No. 21-___

IN THE
Supreme Court of the United States

JAYSON BADILLO,

Petitioner,

v.

STATE OF RHODE ISLAND DEPARTMENT OF CORRECTIONS, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Petitioner was entitled as a matter of right to intervene in a Title VII enforcement action brought by the United States against the State of Rhode Island and the Rhode Island Department of Corrections alleging disparate impact discrimination with respect to the hiring of minority applicants for correctional officer positions where Petitioner was one of those applicants and he wanted to object to the Settlement Agreement into which the parties had entered?

PARTIES TO THE PROCEEDING

Petitioner is Jayson Badillo.

Respondents are the State of Rhode Island, the Rhode Island Department of Corrections ("the Defendants") and the United States of America (collectively, "the Parties").

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INTRODUCTION

Petitioner Jayson Badillo was an unknowing victim of disparate impact discrimination by Defendants but may have no meaningful remedy. This Court has previously held that an aggrieved person like Badillo cannot file an independent federal action while a Title VII enforcement action like this is pending. *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 291 (2002) ("*Waffle House*"), citing 42 U.S.C. §2000e-5(f)(1) ("the Statute"). The Parties assert that Badillo's individual claims are now barred by the statute of limitations. This petition is here because the lower courts have held Badillo also cannot intervene in this lawsuit. Badillo sought to intervene to object to the Settlement Agreement because the Parties proposed to pay him $1,992.30, but his "make whole" damages exceed $800,000. Instead, Badillo is supposedly bound by the Parties' court-approved Settlement Agreement which provided Badillo a relatively worthless remedy.

Badillo is entitled to intervene as a party plaintiff as a matter of right under F.R.Civ.P. 24(a)(1) ("the Rule") because the Statute mandates that an "aggrieved person" has an "unconditional" right to intervene in Title VII actions brought by the Attorney General against a governmental agency. The First Circuit and the district court erred as a matter of law when they failed to consider whether Badillo had an unconditional right to intervene under the Rule.

Badillo can also intervene as a matter of right under Rule 24(a)(2) because he is one of the persons for whose benefit the United States filed suit but it is not adequately representing his interest, and the Parties' inadequate Settlement Agreement impairs his interest.

Badillo is prejudiced because he cannot file an independent federal action but he can only intervene in this enforcement action; the First Circuit has previously held he must intervene in order to appeal the approval of the Settlement Agreement; the district court refused to consider Badillo's 23-page objection to the Parties' Joint Motion for Final Approval because it had denied his motion to intervene; and the Parties have argued Badillo's individual claim is time-barred. F.R.Civ.P. 24(a)(2). Finally, the Parties have no genuine prejudice. The lower courts erred by failing to consider all the relevant factors. The lower courts also abused their discretion when they failed to identify any specific, actual prejudice before denying Badillo's motion as untimely.

Badillo's motion was timely in that he filed it before objections to the final approval of the settlement were due and he has an unconditional right to intervene.

Badillo's intervention matters to the public because this situation is capable of repetition every time the United States files a Title VII action on behalf of aggrieved parties. Further, the Parties have failed to show that the Settlement Agreement is fair, reasonable, and adequate to all the aggrieved persons and Badillo wants to appeal his objection to it.

In 2009, the United States initiated an investigation of hiring practices for correctional officers (CO) by the Rhode Island Department of Corrections. *U.S. v. Dept. of Corrections*, 81 F.Supp.3d 182, 184-85 (D.R.I. 2015). In 2014, the United States filed suit alleging that over one hundred additional Hispanic and African-American applicants for CO positions would have been hired but for disparate impact discrimination in the hiring process.

Settlement negotiations were unsuccessful and the litigation proceeded. In 2016, Donald Trump was elected president and the Parties promptly reached a Settlement Agreement.

If Badillo's lost earnings are representative, the collective "make whole" damages of the applicants who should have been hired may be $80 million ($800,000 x 100), nearly 200 times the Settlement Agreement amount of $450,000. Moreover, although the United States' experts opined that more than 100 additional people of color should have been hired as correctional officers, the Settlement Agreement, as written, does not actually require the hiring of any additional minority officers.

The parties failed to justify these provisions of the Settlement Agreement at the fairness hearings pursuant to the standard applicable factors. *E.E.O.C. v McDonnell Douglas Corp.*, 894 F.Supp. 1329, 1333 (E.D.Mo. 1995) (holding that the settlement of a Title VII enforcement action is subject to the same standard of fairness, adequacy, and reasonableness that applies to settlements of class actions). Rather, the district court assumed that the United States was representing the applicants adequately and presumed that a settlement it negotiated would be fair. The First Circuit presumed that Badillo's objection to the settlement was meritless.

OPINIONS BELOW

The District Court's text order denying Petitioner's Motion to Intervene is not published. (Pet.App. B). The First Circuit's Judgment is also not published. (Pet.App. A).

JURISDICTION

The First Circuit entered judgment on February 22, 2021. This petition was timely filed, consistent with the Supreme Court's March 19, 2020 Order, within 150 days of that judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND PROCEDURAL PROVISIONS INVOLVED

The relevant provision of 28 U.S.C. §2000e-5(f)(1) states:

> The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. (emphasis added).

Rule 24(a) states:

> On timely motion, the court must permit anyone to intervene who:
>
> (1) is given an unconditional right to intervene by a federal statute; or
>
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest. (emphasis added).

STATEMENT

Badillo is Hispanic. (App. 75, ¶ 2).[1] He is now 35 years old and has an associates' decree in criminal justice. (*Id.* ¶ 3). From 2007 to 2011, Badillo worked as a correctional officer for the State of South Carolina. (*Id.* ¶ 4). He completed correctional officer training with an overall score of 92.72 and an overall grade of "A." Badillo was promoted to corporal in 2009 and to sergeant in 2010. In October 2010, he began taking the courses to become a supervisor. He also received other honors. (App. 132, ¶ 4).

In 2011, Badillo moved back to Rhode Island because his ex-wife returned there with their child. (App. 75, ¶ 5). Badillo took the Department of Corrections ("RIDOC") examination to be a correctional officer ("CO") in 2011 but was not hired that year or in 2012. *(Id.,* ¶ 6). Badillo did not know and had no reason to know that he had been a victim of disparate impact discrimination. (*Id.*, ¶ 10).

