Nos. 14-51132, 14-51276

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

CITY OF AUSTIN,

Defendant-Appellee

v.

(See inside cover for continuation of caption)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS APPELLEE

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(Continuation of caption)

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 975; ANDRES ARREOLA; ANDREW BLAIR; CAROLINE BULL; JOHN EDMISTON; DANIEL HATCHERSON; STEVEN HERRERA; WILLIAM KANA; MATTHEW MARTIN; MATTHEW RETTIG; MEAGAN STEWART,

Movants-Appellants

STATEMENT REGARDING ORAL ARGUMENT

While the issues on appeal are not difficult and could be resolved on the briefs, the United States does not oppose oral argument.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 42 U.S.C. 2000e-6 and 28 U.S.C. 1343(a)(3) and 1345. On September 15, 2014, the district court denied International Association of Firefighters, Local 975 (AFA), and ten firefighters of

the City of Austin Fire Department's (collectively, appellants') motion for intervention as of right and permissive intervention. ROA.14-51132.885-889.[1] On September 17, 2014, appellants filed a motion that sought, in the alternative, reconsideration or a stay of proceedings. ROA.14-51132.890-933. That motion was denied on October 8, 2014. ROA.14-51132.963-965. On October 8, 2014, appellants filed a timely notice of appeal. ROA.14-51132.966-970. This Court has jurisdiction under 28 U.S.C. 1291 to consider the district court's denial of intervention as of right.

This Court has provisional jurisdiction to determine whether the district court abused its discretion in denying permissive intervention. *Edwards* v. *City of Houston*, 78 F.3d 983, 992 (5th Cir. 1996). If that decision was within the district court's discretion, this Court must dismiss the appeal for lack of jurisdiction. *Ibid.* If the district court abused its discretion, this Court retains jurisdiction and must reverse. *Ibid.*

On November 7, 2014, the district court approved and entered the Consent Decree (Consent Decree or Decree). ROA.14-51132.3787-3820. On December 1, 2014, appellants filed a notice of appeal challenging that ruling. ROA.14-

[1] "ROA.14-51132.__" refers to the page number of the electronic record on appeal in Case No. 14-51132. There is no district court record in No. 14-51276, which is the second appeal. "Br. __" refers to the original page number of appellants' opening brief and not the pagination recorded by this Court.

51132.3911-3915. This Court does not have jurisdiction to consider appellants' challenge to the district court's approval of the Consent Decree. *Marino* v. *Ortiz*, 484 U.S. 301, 304 (1988) (per curiam); see pp. 37-41, *infra*.

STATEMENT OF THE ISSUES

1. Whether the district court erred in denying appellants' motion to intervene as of right for lack of sufficient interest.

2. Whether the district court abused its discretion in denying appellants' motion for permissive intervention.

3. Whether this Court has jurisdiction to consider appellants' challenge to the merits of the Consent Decree.

4. If so, whether the district court abused its discretion in approving the Consent Decree.

STATEMENT OF THE CASE

This appeal involves appellants' challenge to a denial of intervention in a suit brought by the United States against the City of Austin (City) under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.* (Title VII). The district court held that appellants did not have the interest required for intervention under Federal Rule of Civil Procedure 24(a) and that permissive intervention was not warranted under Rule 24(b). The district court also denied

appellants' motion for reconsideration. Appellants timely appealed the denial of intervention.

After appellants unsuccessfully sought to stay the proceedings, the district court held a fairness hearing to consider the merits of the Consent Decree proposed by the United States and the City (the Parties). Appellants had filed objections and participated fully at the fairness hearing by arguing their objections. The district court approved the Decree. Notwithstanding their lack of party status, appellants have appealed that approval. This Court has consolidated the two matters for briefing.

1. United States' Investigation, Pre-Suit Negotiations, And Expiration Of The City And AFA's Collective Bargaining Agreement

In April 2013, the United States began an investigation into whether the City's selection procedures for entry-level firefighter (fire cadet) used in 2012 and 2013 discriminated against African-American and Hispanic applicants in violation of Title VII's disparate impact provisions. See 42 U.S.C. 2000e-2(k).[2]

[2] The Equal Employment Opportunity Commission (EEOC) had received a written complaint alleging violations by the City and AFA. The EEOC has authority to enforce Title VII against private employers while the Attorney General has authority to enforce Title VII against public employers. 42 U.S.C. 2000e-5(a) and (f)(1). In February 2014, the EEOC issued a letter of findings against the AFA (ROA.14-51132.760-761), but on December 29, 2014, it closed the matter and issued a "Notice Of Right To Sue" to the charging party. ROA.14-51132.4028-4030.

During its investigation, the United States reviewed thousands of pages of material provided by the City, retained experts to assess the 2012 and 2013 examinations' adverse impact and validity, and had extensive discussions with the City and its retained experts. ROA.14-51132.210, 221-222. The United States concluded that the City had violated Title VII with respect to the 2012 hiring process because (1) its pass/fail use of the cognitive-behavioral examination and (2) its rank order certification of applicants based, in part, on the applicants' examination performance had an adverse impact on African Americans and Hispanics, and were neither job related nor consistent with business necessity. ROA.14-51132.211-213, 222-226; see 42 U.S.C. 2000e-2(k). The United States also concluded that the City's 2013 hiring process had a disparate impact on African-American and Hispanic applicants and would violate Title VII if used as planned. ROA.14-51132.213-215, 226.

During discussions with the United States regarding the evidence of discrimination, the City decided not to select candidates based on the 2013 eligibility list. In the fall of 2013, the Parties began settlement discussions.

In December 2009, AFA and the City had entered into a collective bargaining agreement (CBA) that, among other things, addressed (a) the selection procedure for fire cadets and (b) incumbent seniority. ROA.14-51132.444, 452,

462-464. But that CBA expired, by its terms, on September 30, 2013. ROA.14-51132.488.

Notwithstanding the lack of a CBA, after the Parties had reached a tentative agreement on the major terms of a settlement, counsel for the United States and one of its experts met twice with AFA representatives to hear their settlement-related concerns. The Parties subsequently changed the settlement terms in several respects to address AFA's concerns. ROA.14-51132.237-241.

2. Overview Of The Proposed Consent Decree And Fairness Hearing Process

In early June 2014, the Parties executed a proposed Consent Decree that, if approved by the district court, would resolve the United States' allegations against the City. The proposed Decree (a) required the City to develop a fire cadet selection procedure valid under Title VII and approved by the United States; (b) permitted the City to use its 2013 hiring process to hire up to 90 fire cadets to address its current firefighter shortage; and (c) provided individual relief to qualified Claimants. ROA.14-51132.3833-3841, 3845-3852.[3]

On June 9, 2014, the United States filed its Complaint (ROA.14-51132.14-23), and the Parties jointly moved for provisional approval of the proposed Decree and for a fairness hearing (ROA.14-51132.32-365), where individuals could

[3] All citations to the proposed and approved Decree are to the approved Decree, which is identical to the proposed Decree.

present objections to the proposed Decree and the district court could evaluate the Decree's legality and fairness. See 42 U.S.C. 2000e-2(n). On June 11, 2014, the district court granted the Joint Motion for Provisional Entry of the Consent Decree. ROA.14-51132.370.

