No. 18-1395

IN THE

Supreme Court of the United States

FRATERNAL ORDER OF POLICE CHICAGO LODGE NO. 7,
Petitioner,

v.

STATE OF ILLINOIS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit

REPLY TO BRIEF IN OPPOSITION FOR RESPONDENT

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I. The Motion to Intervene Was Timely Filed

A. The Timeline of Events Supports Intervention

The Motion to Intervene was filed almost two months before an incomplete draft of the consent decree was published by the respondent and more than three months before a finished draft was submitted to the court. Contrary to the respondent's central and initial point in this case, the existing parties were not on the "brink of finalizing a proposed consent decree" or on the "cusp of releasing a proposed consent decree for public review" at the time the Lodge filed its motion. *Opposition Brief,* at 13, and *Motion to Intervene*, [Doc. No. 51]. The day after the Lodge filed its motion, the existing parties filed their *Fourth Joint Status Report* and stated:

> While the parties have made considerable progress in these negotiations, *many* issues remain unresolved. *State of Illinois v. City of Chicago, Fourth Joint Status Report.* [Doc. No. 53, Para. 11 at 3] (emphasis added).

This definitely shows that many issues remained unsolved at the point the Lodge filed its motion, and seven months passed before the consent decree was approved by the district court. The pertinent timeline is:

6/6/18 Motion to Intervene. [Doc. 51].

7/20/18 Existing parties advised the court that "the parties have one issue they have been unable to resolve . . . ." [Doc. 73-1 at 5-6].

7/27/18 Existing parties released a draft consent decree that was not complete. *Joint Motion to Approve Proposed Consent Decree*, [Doc.107 p. 1].

9/13/18 Respondent's and City's motion to approve Consent Decree filed as proposed. [Doc. 107].

10/24/18 Fairness Hearing held [Doc. 622].

10/25/18 Fairness Hearing held [Doc. 623].

1/31/19 District court's approval of Consent Decree [Doc. 702].

This timeline shows that the Lodge's motion was filed 99 days before the consent decree was filed with the district court and 52 days before an incomplete draft was made public. The respondents cannot credibly argue that they were about to "finalize" a proposed consent decree. It was another 140 days after the September 13, 2019, filing date that the consent decree was approved.

The Fifth Circuit case law analyzes the factual record as to when the would-be intervenor "knew or reasonably should have known of the broad reach of the Consent Decree." *Edwards v. City of Houston*, 78 F. 3d 983, 1000 (5th Cir. 1996). There the court held that the date of the official notice of the decree is important. The court allowed an intervention motion filed by two police officer associations "only 37 and 47 days, respectively, after publication of the notice and the decree. In light of our jurisprudence, these delays are not unreasonable." *Id.* The complaint in *Edwards* was filed on August 19, 1992; the official notice of the decree was published on February 3, 1993. 78 F.3d at 989, 1000. In applying the timeliness test, the court held:

> From the record before us, it appears that these appellants knew or reasonably should have known of the broad reach of the Consent Decree and its adverse effects on the interests of their members no earlier than February 3, 1993, the date of the official notice of the decree. *Edwards*, 78 F. 3d at 1000.

The "broad reach" of the consent decree could not be seen in the complaint filed by respondent because the remedies sought did not refer to specific CBA provisions that would be subject to change. *Petition*, at 20. Thus for the petitioner the critical date is no earlier than September 13, 2018, when a complete draft of the consent decree was filed. Significantly, in *Edwards*, the court did not hold that the time clock ran from the date on which the complaint was filed. This is an additional conflict among the circuit courts' opinions, also not acknowledged by the respondent.

B. The FRCP Rule 24(a) Time Standard is Not Punitive But is Based on Certainty Not Probability

Respondent does not credibly address the petitioner's argument that the Seventh Circuit did not follow the "as soon as it became clear" standard of *United Airlines Inc. v. McDonald*, 432 U.S. 385, 394 (1977). There this Court did not use a probable or possible test. The word "might," as used by Seventh Circuit is not found in *McDonald*. *State of Illinois v. City of Chicago*, App. A-2 at 36a (requiring intervention as soon as a "person knows or has reason to know that its interest *might* be adversely affected . . . ."). Might is defined as an auxiliary verb to express probability or possibility and is the past tense of may. *Webster's New International Dictionary*, 1517, 1557 (Unabridged, 2d ed. 1953). Reliance on the word might is a significant departure from *McDonald*. *Petition,* at 10-11. Respondent does not justify this new test. *Opposition Brief*, at 18.