In 2014, the United States filed suit against Defendants alleging that they violated Title VII through hiring procedures for CO positions which had a disparate impact on African-American and Hispanic applicants going back to 2000. (App. 1-11). The Complaint requests that the court order "make whole" relief for the applicants. (*Id.*). The Department of Justice issued a press release stating that it "is seeking a court order requiring that the defendants…provide make-whole relief including, where appropriate, offers of hire, back pay and retroactive seniority, to African-Americans and

[1] Badillo will cite to the Appendix he filed in the First Circuit.

Hispanics who have been or will be harmed…"[2] (App. 75-76, ¶11). The Parties held unsuccessful settlement talks before and after the filing of the complaint but then litigated the case vigorously, by reported accounts. See *U.S. v. Rhode Island Dept. of Corrections*, 81 F.Supp.3d 182 (D.R.I. 2015); *U.S. v. State of Rhode Island*, C.A. No. 14-78, 2016 WL 4792265 (D.R.I. Sept. 12, 2016).

In November 2016, Donald Trump was elected president and a new administration took over the Department of Justice ("DOJ"). That administration had a demonstrable lack of interest in pursuing civil rights litigation such as this case.[3] In fact, based on information on the DOJ's website,[4] it appears that the Trump administration filed and litigated no employment discrimination cases based on race and/or national origin, between January 2017 and May 2019, when Badillo moved to intervene. On April 20, 2017, the district court held another settlement conference which resulted in a proposed Settlement Agreement. (App. 20-67).

The Settlement Agreement asserts that absent the disparate impact, an estimated 107 additional African-American and Hispanic applicants would have been hired (the "Claimants"). (*Id.* pp. 25-26). It states that Defendants will hire up to 37 Claimants, so-called "priority hires." (*Id.* p. 54, ¶90). However, the Agreement does not require any minimum number of priority hires if the Defendants "exhaust"

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[2] https://www.justice.gov/opa/pr/justice-department-files-lawsuit-against-state-rhode-island-and-ri-department-corrections. (last visited April 30, 2021).

[3] See, *infra*, pp. 27 to 32.

[4] www.justice.gov/crt/employment-litigation-section-cases. (last visited April 30, 2021).

the Priority Hire Claimant List. (*Id.*, p. 56, ¶ 93). The Agreement also provides that, with the United States' assent, Defendants may meet the priority hires requirement entirely by providing retroactive seniority to existing minority COs. (*Id.* pp. 55, 59, ¶¶91(b), 101).[5] The Settlement Agreement also provides for Monetary Relief to the Claimants in the collective, maximum amount of $450,000. (*Id.* p. 40, ¶41). The Settlement Agreement does not set forth the basis of this amount except it is "some of the lost wages" that would have accrued to the Claimants but for the discrimination. (*Id.* p. 27). The Settlement Agreement requires the Claimants to execute releases of all potential discrimination claims under federal and state law, including all Title VII claims, in order to receive any payment and before they learn whether they will be offered CO positions. (*Id.* p. 49; App. 68-69).

Badillo received the notice of the proposed settlement agreement on December 6, 2017. (App. 75-76, ¶ 10). The Notice stated that objections to it must be filed by December 19, 2017.[6] This notice was the first time Badillo learned that he may have been a victim of discrimination when he applied for the CO positions and that the United States had filed this lawsuit. (*Id.* ¶ 11-12).

By email on December 16, 2017, Badillo's counsel asked the Parties' counsel how the Monetary Relief was calculated and how it would be distributed

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[5] The Parties claim that they have agreed to limit such "retroactive seniority" priority hires to eight, but that limitation is not in the Settlement Agreement.

[6] By email to the Parties' counsel on December 15, 2017, Mr. Badillo's counsel requested an extension of the December 19th deadline but this request was not granted. (App. 71-72).

among the claimants. The United States' counsel declined to "disclose confidential settlement communications with regard to how monetary relief was determined." (App. 73-74). With respect to distribution of the relief, counsel referred to Section 6 of the Settlement Agreement. (*Id.*).[7]

On December 19, 2017, Badillo filed a 12-page objection to the Proposed Settlement, based partially on his own economic damages, and supported by his affidavit. (ECF # 84-2[8]). On January 26, 2018, the Parties filed a reply to Badillo's objection in which they asserted that, with respect to him filing an individual claim, "[t]hat window of opportunity has passed." (App. 95). In other words, the Parties argued that Badillo's individual claim was barred by the statute of limitations.

By email on March 1, 2018, Badillo asked the Parties for copies of their expert disclosures which presumably would have indicated the amounts of "make whole" damages the Parties were disputing. The Parties asserted their expert disclosures were subject to a confidentiality order and declined to provide them. (App. 99).[9]

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[7] Paragraph 51, within Section 6, states: "The United States, in consultation with the State, shall determine each eligible Claimant's monetary award from the Settlement Fund, such that awards are distributed among all eligible Claimants who sought monetary relief in a manner that is reasonable and equitable, considering when each Claimant was disqualified by the initial or revised written exam, or the video exam."

[8] Citations to "ECF" refer to the district court docket.

[9] The Protective Order only covers personally identifiable information (App. 12-19) so the Parties should have been able to provide the disclosures with any such information redacted. In any event, it is unclear, at best, why the expert disclosures in a dispute of such public importance should be confidential.

On May 11, 2018, the Court overruled Badillo's Objection and preliminarily approved the Settlement Agreement. (ECF # 99). Badillo appealed but the United States moved to dismiss his appeal because he had not intervened as a party. Badillo objected and argued, *inter alia*, that the First Circuit permit him to intervene *nunc pro tunc*. Nonetheless, the First Circuit granted that motion. *United States v. R.I. Department of Corrections*, No. 18-1462, 2018 WL 6079524 at *3 (1st Cir. Nov. 7, 2018).

