, and as is reflected in today's hearing, a contrived controversy has emerged regarding deadline lawsuit settlements. These settlement agreements have been pejoratively dubbed "sue and settle" agreements by opponents of strong regulatory standards.

The criticism of such settlements rests on a number of false and misleading allegations that federal agencies are colluding with public interest groups to enter into settlement agreements that ultimately result in outcomes preferred by those public interest groups. The December 2014 Government Accountability Office (GAO) report, "Impact of Deadline Suits on EPA's

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[41] OSHA Occupational Exposure to Crystalline Silica, 75 Fed. Reg. 79.603 (2010, Dec. 20).
[42] See https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=31082.
[43] OSHA. (2013). Preliminary Economic Analysis and Initial Regulatory Flexibility Analysis: Supporting document for the Notice of Proposed Rulemaking for Occupational Exposure to Crystalline Silica. Available at: https://www.osha.gov/silica/Silica_PEA.pdf.

Rulemaking Is Limited,"[44] dispels these myths. The report focuses specifically on the Environmental Protection Agency (EPA) and, it should be noted, was requested by Republican members of the House of Representatives Committee on Energy and Commerce of the House of Representatives. The GAO report makes three overriding points.

First, the GAO explains, the lawsuits should be considered "deadline suits"[45] because they allege that the EPA failed to perform a nondiscretionary, or mandatory, act by a deadline established by Congress. In other words, these lawsuits allege that agencies such as the EPA broke the law by failing to take a congressionally mandated action by a congressionally mandated date. These lawsuits are among the simplest to understand and prove. To illustrate, if the law says EPA must finalize a rule by September 8th, 2017 and the EPA does not finalize the rule by that date, third parties are entitled to bring a "deadline suit" to enforce the congressionally mandated deadline. The point of these lawsuits is obvious and simple: to enforce the law by holding federal agencies accountable when they ignore Congress.

That EPA, working with the Department of Justice (DOJ), seeks to settle these lawsuits instead of going to trial should surprise no one. It makes little sense to waste taxpayer resources to defend against claims that the EPA didn't perform a legal requirement by a congressionally imposed deadline when the parties who are bringing the suit only have to point to the calendar in order to prove their case. In these situations, "it is very unlikely that the government will win the lawsuit," according to the GAO report.[46]

Second, deadline lawsuit settlements do not pre-ordain the *substance* of the agency action that the EPA and other agencies agree to finalize under the terms of the settlement. According to the GAO report, "EPA officials stated that they have not, and would not agree to settlements in a deadline suit that finalizes the substantive outcome of the rulemaking or declare the substance of the final rule."[47] This is consistent with a 1986 DOJ memo from President Reagan's Attorney General Edwin Meese which prohibits the EPA from entering into settlement agreements that prescribe specific substantive outcomes regarding final rules. Thus, the allegation that deadline lawsuits involve back-room negotiations between pro-regulatory groups and complicit federal agencies which result in agreements that dictate the content of rules or bind agency discretion is false.

Third, and relatedly, deadline litigation settlements do not replace the notice-and-comment process, they just provide a new timeline in light of agency failure to meet Congressional directives. The settlement agreement that results from a deadline suit sets out nothing more than a simple timeline for the agency, the EPA in the GAO report, that has missed a Congressionally mandated deadline to complete the action. If the action is a rule involving rulemaking, the agency must generally follow the traditional public notice and comment rulemaking process prescribed by the Administrative Procedures Act or procedures prescribed by the agency's authorizing statute. In the case of the EPA, all of the settlements scrutinized by GAO pursuant to

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[44] U.S. Government Accountability Office, GAO-15-34, Environmental Litigation: Impact of Deadline Suits on EPA's Rulemaking is Limited, December 2014, available at: http://www.gao.gov/assets/670/667533.pdf.
[45] *Id.* at 3.
[46] *Id.* at 7.
[47] *Id.* at 8.

the EPA's rulemaking authority under the Clean Air Act went through the public notice and comment process, allowing all members of the public an opportunity to comment on the rule before it is finalized.[48]

Since the allegations claiming the existence of collusion or impropriety in reaching settlement agreements under deadline lawsuits are unsubstantiated, it is fair to assume that the discussion of "sue and settlement" actually opposition to the regulatory action itself. In the case of the EPA, more often than not such action involves air pollution regulations that implement the Clean Air Act.

Deadline suits are, simply, a function of missed deadlines. As discussed above, those are pervasive. The GAO report bears this out with eye-opening examples. For example, the Clean Air Act rules that GAO studied included rules which missed Congressional deadlines by shocking and unacceptable margins. One rule was finally implemented 26 years after the Congressional deadline to finalize the rule.[49] Another missed its deadline by 19 years.[50]

**IV. Conclusion: Real Problems with Justice Department Settlements**

There are real problems at the Justice Department related to settlement policy, but settlements of deadline suits are not among them. Members of Congress have expressed concern on a bipartisan basis about civil and criminal settlements with banks and other corporate wrongdoers that create a two-track justice system: a genteel, light-handed and often non-punitive approach for large corporations and their executives, and a wholly different standard for regular people. This is a topic on which the Committee could shed useful light.

**A. Settling with the Big Banks**

Remarkably, given the scale of corporate wrongdoing and devastation wreaked, the perpetrators that caused the Great Recession escaped any criminal prosecution. No criminal prosecution of the giant corporations who ripped off borrowers; no criminal prosecutions for widespread securitization fraud, save for a single, relatively low-level case; no criminal prosecution for the ratings companies that knowingly blessed widespread misconduct. No criminal prosecution of the Big Banks, and no prosecution of their executives.

The failure to prosecute is a major blemish on the record of the Department of Justice. It enabled wrongdoers to escape accountability, left victims uncompensated and failed utterly to establish a commitment to enforcement that will deter future wrongdoing.

Very belatedly, as a kind of mop-up operation, the Department of Justice starting in 2013 entered into a series of settlements of civil claims against the largest banks. The first major "global settlement" was with JPMorgan, for a purported $13 billion, entered into in November 2013.[51] It

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[48] *Id.* at 12.
[49] *Id.* at 11
[50] *Id.*
[51] Department of Justice, "Justice Department, Federal and State Partners Secure Record $13 Billion Global Settlement with JPMorgan for Misleading Investors About Securities Containing Toxic Mortgages," November 13,

was followed by a July 2014 purported $7 billion deal with Citigroup,[52] and a purported $16.6 billion settlement with Bank of America in August 2014.[53]

Later deals included a purported $2.6 billion settlement with Morgan Stanley[54] and a purported $5 billion settlement with Goldman Sachs[55] in 2016, and a purported $864 million settlement with Moody's,[56] a purported $7.2 billion settlement with Deutsche Bank,[57] and a purported $5.28 billion settlement with Credit Suisse, all in January 2017.[58]

Although the details of the settlements varied, they aimed to resolve claims related to the improper issuance of residential mortgage-backed securities.

Perhaps because of frustration and resignation over DOJ's decision not to engage in criminal prosecutions, or perhaps because the settlements did involve large sums of money, and although they were front-page news for a day, these giant deals received very little scrutiny. That was a mistake that Congress should remedy. These settlements were reached through secretive and faulty processes; they failed to provide any serious accounting to the public of what the Department had uncovered and why it thought billions of dollars in penalties and restitution were in order; the public relations hype around the settlements obscured the extent to which substantial portions of the settlement totals imposed no or minimal actual costs on the settling banks; and although the non-transparent aspect of the settlements makes this impossible to determine with certainty, they very likely let the banks off cheap relative to their potential liability. While "rough justice" is sometimes the best that can be obtained, there is an almost ad hoc element to these deals that suggests a mutually face-saving, slipshod negotiation rather than an appropriately deliberative and thoughtful process.

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2013, Available at: https://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-13-billion-global-settlement.

[52] Department of Justice, "Justice Department, Federal and State Partners Secure Record $7 Billion Global Settlement with Citigroup for Misleading Investors About Securities Containing Toxic Mortgages," July 14, 2014, available at: https://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-7-billion-global-settlement.

[53] Department of Justice, "Bank of America to Pay $16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading up to and During the Financial Crisis," August 21, 2014, available at: https://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading.

[54] Justice Department, February 11, 2016, Morgan Stanley Agrees To Pay $2.6 Billion Penalty In Connection With Its Sale Of Residential Mortgage Backed Securities, available at: https://www.justice.gov/usao-ndca/pr/morgan-stanley-agrees-pay-26-billion-penalty-connection-its-sale-residential-mortgage.

[55] Justice Department, April 11, 2016, Goldman Sachs Agrees to Pay More than $5 Billion in Connection with Its Sale of Residential Mortgage Backed Securities, available at: https://www.justice.gov/opa/pr/goldman-sachs-agrees-pay-more-5-billion-connection-its-sale-residential-mortgage-backed.

[56] Department of Justice, January 13, 2017, Justice Department and State Partners Secure Nearly $864 Million Settlement With Moody's Arising From Conduct in the Lead up to the Financial Crisis, available at: https://www.justice.gov/opa/pr/justice-department-and-state-partners-secure-nearly-864-million-settlement-moody-s-arising.

[57] Department of Justice, January 17, 2017, Deutsche Bank Agrees to Pay $7.2 Billion for Misleading Investors in its Sale of Residential Mortgage-Backed Securities, available at: https://www.justice.gov/opa/pr/deutsche-bank-agrees-pay-72-billion-misleading-investors-its-sale-residential-mortgage-backed.

[58] Department of Justice, January 18, 2017, Credit Suisse Agrees to Pay $5.28 Billion in Connection with its Sale of Residential Mortgage-Backed Securities, available at: https://www.justice.gov/opa/pr/credit-suisse-agrees-pay-528-billion-connection-its-sale-residential-mortgage-backed.

In the case of the JPMorgan settlement, for example, the Department never filed nor published a complaint against the megabank, though DOJ lawyers had apparently drafted a detailed version. Instead, the settlement contains only an 11-page statement of facts that purports to describe the misdeeds of JPMorgan and its acquired Bear Stearns and Washington Mutual operations. This statement of facts may generously be characterized as bare bones.