3. Appellants' Motion To Intervene

On June 13, 2014, appellants moved to intervene. ROA.14-51132.387-764. Appellants raised five bases for intervention as of right: (1) contractual rights regarding entry-level hiring under the expired CBA; (2) contractual seniority rights under the expired CBA; (3) state law rights to collectively bargain; (4) the asserted preclusive effect of this case on a potential suit by the EEOC against AFA; and (5) the safety of incumbent firefighters working for the Austin Fire Department. ROA.14-51132.392-395. Appellants also sought permissive intervention. ROA.14-51132.396. The Parties separately opposed this motion. ROA.14-51132.782-795, 802-822. In their reply brief, appellants raised a new argument based on statutory seniority rights. ROA.14-51132.837-838. The Parties argued these new assertions were insufficient to warrant intervention. ROA.14-51132.872-884.

4. The District Court's Opinion Denying Intervention

On September 15, 2014, the district court ruled that neither intervention as of right nor permissive intervention was warranted. ROA.14-51132.885-889.

Citing this Court's precedent, the district court held that appellants did not have a "direct, substantial, legally protectable interest in the action, meaning 'that the interest be one which the *substantive* law recognizes as belonging to or being owned by the applicant.'" ROA.14-51132.886-887 (citation omitted). Absent an existing collective bargaining agreement, the district court explained, appellants did not have a cognizable interest under Federal Rule of Civil Procedure 24. ROA.14-51132.887-888 (citing *Stallworth* v. *Monsanto Co.*, 558 F.2d 257, 269 (5th Cir. 1977)). The court rejected appellants' reliance on precedent addressing employees' rights to intervene based on an *existing* collective bargaining agreement. ROA.14-51132.887-888.

The district court also held that even if it were to consider the expired terms of the CBA, appellants had not identified a protected interest, as nothing in the proposed Decree violated the expired CBA's terms. ROA.14-51132.888. The court explained that the CBA permitted the City to change its hiring process if it was deemed to violate Title VII. ROA.14-51132.888. Moreover, the proposed Consent Decree does "not alter, eliminate or even address the terms or conditions of employment of any incumbent * * * firefighter; nor does it affect any statutory seniority provisions." ROA.14-51132.888. The court also rejected appellants' assertion that the proposed Decree would have a preclusive effect on future litigation by the EEOC against AFA, or impair the safety of the community

and fellow firefighters. ROA.14-51132.888. In sum, "the AFA's speculative interests in safety, seniority, and promotion standards, as well as the AFA's fear of the preclusive effect on future litigation, are insufficient to establish a direct and substantial interest required for intervention under Rule 24." ROA.14-51132.888. The court also denied permissive intervention based on the reasons stated above, and "weighing the undue delay and prejudice that would result [from] allowing the AFA's intervention in this cause." ROA.14-51132.888.

5. The District Court's Denial Of Appellants' Motion For Reconsideration And Request For A Stay

On September 17, 2014, appellants filed a motion for reconsideration and, alternatively, a stay of the fairness hearing. ROA.14-51132.890-934. Appellants repeated arguments in their original motion (ROA.14-51132.891-896), and attached new exhibits. ROA.14-51132.902-934. The Parties opposed reconsideration. ROA.14-51132.935-955.

On October 8, 2014, the district court denied both reconsideration and a stay. ROA.14-51132.963-965. Treating the appellants' motion as a motion to alter or amend judgment pursuant to Federal Rule of Civil Procedure 59(e), the district court concluded that AFA failed to identify any change in controlling law or fact. ROA.14-51132.964-965. The court again rejected appellants' argument that the Decree affected collective bargaining rights (ROA.14-51132.964), and held that AFA's assertion that the proposed Decree allegedly interferes with individual

appellants' seniority rights for promotions was "not based on new evidence, and * * * remains insufficient to establish a direct and substantial interest required for intervention." ROA.14-51132.965. The court also held AFA had failed to establish it would suffer irreparable harm without a stay. ROA.14-51132.965.[4]

6. Principles Of Disparate Impact And Evidence Of Discrimination Supporting The Parties' Decision To Resolve This Litigation By Consent Decree

a. Overview Of Disparate Impact Principles

Under Title VII, a plaintiff may establish a *prima facie* case by showing that an employer uses "a particular employment practice" that has a disparate impact on the basis of, among other things, race, color, or national origin. 42 U.S.C. 2000e-2(k)(1)(A)(i); see *Ricci* v. *DeStefano*, 557 U.S. 557, 578 (2009). A difference is statistically significant and has an adverse impact when the probability of that difference occurring by chance is 5% or less, which is equivalent to 1.96 standard deviations. ROA.14-51132.322, 3796. Courts generally accept standard deviations of two or greater as evidence of disparate impact. *Hazelwood Sch. Dist.* v. *United States*, 433 U.S. 299, 308 n.14 (1977); *McClain* v. *Lufkin Indus., Inc.*, 519 F.3d 264, 279-280 (5th Cir.), cert. denied, 555 U.S. 881 (2008). To refute liability, the employer must show that the "challenged practice is job related * *

[4] On October 22, 2014, this Court denied appellants' Emergency Motion To Stay And To Expedite Appeal.

* and consistent with business necessity." *Ricci*, 557 U.S. at 578 (quoting 42 U.S.C. 2000e-2(k)(1)(A)(i)). Even if a selection device is job related, it cannot be used if plaintiff can show that an alternative with less adverse impact meets the employer's needs. 42 U.S.C. 2000e-2(k)(1)(A)(ii).

b. The 2012 Fire Cadet Selection Process And Evidence Of Discrimination

In 2012, fire cadet applicants who met the City's minimum qualifications took two written examinations: one intended to test cognitive and non-cognitive skills and abilities (NFSI) and another intended to test counterproductive work behaviors (Integrity Inventory). ROA.14-51132.211. The NFSI was administered on a pass/fail basis with a nominal cut-off score of 70. However, the City invited only the top 1500 scorers on the NFSI who also passed the Integrity Inventory to proceed to the next step – a structured oral interview (SOI) – which resulted in an "effective" passing score of 75.06 on the NFSI. ROA.14-51132.211. Those who passed both written exams and the SOI received a composite score based on their SOI (2/3 weighting) and NFSI (1/3 weighting) performance. Points were added for an applicant's military service. ROA.14-51132.211. The top-scoring applicants then had several pre-employment assessments, including a physical ability test, drug screen, and a background check. Applicants who passed these assessments were placed in descending rank order on a final eligibility list based on their composite test score. ROA.14-51132.211.