Badillo submitted an "Interest-In-Relief" form requesting Monetary Relief. Based on publicly-available information on correctional officers' salaries and Badillo's tax returns, his forensic accountant estimates Badillo's lost back pay through December 2018 at $166,570 and his lost front pay at $647,070, for total lost pay over his working career of $813,640. (App. 120-29).

On April 5, 2019, Badillo received a "Letter to Claimants" stating that the United States proposed that he receive Monetary Relief of $2,047.98. (App. 101).[10] This was Badillo's first notice of the specific relief that the Parties proposed for him. The Letter provided no explanation of how the Monetary Relief was calculated.

On May 6, 2019, Badillo filed an objection to his proposed relief. (App. 107-19). The objection included his expert's Preliminary Opinion. On May 6th, Badillo also moved to intervene as a matter of right. (App. 130-31). The Parties objected.

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[10] The United States subsequently reduced that amount to $1,992.30, because the district court permitted additional persons to participate in the settlement.

On June 14, 2019, the Parties filed a Joint Motion for Final Approval of the Amended Proposed Individual Relief Award Lists to which Badillo filed a 23-page objection supported by the Preliminary Opinion. (App. 137-59).

On June 21, 2019, without holding a hearing on Badillo's motion to intervene, the District Court issued this Text Order:

> TEXT ORDER denying [117] Motion to Intervene: Jayson Badillo's Motion to Intervene, ECF No. 117, is DENIED as untimely. He had "knowledge of a measurable risk to [his] rights" when he received notice of the proposed settlement agreement on December 6, 2017, a full seventeen months before he moved to intervene. R & G Mortg. Corp. v. Fed. Home Loan Mortg. Corp., 584 F.3d 1, 7-13 (1st Cir. 2009) (affirming denial of intervention, under both Rules 24(a) and 24(b) of the Federal Rules of Civil Procedure, where movant waited just two and a half months after knowing its rights were imperiled). Mr. Badillo's arguments will be considered objections at the upcoming fairness hearing. So Ordered by Chief Judge William E. Smith on 6/21/2019. (Jackson, Ryan)

(App. B to this Petition).

On June 24, 2019, the District Court issued another text order stating it would not consider Badillo's objection to the Joint Motion for Final Approval on the grounds it had denied his motion to

intervene. (App. 161). On June 27, 2019, the District Court issued a text order overruling his oral objections at the fairness hearing. (App. 162).

On July 19, 2019, Badillo filed a notice of appeal from the denial of his motion to intervene as a matter of right. Respondents jointly moved for summary affirmance that Badillo's motion to intervene was untimely ("Joint Motion") and Badillo objected.

Seventeen months later, on February 22, 2021, the First Circuit granted the motion for summary affirmance. *United States v. State of Rhode Island Dept. of Corrections, et al.*, No. 19-1739, Judgment (1st Cir. Feb. 22, 2021). (App. A to this Petition). It said that a motion to intervene must be timely and that the issue of timeliness was "fact-sensitive and requires consideration of the totality of the circumstances." *Id.* at 2. It commented that "the extent of the progress in the litigation typically weighs against intervention where, as here, the motion is filed after the 'litigation is nearly wrapped up[.]'" *Id.* The First Circuit rejected Badillo's argument that the district court erred by not making an explicit finding of prejudice. *Id.* at 3. It inferred that the district court "could have found that delay alone was sufficient to support a finding that the motion was untimely." *Id.*

The First Circuit presumed that neither the Title VII action nor the Settlement Agreement extinguished Badillo's cause of action. *Id.* The circuit court assumed without considering them that Badillo's objections to the settlement were meritless. *Id.* Finally, it said any prejudice to Badillo was outweighed by the prejudice to others if the settlement was delayed. *Id.*

The First Circuit did not address Badillo's argument that he has an unconditional right to intervene pursuant to 28 U.S.C. § 2000e-5 and Rule 24(a)(1). The First Circuit did not address Badillo's argument that federal law bars Badillo from filing his own federal claims while this lawsuit is pending. The First Circuit did not address the Parties' position that Badillo's individual claims are barred by the statute of limitations. The First Circuit did not specify what prejudice there might be to unidentified other persons.

This petition followed.

REASONS FOR GRANTING THE WRIT

Pursuant to the Statute and the Rule, Petitioner has an unconditional right to intervene in this action to object to the settlement and to appeal. The First Circuit's Judgment contradicts the express purpose of the Statute and of the Rule, as well as virtually every other analogous circuit court decision and the views of civil procedure treatises. Further, the First Circuit's Judgment is simply wrong even under Rule 24(a)(2). The sole reason for Badillo's intervention is to object to the Settlement Agreement and to preserve his right of appeal. Other circuits have expressly held interested persons can intervene to object to and appeal settlements or consent orders. Badillo filed his motion before objections to the Settlement Agreement were due. The Parties assert Badillo's individual claims are barred by the statute of limitations. The First Circuit's Judgment creates a legal Catch-22 in which Badillo may have no meaningful remedy. Moreover, this is a situation which can repeat itself anytime the United States files a Title VII enforcement action on behalf of aggrieved persons.

I. THE FIRST CIRCUIT'S JUDGMENT IS CONTRARY TO OTHER APPLICABLE LAW AND CREATES SPLITS WITH OTHER CIRCUITS

Every other circuit court which has addressed the issue has said that a person aggrieved by a discriminatory action of a governmental employer has an unconditional right to intervene in an enforcement action brought by the EEOC or the Department of Justice against that employer. *See, EEOC v. STME, LLC*, 938 F.3d 1305, 1322 (11th Cir. 2019); *EEOC v. PJ Utah, LLC*, 822 F.3d 536, 540 (10th Cir. 2016); *EEOC v. Woodmen of the World Life Ins. Soc'y*, 479 F.3d 561, 568-69 (8th Cir. 2007); *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d. 448, 456 (6th Cir. 1999); *Adams v. Proctor & Gamble Mfg. Co.*, 697 F.2d 582, 583 (4th Cir. 1983); *EEOC v. Occidental Life Ins. Co. of California*, 535 F.2d 533, 542 (9th Cir. 1976).