The Big Bank civil settlements deserve ongoing Congressional scrutiny, to determine bank compliance but especially to prevent such flawed deals in the future.

**B. Inappropriate use of deferred and non-prosecution agreements**

Far too often, corporations are able to commit crimes but escape criminal prosecution, even when caught. In the past 15 years, there has been a dramatic rise in federal prosecutors choosing not to prosecute corporations that have committed crimes. Instead, the U.S. Department of Justice has adopted an alternative approach, entering into agreements with corporations to either defer prosecution or abstain from prosecution entirely if the corporation meets the terms set out in these agreements. When first introduced, these types of agreements, also known as "pre-trial diversion," were intended to apply not to corporations, but primarily to juvenile delinquents, with the aim of clearing the courts to allow them to attend to major criminal cases.[59] Yet, when deferred and non-prosecution agreements are used in response to massive corporate crimes, it is exactly such perpetrators of major crimes that reap the benefits. Indeed the extent and nature of deferred and non-prosecution of agreements is such that they have turned much of DOJ's corporate criminal practice into a branch of civil enforcement – a deeply problematic state of affairs precisely because criminal and civil enforcement aim to achieve distinct if overlapping objectives.

Prior to 2003, the DOJ entered into fewer than five deferred prosecution agreements and non-prosecution agreements with corporations per year. In the first decade following the millennium, these numbers gradually crept upwards, entering the double digits by 2005. Numbers rose to a high of 42 deferred and non-prosecution agreements in 2007 and continue to number in the dozens every year, according to a forthcoming report from Public Citizen.[60]

Deferred and non-prosecution agreements are a special gift to large corporations, which are enabled to escape prosecution for serious crimes in a manner rarely afforded to individuals or small business. The logic of these agreements is that they permit prosecutors to put in place special compliance mechanisms to prevent future wrongdoing. These compliance mechanisms can equally be obtained through criminal plea agreements, however, so the claim that deferred and non-prosecution agreements offer some unique benefit is incorrect. Worse, deferred prosecution agreements offer little or no deterrent effect, either for the (non-)charged corporation or for others. Corporations entering into deferred and non-prosecution agreements have a

[59] Mokhiber, R. (2005). Crime without Conviction: The Rise of Deferred and Non Prosecution Agreements. Available at: http://corporatecrimereporter.com/deferredreport.htm

[60] Ben-Ishai, E. and Weissman, R. (forthcoming, 2017). Justice Deferred – and Denied. Public Citizen. The most detailed account and analysis of deferred prosecution agreements is contained in Garrett, B. (2014.) Too Big To Jail: How Prosecutors Compromise with Corporations. Harvard University Press.

strikingly high recidivism rate, including companies such as AIG, Barclays, Bristol-Myers Squibb, Chevron, GlaxoSmithKline, Hitachi, Lucent, Merrill Lynch, Pfizer, Prudential and UBS.[61]

Perhaps the most appalling example of the abuse of deferred prosecution – one which emphasizes how this kid-glove treatment is designed primarily for giant corporations – involves the banking giant HSBC. In December 2012, the company agreed to pay more than $1 billion in fines and entered into a deferred prosecution agreement for anti-money laundering and sanctions violations. Assistant Attorney General Lanny Breuer said the company was guilty of "stunning failures of oversight – and worse" and that the "record of dysfunction that prevailed at HSBC for many years was astonishing."[62] Yet no criminal prosecution occurred. According to Breuer, the worry was that a criminal prosecution of a giant bank like HSBC might bring down the company and threaten the global financial system's stability.[63] "

In other words, the mere fact of its excessive size enabled HSBC to escape criminal penalties; it was judged too big to jail.

Criticisms of disparate treatment for large banks did strike a chord inside the Department of Justice, however. DOJ has recently secured some criminal pleas from giant financial firms, most notably in regards to the extraordinary manipulation of foreign exchange markets by five major banks. These banks – Barclays, Citigroup, JP Morgan Chase, the Royal Bank of Scotland and UBS – colluded on the size, timing and nature of their buy and sell orders for U.S. dollars and euros. The conspirators referred to themselves as the "mafia," and one said, "if you ain't cheatin', you ain't tryin'." There is no question of intentionality in this case.[64]

Yet even though guilty pleas were obtained from four of the banks and a deferred prosecution agreement was rescinded for the fifth, UBS, the Department of Justice maneuvered yet again to protect the banks from the normal consequences of law-breaking. A final deal on the guilty pleas was apparently held off until the SEC granted waivers to the banks from rules that would otherwise prevent them from undertaking certain securities activities.[65] It has also been reported that the Department of Justice obtained pleas from the banks' parent companies, rather than from subsidiaries, to protect those subsidiaries from other possible sanctions, including state charter revocation.[66]

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[61] Ben-Ishai, E. and Weissman, R. (forthcoming, 2016). Justice Deferred – and Denied. Public Citizen.
[62] Breuer, L. (2012, December 11.) *Assistant Attorney General Lanny A. Breuer Speaks at the HSBC Press Conference*. Available at: http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1212111.html.
[63] O'Toole, J. (2012, December 12.) *HSBC: Too Big to Jail?* CNNMoney. Available at: http://money.cnn.com/2012/12/12/news/companies/hsbc-money-laundering/index.html.
[64] Department of Justice. (2015, May 20.) Five Major Banks Agree to Parent-Level Pleas. Available at: http://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas.
[65] Reuters. (2015, May 20.) U.S. SEC Grants Waivers to Banks After Guilty Pleas. Available at: http://www.reuters.com/article/2015/05/20/banks-forex-settlement-waivers-idUSL1N0YB1GA20150520.
[66] Protess, B. and Corkery, M. (2015, May 13.) 5 Big Banks Expected to Plead Guilty to Felony Charges, but Punishments May Be Tempered. New York Times. Available at: http://www.nytimes.com/2015/05/14/business/dealbook/5-big-banks-expected-to-plead-guilty-to-felony-charges-but-punishments-may-be-tempered.html.

To be very clear, the inappropriate use of deferred and non-prosecution agreements is not limited to the financial sector. Consider, for example, the case of the GM ignition switch. Starting in 2002, GM sold a host of cars containing a faulty ignition switch that would suddenly shut off the engine during driving, and prevent airbags from deploying in the event of a crash. GM has acknowledged that 174 people have died as a result of ignition switch failures, and the actual number may be much higher.

The problems with the General Motors ignition switch began more than a decade before defective cars were finally recalled. "During the time between GM's approval of the low-torque ignition switch in 2002 and its 2014 recall of 2.6 million vehicles affected by the ignition switch defect, key facts were withheld by, or unrecognized within, GM, making detection of the connection between the faulty ignition switch and non-deployments of air bags difficult for both GM and NHTSA, and leading to a tragic delay in instituting a recall," a National Highway Transportation and Safety Administration (NHTSA) review found. "GM's delay in disclosing the defect at issue was the product of actions by certain personnel responsible for shepherding safety defects through GM's internal recall process, who delayed the recall until GM could fully package, present, explain, and handle the deadly problem," according to the Department of Justice.[67]

In September 2015, GM entered into a deferred prosecution agreement with the Justice Department. Simultaneous with the filing of the deferred prosecution agreement, prosecutors filed a criminal information against the company, alleging it had illegally concealed information from NHTSA (under 18 U.S.C. 1001) and engaged in wire fraud by misleading consumers as to the truth about the ignition switch.[68] GM agreed to pay $900 million in penalties as part of the deal. No individuals have been charged in connection with the case, and it is not expected that any will be.

It turns out that a number of individual drivers were prosecuted for manslaughter for crashes that were in fact attributable to the ignition switch defect; the contrast with the ultimate treatment of GM could not be starker in showing the double standards applied to corporate criminal prosecutions and in underscoring the challenges in prosecuting individuals involved in such cases.[69]

When it comes to corporate wrongdoing, our system of criminal justice has gone awry. Because of a lack of will and/or statutory authority, prosecutors fail to prosecute corporations and corporate executives for reckless conduct the likes of which would generate full-on prosecution and harsh sentences if committed by individuals outside of the corporate context. Through deferred and non-prosecution agreements, large companies, and especially but not only big

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[67] Department of Justice, "Manhattan U.S. Attorney Announces Criminal Charges Against General Motors And Deferred Prosecution Agreement With $900 Million Forfeiture," September 17, 2015, available at: http://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-criminal-charges-against-general-motors-and-deferred.

[68] United States of America v. General Motors Company, Information, September 17, 2015, available at: http://www.justice.gov/usao-sdny/file/772301/download.

[69] See Jeff Bennett, "Texas Woman Driving GM Recalled Car Cleared In Death of Fiancé," Wall Street Journal, November 24, 2014, available at: http://www.wsj.com/articles/gm-confirms-texas-accident-linked-to-faulty-ignition-switch-1416842193.

banks, get special treatment, enabling them to avoid criminal prosecution for egregious wrongdoing simply by promising not to commit wrongs in the future. And even criminal prosecutions are engineered to enable giant banks to avoid meaningful penalties.

**C. Worrying Developments: Backtracking on the Yates Memo?**

In tacit recognition of some of the problems discussed here, particularly the failure to hold any individuals criminally accountable for the Wall Street crash, in 2015 the Justice Department issued the Yates Memorandum, urging more aggressive prosecution of individuals at criminal wrongdoers, and adopted certain prosecutorial guidelines aimed at spurring more such prosecutions.[70]

Although the evidence is mixed after issuance of the memo, there were some signs of progress. Notably, the Justice Department obtained criminal convictions of the executives associated with the New England Compounding Center-induced fungal meningitis outbreak that killed at least 64 patients,[71] a one-year criminal sentence against former Massey Energy CEO Don Blankenship for willful violation of coal safety rules,[72] a 28-year sentence against the former head of the Peanut Corporation of America in connection with a salmonella outbreak that killed nine people,[73] and a settlement with Volkswagen for its emissions cheating that included more than $4 billion in fines, a criminal plea for the corporation and indictments against numerous VW executives and managers associated with the scandal.[74]

But recent developments in the new administration's Justice Department suggest cause for concern. Attorney General Jeff Sessions has made clear that he aims to seek the toughest sentences permissible for low-level, nonviolent drug offenders, but he has made no comparable statements about corporate wrongdoers, who inflict vastly greater harm on society and, as the utmost rational actors, should be far more responsive to tougher enforcement and criminal sanction.