The United States' statistical expert, Dr. Bernard Siskin, concluded that African-American and Hispanic applicants achieved a 75.06 score on the NFSI at a statistically significantly lower rate than white applicants. ROA.14-51132.322-323. The disparity between white applicants and African-American and Hispanic applicants was equivalent to 9.72 and 8.75 units of standard deviation, respectively. ROA.14-51132.212, 322-323.

In addition, the City's rank ordering of 2012 fire cadet applicants for certification separately resulted in a statistically significant disparate impact upon African Americans and Hispanics. ROA.14-51132.323. The disparities in the likelihood that an African-American or Hispanic applicant would be ranked high enough to be considered for appointment, as compared to a white applicant, was equivalent to 4.18 and 4.88 units of standard deviation, respectively. ROA.14-51132.323.

The United States retained expert industrial/organizational psychologist David P. Jones, Ph.D., to evaluate the validity of the 2012 and 2013 examination processes based on principles of content validity, criterion-related validity, and validity transportability.[5] ROA.14-51132.329-335. Dr. Jones concluded that the

[5] Content validity is established when an employer can show that the "content of the selection procedure adequately parallels the content of the job." ROA.14-51132.332 (internal quotation marks omitted). Criterion-related validity is established when the employer can show that test scores relate "in a statistically

(continued…)

City's use of an effective cut-off score of 75.06 on the NFSI and its rank ordering of applicants based, in part, on their NFSI score were not sufficiently job related or consistent with business necessity to comply with Title VII. ROA.14-51132.336-343. His conclusion is based on four factors. First, the NFSI test developer found no meaningful relationship between incumbent Austin firefighters' NFSI scores and their job performance to support criterion-related validity. ROA.14-51132.338-339. Second, the NFSI was criterion-validated as a two-and-a-half hour examination, but the City allowed only two hours, which substantively changes the exam and precludes any finding of transportability. ROA.14-51132.339-341. Third, the City's pass/fail use of the NFSI with an effective cut-off score of 75.06 did not distinguish meaningfully among those applicants who can better perform the job of entry-level firefighter. ROA.14-51132.341-342. In fact, the test developer validated a qualifying score of 57.75 as an appropriate pass/fail standard, as compared to the City's nominal cut-off score of 70 or the effective cut-off score of 75.06. ROA.14-51132.341-342. Moreover, there was no evidence to establish

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(…continued)
significant way" to job performance or a measure of success. ROA.14-51132.332. Validity transportability addresses the extent to which a criterion-related study in one location can be relied upon in another location. ROA.14-51132.333-334. For transportability, the selection procedures must be applied in the same manner (scoring, weighting, etc.) and to the same type of position. ROA.14-51132.333-335.

the validity of ranking of applicants based on the weighting of the NFSI and SOI test scores. ROA.14-51132.342-343.

c. The 2013 Fire Cadet Selection Process And Evidence Of Discrimination

The 2013 selection process, underway when the United States began its investigation, was similarly problematic under Title VII. In 2013, the City administered a different cognitive-behavioral test (NELF). ROA.14-51132.344. All applicants who completed the NELF were given a structured oral interview. ROA.14-51132.344-345. The City's rank ordering of applicants based, in part, on their performance on the NELF had a statistically significant disparate impact on African Americans and Hispanics. ROA.14-51132.324-325. Dr. Siskin concluded that the difference in ranking of white applicants as compared to African-American or Hispanic applicants was statistically significant and equivalent to 2.85 and 4.80 units of standard deviation, respectively. ROA.14-51132.324-325.

Dr. Jones initially found that the City's 2013 process was not supported by the test developer's validation study and did not meet professionally acceptable standards for validity transportability due, in large part, to the City modifying the original examinations and the scoring methodology. ROA.14-51132.344-347. Notwithstanding limitations in available data, Dr. Jones conducted his own criterion-related validity analysis and was able to find modest evidence of transport validity for the NELF examination. ROA.14-51132.349-350. Significantly,

however, Dr. Jones found that an equally valid alternative scoring methodology of the NELF – relying on two (memorization and reading comprehension) rather than all five cognitive subtests – would have resulted in less adverse impact while retaining the test's validity. ROA.14-51132.325, 350-353.

The Parties engaged in arms-length negotiations for approximately six months before they reached agreement on the proposed Consent Decree. ROA.14-51132.210, 221. During those negotiations, the United States also met with AFA representatives to discuss the terms of an early draft. The Parties changed provisions in light of those discussions. ROA.14-51132.237-241.

7. The Consent Decree

The Consent Decree includes injunctive relief and individual relief to qualified Claimants. ROA.14-51132.3833-3841, 3845-3860. The City has the flexibility to develop and administer a new, lawful procedure to select qualified fire cadets. ROA.14-51132.3837-3841.[6] Significantly, the Parties did not identify a specific replacement procedure in the Decree. ROA.14-51132.3837. The United States may review the City's proposed procedure and its implementation to ensure compliance with Title VII. ROA.14-51132.3837-3841. In addition, in the spirit of

[6] The City is currently seeking a contractor to develop the test and has invited AFA to participate in this process. Nothing in the Decree precludes the City from involving AFA in test development or development of the entry-level firefighter selection process.

compromise and due to the City's current hiring needs, the Parties agreed that the City may utilize its 2013 selection process to hire up to 90 fire cadets. ROA.14-51132.3834-3835, 3870-3872.[7]

Thirty Claimants (12 African-Americans and 18 Hispanics) will be eligible for priority hire appointments with limited retroactive seniority. ROA.14-51132.3849-3850, 3852, 3868-3869. These figures are based on Dr. Siskin's analysis of the anticipated number of African Americans and Hispanics who would have been hired but for the disparate impact of the scoring and rank ordering of the 2012 fire cadet applicants. ROA.14-51132.324, 1067-1068. All Claimants who wish to compete for a priority appointment must successfully complete the new, lawful selection procedure developed by the City and pass all other pre-employment screenings. ROA.14-51132.3849. Fifteen Claimants will be included in each of the first two fire cadet academy classes after the new selection device is implemented. ROA.14-51132.3850. Each Claimant must successfully complete the fire cadet academy. ROA.14-51132.3852. Thus, the Decree does not require

[7] The City also has agreed to pay $780,000 in backpay awards. ROA.14-51132.3845. Eligible Claimants for backpay are African-American or Hispanic applicants who scored below 75.06 on the 2012 NFSI examination or were ranked too low for selection in 2012. ROA.14-51132.3845-3848. The backpay fund ($780,000) is Dr. Siskin's calculation of the base salaries that would have been earned by 30 qualified, minority Claimants if they were hired in either of the two 2012 fire cadet academies, without overtime or interest, and reduced to account for mitigation of earnings. ROA.14-51132.326.

the City to appoint anyone who is not qualified to be a fire cadet. ROA.14-51132.3849, 3883.