Civil procedure treatises agree with the other circuits. 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure*, § 1906 (3d Ed. 2015); James Wm. Moore, *Moore's Federal Practice, Third Edition*, Vol. 6, § 24.02[4][c], p. 24-18 (Lexis-Nexis 2013).

This view is consistent with the statutory scheme which bars such persons from filing an independent federal suit against the employer while the Government's enforcement action is pending. 42 U.S.C. § 2000e-5(f)(1).

Even if Petitioner does not have an unconditional right to intervene under Rule 24(a)(1), he can still intervene as a matter of right under Rule 24(a)(2) because no party is representing his interest. Other circuits hold in analogous litigation that a person may intervene in an action to object to and

appeal a class action settlement or a consent judgment of which he is an ostensible beneficiary.

A. TITLE VII AND THE RULES ENABLING ACT MANDATE THAT BADILLO HAS AN UNCONDITIONAL RIGHT TO INTERVENE UNDER RULE 24(a)(1)

Badillo may intervene as a matter of right where he has an unconditional right to intervene under a federal statute. F.R.Civ.P. 24(a)(1); *EEOC v. STME, LLC*, 938 F.3d at 1322; *EEOC v. PJ Utah, LLC*, 822 at 540; *EEOC v. Woodmen of the World Life Ins. Soc'y*, 479 F.3d at 568-69; *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d. at 456; *Adams v. Proctor & Gamble Mfg. Co.*, 697 F.2d at 583; *EEOC v. Occidental Life Ins. Co. of California*, 535 F.2d at 542.

Title VII gives Badillo the right to intervene: "The person or persons aggrieved shall have the right to intervene in a civil action brought by the…Attorney General in a case involving a government, government agency, or political subdivision." (emphasis added). 42 U.S.C. §2000e-5(f)(1); *Waffle House*, 534 U.S. at 291.

This right to intervene is "unconditional." *E.E.O.C. v. STME*, 938 F.3d at 1322 ("The language of § 2000-5(f)(1) unambiguously gives employees an unconditional right to intervene in EEOC enforcement actions."); *E.E.O.C. v PJ Utah, LLC*, 822 F.3d at 540 ("This language unambiguously gives employees an unconditional right to intervene in EEOC enforcement actions…Once it is established that a party enjoys an unconditional statutory right to intervene, the language of Rule 24(a)(1) does not allow the district court any discretion to deny intervention…"); *E.E.O.C. v Woodmen of World Life*

Ins. Soc., 479 F.3d at 569 ("Title VII explicitly preserves the employee's unconditional right to vindicate her own interests by intervening in the EEOC's enforcement action. See § 2000e-5(f); Fed.R.Civ.P. 24(a)(1) (allowing an intervention as a matter of right where a federal statute confers an unconditional right to intervene.)"); *E.E.O.C. v. Frank's Nursery & Crafts, Inc.*, 177 F.3d at 456 ("In such cases, the only right Title VII reserved to an aggrieved individual is the right to intervene in the EEOC's action. See 42 U.S.C. § 2000e-5(f)(1) (1998).").

Unconditional intervention is necessary when the federal government brings a Title VII suit on behalf of an individual because he is then barred from filing a separate federal cause of action and his only recourse is to intervene in the government's suit. 42 U.S.C. §2000e-5(f)(1); *Waffle House*, 534 U.S. at 291 ("If…the EEOC files suit on its own, the employee has no independent cause of action, although the employee may intervene in the EEOC's suit."); *E.E.O.C. v. W.H. Braum, Inc.*, 347 F.3d 1192, 2101 (10th Cir. 2003); *E.E.O.C. v. Frank's Nursery & Crafts, Inc.*, 177 F.3d at 456. There are two important justifications that apply: "to foster economy of judicial administration, and to protect non-parties from having their interests adversely affected by litigation conducted without their participation." *E.E.O.C. v. Stone Pony Pizza, Inc.*, 172 F.Supp.3d 941, 950 (N.D.Miss. 2016), quoting *Stallworth v. Monsanto Co.*, 558 F.2d 257, 265 (5th Cir. 1977).

The First Circuit itself recently reversed a district court denial of a motion to intervene in a public financing case that was based on an "overly technical" reading of Rule 24 and it commented that "Rule 24(a) requires the district court to allow

intervention where the movant is given an unconditional right to intervene by federal statute." (emphasis added). *Peaje Investments LLC v. Garcia-Padilla*, 845 F.3d 505, 516 (1st Cir. 2017). This is just such a case.

A leading treatise agrees the Statute mandates intervention: "The legislation must be read to confer an unconditional right to intervene in (1) all civil actions by the EEOC and (2) civil rights actions by the Attorney General that involve governmental entities." James Wm. Moore, *Moore's Federal Practice, Third Edition*, Vol. 6, §24.02[4][c], p. 24-18 (Lexis-Nexis 2013); see also, 7c Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure*, § 1906 (3rd Ed 2015), citing *E.E.O.C. v. STME, LLC,* 938 F.3d 1305 (11th Cir. 2019).

The Rule cannot impose a timeliness condition on the unconditional right to intervene provided by the Statute. Under the Rules Enabling Act, 28 U.S.C. § 2072, the Statute trumps the Rule because the Statute post-dates the Rule. See, *U.S. v. Wilson*, 306 F.3d 231, 236 (5th Cir. 2002) ("[W]e have recognized that where a conflict exists between a Rule and a statute, the most recent of the two prevails."); see also *Halasa v. ITT Educational Services, Inc.*, 690 F.3d 844, 849 (7th Cir. 2012) (recognizing that the Rules Enabling Act "trumps 'only statutes passed before the effective date of the question.'"); *Local Union No. 38 Sheet Metal Workers Intern. Ass'n, AFL-CIO v. Custom Air Systems, Inc.* 333 F.3d 345, 348 (2nd Cir. 2003) (same). The Rule was promulgated in 1938 and amended in 1966. The Statute was amended in 1972 to provide for intervention by aggrieved persons when the United States files an action against

governmental entities. Pub.L. 92-261, § 4(a).[11] Thus, the subsequent Statute provides Badillo a genuinely unconditional right to intervene.