In May, the Justice Department settled a case with Citigroup involving what the Department described as criminal violations related to money laundering.[75] The case involved more than

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[70] Sally Quillian Yates, "Individual Accountability for Corporate Wrongdoing," September 9, 2015, available at: http://www.justice.gov/dag/file/769036/download.

[71] Justice Department, Owner of New England Compounding Center Convicted of Racketeering Leading to Nationwide Fungal Meningitis Outbreak, March 22, 2017, available at: https://www.justice.gov/opa/pr/owner-new-england-compounding-center-convicted-racketeering-leading-nationwide-fungal.

[72] Justice Department, Blankenship Sentenced to a Year in Federal Prison, April 6, 2016, available at: https://www.justice.gov/usao-sdwv/pr/blankenship-sentenced-year-federal-prison.

[73] Kevin McCoy, Peanut Exec in Salmonella Case Gets 28 Years, USA Today, September 22, 2015, available at: https://www.usatoday.com/story/money/business/2015/09/21/peanut-executive-salmonella-sentencing/72549166/. Although filed long before the Yates Memo was issued, this case can fairly be considered part of the Department's recent, stepped-up effort to get somewhat tougher on corporate wrongdoing.

[74] Justice Department, Volkswagen AG Agrees to Plead Guilty and Pay $4.3 Billion in Criminal and Civil Penalties; Six Volkswagen Executives and Employees are Indicted in Connection with Conspiracy to Cheat U.S. Emissions Tests, January 11, 2017, available at: https://www.justice.gov/opa/pr/volkswagen-ag-agrees-plead-guilty-and-pay-43-billion-criminal-and-civil-penalties-six.

[75] Justice Department, Banamex USA Agrees to Forfeit $97 Million in Connection with Bank Secrecy Act Violations, May22, 2017, available at: https://www.justice.gov/opa/pr/banamex-usa-agrees-forfeit-97-million-connection-bank-secrecy-act-violations.

18,000 alerts covering $142 million in what the DOJ called "potentially suspicious remittance transactions" at Citi's Banamex USA division. The Bank Secrecy Act makes it a crime to "willfully fail to establish and maintain" a robust anti-money laundering compliance program. Details released by the DOJ show that between 2007 and 2012, the firm processed more than 30 million remittances to Mexico covering $8.8 billion with "virtually no investigation for suspicious activity." In one instance, a Mexican beneficiary received 1,400 remittances from more than 950 different senders in 40 different states in the U.S. But the Citi subsidiary never filed a suspicious activity report, which is a bank investigation of the issue. The DOJ charged that the firm made at least $92 million in these transactions – but it only required Citi to forfeit $97.4 million. Outrageously, Citi was let off with a non-prosecution agreement, notwithstanding its long record of violating the law. It does not appear that any individual prosecutions will be forthcoming.

This and the other examples discussed here are real injustices, with far-reaching consequences for maintaining a system of equal justice for all and for deterring corporate wrongdoing. It is to these settlement issues that the Committee should turn its attention.

Mr. PALMER. I thank the gentleman.

I now recognize Mr. Geffken for his testimony.

**STATEMENT OF CARL E. GEFFKEN**

Mr. GEFFKEN. Thank you, Chairman.

Chairmen Palmer and Farenthold, I am pleased to join you and your fellow subcommittee members for today's important hearing on public policy considerations behind Federal litigation settlements. On behalf of the city of Fort Smith, Arkansas, I want to thank the committee for allowing me to share with you our experiences regarding the Fort Smith consent decree with the EPA and the State of Arkansas. I can assure you the city has taken this consent decree seriously. In fact, not only has the city raised its sewer rates 167 percent in three years, but it also has complied with all the provisions contained in the consent decree to date.

We seek successful implementation of all sewer utility improvements within the consent decree. However, the city has major concerns about future compliance because aspects of it are unattainable for the city.

Fort Smith has a population of 87,351, but it is also a regional metropolitan center in northwestern Arkansas of about 300,000 and the largest manufacturing hub in the State. Unfortunately, it has experienced some manufacturing setbacks due to business relocation and foreclosure. Twenty-nine percent of Fort Smith's population live below the Federal poverty line, while the national average is 14.7 percent. One of more troubling statistics is the fact that the median household income for the city is decreasing.

When the consent decree was finalized in 2015, the MHI was $37,600, 32 percent lower than the national average. Today, Fort Smith's MHI is now projected to be $33,500, 11 percent lower than two years ago. While our resident's incomes dropped 11 percent, the sewer utility bills have increased 167 percent to pay for the initial work on the consent decree.

Leading up to the consent decree, the city was under an administrative order with the EPA, one of the oldest active administrative orders in the country. However, the city was actively attempting to improve the compliance issues raised by the EPA by investing $200 million in its sewer infrastructure. Unfortunately, having one of the oldest administrative orders may have made us a target for enforcement.

Despite our willingness to comply, the Department of Justice and the Arkansas State Attorney General browbeat and coerced Fort Smith into accepting a consent decree. The city was presented with two options: spending millions in legal fees required to contest the consent decree or accept it.

The consent decree has many features and requirements in it that are typical of many other decrees. However, there are six items in the consent decree the city believes are not realistic and need modifying. The six items are, first, the city has only 12 years to complete the consent decree; however, there are at least 12 cities who were granted 20 to 25 years to comply.

Second, the consent decree contains a detailed and prescribed list of tasks that must be performed over the 12 years. It does not

allow for adequate flexibility or an iterative approach to maximize public benefits with limited dollars available.

Third, the cost of the consent decree exceeds the Federal guideline of 2 percent of median household income. The sewer portion alone of the city's utility bill is already at 2.2 percent of MHI, and rates will need to increase further in order to complete the consent decree. Funds over and above the amount needed for the consent decree will be needed for non-consent decree projects.

Fourth, stipulated penalties in consent decrees are counterintuitive. Assessing penalties is a tool to change behavior. However, Fort Smith worked on sewer issues prior to the consent decree. When a city is complying with its consent decree, assessing penalties only reduces the funds available to comply in the future.

Fifth, Fort Smith's consent decree is flawed in that there is a set, fixed time to complete it, but the ultimate scope of the projects and the actual cost of these projects was unknown when the consent decree was finalized.

And sixth, the consent decree requires Fort Smith to repair structural problems instead of focusing on spending those dollars where it will have the greatest impact.

The city shares its experiences and concerns with both subcommittees to show that Fort Smith has made every effort to comply with the Federal Clean Water Act. The city is spending a great deal of time, money, and effort on the consent decree. However, the current consent decree has a price tag of over $450 million. That makes it the single largest project in the city's history, and it is more than two years of Fort Smith's total budget for all government functions. In addition, the cost of this agreement has resulted in utility rate fatigue amongst our residents.

As the Fort Smith sewer utility rates rise, our city becomes less competitive for private economic investment. What company would choose a city in which sewer utility rates are three to four times higher than non-consent decree cities? This results in cities becoming poorer and exacerbates decreasing investments in cities. It is an unrealistic attempt to coerce compliance. Cities in consent decrees become less able to comply financially.

The modification that we will eventually propose to the EPA will be aggressive in compliance, affordable to the community, and provide the greatest public benefits for the dollars invested.

Thank you for the opportunity to share the Fort Smith perspective on Federal consent decrees, and I will be pleased to answer any questions you may have.

[Prepared statement of Mr. Geffken follows:]

# Statement of Carl E. Geffken
# City Administrator
# City of Fort Smith, Arkansas

## Before the Subcommittee on Intergovernmental Affairs and the Subcommittee on the Interior, Energy, and the Environment of the Committee on Oversight and Government Reform

**July 25, 2017**

Chairmen Palmer and Farenthold:

I am pleased to join you and your fellow subcommittee members for today's important hearing on public policy considerations behind federal litigation settlements.

Because the other panelists will address sue and settle examples whereby special interest groups sue a friendly federal administration and extract settlements which inappropriately commit the federal government to prioritizing issues and even specifying what subsequent rules and requirements will specify, I will address a related abuse of federal litigation affecting communities nationwide.

On behalf of the City of Fort Smith, Arkansas, I want to thank the committee for allowing me to share with you our experiences regarding the Fort Smith Consent Decree with United States Environmental Protection Agency and the State of Arkansas. I can assure you the City has taken this Consent Decree seriously. In fact not only has the city raised its utility rates 167% in three years but it also has complied with all the provisions contained in the Consent Decree to date. The City's staff has become environmental stewards in Consent Decree compliance. We seek a successful implementation of all the utility improvements within the Consent Decree, however the City has major concerns about future compliance because aspects of the Consent Decree are unattainable for the City. Before we discuss the issues of concern within the Consent Decree, a brief review of the community of Fort Smith should be informative for the Committee.

Fort Smith has a population of 87,351. However its utility provides water and sewer services to a number of adjacent communities for a service area population of

approximately 120,000. Fort Smith is a regional metropolitan center in North Western Arkansas of about 300,000 and it is a transportation hub with multiple Interstate highways, three class one railroads, and barge traffic on the Arkansas River. Even though Fort Smith is the largest manufacturing hub in the State of Arkansas, it has experienced some manufacturing setbacks due to business relocation or closure. For example, Whirlpool employed upwards of 4,500 residents manufacturing appliances but relocated the manufacturing to Mexico about ten years ago. The economic impact of this loss and other business closings have had a negative financial impact on the City.

Like many older cities, Fort Smith has an aged utility infrastructure system. Many of the sewer lines and water lines have exceeded their design life which has undoubtedly contributed to compliance issues with the Clean Water Act. 29% of Fort Smith's population live below the Federal poverty line while the national average is 14.7%. One of more troubling statistics is the fact that the median household income for the City is decreasing. When the Consent Decree was finalized in 2015, the Median Household Income was $37,600, 32% lower than the national average of $55,775. Today, Fort Smith's Median Household Income is now projected to be $33,500, 11% lower than two years ago. While our resident's incomes dropped 11%, the sewer utility bills have increased 167% to pay for the initial work on the Consent Decree. If this were not enough, a recent 24/7 Wall St. survey ranked Fort Smith as the 24th worst place to live in the United States. Many of the Fort Smith community profiles reflect an older, poorer community with aging infrastructure and an unfortunate candidate for a Consent Decree addressing Clean Water compliance.