This "might as in probable" test in effect is a "tool of retribution" for the tardy would-be intervenor. *Adam Joseph Resources v. CNA Metals Limited*, 919 F.3d 856, 865 (5th Cir. 2019). In *CNA Metals*, the would-be

intervenor was a law firm seeking to obtain a contingency fee. Its client settled a case without disclosing it to the law firm. The law firm filed a motion to intervene to collect fees, "when it was absolutely clear that it could not vindicate its interest without intervention." *Id.* at 865. In that case, the settlement had been hidden by the client. Similarly, petitioner attempted without success to obtain the drafts of the consent decree that had been exchanged between the existing parties and to observe the settlement discussions conducted by the district court. Throughout that period of time, the respondent assured petitioner that its interests in the CBA and its collective bargaining rights would be protected—hindsight shows that they were not. When petitioner learned from a confidential source that its rights would be affected, it moved quickly to intervene.

In *McDonald*, the fact that McDonald could have filed her own claims earlier in the five-year litigation did not bar her from seeking post-judgment intervention. The State here argues that the Seventh Circuit reached a different result "dictated by the particular facts of this case." *Opposition Brief* at 18. There is no explanation as to how the facts differ. McDonald like the petitioner here waited until there was a clear basis to file.

In adopting this new test, the Seventh Circuit decision also conflicts with the rationale and sound decisions of other circuits holding that ". . . making knowledge of the pendency of the litigation the critical event would be unsound because it would induce both too much and too little intervention." *Stallworth v. Monsanto Co.*, 558 F.2d 257, 265 (5th Cir. 1977); *Petition,* at 11-14. This reasoning promotes efficient judicial administration and protects non-parties' interests. *Id.* Respondent does not note this important principle

that promotes sound litigation. *Petition* at 12-13; *Opposition Brief*, at 15-6.

C. Factual Statements That Support the Motion to Intervene Were Rejected By the Seventh Circuit

Petitioner reasonably relied upon the representations of respondent and did not file its motion shortly after the complaint was filed. These statements are outlined in the Petition at 5-9 and constitute assurances of no interference by the existing parties. They are to be taken as true and were not. *Lake Investors Dev. Corp. v. Egidi Dev. Group*, 715 F.2d 1256, 1258 (7th Cir. 1983). Respondent urges these statements do not suggest an alignment of interests, but they do show that officers' rights would have been protected. *Opposition Brief*, at 22. To hold otherwise is inconsistent with the rule that facts are to be taken as true. A key statement of the Lodge's President is that he was told by a confidential source that the consent decree would interfere with the CBA. App. E at 81a. The Seventh Circuit erred when it rejected this factual statement holding that the Lodge never identified the specific information that these sources provided, and that Lodge could have previously intuited from the complaint or discussions with the State. *State v. Illinois*, App.A-2 at 39a. The Respondent does not explain why this statement should have been disregarded.

D. There Is No Response To The Claim That The FRCP Rule 24(b) Prejudice Test Was Used.

The Seventh Circuit improperly measured prejudice to the existing parties on the basis of the FRCP Rule 24(b)(3) standard, not the Rule 24(a) standard.

State of Illinois, App. A-1 at 1a, 15a-17a, and *State of Illinois*, App. A-2 at 39a–40a. Under Section 24(b), the test is different. This is a Rule 24(a) case. *Motion to Intervene*, [Doc. 51 at 1]. The governing case law holds that the prejudice factor for timeliness under Rule 24(a) is not to be considered as that which occurs from the commencement of the litigation. *Stallworth*, 558 F.2d 265. Respondent has not responded to this argument on the circuit conflict in determining timeliness on the prejudice factor.