Priority hires will also receive limited retroactive seniority. Retroactive seniority will be based on the hire and commission dates applicable to one of the two 2012 fire cadet classes. ROA.14-51132.3868-3869. Under state law, retroactive seniority provides limited benefits to incumbents. See, *e.g.*, Tex. Loc. Gov't Code Ann. § 143.033(b)-(c) (seniority points for promotion) and 143.085 (seniority considerations for reduction-in-force and reinstatement) (West 2014).[8] Some of these benefits, such as longevity pay, base pay and leave accrual, will not provide any competitive advantage over other employees. See ROA.14-51132.3868. In addition, retroactive seniority cannot be used to satisfy a Claimant's eligibility to meet the time-in-grade requirement for a future promotional examination. ROA.14-51132.3868-3869.

A Claimant's retroactive commission date may be used to calculate the individual's seniority points, which are one factor in determining a candidate's total points for placement on a promotion eligibility list. Tex. Loc. Gov't Code Ann. § 143.033(b)-(c) (West 2014). Fifteen Priority Hire Claimants will have the same seniority commission date as the individual appellants (July 28, 2013), while

[8] Given the absence of a CBA, there are no additional seniority rights deriving from such an agreement.

the remaining 15 Priority Hire Claimants will have a seniority commission date that is eight weeks earlier (June 2, 2013). ROA.14-51132.417-419, 1092-1093, 3869.

8. The District Court's Fairness Hearing And Approval Of The Consent Decree

Pursuant to the Consent Decree, the Parties sent a notice to almost 4000 individuals through the Postal Service and by electronic mail, and published a notice in the *Austin Statesman*. ROA.14-51132.1041-1044. This notice advised recipients and readers of the proposed Consent Decree, the objection process, and the scheduled fairness hearing. ROA.14-51132.1041-1042.

The Parties received 38 objections, including objections from all 11 appellants that were identical in form save for the appellants' identifying information. ROA.14-51132.1013, 3788. Shortly before the fairness hearing, the Parties filed a thorough brief with numerous attachments, including all of the objections. ROA.14-51132.1000-3734. The Parties categorized the objections and explained why each category did not warrant modifying or rejecting the Decree, and why the court's approval of the Decree was warranted. ROA.14-51132.1013-1037. The appellants filed an opposition brief that included an attachment (in addition to their objections). ROA.14-51132.3738-3752.

The district court held a fairness hearing on October 29, 2014. ROA.14-51132.3916-3986. At the hearing, the Parties addressed (a) the United States'

investigation; (b) the evidence supporting the proposed Consent Decree; (c) appellants' objections to the proposed Decree; and (d) the reasons why the Consent Decree was lawful, reasonable, and fair. ROA.14-51132.3920-3946, 3973-3981. The Court gave appellants substantially equal time to argue their objections. ROA.14-51132.3948-3970; PowerPoint Exhibit, ECF Doc. 60. The court withheld approval of the Decree pending its review of the Parties' proposed findings of fact and conclusions of law. ROA.14-51132.3982-3983.

9. The District Court's Approval Of The Consent Decree

After that review, on November 7, 2014, the district court adopted as its own the Parties' proposed findings of fact and conclusions of law, and approved the Decree. ROA.14-51132.3787-3820. The district court concluded that the Decree was "lawful, reasonable and equitable," and the relief was "adequate and sufficient." ROA.14-51132.3805. In reaching this conclusion, the court assessed the evidence of disparate impact, the lack of (or minimal) job relatedness for the City's 2012 and 2013 selection procedures, and an alternative procedure with less impact for 2013. ROA.14-51132.3794-3801. Without resolving specific claims, the district court concluded that the United States provided "credible" and "significant" evidence establishing a "sufficient likelihood of success" under circuit precedent. ROA.14-51132.3796-3797, 3800, 3809.

Moreover, the district court considered the objections and concluded that "they raise no genuine issue as to the fairness, adequacy, and reasonableness of the settlement and do not provide a reasonable basis to withhold final and complete approval of the Decree." ROA.14-51132.3809; see ROA.14-51132.3803-3805, 3809-3818. In doing so, the court approved the injunctive relief and found the elements of individual relief "narrowly tailored." ROA.14-51132.3811-3818. The court concluded that backpay awards and 30 priority hires were within the range of relief that the United States could obtain had it prevailed at trial and were consistent with precedent. ROA.14-51132.3813-3815. The court also held that the limited retroactive seniority for priority hires was a part of "'make-whole' objective" afforded in similar circumstances and would have "limited, if any, impact on incumbent firefighters." ROA.14-51132.3816. Finally, the district court held that the circumstances of this case did not require findings on the merits prior to approval of the Consent Decree. ROA.14-51132.3818-3820.

On December 1, 2014, appellants, undeterred by their lack of party status, appealed the district court's approval of the Consent Decree. ROA.14-51132.3911-3915. On December 11, 2014, this Court granted the appellants' motion to consolidate the two appeals.

SUMMARY OF ARGUMENT

1. The district court did not err in denying the motion to intervene because appellants do not have the requisite interest under Federal Rule of Civil Procedure 24(a). The district court fully considered appellants' various grounds for intervention and found each, including those based on an *expired* CBA, either did not exist or were not substantial enough to satisfy Rule 24(a). The district court's ruling is consistent with this Court's precedent. *E.g.*, *Stallworth* v. *Monsanto Co.*, 558 F.2d 257, 269 (5th Cir. 1977).

2. Similarly, the district court did not abuse its discretion in denying permissive intervention. Appellants cannot show "extraordinary circumstances" or that the district court's decision, which was based on the appellants' lack of sufficient interest, as well as undue delay and prejudice, was an abuse of discretion. *Edwards* v. *City of Houston*, 78 F.3d 983, 995 (5th Cir. 1996) (citation omitted).

3. Because appellants are not parties in this case, they do not have the right to appeal the district court's approval of the Consent Decree. *Marino* v. *Ortiz*, 484 U.S. 301, 304 (1988) (per curiam). This Court has held that applicants who are properly denied intervention are not entitled to appeal any merits determination entered in the case. *Edwards*, 78 F.3d at 993. Accordingly, the district court's order entering the Consent Decree is not properly before this Court in this appeal.

4. Should this Court nevertheless decide to address the propriety of the Consent Decree, it should affirm the district court's decision to enter the Decree. Appellants had ample opportunity to present and argue their objections before and at the fairness hearing, and the district court thoroughly and thoughtfully analyzed these (and other) objections prior to its approval of the Consent Decree. On this record, there is no basis to find that the district court's decision to enter the Decree on the ground that it is lawful, reasonable, and equitable is an abuse of discretion. Indeed, even if appellants had been allowed to intervene, there is no reason to believe that the district court would have declined to enter the Consent Decree.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY DENIED APPELLANTS' MOTION TO INTERVENE AS OF RIGHT

A. Standard Of Review

This Court reviews *de novo* a district court's decision to deny intervention as of right. *Brumfield* v. *Dodd*, 749 F.3d 339, 342 (5th Cir. 2014).