Leading up to the Consent Decree, the City was under an Administrative Order from United States Environmental Protection Agency. It was also one of the oldest Administrative Orders still active, however the City was actively attempting to improve the compliance issues raised in the Administrative Order by investing $200 million dollars in the sewer infrastructure, responding to requests from the Environmental Protection Agency, and eliminating 22 Sanitary Sewer overflow points. Unfortunately, having the oldest Administrative Order may have made us a target for enforcement.

Despite our willingness to comply and after a change in the attorney assigned to Fort Smith by the United States Department of Justice, the Department of Justice and the Arkansas State Attorney General brow beat and coerced the Fort Smith into accepting the Consent Decree. Statements were made by the Department of

Justice attorney at disagreements during the negotiations that the complaint was already written and would be filed. The City was presented with the option of spending millions in the legal fees required to contest the Consent Decree provisions or accept it.

The Fort Smith Consent Decree has many features and requirements in it that are typical to many other Consent Decrees. Many of the requirements are aimed at improving management tools and programs. One could argue that this is regulatory overreach but the City is not concerned at this time over these items because it has enacted most of the management improvements already. However there are six items in the Consent Decree the City believes are not realistic and need modifying. The six items are:

1) The City has only 12 years to complete the Consent Decree, however there are at least 12 cities who were granted 20 to 25 years to comply. Fort Smith is poorer than most and it is the only one experiencing a Median Household Income decline. The obvious question is whether Fort Smith been treated fairly.

2) The Consent Decree contains a detailed and prescribed list of tasks that must be performed over the 12 years. It does not allow for adequate flexibility or an iterative approach to maximize public benefits with the limited dollars available.

3) The cost of the Consent Decree exceeds the Federal guideline of 2% of Median Household Income. The sewer portion of the City's utility bill is already at 2.2% of Median Household Income and rates will need to increase further in order to generate the funds needed just to complete the Consent Decree. Funds, over and above the amount needed for the Consent Decree, will be needed for non-Consent Decree expenses.

4) Stipulated penalties in Consent Decrees are counterintuitive and for Fort Smith, need to be changed. Assessing penalties is a tool to change behavior, however Fort Smith worked on the sewer issues before the Consent Decree and is currently complying with all requirements contained in the Consent Decree. When a city is complying with its Consent Decree, assessing penalties only reduces the funds available to comply in the future.

5) Fort Smith's Consent Decree is flawed in that there is a set, fixed time to complete it but the ultimate scope of the Consent Decree projects and the actual cost of those projects was unknown when the Consent Decree was finalized.

6) The Consent Decree requires Fort Smith to repair structural problems instead of focusing on spending those dollars on inflow and infiltration points.

The City shares its experiences and concerns with both Subcommittees of the United States House Committee on Oversight and Government Reform to show that the City of Fort Smith has made every effort to comply with Federal Clean Water Act. The City is spending a great deal of time, money, and effort on the Consent Decree, however we need the Federal Government to be our partner and allow modifications to the Consent Decree. The modifications that the City will request are absolutely needed because as you have heard, Fort Smith does not have money to waste. The current Consent Decree has a price tag of over $450 million dollars. That makes it the single largest project in the City's history and it is more than two years of Fort Smith's total budget for all government functions. In addition, the cost of this agreement has resulted in utility rate fatigue among our residents. Our water utility needs to invest in a new transmission main and the replacement and upgrade of all household water meters but the cost of Consent Decree is impacting our ability to fund the public drinking water system.

As a City Administrator, I need to share how aggressive and unrealistic Consent Decrees can result in poor public policy. The following issues six highlight this:

1) Federal enforcement removes the State from exercising their enforcement role.

2) Federal enforcement is not always necessary. States, using the NPDES Permit process, should enforce and address sewer issues not Federal Consent Decrees.

3) Federal Enforcement by the Department of Justice and the Environmental Protection Agency pursue "comprehensive relief" to address all possible areas of noncompliance instead of focusing on the matters which require direct federal regulation.

4) Cumbersome provisions to modify Consent Decrees inhibit a city's ability to adjust the scope of work and spend limited funds wisely based on actual experience and findings.

5) Federal Consent Decrees lack Federal agency appreciation for local affordability and are used to impose Federal policy.

6) Federal Consent Decrees inhibit integrated planning.

Fort Smith is an older and somewhat poorer city that is faced with a very large expense as a result of a federal unfunded mandate. As the Fort Smith sewer utility rates rise, our city becomes less competitive for private economic investment. What company would choose a city in which sewer utility rates are three or four times higher than non-Consent Decree cities? This results in older cities becoming poorer, exacerbating decreasing investment in cities and the continuation of urban sprawl. In an unrealistic attempt to coerce compliance, the cities in Consent Decrees become less able to comply financially.

The modification that we will eventually propose to the United States Environmental Protection Agency will be aggressive in compliance, affordable for the community and provide the greatest public benefits for the dollars invested. Once a new EPA Regional Administrator is appointed, the City will request an appointment to discuss the modifications we need to Consent Decree. Hopefully this meeting can take place in October. The City of Fort Smith would be happy to update the committee on our progress with the Regional Administrator and the Consent Decree modification in order to show the successes and difficulties faced by cities like Fort Smith across the United States.

Thank you for the opportunity to share the Fort Smith perspective on federal consent decrees. I will be pleased to answer any questions you may have.

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Mr. PALMER. I thank the witnesses for the testimony.

The chair now recognizes the gentleman from Tennessee, Mr. Duncan, for five minutes.

Mr. Duncan has left the hearing.

The chair recognizes the gentleman from Arizona, Mr. Gosar, for questions for five minutes.

Mr. GOSAR. Thank you, Mr. Chairman.

As we talk about sue-and-settle and their associated cost, I want to focus a little bit on the EPA. In the last few years, we have seen the EPA run rampant, imposing extraordinary costs on States. We know that the EPA and other Federal agencies collect fines and enforce penalties when consent decrees have been violated. Mr. Geffken, do you know where these fines go once they are collected?

Mr. GEFFKEN. Representative, I believe they go into the Federal coffers. I know when Fort Smith entered its consent decree, it had to pay $300,000, and the main goal of our—of the consent decree relates to sewer sanitary system overflows, and we were hit with stipulated penalties that were thankfully waived after much pushing back, but that was to go into the Federal coffers back to the EPA.

Mr. GOSAR. Into the EPA ——

Mr. GEFFKEN. Yes, sir.

Mr. GOSAR.—specifically?

Mr. GEFFKEN. Yes, sir.

Mr. GOSAR. Okay. Now, do you ever receive assistance through Federal grants to assist in being compliant?

Mr. GEFFKEN. No, sir, neither in the city of Reading, nor in the city of Fort Smith. The only benefits we can get are usually from the States if they have available funds.

Mr. GOSAR. Are you aware of any other municipality getting any type of grant to assist them?

Mr. GEFFKEN. No, sir.

Mr. GOSAR. Okay. So other than being fined for noncompliance and then being stuck with the bill to fix the problem, how else can consent decrees be duplicative?

Mr. GEFFKEN. One more time, sir?

Mr. GOSAR. So being fined for noncompliance and then being stuck with a bill to fix the problem, how else are consent decrees duplicative?

Mr. GEFFKEN. They—well, that's—your first example is the most telling, that we're having to spend $450 million and then, while we're in the consent decree, if there is a violation, which we could be charged a stipulated penalty.

But in terms of other duplicative actions, you know, there are areas that we already have NPDES permit levels, and that is one area that we have the consent decree that requires certain actions, and yet there are certain—there are other compliance avenues that we have that duplicate the need to update and maintain our system.

Mr. GOSAR. Now, we have obviously seen a number of changes with the new administration, so how have things differed between the last administration and this one?

Mr. GEFFKEN. At this point I can honestly say that we have seen a greater benefit to having discussions and a willingness to take our requests under consideration.

Mr. GOSAR. So more flexibility?

Mr. GEFFKEN. Yes, more flexibility.

Mr. GOSAR. Isn't it true that the EPA, under the direction of Administrator Scott Pruitt, recently waived all penalties owned by the city of Fort Smith?

Mr. GEFFKEN. That is correct.

Mr. GOSAR. Now, can you explain the impact these fines make both in terms of the additional fees associated with them and in terms of being waived?

Mr. GEFFKEN. Well, we had the—we were going to be assessed approximately $400,000 for violating the corrective actions that are in the consent decree, and that was reduced to $120,900. And we spoke with the EPA and the Department of Justice, and they were able to waive that after much discussion. We were very grateful for that flexibility, but it is still—that is money that's taken away from doing other work. We offered to spend that money to clean sewer lines in order to go on green projects, and it was denied until such time as there was a change in the direction and greater flexibility.

Mr. GOSAR. Now, many times specialists are called in to investigate as well. Do you know how many of these cases are settled at a rate inconsistent with the manner set forward with Congress?

Mr. GEFFKEN. I'm sorry, I didn't hear that one.

Mr. GOSAR. Yes. Do you know how many of these cases are settled at a rate consistent with the manner set forward from Congress?

Mr. GEFFKEN. Well, many of them actually do result in consent decrees.

Mr. GOSAR. Right.

Mr. GEFFKEN. Instead of moving forward and looking to go through the legislative path, we wind up having cities that are poorer like Reading and starting to look like Fort Smith that are having to take their scarce resources and put them in one project instead of being able to spend it on many different areas that the city needs.

Mr. GOSAR. Yes. What I am alluding to is in many cases in a sue-and-settle application and particularly highlighting maybe an endangered species, what ends up happening, we don't see a rate that is being utilized that is consistent with Congress. What we see is specialists actually being jacked up because there are only so many people that have so many—have the expertise in certain areas. And it is very inconsistent with what Congress.