In *Edwards*, the court noted that at no time prior to the filing of the official notice of the consent decree did the would-be intervenor have knowledge of the specific terms of the consent decree. *Edwards*, 78 F.3d 1001; *Stallworth* 558 F.2d at 265. That was true with the petitioner. *Petition* at 20. The confidential statement to the Lodge president about the harm to the CBA started the period for measuring the prejudice. This was not relied upon by either the district court or the Seventh Circuit and therefore represents a significant circuit court conflict.

II. Police Officers' Rights Were Prejudiced by the Denial of Intervention

Contrary to respondent's claim, the Seventh Circuit did not consider the petitioner's loss of appeal rights resulting from the denial of the intervention. *Opposition Brief*, at 26. The court only stated that "the inability to appeal a loss of intervention does not always mandate intervention." *State of Illinois*, App. A-2 at 40a. It noted that when the would-be intervenor can address its concerns in a fairness hearing, the prejudice is minimal. This analysis is contrary to *Edwards*, which held that "this contention . . . ignores the legal rights associated with formal intervention, namely the briefing of issues, presentation of evidence, and

ability to appeal.'" 78 F.3d 1003. The Fifth Circuit noted that the inability to engage in discovery prior to the fairness hearing was also a consideration in finding prejudice to the would-be intervenors. *Id.* at 1003.

Respondent defends the Seventh Circuit's handling of the state law and ordinance rights by claiming that prejudice to the Lodge is "largely speculative," *Opposition Brief* at 25, but the court "found that there was 'some evidence that parts of the current draft consent decree may conflict within the CBA, the IPLRA or other state laws . . . .' For purposes of this opinion, we will assume that certain provisions of the draft consent decree conflict—on their face—with the CBA and Illinois law." *State of Illinois*, App. A-2 at 40a-41a. No language in the carve out clause protects rights beyond the CBA and the IPLRA. Respondent does not prove that there are no real conflicts between the consent decree and state law rights that are provided by statutes:

A. Sworn affidavits are required by the *Uniform Peace Officer's Disciplinary Act*, App. D at 65a, and the IPLRA, App. D at 56a, to ensure that honest and reliable claims against police officers are presented for investigation. Such protections are necessary in a major city police department where citizens constantly raise unfounded complaints against officers.

Contrary to the respondent's claim that the consent decree simply requires best efforts to negotiate around these statutes, the consent decree provides that the City and its agencies will ensure individuals are allowed to submit complaints anonymously. *Opposition Brief*, at 26-7. This attempt at a qualification is not in all of the consent decree paragraphs designed to negate the sworn affidavit statutory requirements. Consent decree Para. 425 provides for telephone or

online complaints. App. C at 48a. Para. 462 of the consent decree definitively states: "A signed complainant affidavit will not be required to conduct a preliminary investigation." App. C at 49a. "Best efforts" is not in this requirement, it only appears in Para. 431, which states: "The City and CPD will undertake best efforts to ensure that the absence of a signed complainant affidavit alone will not preclude administrative investigation." *Id.*

Best efforts is defined as requiring a party to take in good faith all reasonable steps to achieve the stated objective. [Doc 703-1, Para. 729]. This means that the City is required to attempt to eliminate and ignore statutory requirements that complaints need to be signed and sworn. Such action by the City would violate the rules that prohibit consent decrees from overruling state law. *People Who Care v. Rockford Bd. of Educ. School Dist. No. 205*, 961 F. 2d 1335, 1337 (7th Cir. 1992); *City of Warren v. Detroit*, 495 F. 3d 282, 287 (6th Cir. 2007). The Sixth Circuit, following *People Who Care,* held that consent judgments lack the power to supersede contractual obligations and state law rights of third parties without their agreement. Simply put, parties to a consent decree may not disregard valid state laws. *International Association of Firefighters Local 93 v. City of Cleveland*, 478 U.S. 501, 522 and 529 (1986).