B. Principles Of Intervention As Of Right Under Rule 24(a)(2)

Pursuant to Federal Rule of Civil Procedure 24(a)(2), a proposed intervenor must satisfy four criteria for intervention as of right: (1) a timely application; (2) an interest relating to the property or transaction which is the subject of the underlying action; (3) significant impairment of the applicant's ability to protect

his interests absent intervention; and (4) inadequate representation of the applicant's interests by the existing parties. *Edwards* v. *City of Houston*, 78 F.3d 983, 999 (5th Cir. 1996). If an applicant fails to satisfy any one of these requirements, this Court must deny intervention as of right. *Ibid.*

Intervention as of right is appropriate only where the applicant has a "direct, substantial, and legally protectable [interest]" in the subject matter of the proceedings. *Brumfield*, 749 F.3d at 343 (citation omitted); *New Orleans Public Serv., Inc.* (*NOPSI*) v. *United Gas Pipe Line Co.*, 732 F.2d 452, 463 (5th Cir.), cert. denied, 469 U.S. 1019 (1984). "[I]t is plain," this Court explained, that the applicant must establish "something more than an economic interest." *Id.* at 464. That "something more" is an interest "which the *substantive* law recognizes as belonging to or being owned by the applicant." *Ibid.*

This Court has held that where, as here, employees do not have an existing collective bargaining agreement, and cannot show that a proposed settlement will conflict with any existing rights under state law, employees do not have the legally protected interest that is required for intervention as of right. *United States* v. *City of New Orleans*, 540 F. App'x 380, 381 (5th Cir. 2013); *Stallworth* v. *Monsanto Co.*, 558 F.2d 257, 269 (5th Cir. 1977).

In *New Orleans*, this Court rejected a union's motion to intervene in police misconduct litigation resolved by a proposed Consent Decree requiring the city to

modify various employment procedures. See 540 F. App'x at 381. The Court held that, notwithstanding the union members' property interest in their jobs under the civil service system, they lacked a sufficient interest to intervene because the proposed Decree did not modify any rights protected by the civil service system.

In *Stallworth*, 558 F.2d at 262, proposed intervenors alleged that a consent order interfered with their seniority rights under a contract with the defendant, Monsanto Company. This Court ruled it had insufficient evidence to resolve whether a contract existed, and ordered a remand. *Id.* at 268. The Court stated that, if "no contract exists between the appellants and Monsanto, * * * they would not be entitled to intervene as of right" due to lack of sufficient interest. *Id.* at 269. In *Stallworth*, proposed intervenors sought intervention based solely on their asserted contract with Monsanto. *Id.* at 262.

C. The District Court Correctly Concluded That Appellants Did Not Have An Adequate Interest For Intervention As Of Right

1. AFA's Statutory Opportunity To Bargain Over Hiring Procedures Does Not Establish A Sufficient Interest

AFA asserts (Br. 39-41) that it has a "statutory right to bargain over the hiring process," which in turn establishes its interest under Rule 24. Not so. State law recognizes that a municipality and union may negotiate any terms of an agreement that are contrary to civil service requirements, including terms that permit a union's participation in the development of a fire cadet hiring process.

See Tex. Loc. Gov't Code Ann. § 174.006(c) (West 2014). But the law neither requires such participation, nor establishes a legally protectable right to an agreement with such participation. *Ibid*. In sum, per state law, a municipality *may* negotiate with a union over fire cadet selection procedures – as the City has done in the past with AFA (ROA.14-51132.426-500). However, nothing in state law *requires* a municipality to do that.

AFA's related claim (Br. 40) that it has a sufficient interest under Rule 24 because the City must either use the state-mandated selection procedure (a cognitive test with 70 points passing on a 100-point score) or bargain with AFA is wrong. See Tex. Loc. Gov't Code Ann. §§ 143.025, 174.006(c) (West 2014). Regardless of the accuracy of the assumption underlying this claim, which the Court need not resolve, the district court correctly applied this Court's precedent in concluding that any risk of harm to AFA's asserted interests in bargaining was too speculative to warrant intervention. See *Taylor Commc'ns Grp.* v. *Southwestern Bell Tel. Co.*, 172 F.3d 385, 388-389 (5th Cir.) (resolution of pending case would not necessarily impact proposed intervenor's interests), cert. denied, 528 U.S. 930 (1999); *Texas* v. *United States Dep't of Energy*, 754 F.2d 550, 552 (5th Cir. 1985) (insufficient interest to intervene since the impact on the movants' interest depended, in part, on resolution of litigation). Under the Decree, the City has tremendous flexibility to develop a Title VII-compliant selection procedure.

Nothing in the Decree addresses the City's authority to do so by means contrary to the State's civil service rules. Moreover, nothing in the Decree either forecloses the City from entering into a new agreement with AFA that includes provisions regarding entry-firefighter selection procedures or otherwise negotiating with AFA in developing new hiring practices.[9]

For these reasons, this case is distinguishable from *Brumfield*, 749 F.3d at 344. In *Brumfield*, this Court authorized intervention by parents based on the Court's conclusion that relief sought by the United States might ultimately affect the parents' opportunities under a state educational voucher program, even though the district court had not yet decided whether to enter the relief. *Ibid.* In this case, by contrast, even after approval of the Decree, the City's future selection procedure is unknown, as is the City's bargaining relationship with AFA. Consequently, the district court correctly concluded that AFA did not satisfy Rule 24's criterion of a sufficient interest for intervention as of right. See *Taylor*, 172 F.3d at 388-389; *Texas*, 754 F.2d at 552.

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[9] As noted, the City is currently seeking a vendor for test development and is communicating with AFA on this process. Moreover, the City is negotiating with AFA regarding the terms of a CBA, including fire cadet selection procedures.

AFA also asserts (Br. 41 n.15) that the Parties' prior settlement discussions with AFA regarding the terms of the proposed Decree reflect a concession that AFA has a sufficient interest pursuant to Rule 24 to intervene. This claim is without basis and ignores the voluntary, good faith efforts made by the Parties.

2. AFA Does Not Have A Sufficient Interest To Defend The Expired CBA

AFA further asserts (Br. 43-46) that its "contractual interest in defending" the terms of the expired CBA establishes an adequate interest under Rule 24. This argument is baseless.