Last but not least, in our first question in talking about fees, I don't think Congress dictates how the agency actually spends those. They are up to the agencies' flexibility to whatever they would like to do, and so that is problematic in that regards to perpetuating certain agenda items that may not be consistent with what Congress. Giving you an example of that is the Waters of the U.S. Here, you had parts of five Supreme Court rulings defying the EPA even going to that aspect, and yet they still did. And so once again, it took an action by the States to reel them back in to actually stop the promulgation of a false type of narrative.

So I want to thank you very, very much for your testimony today, and with that, I yield back.

Mr. PALMER. The chair recognizes the gentlewoman from Florida and ranking member, Mrs. Demings, for her questions.

Mrs. DEMINGS. Thank you so much, Mr. Chairman.

Mr. Weissman, I want to take just a few minutes to discuss the benefits of rulemaking as it pertains to public health. According to the Center for Disease Control, foodborne illnesses contribute to about 48 million illnesses, 128,000 hospitalizations, and 3,000 deaths per year. The Food Safety Modernization Act is one of the most pivotal pieces of legislation that transformed our food safety industry. President Obama signed it, as I am sure you know, in 2011.

Mr. Weissman, how will the Food Safety Modernization Act help to prevent foodborne illnesses and prevent the loss of economic activity attributable to sicknesses and deaths caused by those illnesses?

Mr. WEISSMAN. Well, thank you, Ranking Member.

The act was passed after an amazing series of outbreaks of disease, salmonella, listeria, and other outbreaks. Because neither the—no agency, including USDA or FDA, had proper authority to ensure cleanliness in the fields and in processing factories. The Food Safety Modernization Act gave new authorities to the agencies, required them to issue some rules, which, as an aside, they were slow in issuing but is projected to save really thousands of lives by cleaning up our food supply.

And I think in this case, as in many others—and your question alludes to this—the benefit is not just to the people who will avoid being sick, which is reason enough. There are massive economic benefits as well. When the cantaloupe industry is suddenly hit with an outbreak and no one buys cantaloupes, it affects the farmers, it affects the workers in the fields, it affects the stores that are selling the food, it affects the restaurants that wanted to serve dishes made with cantaloupe. It really goes all the way up, as it were, the food chain. It has broad economic impact.

Mrs. DEMINGS. You led, Mr. Weissman, with the story of Cameron Gulbransen, and you are right; it is a small example. He was two years old. But certainly, his death will have major lasting impact. Once the Kids Transportation Safety Act was passed, the transportation industry delayed implementing it. So, Mr. Weissman, what does history teach us? Why can't we just rely on the industry to prevent health and safety problems without Federal laws and regulations?

Mr. WEISSMAN. Well, on this, the history is overwhelming. Self-regulation will not work. The—although industry is incredibly innovative and sometimes on its own introduces lifesaving innovations, by and large, it also has a history of covering up defects in a wide array of products, failing to adopt new technologies that could save lives or protecting the environment, and responds primarily to new government mandates. When it does so, the retrospective analysis shows the costs are dramatically less than the industry insisted they would be, almost without exception, but the benefits are really enormous. There are endless examples of this, including many in the auto industry.

In addition to this issue that we talk about with rearview cameras, we just think about the many abuses in the auto industry in recent years, including the GM ignition switch disaster where they covered up for at least six years and potentially longer what they knew about a flaw in their car leading to, as they've acknowledged, 174 preventable deaths, potentially many more.

Now, people who were involved in accidents relating to that defect were prosecuted personally for manslaughter or for unsafe driving or sometimes driving under the influence. The problem wasn't the driver; the problem was the manufacturer. The manufacturer was not criminally prosecuted. They got off with a deferred prosecution and a payment of $900 million, a lot to you and me but not to them and, again, evidence both of their recklessness and their readiness to cover up safety problems unless forced by government to do the right thing.

Mrs. DEMINGS. Thank you so very much. Mr. Chairman, thank you, and I yield back.

Mr. PALMER. The chair now recognizes the gentlewoman from North Carolina, Ms. Foxx, for her questions.

Ms. FOXX. Thank you, Mr. Chairman. And I want to thank our witnesses for being here today and shedding light on this very important issue to all of us.

Governor Engler and City Administrator Geffken, I would like to ask you a question. States are responsible for the administration of many Federal programs, including medical insurance, environment projects, housing, and food stamps. In fact, the Chamber of Commerce found that States administer 96.5 percent of all Federal delegated environment programs, yet Federal categorical grants to States fund no more than 28 percent of the amounts needed to run the programs. Can you explain how consent decrees compound the problem of Federal unfunded mandates? Governor Engler and then Administrator?

Mr. ENGLER. Thank you, Madam Chair. I think this is—you put your finger right on one of the real important abuses that exist. There are Federal mandates. Special education was one where there was a promise initially that, as you're familiar, half that was going to be funded by the Federal Government. I don't know that funding has ever exceeded, you know, 20 percent of the total cost. It's—but there are efforts then to use the litigation at the State level—and I'm—I know we're talking a lot about Federal laws and Federal agency rulemaking, but at the State level, it's a different issue. And your question goes to the heart of it.

The litigation is designed to push the State into setting different spending priorities on the basis of which activist group happens to be pursing the litigation. It could be an education, it could be over in the environmental area, it could be a prisoners' rights group, but this is a process that we call the appropriations process at the State level where committees of the House and Senate fight these things out with the Governor's budget.

The consent decree is an effort to come in on top of that, and one of the things that I—was in my testimony I will just stress, you have to look at who these parties are. Sometimes, in the legislature there's a difference between the two parties and we may have a different priority than the Governor but we—we've seen examples,

and I can recall one where the corrections agency couldn't get what they wanted in the legislature, actually encouraged the litigation against the Department. The Department then says, oh, we've been sued; we better settle. They reach an agreement, which is to do exactly what they couldn't do politically in the legislature. Then they show up back at the legislature saying, hey, we've got a court order; we've—you have no choice. And at that point you don't.

In my case, I happened to later on get elected Governor and went back to court to say we need to be freed from these consent decrees. And these were consent decrees—in Michigan's case, I got elected in 1990. One of these started in 1977; the others started in 1984.

So to get to your question, whether it's education or any of these other areas, this is all a fight about spending priorities and who gets to decide, and I always come down on the side of let those who get elected fight these fights out. They're political questions. They're not legal questions unless there's an assertion there's been a deprivation of some federally constitutionally protected right, and in many of these cases, I think that's a very dubious proposition.

Ms. FOXX. Mr. Geffken?

Mr. GEFFKEN. Thank you, Representative Foxx.

In the case of the consent decree dealing with wastewater and stormwater issues, we believe that the EPA has pressured the States to step aside from their primary enforcement role and relinquish that back to EPA. And then the problem that we have with consent decrees is that both the Department of Justice and EPA, they do want comprehensive relief and not have the continued time—they don't want to spend continued time or money on overseeing these massive programs. And so frequently, rather than allowing communities to develop an integrated or innovative program, let's say, in five-year increments, they want 20 or 25, unfortunately, only 12 in the case of the city of Fort Smith.

And so you wind up getting caught up and your hands are tied that in the case of Fort Smith, we see where we now need—where we need to spend our money on improving the goal of the consent decree because we do believe in making sure that there is clean water. However, we are required to replace pipes that are ranked on a specific and agreed-upon scale that if it's a problem of four or five, the pipe needs to be replaced. It may not be causing an issue yet, but it must be replaced due to the consent decree instead of allowing us to focus where we can have the greatest bang for the buck.

The problem we're looking at is that we agree with the Clean Water Act. We want to make sure our residents have clean water and that everything is handled and treated properly, but the cure in some instances is killing the patient.

Ms. FOXX. Thank you, Mr. Chairman. I yield back.

Mr. PALMER. The chair now recognizes the gentlewoman from the Virgin Islands, Ms. Plaskett, for her questions.

Ms. PLASKETT. Thank you very much, Mr. Chairman.

Mr. Geffken, although you are from Arkansas and my first husband is from Arkansas so I have a bias against it, Arkansas has been good to me. One of my sons is a graduate of University of Arkansas Pine Bluff in applied mathematics, so—but one of the things that you said is very intriguing to me and I would love to

find a colleague across the aisle who might be interested in working on this issue is when you talk about the fines in the consent decrees and that they are going specifically to the Federal Government.

While I understand the punitive impetus in creating those fines, I think that for areas like your own and I know in the Virgin Islands that those fines mean that there is less money to actually do the work that needs to be done. And so if there is a way that we can, through legislation, work on some of these areas being able to be fined necessarily but that money somehow be funneled back into working on the issues that the consent decree is for, I would be happy to work with someone on something like that. I think that is really important.

EPA has created fines for the Virgin Islands that are very, very restrictive to us growing our economy, and so that is something that I hear you on and would be willing to support you, despite being from Arkansas.

[Laughter.]

Ms. PLASKETT. But, Mr. Weissman, I wanted to thank you for your testimony as well and wanted to talk with you about the economic importance and the economic rather detriment or contribution that consent decrees have had. That is something that is very, very important to me, and I think that, as lawmakers, in creating these laws, that is something that we require to be done on the front end.

It has been your testimony and studies that we have been looking at in the Office of Management and Budget has found that major Federal regulations have produced annual benefits to the U.S. economy of between $269 billion and $872 billion. Mr. Weissman, does this surprise you that the net impact, the net impact of Federal regulations is positive, meaning there is an overall economic benefit to those regulations?

Mr. WEISSMAN. It's—you're correct, and it's not surprising to me both because I'm aware well of that data, which, as you say, shows, depending on the range, benefits exceed costs of—by 2–1/2 to 1 or maybe as much as 12 to 1 over the decade period that you're referring to, so 12 to 1 is quite substantial.

Ms. PLASKETT. So can I ask, when we talk about—I mean, there are costs, and we have heard testimony today about the costs, which are real. How does that economic benefit actually take place, and where is that benefit being felt? Where does it play itself out in our economy?

Mr. WEISSMAN. Well, there are a lot of areas. The benefits are generally diffused. They're not focused on individual persons or individual corporations. They may be the benefits of averted illness, averted asthma, averted death in the case of the Cameron Gulbransen Act that we were talking about. They may be in consumer savings by the introduction of generic drugs, for example. They may be in the area of averted harm to the economy in the area of many of the Dodd-Frank rules. They may be savings to consumers by preventing rip-offs, and on and on.