This is especially true because the Seventh Circuit has held in *People Who Care* that "before altering the contractual or (state-law entitlements of third parties), the court must find the change necessary to an appropriate remedy for a legal wrong." 961 F.2d at 1339. Respondent has not and cannot claim any legal wrong to support the best efforts approach given the very broad non-admission clauses it entered. *Consent*

Decree Paras. 701 and 707, App. C at 50a and 51a. Entry into the consent decree was not an admission that the CPD and its employees engaged in any unconstitutional activity. *Id.* Therefore, the respondent's attempts to justify changes in state law requirement on best efforts should be rejected.

B. A Chicago ordinance prohibits the use of anonymous complaints, App. D at 66a, Para. D, but consent decree paragraphs 425 and 429 provide for the use of such anonymous complaints. App. C at 48a and 49a. The very nature of an anonymous complaint means that the complainant has not signed a sworn affidavit or otherwise been identified. *Id.* The legal bar on the use of anonymous complaints is obviously connected to the state law requiring the use of sworn affidavits.

Respondent argues that the consent decree at Para. 425 allows such anonymous complaints to be submitted but that ". . . it does not speak to their use and does not require the initiation of disciplinary investigations." *Opposition Brief*, at 28. This position defies logic because, of course, the CPD will use anonymous complaints in the investigation of an officer. Para. 429. App. C at 49a.

C. A City ordinance requires that prior to an officer interrogation, the officer shall be informed in writing of the nature of the complaint and the names of all complainants. App. D at 66a Para. E. Running counter to this requirement is Para. 475 of the consent decree providing that the "CPD will undertake best efforts to ensure that the identities of complainants are not revealed to the CPD member [officer] prior to the CPD member's investigation." App. C at 50a. Requiring the City to use best efforts to invalidate or not to follow the ordinance is unlawful. *People Who Care*, 961 F. 2d at 1337, 1339.

III. All Four Timeliness Factors Were Not Considered By the Seventh Circuit

The respondent argues that the Seventh Circuit found that the unusual circumstances factor of the timeliness standard was not "squarely considered" before the district court, but that argument was presented in a reply brief. *Petition* at 29. Respondent is incorrect on this point and offers no evidence to show the unusual circumstances claim was not presented to the district court. The reply brief rebuts this. Respondent further argues that the Seventh Circuit correctly held the district court did not abuse its discretion in failing to consider unusual circumstances but inexplicably does not explain why the Seventh Circuit did not consider all four timeliness factors. *Opposition Brief*, at 28.

The only defense by the respondent is that the district court "thoroughly assessed the 'facts underlying [this] argument' in its analysis of the first factor. . . . [timeliness]" *Id.* The district court only noted the petitioner's president's declaration that the respondent stated it would not get involved in police disciplinary matters but did not consider any of the other claims outlined in the Petition at 5-9. The words "unusual circumstances" do not appear in this court opinion, and this was an error.

The misrepresentations are unusual circumstances warranting intervention. Limiting access to information is an unusual circumstance. *Stallworth*, 558 F.2d at 267; *CNA Metals*, 919 F.3d at 866. The respondent cannot persuasively complain that the motion to intervene should have been filed earlier because the existing parties foreclosed access to important information. The law firm in *CNA Metals* was "purposely kept in the dark," and in the instant

case, petitioner was locked out of observing the settlement discussions and was not given copies of the draft consent decree proposals.

IV. Collaborative Discussions Are Important

Petitioner could not observe the settlement conferences and was not given copies of the draft proposals for the consent decree, all the while it was discussing with the respondent ways to improve operations in the police department. This collaborate effort was not apparent when the complaint was filed in this case, but the petitioner's officers clearly learned the value of having a meaningful opportunity for participation and dialogue and for police officers at the street level to assist in developing operational improvements for the CPD. Respondent kept that from happening. Contrary to respondent's argument, *Opposition*, at 21, petitioner submitted a carve out proposal at the start of discussions with respondent as a prophylactic failsafe to protect bargaining rights and prior to the assurances of noninterference, which unfortunately were untrue. Allowing intervention will enable the CPD to have fruitful discussions on these issues.

CONCLUSION

For these reasons, the Petition should be granted.

Respectfully submitted,

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