First, AFA concedes (Br. 45) it is not aware of any precedent that establishes an ongoing interest under Rule 24 based on a CBA *after the CBA has expired*. Nor is the United States aware of any. Once the CBA expired on September 30, 2013, the City was under no obligation to use the selection procedures AFA claims it has an interest to defend. ROA.14-51132.488.[10]

Given the expiration of the CBA, AFA cannot identify a protected interest to warrant intervention. *Stallworth*, 558 F.2d at 269. In *Stallworth*, this Court remanded for determination of *whether* proposed intervenors – incumbent employees challenging a settlement with the employer that could affect seniority benefits – had an existing contract that afforded seniority benefits. *Id.* at 268-269. This Court explained that absent a contract addressing seniority – which was the sole basis on which movants sought intervention – movants would not have a sufficient interest under Rule 24. *Id.* at 262 & n.5, 269.

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[10] Under the Agreement, the City had the option of selecting candidates on the 2013 eligibility list for six months after the expiration of the CBA but it was not required to do so. ROA.14-51132.464.

AFA's claims that the Decree "retroactively" revises the CBA (Br. 44) and "override[s]" the CBA's selection procedures (Br. 45), are wholly unsupportable and ignore important facts. First, the City hired applicants – including all ten individual appellants – through the 2012 selection procedure identified in the expired CBA. ROA.14-51132.417-419. The 2012 process was used only in 2012. In addition, under the expired CBA, the City was not *required* to hire any applicants under the 2013 selection process. ROA.14-51132.464. Thus, the Decree does not overturn the results of the selection procedures identified in the CBA. AFA admits (Br. 44) that "the CBA clearly does not govern future hiring processes" – and therefore this Court's consideration of their alleged interest based on the expired CBA should end.[11]

3. Appellants' Limited Statutory Seniority Benefit Does Not Establish A Sufficient Interest

Appellants assert (Br. 41-43) that their "statutory interest in protecting the[ir] seniority rights" in the Fire Department's promotional process is "jeopardized" by the Decree, which in turn establishes an interest under Rule 24. This claim is without merit.

[11] Finally, AFA's references (Br. 44-45) to federal labor policy regarding collective bargaining and the standards for enforcement of a bargaining agreement are irrelevant here, especially given the expiration of their CBA.

The United States explained below, "[b]efore the retroactive seniority awards could possibly manifest themselves in a priority hire's advantage over an incumbent in the promotional [process], among other things: the Austin Fire Department must make priority hires; promotional vacancies must arise; both priority hires and incumbents must compete for the same promotions; priority hires must prevail over incumbents; and retroactive seniority must be the basis for displacing an incumbent in the promotional process." ROA.14-51132.947-948. Given the requisite confluence of these factors, the district court concluded that the Decree's potential impact on an appellant's seniority is "speculative" and "insufficient to establish a direct and substantial interest required for intervention under Rule 24." ROA.14-51132.888 (citing *Texas*, 754 F.2d at 552); see *NOPSI*, 732 F.2d at 463-464 (asserted interest must be "direct, substantial, legally protectable," and "one which the *substantive* law recognizes" as belonging to the intervenor) (citation omitted). The district court also correctly rejected appellants' motion for reconsideration on this issue. ROA.14-51132.892-894, 964-965.

While this Court has stated that an employee's "expectancy" based on established seniority privileges "should not be lightly or blindly swept aside," *Stallworth*, 558 F.2d at 269, not every agreement or civil service provision that addresses promotional opportunities in any manner establishes an interest for intervention. This is particularly so here where the civil service provisions that

address seniority points for promotional eligibility can be modified by a bargaining agreement. See Tex. Loc. Gov't Code Ann. §§ 143.033(b)-(c), 174.006(c) (West 2014). Because civil service seniority points are not constant, appellants cannot show that this limited, variable benefit establishes an "expectancy" that is a sufficient interest under Rule 24. *Stallworth*, 558 F.2d at 269.

In addition, appellants' reliance on *Edwards*, 78 F.3d at 991-992, 1004, is inapposite. In *Edwards*, this Court granted intervention to employee-intervenors to challenge a Decree that reserved 106 remedial promotion *positions* to claimants, and therefore would have barred intervenors from competing for those positions. *Id.* at 991-992, 1004.[12] Similarly, in *Black Fire Fighters Ass'n of Dallas* (*BFFA*) v. *City of Dallas*, this Court granted intervention to employees to challenge a proposed decree's provision on "skip promotions," which required the employer to give 28 promotional positions to minority employees who scored lower than nonminority employees. 19 F.3d 992, 994 (5th Cir. 1994). This Court has stated, "[a] decree's prospective interference with promotion opportunities *can* justify intervention." *Edwards*, 78 F.3d at 1004 (quoting *BFFA*, 19 F.3d at 994) (alteration in original); (emphasis added). However, because no promotional opportunity is withheld from appellants, this case is distinguishable from this

[12] A second group in *Edwards* also was granted intervention to challenge a provision of the decree that was contrary to an earlier judgment – a circumstance not present here. *Edwards*, 78 F.3d at 1004.

Court's prior cases granting intervention. Cf. *Edwards*, 78 F.3d at 991-992; *BFFA*, 19 F.3d at 994.

First, for several years, appellants and other members of the 2012 fire cadet academies can compete for promotions without competition from the Priority Hire Claimants. That is so because of the time it will take to develop a new selection procedure that will be used before a Priority Hire Claimant and others are hired, and a Priority Hire Claimant's fulfillment of the two-year time-in-grade requirement. In addition, when Priority Hire Claimants satisfy the time-in-grade requirement, they and appellants will have the same opportunity to compete for promotion. ROA.14-51132.3868-3869.

In addition, the minimal impact that retroactive seniority for the 30 Priority Hire Claimants may have on individual appellants and the other members of the 2012 fire cadet class is insufficient to satisfy Rule 24's standard for intervention. Under state law, points based on an employee's seniority are added to the employee's score on examination(s) to determine his or her total score for rank ordering on an eligibility list. Tex. Loc. Gov't Code Ann. § 143.033(b)-(c) (West 2014). As noted, 15 Priority Hire Claimants will have the same seniority as the individual appellants, and 15 Priority Hire Claimants will have eight additional weeks of seniority over the individual appellants, which is only .153 points. See pp. 17-18, *supra*; Tex. Loc. Gov't Code Ann. § 143.033(b) (West 2014). Under

the State's Rule of Three, selecting officials may consider the top three candidates for a given position. Tex. Loc. Gov't Code Ann. § 143.026(a)-(b) (West 2014). Accordingly, appellants may be considered for promotions alongside even a higher ranking Claimant, whether due to the Claimant's higher examination score or based on seniority points. A Priority Hire Claimant will have a greater opportunity than an appellant (or other member of a 2012 academy) who scores higher on the promotional exam, but only in the unlikely scenario where (1) the Claimant's performance score is the same or slightly lower than the appellant, but (2) where the .153 points gives him a higher rank, and (3) where the Rule of Three grouping precludes the appellant from simultaneous consideration with the Claimant. Again, this circumstance would result only in a delay and not a denial of an opportunity for an appellant. Given the confluence of circumstances that must be present simultaneously, the absence of a reserved number of promotional positions, and the potential that the civil service rules will change based on future bargaining agreements, the occurrence and impact that retroactive seniority will have on an incumbent will be nominal, if at all. This limited interest is not sufficient to satisfy Rule 24. Cf. *Edwards*, 78 F.3d at 1004; *BFFA*, 19 F.3d at 994.