It's worth pointing out that the regulatory processes that currently exist requirements what some might say—and this is prior to the Trump Administration—an excessive focus on costs. It is al-

most never the case that an agency proceeds with a rulemaking where the costs, as defined in a corporate-friendly way, exceed the benefits.

There are about two examples that I'm aware of over the last decade, and in those cases, Congress required the agencies to act. It's also—I'll pause there.

Ms. PLASKETT. So, you know, you are talking then about the requirements. I know that Congress itself requirements the cost of prospective regulations be considered before a final rule is ordered, and additionally—excuse me—OMB's annual report to Congress on agency compliance requires that each agency conduct a cost-benefit analysis and select the least-costly, most cost-effective or least-burdensome alternative before promulgating any proposed or final rule that may result in expenditures of more than $100 million in at least one year by State, local, tribal governments or by private sectors.

So the Federal agencies are already required to do extensive economic analysis prior to issuing those regulations?

Mr. WEISSMAN. Yes. It varies by agency, by statute, and how the OIRA rules apply, but the general statement that agencies are required to look hard at costs before proceeding is correct.

Ms. PLASKETT. Thank you. And it appears I have run out of time. I yield back. Thank you.

Mr. PALMER. The gentlewoman yields back.

The chair recognizes the gentleman from Montana, Mr. Gianforte, for his questions.

Mr. GIANFORTE. Yes, Thank you, Mr. Chairman and Ranking Member.

My questions are for Mr. Geffken. Were you aware that the Justice Department's Environment and Natural Resources Division identified the city of Fort Smith as, quote, "the most important case" in all the settlements they negotiated by the division in 2015?

Mr. GEFFKEN. Thank you, Representative Gianforte. I did not know that. That is troubling to a city administrator because the board of directors approved the consent decree begrudgingly. When you have the world's largest law firm coming down and saying that, well, if you don't accept this, I have the complaint ready to be filed immediately. From my experience, I would have called them on that. I did not know that that is what it was.

Mr. GIANFORTE. Yes. And in the fiscal year 2015 Accomplishments Report the Department of Justice wrote, quote, "The city of Fort Smith agreed to spend what it estimates to be more than $480 million," end quote, on upgrades to its sewer system and $700,000 in civil penalties and costs. Do you believe that the EPA and the Department of Justice targeted Fort Smith with the intent to pressure the city into a consent decree?

Mr. GEFFKEN. I would have to answer in the affirmative on that. I mean, we did have the oldest administrative order outstanding. However, we did have—we did spend over $200 million to come into compliance. And we had replied to the EPA on several occasions, but as is wont of happening, you do not get much reply back. We've asked many times who else has a consent decree that is only 12 years? Who else has a consent decree where the bill, the cost

is already over 2 percent of median household income? We have yet to receive any of that information ourselves.

So, to say that Fort Smith was targeted, I mean, I would believe so. The—in many instances it's good to make an example of someone, but unfortunately, the Federal consent decree will cost each and every household in Fort Smith over $15,000.

Mr. GIANFORTE. Yes. And also in your comments you said, quote, that the Justice Department "browbeat and coerced Fort Smith into accepting this consent decree." What are some of the ways that they did that?

Mr. GEFFKEN. Well, as I mentioned before, one of the largest ways that—during the negotiations that if there was a contentious point, the city and its attorney were told that if you don't accept it, the complaint is already written and we'll just go ahead and file it. And this being my second consent decree, I wasn't there, but I have done a lot of my research with the city's attorneys and the staff that were there, and when you have the Department of Justice and the—at the time the former State Attorney General saying you need to take this, you need to accept this, it's very hard for a city that's on its own, you know, 87,000 people to try to say no to the United States Government, or the United States, as they're referred to.

Mr. GIANFORTE. Yes. And you also mentioned—you told the committee that, prior to entering into the consent decree, the EPA had sent you a letter acknowledging and thanking the city for the work it had performed prior to that point.

Mr. GEFFKEN. Yes, sir.

Mr. GIANFORTE. When did the EPA and the Department of Justice's approach to Fort Smith shift from a collaborative relationship to one that was more antagonistic?

Mr. GEFFKEN. I believe that was the 2013 time period is when that shift came. There was also a change in the staff assigned to the Fort Smith case at the Department of Justice. And so it did go from a more collaborative "let's work together." And just as Representative Plaskett may know, that in Arkansas, the majority of funding is raised through sales tax, not through property tax as in Pennsylvania, New Jersey, New York where I'm from. So, the citizens approved a 1 cent sales tax to pay off debt, which is a large commitment by such a small city to raise $200 million.

Mr. GIANFORTE. And just to put a point on it, if you could just summarize very quickly, what are some of the ways that consent decree has harmed the community of Fort Smith, particularly the lower-income families?

Mr. GEFFKEN. Well, you know, we have people—we have residents that worry when their rent for their, you know, husband, wife—and it is literally two children will go from $350 to $450 per month ——

Mr. GIANFORTE. Okay. Thank ——

Mr. GEFFKEN.—and then ——

Mr. GIANFORTE. Thank you, Mr. Geffken.

Mr. GEFFKEN. Thank you.

Mr. GIANFORTE. Yes. I yield back.

Mr. PALMER. The gentleman yields.

The chair now recognizes the gentleman from Missouri, Mr. Clay, for questions.

Mr. CLAY. Thank you, Mr. Chairman.

The underlying issue of this hearing is the value of civic participation. Citizen suits are an avenue for Americans to right wrongs and compel the government to do better. When Americans bring attention to agency noncompliance, they act as an extension of their government, a lever to enforce the laws. Republicans would like to discourage that. If they get their way, they will foreclose a channel that has literally saved lives, not to mention money.

Mr. Weissman, what are some chief benefits from successful citizen suits?

Mr. WEISSMAN. Thank you very much, Mr. Clay. The example I highlighted is one. I highlight in my testimony another 20-year effort on the part of my organization to have a rule issued requiring new truck drivers to be adequately trained. In the environmental area, citizen suits are quite common to enforce, again, congressionally made law and congressionally established deadlines, particularly in the clean air area with many lives saved and asthma attacks averted.

The list is really very, very long, and it's—unfortunately, it's so long because there should be no need for these suits. These are suits, again, just to enforce what Congress has directed the agencies to do.

Mr. CLAY. And thank you for that response. You know, some of the legislation congressional Republicans support would delay the rulemaking process, make agency action more expensive or impractical. The main goal is to do away with consent decrees, yet continuing litigation can often be far costlier than settling. I know a little bit about consent decrees because I represent Ferguson, Missouri. And we entered into a consent decree last year with the Justice Department that made significant changes to the way the criminal justice system was conducted in that community, and it has reaped benefits for that community.

So, Mr. Weissman, can you elaborate on the cost-effectiveness of consent decrees?

Mr. WEISSMAN. Thank you, sir. Well, you know, in regard to the consent decrees involving local and State Governments, I'm sure there are many examples and some cited here where things have gone awry, but the predicate for all of those lawsuits is the failure by a State or local government to comply with federally established rights. That's for sure what was happening in Ferguson, as well as in many police departments around the country. I think there is overwhelming agreement that those consent decrees, not unimportant, have meaningfully improved police performance in cities across the country.

Mr. CLAY. They certainly have. And, Dr. Sanders, thank you for your work in the foster care space at the Casey Foundation that impacts so many lives in such a meaningful way. You have seen firsthand how States have devoted more resources to foster care programs in response to consent decrees, correct?

Mr. SANDERS. That's correct.

Mr. CLAY. And it sounds like in this context foster youth are positively impacted when States in crisis are forced to act via consent decrees? Do you agree?

Mr. SANDERS. I would agree in some cases. In other cases, it doesn't appear that there have actually been improvements for children, their—improvements in their outcomes.

Mr. CLAY. Well, and I would think that that would be debatable because we know of—we all know of some atrocities that occur in the system, so anything that improves that, that protects the lives of those young people has to be beneficial. You know, Congress should not continue down a path that weakens civil participation and citizens' abilities to stand up for their rights. And I would hope that if we get anything out of this hearing, Mr. Chairman, is that citizens still need to participate in our process in an open process.

And with that, I yield back.

Mr. PALMER. I thank the gentleman for that last point.

The chair now recognizes the gentleman from Wisconsin, Mr. Grothman, for his questions.

Mr. GROTHMAN. Well, Dr. Sanders, I will keep you going here. You cite in your testimony that child welfare consent decrees work against the people that are trying to help. Can you give us examples or elaborate on that a little bit?

Mr. SANDERS. Over the last 15 years, there have been numerous developments in brain science, in research around predictive analytics, other efforts that have resulted in improvements in the ability of government agencies to protect children. The consent decrees often lock States into agreements that were made at a point in time and don't allow the kind of flexibility that can be implemented to increase the likelihood that children will be protected.

So, examples would include some of the States like Tennessee that were sued more than 15 years ago and aren't able to implement some of the research changes that have occurred more recently to improve lives of children.

Mr. GROTHMAN. Let's take an example of a kid. We will call him Joshua, you know, a fictional kid maybe, but Joshua, a child who—how would we deal with him without the consent decree and because of the consent decree, how are we dealing with him, hurting him?

Mr. SANDERS. I may take the liberty and suggest that part of the solution would be if there were an ability to modify the consent decrees more regularly based on changes in Federal regulation, changes in State performance, et cetera. That doesn't happen as much as we think it should.

So, in Joshua's case, it's quite possible that Joshua, as a result of the consent decree, would be seen more frequently by a social worker. What might not happen is that Joshua's social worker would be better trained in trauma-informed practice, which is emerging as a way to keep children safe. And so the visits might occur, but the actual improvements in Joshua's performance and by the social worker may not occur.

Mr. GROTHMAN. Can you give me an example of, say, in Joshua's case this is what happens to him under the consent decree and this is what we would be able to do differently?

Mr. SANDERS. So under the consent decree we can assure that the State will send a social worker out to see Joshua. Under a consent decree, that would occur. What would not occur is that that social worker may be trained in new techniques that would result in Joshua actually being safer.