Moore's agrees that the requirement of timeliness does not apply to a motion under Rule 24(a)(1): "In the absence of a statutory authority granting a right to intervene (*see §24.02*), a movant must make a timely motion (*see §24.21*), and satisfy [the other criteria]." *Moore's*, §24.03[1][A], p.24.21.

The First Circuit and the district court failed to address Badillo's unconditional right to intervene under the Statute when they rejected his intervention. Accordingly, they erred as a matter of law. *Kane County, Utah v. United States*, 928 F.3d 877, 889 (10th Cir. 2019) ("*Kane County*"). Instead, based on the Rule, they held his motion was not timely.

The First Circuit assumed that the Settlement Agreement did not extinguish Badillo's individual cause of action. However, under the Statute and the Rule, it is irrelevant whether the Settlement Agreement extinguishes Petitioner's right to assert an individual claim. See, *General Tel. Co. of the Northwest, Inc. v. E.E.O.C.*, 446 U.S. 318, 326 (1980) ("The EEOC's civil suit was intended to supplement, not replace, the private action…The aggrieved person may also intervene in the EEOC's enforcement action."); *E.E.O.C. v. PJ Utah, LLC.*, 822 F.3d at 540. In *PJ Utah*, the EEOC brought a Title VII discrimination action against an employer, Papa

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[11] "The person or persons aggrieved shall have the right to intervene in a civil suit brought by the Commission or Attorney General in a case involving a government, governmental agency, or political subdivision."

John's. An employee sought to intervene pursuant to the Statute and the Rule. Papa John's objected because the individual employee's claim was subject to arbitration. The Tenth Circuit said: "Once it is established that a party enjoys an unconditional statutory right to intervene, the language of Rule 24(a)(1) does not allow the district court any discretion to deny intervention even if the party would ultimately need to go to arbitration." 822 F.3d at 540, citing *Brotherhood of R.R. Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 531 (1947) (holding that railroad employees' statutory right to intervene pursuant to § 17(1) of the Interstate Commerce Act and Rule 24(a)(1) was "absolute and unconditional").

In any event, the Parties assert that Badillo's individual claim is barred by the statute of limitations. Therefore, the First Circuit's rationale that the Settlement Agreement does not extinguish Badillo's individual right of action may be incorrect.

B. BADILLO'S MOTION WAS TIMELY; THE FIRST CIRCUIT ERRED BY INFERRING PREJUDICE; ITS ERROR CREATES ANOTHER SPLIT AMONG THE CIRCUITS

Even if Badillo's motion must be timely, it was. Courts liberally grant motions to intervene and resolve any doubts in favor of the proposed intervenor. *Moore's*, §24.03, p. 24-22, and cases cited therein. To determine whether a motion is timely, all courts consider some variation of three factors: (1) the stage of the proceedings, (2) the prejudice to parties, and (3) the reason for the movant's delay in moving to intervene. *See, e.g., Smith v. Los Angeles Unified School District*, 830 F.3d 843, 854 (9th Cir. 2016); *Scardelletti v. Debarr*, 265 F.3d 195, 202-04 (4th Cir.

2001), rev'd on other grounds sub nom., *Devlin v. Scardelletti*, 536 U.S. 1 (2002); *Mountain Top Condominium Ass'n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 324 (3rd Cir. 1995). Some courts also consider: (4) any unusual circumstances militating for or against intervention. *See, e.g., Meek v. Metropolitan Dade County, Fla.*, 985 F.2d 1471, 1479 (11th Cir. 1993); *Stallworth v. Monsanto Co.*, 558 F.2d at 263-66.

Other courts liberally grant Rule 24(a) motions to intervene so that the intervenor can object to a settlement, see, e.g., *South v. Rowe*, 759 F.2d 610, 612-13 (7th Cir. 1985); or after judgment has entered, so the intervenor can appeal. See, e.g., *Linton by Arnold v. Commissioner of Health and Environment*, 973 F.2d 1311, 1318 (6th Cir. 1992); *Yniguez v. State of Arizona*, 939 F.2d 727, 735 (9th Cir. 1991) (holding the district court should have allowed a post-judgment motion to intervene where the movants had relied on the state attorney general to represent their interest); *United States v. City of Chicago*, 870 F.2d 1256, 1263 (7th Cir. 1989); *Stallworth v. Monsanto*, 558 F.2d at 267.

Here, the only timeliness factor the district court mentioned was the passage of time between when Badillo received notice of the proposed Settlement Agreement in December 2017 and when he filed his motion to intervene in May 2019. But, the mere passage of time does not dictate timeliness. See *In re White Savage Associates*, 860 F.2d 1090 (9th Cir. 1988) (district court abused its discretion by failing to consider prejudice when denying motion to intervene); *Walker v. Jim Dandy Co.*, 747 F.2d 1360, 1366 (11th Cir. 1984) (same); *Davis v. Lifetime Capital, Inc.*, 560 Fed.Appx. 477, 493 (6th Cir. 2014) ("Natlis waited ten months after learning of its interest to intervene. This

delay alone, absent a finding of incremental prejudice, is insufficient to deny the motion as untimely."). *Moore's*, §24.21[1], pp. 24-85, 86. ("The mere passage of time, in itself, does not render a motion untimely; rather, the important question concerns actual proceedings of substance on the merits.").

The First Circuit did not decide that the district court had expressly found any prejudice. Rather, it inferred that the district court might have found prejudice in the time period between when Badillo learned of the lawsuit and when he filed his motion to intervene. The First Circuit speculated this prejudice might be to other people from delay in implementing the settlement agreement. However, it did not say who these other people were or how they were prejudiced. In short, it presumed possible prejudice to someone.

Further, the Parties are not prejudiced by the passage of time between December 2017, when Badillo first learned of the settlement, and May 2019, when he moved to intervene after the Parties informed him of his individual award. Nothing different would have occurred during that period had Badillo moved to intervene sooner. Badillo still filed his objection to the Motion for Preliminary Approval in December 2017, still appeared at the first Fairness Hearing to press his objection, still objected to the Report & Recommendation respecting the Preliminary Approval, still filed an appeal from the Court's order granting that Motion, still filed an objection to the motion for final approval, and still appeared at the second fairness hearing to object. Accordingly, the passage of time changed nothing. See *U.S. ex rel. McGough v. Covington Technologies Co.*, 967 F.2d 1391, 1395 (9th Cir. 1992) (holding that

government should have been allowed to intervene after judgment for purposes of appeal where objector's position would have been the same even if intervention occurred earlier).