4. The Fairness Hearing And Subsequent Negotiations With The City Are Irrelevant To Whether AFA Had A Sufficient Interest For Intervention

AFA's argument that its interests in intervention are established based on the manner in which the district court conducted the fairness hearing and the City's subsequent negotiating positions (Br. 46-49) is meritless. Intervention is determined based on the interests and status of the case at the time the motion is presented; it is not evaluated with 20-20 hindsight. Thus, there is no basis for this Court to consider the district court's management of the fairness hearing in October 2014 or the City's more recent negotiations with AFA in determining whether the district court appropriately determined that appellants lacked a sufficient interest in August 2014. Likewise, to the extent the appellants suggest (Br. 46-49) that the district court considered the fairness hearing a substitute for intervention, that is not so. The district court merely stated that the fairness hearing and future negotiations with the City would provide an opportunity for the appellants – who did not satisfy Rule 24 – to voice their concerns. ROA.14-51132.889.

At any rate, the appellants had ample opportunity to present their views at the fairness hearing. Appellants argued their objections, utilized a 44-slide PowerPoint presentation, and spoke almost as long as the Parties. ROA.14-51132.3948-3970; PowerPoint Presentation, ECF Doc. 60. At the conclusion of

the hearing, the court withheld approval of the Decree pending receipt and review of the Parties' proposed findings of fact and conclusions of law. ROA.14-51132.3982-3983. The district court's conduct of the fairness hearing was well within its discretion as the hearing is not a trial on the merits. *Union Asset Mgmt. Holding A.G.* v. *Dell, Inc.*, 669 F.3d 632, 641 (5th Cir. 2012) ("a fairness hearing [on a proposed class settlement] is not a full trial proceeding").

For the foregoing reasons, this Court should affirm the denial of intervention as of right.

II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PERMISSIVE INTERVENTION

A. Standard Of Review

This Court reviews a district court's decision to deny permissive intervention for a clear abuse of discretion. *United States* v. *City of New Orleans*, 540 F. App'x 380, 381 (5th Cir. 2014); *Edwards* v. *City of Houston*, 78 F.3d 983, 995 (5th Cir. 1996). Under this standard, the Court will reverse a district court's denial of permissive intervention only under "extraordinary circumstances." *Ibid.* (citation omitted).

B. The District Court Did Not Abuse Its Discretion In Denying Appellants' Motion For Permissive Intervention

A person may seek permissive intervention where he asserts "a claim or defense that shares with the main action a common question of law or fact," provided intervention will not "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(1)(B) and (3). A district court may deny permissive intervention even where the requirements of Rule 24(b) are satisfied. *New Orleans*, 540 F. App'x at 381; *New Orleans Public Serv., Inc.* (*NOPSI*) v. *United Gas Pipe Line Co.*, 732 F.2d 452, 471 (5th Cir.), cert. denied, 469 U.S. 1019 (1984).

The district court explained that its decision to deny appellants permissive intervention was based upon the same reasons it denied intervention as of right, "and weighing the undue delay and prejudice that would result [from] allowing the AFA's intervention in this cause." ROA.14-51132.888. To the extent appellants raise (Br. 50) the same arguments for intervention as of right to justify permissive intervention, there is no merit. See Argument I, *supra*.

Appellants further assert (Br. 50) that the EEOC's investigation and subsequent withdrawal of its complaint against AFA supports their claim they have a common question of law or fact with the underlying litigation. Contrary to appellants' suggestion, however, satisfying this element of Rule 24(b)(1)(B) does not guarantee or trigger an automatic right to permissive intervention. *New*

Orleans, 540 F. App'x at 381; *NOPSI*, 732 F.2d at 471. The inquiry on appeal is not whether "the factors which render permissive intervention appropriate" under Rule 24(b) exist, but whether "the district court committed a *clear* abuse of discretion in denying * * * [the] motion." *Cajun Elec. Power Coop.* v. *Gulf States Utils., Inc.*, 940 F.2d 117, 121 (5th Cir. 1991) (emphasis added).

Appellants are mistaken when they assert (Br. 51) that it was a clear abuse of discretion when the district court failed to sufficiently explain its finding of "undue delay or prejudice." *Taylor Commc'ns Grp.* v. *Southwestern Bell*, 172 F.3d 385, 389-390 (5th Cir.) (no abuse of discretion when district court denied permissive intervention and sought "to bring the litigation to an expeditious close"), cert. denied, 528 U.S. 930 (1999). The basis of the district court's conclusion is straightforward. The proposed Decree represented the results of lengthy, intense negotiations between the Parties. If permitted to intervene, appellants would presumably seek to rewrite the Decree to be more aligned with their particular interests. Under those circumstances, permitting intervention would unduly delay the entry and implementation of the Decree, prejudice the existing Parties, and, thereby prejudice future firefighter applicants and Austin residents who also have an interest in ensuring that the City uses lawful selection procedures to hire qualified firefighters.

Quite simply, appellants have not shown extraordinary circumstances or why the district court's decision was a clear abuse of discretion. *New Orleans*, 540 F. App'x at 381; *Taylor*, 172 F.3d at 389-390. Accordingly, the denial of permissive intervention should be affirmed.

III

THIS COURT DOES NOT HAVE JURISDICTION TO CONSIDER THE APPELLANTS' CHALLENGE TO THE MERITS OF THE CONSENT DECREE

A. Standard Of Review

Whether this Court has subject matter jurisdiction is a question of law that is subject to determination *de novo* and may be considered *sua sponte*. *Giles* v. *NYLCare Health Plans, Inc.*, 172 F.3d 332, 335 (5th Cir. 1999); *Castaneda* v. *Falcon*, 166 F.3d 799, 801 (5th Cir. 1999).

B. This Court Does Not Have Jurisdiction To Consider Appellants' Challenge To The Consent Decree

Appellants have separately challenged the district court's approval of the Consent Decree.[13] Because the district court appropriately denied appellants' motion to intervene, appellants are not "parties" within the meaning of Federal

[13] While the term "appellants" connotes party status, for ease of reference we will continue to use that term to refer to the AFA and the 10 individuals in their status as a nonparty.

Rule of Appellate Procedure 3(c)(1)(A), and therefore are not entitled to appeal the district court's disposition of this case.