Mr. GROTHMAN. Okay. In New Jersey in 2004 because of a consent decree, the State invested billions of dollars in its child welfare program, but they still haven't been able to exit their consent decree. In March of this year the Federal judge overseeing the case called New Jersey's program a national model. If the program is really so successful according to the Federal judge, why hasn't the State been able to exit from the consent decree?

Mr. SANDERS. I'm not entirely sure. What I speculate based on knowing something about New Jersey is that there are measures that have not yet been achieved that were part of the initial settlement agreement, and there is a continuing need to improve on specific measures that were agreed to at the time and that there is not 100 percent compliance.

Mr. GROTHMAN. Okay. Governor Engler, I think the whole problem here with consent decrees is it kind of gets at our whole form of government, okay? Like it or not, every November and spring elections, people show up and vote for people who they want to have vote on our laws. The idea behind consent decrees is that this system of elections doesn't work very well, and we'd be better off determining our laws when some bureaucrats and judges and lawyers get together and decide what they will be, right? So it is kind of—the whole idea is opposed to kind of our whole form of government. But can you give us some examples of consent decrees that you think were damaging to Michigan in your term as Governor?

Mr. ENGLER. Sure. We had a Federal judge—this started in 1977, but Judge Feikens, the late Judge John Feikens was in charge of the women's prisons in Michigan, and he referred to those as his women and he was very solicitous about what needed to be done in those prisons and he had lots of opinions. And we had a monitor that he had appointed, and basically, he was in charge of the prisons. He was setting policy and instructing us to, you know, follow that.

We had another judge who was dealing with prisoners who were dealing with mental illness, and in that case, when I became Governor, we were being fined I think $25,000 a day was the suggested fine for the State because of the previous administration failing to comply with the consent decree.

In both of those cases, what I found from our corrections experts, the people running the department, is that they thought having to take the temperature of the oatmeal being served or to be monitoring the temperature of the showers or a number of other reporting requirements were imposed had gone far beyond the pale. And they were arguing that you had differences in opinion respecting different philosophies I suppose that—of how we ought to run this system. And we even had at a point a requirement that we could only put one person in a cell, which we had—we thought that was pretty limiting in terms of our prison capacity.

The latest one, which I made the decision as Governor not to enter into consent decrees. I said, look, we'll litigate these. My legal

services actually are free. I've got the Attorney General to do that, so we'll fight these. And so we did not do that, but after I left, my successor entered into a consent decree which now has run, you know, for several years. It's going to be $50 million a year is what they're saying. This one is Dwayne B. v. Granholm against the Human Services, and it was brought by a New York group called Children's Rights, Inc., a perfect example, activist showing up and saying this is how you ought to run it. We'd already paid I think $6 million in attorney's fees for them. They're involved with the monitoring and they're involved with the sort of day-to-day departmental operation. The State has been trying to modify that under Governor Snyder. They had a renegotiation of the consent decree. They end up with 211 goals that were part of the modified settlement agreement. And so they're not running these agencies when you're in that kind of situation.

And your premise of the question is very important again and is something that Congresswoman Foxx mentioned. Who decides? And I think it ought to be the men and women who get elected. And if there's a deprivation of a constitutional right, that's not been a finding in this. This is just a difference, a fight over how you ought to run this system.

And I thought Dr. Sanders' testimony—one of the things he pointed out, sometimes you're mandated to spend a lot of money even on technology because that's what the masters in Washington or the agencies want. That comes maybe at the expense of training the caseworker that's dealing one-on-one with the client.

Mr. GROTHMAN. Thank you. I wish I had more time.

Mr. PALMER. The gentleman's time is expired.

The chair now recognizes the gentleman from Florida, Mr. Ross, for his questions.

Mr. ROSS. Thank you, Mr. Chairman. And I thank the panelists for being here as well.

As a litigator for a little over 25 years, one of the things my client and I would discuss is the cost of defense because we understand, of course, that the economics of being sued, regardless of the principles, weigh just as heavily. And so therefore, you see a similar situation here under the APA under the sue-and-settle procedure, and the way we have addressed it in civil litigation of course has been with regard to presumptions, burdens of proof, recovery of attorney's fees, limitation of attorney's fees, and that has had somewhat of an impact in trying to keep just frivolous cases from being filed in an effort to try to force a settlement, again, irrespective of the principles but basically just on the economics of continuing to defend the litigation.

So my question to the panel is what would be the most impactful way of reforming the process, the APA, in order to reduce these consent decrees? And, Governor, I'll start off with you.

Mr. ENGLER. I had mentioned the Federal Consent Decree Fairness Act. That was a few years ago, but they wanted—there was sort of three goals in that act, and I think those are worthy of discussion in terms of—at least as it relates to State and local government.

Mr. ROSS. Right.

Mr. ENGLER. One, permit the State and local defendants to apply for a modification or a vacation of the consent decree ——

Mr. ROSS. Based on a significant change in circumstances or just ——

Mr. ENGLER. Well, the way they ——

Mr. ROSS.—within the discretion of the ——

Mr. ENGLER. The way they set it up if there was a change in government, for example, as a new Governor coming in, I maybe wasn't in that fight, maybe I've got a different approach. I mean, I literally went down to a Federal judge's office and sat there and we talked through why he was unhappy and what had been done. I said, look, I haven't been here, but here's how we're going to approach this.

Mr. ROSS. Got you.

Mr. ENGLER. Eight, nine years later, we got out of the consent decree. I mean—but—so that was a piece of it. The other element was to just to say that there ought to be on a periodic basis a review of these consent decrees just because, again, Dr. Sanders' ——

Mr. ROSS. Right.

Mr. ENGLER.—situation changes. The other that I think is important is that there ought to be—is there any finding of a constitutional issue here? Because sometimes—I mean, you literally have a political fight being sort of fought out in this, and your observation about the cost of defense, that sort of is a seductive argument.

Mr. ROSS. Politically, from an economic—yes, you—I mean, you are almost forced into entering into a consent decree because you have to justify the expense of defending it.

Mr. ENGLER. Yes, but I would say to the Governors and the Attorneys General—I actually think the problem is a little bit the other way. I think that sometimes somebody is—there might be an alignment of political interests trying to do an end run around the political system that hasn't previously agreed with that point of view.

Mr. ROSS. Got you.

Mr. ENGLER. And that ——

Mr. ROSS. Thank you, Governor.

Mr. ENGLER.—is also a reason for review.

Mr. ROSS. Thank you. Anybody else?

Yes, sir, Mr. Geffken.

Mr. GEFFKEN. Thank you, Mr. Ross.

You know, when it comes to EPA consent decrees and dealing with water, wastewater, when it—the consent decrees are comprehensive in nature, so instead of just focusing on the issue at hand—and this is a 147-page document that's $475 million, and its primary goal was to take care of 22 sanitary system overflow points. And the problem becomes—it becomes much more than that. It becomes looking into fats, oils, and greases. It comes into examining each and every pipe and being very prescriptive and not iterative. And it also—and the biggest way to move forward with this is to allow an integrated planning prospect for consent decrees, so not only having a five-year window and then reexamining where we're going and moving forward but also making sure that we're not shortchanging the other aspects.

You know, the city of Fort Smith spent millions to expand Lake Fort Smith, its primary reservoir. It spent millions creating a new reservoir, Lee Creek. Now, it's spending hundreds of millions of dollars on wastewater, and we still need to build a brand-new 48-inch transmission line to come into the city.

Mr. ROSS. I understand.

Mr. GEFFKEN. As it stands, we have to now raise water rates, and this is probably ——

Mr. ROSS. Right.

Mr. GEFFKEN.—the first that residents are going to be hearing that, but also then we've raised our sewer rates 167 percent in such a very short period of time, so an integrated iterative plan that takes affordability into account but while not taking our eyes off the ultimate goal.

Mr. ROSS. Thank you. One second. Yes, sir, Governor?

Mr. ENGLER. Yes. One thing that Mr. Weissman and I—we see the problem. We may have analyzed it differently, but it goes to what also can be done. We talked about—he testified about the openness of the process at the Federal level. One of the concerns I've got at the Federal level is the size of these fines, and I just totaled up in his testimony, J.P. Morgan, $13 billion; Citigroup, seven. Anyway, the list of just the banks was over $56 billion. That just works out to about two years' funding for the Justice Department. Nobody knows where the $56 billion went, and that would be a good question for the committee ——

Mr. ROSS. Okay.

Mr. ENGLER.—to determine. Where does the money go? And there ought to be a lot of openness because part of the problem with this is that these settlements get made, and the disposition of the funds is handled administratively, and I think the Attorney General is trying to end that practice, but that ought to be—those ought to be appropriated dollars if the injury was to the public. That's two years' funding for the Department.

Mr. ROSS. Thank you. I yield back.

Mr. PALMER. The gentleman yields.

I now recognize myself for questions.

And first of all, Governor, you had asked that "Consent Decrees in Institutional Reform Litigation: Strategies for State Legislatures" be entered into the record, without objection, but for transparency's sake, I must confess that I am a coauthor of that report.

One of the points I want to make here is that we are not arguing that all consent decrees are bad. In fact, consent decrees are a legitimate and useful tool in the legal system. They have proven so in both public and private cases. The point and focus of this hearing is the abuse of consent decrees, and I think we got a little off-track on that, particularly when they are used to circumvent the legislative process, which denies citizens their right to governance through their elected representatives. It is particularly egregious in the direct manner in which they bind State and local governments in administering their programs and allocating their resources. Illinois is a prime example of this. They are currently under 80 consent decrees, some dating back to the 1970s.

And just from your perspective as a former Governor, having served in elected office—and I also for transparency's sake, I have known the Governor for 20 years—you want that transparency and that accountability to the voters, which is denied them when they are under a consent decree and particularly when the consent decree is being administered by an unelected judge, an unelected control group, unelected bureaucrats, and unelected special master. Is that not problematic for representative government?

Mr. ENGLER. That's exactly right, and there simply is no accountability there, at least no accountability back to voters. And we haven't talked about the role of monitors either today, but the Federal judge is appointing somebody to kind of be the master to oversee. And in the case of the ongoing litigation in Michigan, there's somebody that's reporting every six months back to the Federal judge.