Regardless, the prejudice asserted is not the kind that should prevent intervention. The Parties' raised three prejudice arguments below: (1) intervention now would disrupt the settlement implementation process (Joint Motion, p. 16); (2) a post-settlement intervention would be costly and waste the resources of both parties (*Id*. pp. 16-17); and (3) Rhode Island needs entry level correctional officers since the last class was hired several years ago. (*Id.* p. 17).

Here, the Parties' prejudice arguments are essentially that Badillo's intervention threatens to upset their Settlement Agreement. As the Parties acknowledged in a footnote: "[T]he purpose of such intervention…would have been to protect his interests, including his right to an appeal, in challenging a settlement that he claimed was unfair and adversely affected his rights." (ECF # 118, p. 8, n. 2). Moreover, the Joint Motion made clear that the Parties would have objected even if Badillo had moved to intervene in December 2017. They argued that "a post-settlement intervention would also be costly and waste the resources of both parties." (Joint Motion, p. 16). In other words, they reject one of the aggrieved persons having standing to object to and appeal the unfair terms of the Settlement Agreement.

First, Badillo's mere intervention is not genuine prejudice. The Tenth Circuit has said the objecting party must show "prejudice caused by the movant's delay, not by the mere fact of intervention." *Kane County*, 928 F.3d at 891, quoting *Oklahoma ex*

rel. Edmondson v. Tyson Foods, Inc., 619 F.3d 1223, 1236 (10th Cir. 2010); *Ross v. Marshall*, 726 F.3d 745, 755 (5th Cir. 2005) (same); *John Doe No. 1 v. Glickman*, 256 F.3d 371, 378 (5th Cir. 2001) ("[C]ourts should ignore the likelihood that intervention may interfere with orderly judicial processes."); *United States v. Union Electric Co.*, 64 F.3d 1152, 1159 (8th Cir. 1995) (same).

Second, Badillo could not have intervened before settlement because he was not aware of the lawsuit until the Parties gave him notice of the proposed Settlement Agreement.

Third, the Parties fail to explain why there has been a delay in hiring COs. Also, it is entirely unclear how that is Badillo's fault. Badillo's intervention and objection to the Settlement Agreement should not prevent Defendants from hiring COs.

Finally, the First Circuit failed to consider any militating circumstances for or against intervention. See *Adam Joseph Resources v. CNA Metal Limited*, 919 F.3d at 866 (holding that the parties' act of keeping the intervenor "in the dark" about their settlement was an unusual circumstance militating in favor of intervention); *Davis v. Lifetime Capital, Inc.*, 560 Fed.Appx. at 494 ("We agree with Natlis that the lack of notice and process prior to the court's seizure of its assets is an unusual factor militating in favor of intervention."). Although the United States was investigating the alleged discrimination at the time Badillo was victimized by it, the Parties did not give Badillo direct notice of the discrimination and this lawsuit until the case had been pending for over three years and they had agreed to a settlement. Thus, the Parties have helped create the circumstances by which the statute of limitations may have run on

Badillo's claims, meaning he may be bound by this Settlement Agreement.

Moreover, it is equally plausible that other people may benefit from Badillo's intervention if, for example, his intervention results in a settlement more favorable to other unsuccessful minority applicants. This is an additional militating circumstance. *Meek v. Metropolitan Dade County, Fla.*, 985 F.2d at 1479 ("The substantial public interest at stake in the case is an unusual circumstance militating in favor of intervention."). This case and this proposed settlement are matters of substantial public interest and the merits of the proposed resolution should be fully heard.

The First Circuit said that Badillo should have moved to intervene at some unspecified earlier time, perhaps, as soon as he got notice of the proposed settlement. App. A at p. 3, citing *R&G Mortgage Corp. v. Federal National Loan Mortgage Corp.*, 584 F.3d 1 (1st Cir. 2009). However, that case was neither a Title VII enforcement action filed on behalf of a class of injured persons nor a class action. In *R&G Mortgage,* Freddie Mac terminated its agreement with plaintiff to service Freddie Mac mortgages. It then contracted with Doral Bank to service the mortgages. Plaintiff sued Freddie Mac. During the litigation, Doral received numerous direct notices from the parties that the litigation threatened its contractual interests. The parties entered into a settlement that allowed plaintiff to continue servicing the mortgages. A week after the district court approved the settlement, Doral moved to intervene. The district court held the motion was untimely and the First Circuit affirmed. 584 F.3d at 12-13.

In this case, the Parties did not give Badillo notice of the lawsuit before reaching a settlement agreement. The Notice of Settlement did not set forth Badillo's individual award and the Parties declined to tell him specifically how the Monetary Relief would be distributed. Badillo objected. Badillo moved to intervene one month after he received the Letter to Claimants telling him what his individual relief would be. He filed his motion seven weeks before the fairness hearing on the final approval of the settlement (including Badillo's individual award). Badillo objected, again. Final judgment had not entered. Moreover, the district court has retained jurisdiction over the case pursuant to the Settlement Agreement. (ECF 80-1, p. 42). This case is completely different from *R&G Mortgage*.

Analogous class action jurisprudence also supports Petitioner's arguments. In *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), the member of a class sought to intervene in order to appeal the final judgment that entered denying class certification. The district court had denied the motion to intervene as untimely but the circuit court reversed. 537 F.2d 915 (7th Cir. 1976). The Supreme Court affirmed the circuit court holding that the class member's motion to intervene was timely:

> The critical fact here is that once the entry of final judgment made the adverse class determination appealable, the respondent quickly sought to enter the litigation. In short, as soon as it became clear to the respondent that the interests of the unnamed class members would no longer be protected by the named class

> representatives, she promptly moved to intervene to protect those interests.

432 U.S. at 394; see also, *Adam Joseph Resources v. CNA Metals Limited*, 919 F.3d at 865; *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 572 (7th Cir. 2009) (Posner, J.) (motion to intervene filed after final judgment entered was timely because intervenor wanted to appeal judgment). In *Adam Joseph Resources*, the Fifth Circuit reversed the denial of a law firm's motion to intervene filed after judgment entered to protect its fee. The circuit court said "prejudice must be measured by the delay in seeking intervention, not the inconvenience to the existing parties of allowing the intervenor to participate in the litigation." *Id.* at 865, quoting, *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994).

The Third Circuit has held there is a presumption of timeliness when the member of a class seeks to intervene in a class action. *Wallach v. Eaton Corp.*, 837 F.3d 356, 372 (3rd Cir. 2016). Badillo submits that the same presumption should apply here because Rule 24 is construed liberally and courts resolve all doubts in favor of the proposed intervenor. *United States v. Union Electric Co.*, 64 F.3d at 1158.

Other circuits have liberally permitted motions to intervene to challenge consent agreements in civil rights class action cases. See, e.g. *Smith v. Los Angeles Unified School District*, 830 F.3d at 853 (reversing district court finding of untimeliness where intervenors moved within several months of learning the specific effects of negotiated consent agreement); *Edwards v. City of Houston*, 78 F.3d 983, 1004 (5th Cir. 1996) (holding that groups of minority police officers timely filed motions to intervene in employment

discrimination action where the motions were filed after notice of the consent decree but before fairness hearing); *Stallworth v. Monsanto Co.*, 558 F.2d at 267 (holding that a motion to intervene filed in an employment discrimination case by non-union white employees after entry of consent judgment was timely). This Court should resolve this conflict among the circuits by adopting a similar approach.

C. BADILLO HAS A RIGHT TO INTERVENE UNDER RULE 24(a)(2) WHEN NO PARTY IS REPRESENTING HIS INTEREST

The First Circuit failed to address the fundamental issue under Rule 24(a)(2) of whether any party was adequately representing Badillo's interest. Further, it assumed that Badillo's interest would not be impaired if it denied his motion to intervene. The First Circuit also inferred that the district court might have found prejudice to someone if Badillo intervened at the late stage of the proceedings. These are three of the four factors the courts are required to consider on a motion to intervene as a matter of right under F.R.Civ.P. 24(a)(2).[12] In other words, the First Circuit's decision against intervention rests entirely on an omission, an assumption, and an inference.

The First Circuit's approach conflicts with other circuits and the leading treatises which state that Rule 24 should be construed liberally and any doubts resolved in favor of the proposed intervenor. *U.S. v. Aerojet General Corp.*, 606 F.3d 1142, 1148 (9th

[12] The fourth factor is whether the movant has an interest in the proceeding. Clearly, Badillo, as an aggrieved party, has an interest.

Cir. 2010) (holding intervenors had a right to intervene to object to consent decree in CERCLA case); *In re Lease Oil Antitrust Litigation*, 570 F.3d 244, 248 (5th Cir. 2009) (holding Texas had a right to intervene post-settlement in a class action to object to part of the settlement); *U.S. v. Union Electric Co.*, 64 F.3d at 1158 (holding that non-settling parties could intervene in CERCLA action to object to consent decree); *F.S.L.I.C. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 216 (11th Cir. 1993); *Moore's*, §24.03[1][a], pp. 24-22, 24-23; *Wright & Miller*, § 1904, pp. 269-70.

The Parties made no genuine attempt below to demonstrate factually that any Party is adequately representing Badillo's interests. Rather, the Parties argue that there is a presumption that the Government's representation is adequate. (Joint Motion, p. 22). However, the presumption is rebuttable, especially when the Government's interest and the intervenor's interest diverge. *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538-39 (1972); *Kane County*, 928 F.3d at 895-96; *Texas v. U.S.*, 805 F.3d 653, 661-62 (5th Cir. 2015); *Benjamin ex rel. Yock v. Dept. of Public Welfare of the Commonwealth of Pennsylvania*, 701 F.3d 938, 958 (3rd Cir. 2012) ("*Benjamin*"); *Mille Lac Band of Chippewa Indians v. State of Minnesota*, 989 F.2d 994, 100-01 (8th Cir. 1993).

In *Trbovich*, the Secretary of Labor filed suit to invalidate a union election. The union member who had first complained to the Secretary about the election moved to intervene pursuant to Rule 24(a)(2). Both the Secretary and the union opposed intervention because the applicable statute gave the Secretary exclusive authority to file such lawsuits.

The district and circuit courts agreed and denied intervention. The Supreme Court granted certiorari.

The Court commented that the Secretary has two duties which are related but not identical. First, the Secretary "in effect becomes the union member's lawyer for purposes of enforcing [his] rights" against the union. *Id.* Second, the Secretary has a duty to represent the public's interest in free and democratic union elections. *Id.* at 539. The Court said that the two duties may not dictate the same approach to the litigation. "Even if the Secretary is performing his duties, broadly conceived, as well as can be expected, the union member may have a valid complaint about the performance of 'his lawyer.'" *Id.* The Court held the union member was entitled to intervene under Rule 24(a)(2). Similarly, the Third Circuit has said: "[W]hen an agency's views are necessarily colored by its view of the public welfare rather than the more parochial views of a proposed intervenor whose interest is personal to it, the burden [of rebutting the presumption of adequate representation] is relatively light." *Benjamin*, 701 F.3d at 958, quoting *Kleisser v. U.S. Forest Service*, 157 F.3d 964 (3rd Cir. 1998).

Indeed, the Tenth Circuit has expressly recognized that a "change in [presidential a]dministration raises the 'possibility of divergence of interest' or a 'shift' during litigation." *Kane County*, 928 F.3d at 895. In that case, the circuit court found that the Trump Administration's change in litigation approach, including settlement negotiations, "suffice[d] to satisfy the minimal burden to show inadequate representation." *Id.* at 896. Moreover, the First Circuit itself has said that the burden of rebutting the presumption of adequate government representation is only that the government's

"representation may be inadequate, not that it is inadequate." (emphasis added). *Conservation Law Foundation of New England, Inc. v. Mosbacher*, 966 F.2d 39, 44 (1st Cir. 1992).