Now, the criteria for picking the monitors is sort of in the province of the Federal judge. That's often, you know, I suppose a qualified university professor or there's a little cottage industry of monitors that are out there. But the reality is that when there's 211 sort of factors that are being monitored, there's not much discretion left for the agency head or the legislature to set priorities or adjust priorities as new information becomes available, new technology emerges.

One of the boondoggles that's been out there in the child welfare world has been the whole SACWIS implementation. Dr. Sanders is very familiar with this, but, I mean, States have spent literally tens of millions of dollars trying to meet a Federal mandate there. This is on data collection. And the way this has been done I would advise nobody would ever do a data project that way. But we—I faced that situation, and we were—by the time I was elected, we were several tens of millions of dollars into the project. It would cost many more millions to start over, and it was going to cost many more millions to finish. We simply slogged on to try to get that done and still wasn't adequate, and yet that's the kind of micromanagement you're getting.

Another area where—and a lot of this area—and again, Dr. Sanders' testimony is important, especially when it comes to children and children's welfare, the cross-agency cooperation and collaboration that's necessary today often is precluded by the very Federal laws that are passed here. They don't allow the flexibility to bring the mental health services, the public health services, the education services all together, and in fact each of the programs often has their own administrator when we'd be better off—I've said you have to be very smart sometimes to be trapped in poverty because you've got so many different agencies with so many different programs who want to look out for you, and we ought to be able to literally appoint an individual who could draw all the services together.

Mr. PALMER. Well, in Dr. Sanders' testimony he mentioned a couple of cases, Alabama being one of them, R.C. v. Hornsby, in which we were able to work through a consent decree to a reasonable solution. But there was another consent decree in Alabama involving the State highway department in which we literally spent enough money just on legal fees to repave every mile of interstate highway

in Alabama twice. And for those who don't think we have paved roads, we have got lots of paved roads.

That is the problem is the ability to work your way through these. And Dr. Sanders' testimony particularly I think is relevant in the area of children that as science changes, as techniques change, those aren't taken into account.

Dr. Sanders, I would like to know, have you seen circumstances where full compliance with a consent decree is impossible? And I am thinking of New Jersey, which has been held up as a model, but they are still under a consent decree.

Mr. SANDERS. Thank you for the question. We actually in one of our convenings had a data expert from Emory University take a look at the—some of the agreements and found that it was impossible to achieve all of the measures that were required at the same time. And in part that happened because the negotiations for the consent agreement weren't made with data experts; they were made with attorneys, and they weren't familiar with some of the measures. And so it was—it would not be possible for some States to exit, given the current measures.

Mr. PALMER. Thank you, Dr. Sanders.

Mr. Geffken, who filed the suit against Fort Smith?

Mr. GEFFKEN. I believe that actually came from the State and EPA ——

Mr. PALMER. Okay. So was ——

Mr. GEFFKEN.—against the city in order to make—to make the city of Fort Smith compliant regarding sanitary system overflows.

Mr. PALMER. And you believe they were trying to make an example of Fort Smith?

Mr. GEFFKEN. I do based on the information I've just heard from Representative Gianforte. Yes, that was unknown to me when I went there. I knew we had a large problem, and I knew it was being addressed by spending several hundred million dollars. Again, it—the whole process of a consent decree ties one's hands, and you're not able to apply the latest technology or focus on actually what yields ——

Mr. PALMER. How much ——

Mr. GEFFKEN.—the best benefit.

Mr. PALMER. How much did you say this is costing the residents of Fort Smith, say, an average household? What is it?

Mr. GEFFKEN. Fifteen thousand dollars.

Mr. PALMER. Fifteen thousand dollars, and the median household income is ——

Mr. GEFFKEN. Thirty-three thousand five hundred.

Mr. PALMER. Thirty-three thousand five hundred. This is one of the examples, again, where overregulation and the abuse of consent decrees does great harm to low-income people. I grew up pretty much dirt poor. My dad had an eighth-grade education. It would have been staggering to us to have had the type of increases in sewer payments that you guys have had in Fort Smith or that we have had in Jefferson County in Alabama and Shelby County. We are going through the same thing, and it has had a negative impact on the ability to grow the economy.

And just to give you an idea of how overregulation harms the economy, Gallup put out a report, pointed out that prior to 2008

there were 100,000 more businesses starting up than were closing. By 2014 in the United States now 70,000 more businesses are closing than starting up, and the primary problem is regulation.

One of the problems that we point out in that paper that Governor Engler cited is the inability to track these consent decrees. We went to the Justice Department, we went to the judiciary to try to see if they categorize these in such a way that we could look at Arkansas or look at Michigan or the State of Washington and determine, you know, what consent decrees apply to those States, the State or local government. They don't track it that way.

So, I would ask, Dr. Sanders and Mr. Weissman, should Congress consider legislation requiring Federal agencies, particularly the Justice Department and the judiciary to track and categorize and publish a list of these consent decrees? Dr. Sanders?

Mr. SANDERS. We found with the child welfare consent decrees that there actually wasn't any single place where it was—the information was captured, and so we've started to do that just based on the convenings and discussions with States. If—that presents a number of issues, and it seems that it would be a good direction for Congress to take a look at, at a minimum tracking the consent decrees, as well as the cost and the results.

Mr. PALMER. Mr. Weissman, would you have a problem with the Federal Government tracking these and publishing a list so that they could be easily identified?

Mr. WEISSMAN. Absolutely not. I think that that would be highly desirable. I think, you know, there's some difference between this consent decrees where the Federal Government initiated the case versus where the—you know, a decentralized thing by a citizen group. But in—so the second would be harder to compile but would be desirable in any case.

Mr. PALMER. Well, it really wouldn't because if the Federal Government entered into a consent decree, it doesn't matter who initiated the suit. It is a matter of tracking these so that there is a concise list.

Governor Engler?

Mr. ENGLER. I think the courts also ought to have an obligation here. There ought to be something in the judicial system where each of the—I don't know if it's the circuit court who oversees the district courts in their region, you know, whether the circuits would have it or somehow the court administrator—the Federal judges ought to know how many consent decrees they're actually enforcing in their jurisdictions, and that may be an easier way to get it than trying to go to the agencies and—because who knows? But they're all—there's a limited number of Federal judges and Federal, you know, circuit courts, and maybe that's—that—they should know their caseload, and that's part of it.

Mr. PALMER. I would like to thank our witnesses for taking the time to appear before us today, and I would particularly like to thank the ranking member, Mrs. Demings, for her indulging me going a little bit longer.

If there is no further business, without objection, the subcommittees stand adjourned.

[Whereupon, at 11:40 a.m., the subcommittees were adjourned.]

# APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

**Opening Statement – Chairman Gary Palmer**
Subcommittee on Intergovernmental Affairs
Subcommittee on Interior, Energy, and Environment
***Examining "Sue and Settle" Agreements: Part II***
Tuesday, July 25, 2017

Good morning. This hearing is the second part of a set of hearings to examine the impact of certain federal settlements referred to as "sue and settle."

The "sue and settle" phenomenon refers to a process where an outside group will sue a federal agency, state, or local government for an alleged violation of federal law or constitutional right.

The parties will often choose to settle by entering into a consent decree agreement rather than face a long and costly trial.

These legally-binding consent decree agreements are then approved by a judge and enforceable by contempt, and can only be modified by court order.

Consent decrees can last for decades and end up costing more than if the parties had gone to trial.

Because parties can use consent decrees to set provisions that extend beyond the scope of the original violation of law, they have become an effective tool to circumvent policymaking by elected representatives in order to push a political agenda across governmental institutions.

These actions place an enormous burden on states, local governments, industry stakeholders, and taxpayers, who may be shut out of the negotiations but are left to foot the bill.

Under the threat of enforcement by contempt charge, state budgets are being reorganized. Local governments across the country are spending multiple decades and billions of dollars to comply with impossible mandates through never-ending federal oversight. Penalties for the inevitable violation of decrees redirect funds from these communities to Washington.

Worse, some feel afraid to speak to Congress about what they are experiencing. Multiple state and local leaders cited fear of political retaliation from federal court monitors if they were to appear to testify before the Committee on this issue.

This is unacceptable and a threat to the principles of Federalism. Unfortunately, I have witnessed this firsthand in my home state of Alabama. I watched as a consent decree between Jefferson County and the Environmental Protection Agency ballooned from $1.5 billion dollars in estimated cost to over $3 billion to address the storm issue in Jefferson County.[1]

Sewer rates quadrupled over four years in order to pay for the project[2], and Jefferson County became the nation's largest municipal bankruptcy case in history, until Detroit filed in 2013.[3]

Because of incomplete data and a lack of proper categorization, we are unable to fully evaluate the total amount taxpayers spend as a result of collusive settlement agreements. For example, in my previous experience leading an Alabama think tank, I was unable to obtain a

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[1] http://www.businessinsider.com/the-incredible-story-of-the-jefferson-county-bankruptcy-one-of-the-greatest-financial-ripoffs-of-all-time-2011-10

[2] http://www.businessinsider.com/the-incredible-story-of-the-jefferson-county-bankruptcy-one-of-the-greatest-financial-ripoffs-of-all-time-2011-10

[3] https://www.forbes.com/sites/danalexander/2013/12/05/biggest-bankruptcy-before-detroit-alabama-county-stages-comeback/#3bce8c4cc427

complete list of all federal consent decrees that apply to the State from the Department of Justice because of inadequate recordkeeping.
This lack of transparency limits our constitutional duty to conduct oversight of the management of taxpayer resources.
It is time for the federal government to move away from emphasizing its role as prosecutor or political monitor and return to serving as the American people's partner in setting priorities that best represent their interest.

Recently, Congressman Doug Collins introduced the *Sunshine for Regulations and Regulatory Decrees and Settlements Act of 2017,* to increase transparency and public engagement by ensuring opportunity for public notice and comment on consent decrees and other settlement agreements.

I thank Congressman Collins for his leadership on this issue. I look forward to exploring additional solutions with our panel today.

The Alabama Policy Institute article titled, "Consent Decrees in Institutional Reform Litigation: Strategies for State Legislatures" can be found at https://www.alabamapolicy.org/wp-content/uploads/API-Research-Consent-Decrees.pdf.

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