Several points rebut any presumption that the Government is providing adequate representation to Badillo. First, the Trump Administration, which negotiated this settlement, had a well-documented lack of interest in pursuing civil rights claims such as this.[13] Indeed, the specific proof of this disinterest is on the Department of Justice's own website. It maintains data on the number and kind of civil rights lawsuits it has filed and resolved since the late 1990s. The DOJ's information indicates that from January 2017, when the Trump Administration took office until May 2019, when Badillo moved to intervene, it filed one employment discrimination case based on race and/or national origin and obtained one other judgment, consent decree, or settlement on that basis (which was in the same matter).[14] Further, it appears that the one complaint, *United States v. Mississippi Delta Community College*, C.A. No. 4:18CV168 (N.D.Miss), was filed and settled the same day. From May 2019, until January 2021, the Trump Administration filed three more such cases for a total of four.

By comparison, the DOJ's website indicates that that the Bush Administration filed 28

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[13] See, e.g., "Jeff Sessions' Agenda for Civil Rights Division, The Trump administration's budget envisions staff reductions and a diminished focus on traditional civil-rights enforcement." https://www.theatlantic.com/politics/archive/2017/05/civil-rights-sessions/528126/. (last visited April 30, 2021).

[14] https://www.justice.gov/crt/employment-litigation-section-cases. (last visited April 30, 2021).

employment discrimination cases based on race and/or national origin and obtained 21 judgments, consent decrees, or settlements on that basis. The Obama Administration filed 16 employment discrimination actions based on race or national origin and obtained 19 judgments, consent decrees, or settlements on that basis.

Further, the United States, which purportedly filed suit to recover Badillo's "make whole" damages, has:

- Proposed a Settlement Agreement in which all the aggrieved persons would receive a tiny fraction of their collective monetary damages and which requires them to sign a release before they know whether they will get a CO position;
- Declined to give Badillo an extension of time in which to file his objection to the proposed Settlement Agreement;
- Refused to explain to Badillo how the settlement was reached;
- Refused to provide its expert disclosures to Badillo;
- Moved to dismiss Badillo's first appeal on the grounds he did not intervene as a party;
- Proposed that Badillo receive Monetary Relief of $1,992.30 which is approximately 1.2 percent of his lost "back pay" through December 2018 and .25 percent of his total lost pay over his working career; and
- Opposed Badillo's Motion to Intervene.
- Moved for summary disposition of Badillo's second appeal respecting intervention.

There is no realistic sense in which the United States is genuinely representing Badillo's interests. To the

contrary, the settlement it proposed and the actions it has taken are hostile to Badillo.

Further, Badillo's interest is greatly impaired:

- The Supreme Court has said persons like Badillo cannot file a separate Title VII action when the United States has filed one on their behalf; they can only intervene in the United States' action. *Waffle House*, 534 U.S. at 291.
- The First Circuit previously held that Badillo must intervene to have standing to appeal. *United States v. R.I. Department of Corrections*, 2018 WL 6079524 at *3.
- The District Court expressly disregarded Badillo's 23-page objection to the Joint Motion for Final Approval because it had denied his motion to intervene.
- The Parties argued and continue to argue that Badillo's individual claim is barred by the statute of limitations. (ECF #85-1, p. 15). While this case was pending, in 2018, Badillo began pursuing claims that the Defendants violated state statutes prohibiting disparate impact discrimination. Defendants assert that Badillo's claims are barred by the statute of limitations and they have indicated that they intend to press that argument through to the Rhode Island Supreme Court.[15]

In short, unless Badillo can intervene, object to the settlement, and appeal his objection, he may have no meaningful remedy. Disposing of this action without

[15] Those claims are now in Providence County Superior Court, C.A. PC-2020-03539. The state court docket is available on-line at https://publicportal.courts.ri.gov/PublicPortal/.

fully compensating Badillo may greatly impair his interest. The total relief that the Parties said Badillo should receive amounts to 1.2 percent of his lost back pay and .25 percent of his total lost pay resulting from Defendants' discrimination. Badillo is severely prejudiced by the Settlement Agreement if he cannot make any other recovery.

For the reasons set forth previously, Badillo's motion was timely. (*Infra*, pp. 18-26).

II. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE A LEGAL CATCH-22 AND A CIRCUIT SPLIT.

The case starkly presents a legal Catch-22 which this Court should resolve. It may have occurred previously and may well occur, again. Federal law gives the Department of Justice the right to file a Title VII enforcement action and when it does the aggrieved persons for whom the suit is filed are barred from filing independent actions. The DOJ's authority to file such suits includes disparate impact actions, which by their nature, can include aggrieved persons who were unaware they were victims of discrimination.

Here, one Administration filed a lawsuit expressly seeking to recover "make whole" damages for the aggrieved persons but the parties did not notify the aggrieved persons of the allegations. Three years later, the next Administration settled the case for less than a penny on the dollar. The lower courts say Badillo cannot intervene as a party to challenge and appeal the settlement. The Parties say Badillo's personal claims are now barred by the statute of limitations. He is a victim of discrimination who may be without a meaningful remedy. Clearly, this is a situation where an aggrieved person should have a

genuinely unconditional right to intervene to object to an unfair, unreasonable, and inadequate settlement.

Moreover, this petition presents the issue of what it means to have an "unconditional" right to intervene under a federal statute pursuant to Rule 24(a)(1). The First Circuit effectively says the unconditional right is overruled by the passage of time and inferred prejudice to unidentified other persons. This creates a split with the other circuits which say the right is genuinely unconditional and that the district court has no discretion, which presumably would include the discretion to find the intervention untimely. The other circuits' position is consistent with the Rules Enabling Act and the legal treatises.

Further, the First Circuit's decision conflicts with other circuits' holdings that Rule 24(a)(2) should be liberally construed to allow intervention. Its decision conflicts with the other circuits when it holds that prejudice can be inferred from the mere passage of time instead of a specific showing of incremental prejudice. This Court should resolve these splits.

CONCLUSION

The petition for a writ of certiorari should be granted.

June 2, 2021 Respectfully submitted,

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