It is well-settled that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Marino* v. *Ortiz*, 484 U.S. 301, 304 (1988) (per curiam). Rejecting attempts by the court of appeals to create judicial exceptions to the general rule that only parties may appeal a ruling, the Supreme Court instructed: "We think the better practice is for such a nonparty to seek intervention for purposes of appeal; denials of such motions are, of course, appealable." *Ibid.* Moreover, this Court has held that a putative intervenor may appeal the denial of his motion to intervene, but a person or entity that is properly denied intervention may *not* appeal any merits determinations in the underlying suit, including the court's approval of a consent decree. *Edwards* v. *City of Houston*, 78 F.3d 983, 993 (5th Cir. 1996); *Walker* v. *City of Mesquite*, 858 F.2d 1071, 1073-1074 (5th Cir. 1988) (non-named class members do not have standing to appeal a final judgment of a class action).

As discussed in Arguments I and II, *supra*, the district court appropriately denied appellants' motion to intervene and therefore they are not parties in this case. Because appellants are not parties to this litigation, they are not entitled to appeal the merits of the district court's order approving the Consent Decree.

Accordingly, this Court should dismiss this aspect of the appeal. See, *e.g.*, *Marino*, 484 U.S. at 304; *Edwards*, 78 F.3d at 993.

Moreover, while this Court has held in limited circumstances that it has jurisdiction to hear an appeal by a nonparty, appellants do not satisfy that criteria. Cf. *Searcy* v. *Philips Elec. N. Am. Corp.*, 117 F.3d 154 (5th Cir. 1997). A nonparty can appeal a judgment when (1) the entity participated in the proceedings below, (2) the equities favor hearing the appeal, and (3) the entity has a "personal stake in the outcome." *Id.* at 157 (citation omitted). In *Searcy*, the court permitted the United States, which did not intervene in a False Claims Act (FCA) case, to appeal and challenge the private settlement. *Id*. at 157-158. Weighing the equities and the United States' interest, the court focused on the FCA's requirement that the United States give consent to private settlements and the United States' authority to object and block private settlements absent intervention. *Id.* at 157.

Here, the equities weigh strongly *against* an exception for appellants under *Searcy*. Cf. 117 F.3d at 157. Significantly, this Court has not granted an exception under *Searcy* when, as here, the nonparty sought and failed to establish the requirements for intervention under Rule 24. In fact, while not citing *Searcy*, this Court held it did not have jurisdiction to consider nonparties' merits challenge to a class action settlement due, in part, to the parties' potential "collateral avenue[] of relief" under Rule 24. *Walker*, 858 F.2d at 1074-1075. The nonparties in *Walker*,

ibid., were denied intervention and they failed to pursue those rights on appeal. Because Rule 24 provides an avenue of relief, including limited appellate jurisdiction to challenge the district court's determination, this Court rejected the nonparties' efforts to establish appellate jurisdiction on other grounds.

The equities can favor appeal by a nonparty when doing so "will *not* frustrate another legal principle" – yet here it would frustrate the purpose of Rule 24. *S.E.C.* v. *Forex Asset Mgmt. LLC*, 242 F.3d 325, 329 (5th Cir. 2001) (emphasis added); see *Walker*, 848 F.2d at 1075 (permitting nonparties' right to appeal class action "would frustrate the purpose behind class litigation.") Granting jurisdiction based on appellants' nonparty status to hear their challenge to the district court's approval of the Decree when they sought and were denied intervention – and their intervention appeal is pending – would nullify and circumvent the standards of Rule 24 and the purpose of limited appellate review.

In addition, 42 U.S.C. 2000e-2(n) strongly counsels against application of the *Searcy* exception. Section 2000e-2(n)(1)(A)-(B) provides that "an employment practice that implements and is within the scope of a * * * consent judgment or order that resolves a claim of employment discrimination under the * * * Federal civil rights laws *may not be challenged*" by an individual who had a reasonable opportunity to present objections at a fairness hearing (emphasis added). Thus, Congress generally eliminated the opportunity for any challenge to a decree when,

as here, appellants had "actual notice" of the proposed Decree and a "reasonable" opportunity to present objections. 42 U.S.C. 2000e-2(n)(1)(B)(i)(I)-(II). For this additional reason, allowing appellants to pursue their challenge to the Decree based on nonparty status should be denied. *S.E.C.*, 242 F.3d at 329; *Walker*, 858 F.2d at 1074-1075.

IV

THE DISTRICT COURT PROPERLY CONCLUDED THAT THE CONSENT DECREE IS LAWFUL, REASONABLE AND FAIR

As explained in Argument III, *supra*, appellants are not proper parties in this case and therefore do not have the right to challenge the district court's entry of the Consent Decree. Should this Court nevertheless reach the issue, it should affirm the district court's entry of the Decree. The district court's decision is consistent with precedent and all of appellants' numerous challenges are without merit.

A. Standard Of Review

This Court reviews a district court's approval of a consent decree for a clear abuse of discretion. *Williams* v. *City of New Orleans*, 729 F.2d 1554, 1558-1559 (5th Cir. 1984); see *Ayers* v. *Thompson*, 358 F.3d 356, 368 (5th Cir.) (class action settlements are reviewed for a clear abuse of discretion) (citing *Parker* v. *Anderson*, 667 F.2d 1204, 1209 (Fifth Cir. Unit A), cert. denied, 459 U.S. 828 (1982)), cert. denied, 543 U.S. 951 (2004).

B. The District Court Did Not Abuse Its Discretion In Approving The Consent Decree

1. Standards For Reviewing A Proposed Consent Decree

A district court reviews a proposed class action settlement, including settlements of Title VII claims, to determine whether it is "fair, adequate, and reasonable." *Ayers*, 358 F.3d at 368; *Salinas* v. *Roadway Express, Inc.*, 802 F.2d 787, 789 (5th Cir. 1986) (citing *Parker*, 667 F.2d at 1209); *Reed* v. *General Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983). This assessment considers six factors that are often referred to as the *Parker* factors:

> (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of class counsel, class representatives, and absent class members.

Reed, 703 F.2d at 172 (citing *Parker*, 667 F.2d at 1209).

This Court evaluates the plaintiffs' likelihood of success and an agreement's proposed relief in light of the principles underlying the claims. *Reed*, 703 F.2d at 172-174 (assessment of proposed settlement of Title VII claims included "uncontroverted statistics" regarding disparate rates of promotion and "little evidence of illegality" in assignments and discipline); *Parker*, 667 F.2d at 1209-1210 ("sharply conflicting testimony" regarding statistical evidence was one factor in assessment of plaintiffs' potential recovery and agreement's relief). However,

in making this assessment, this Court does not resolve the merits of the parties' claims before it approves an agreement. *Reed*, 703 F.2d at 172; *Parker*, 667 F.2d at 1209. This Court's "limited review rule is a product of the strong judicial policy favoring the resolution of disputes through settlement." *Parker*, 667 F.2d at 1209; see *Williams*, 729 F.2d at 1559.

A district court's assessment of a Title VII consent decree is similar to review of a class settlement. *United States* v. *City of Miami*, 664 F.2d 435, 441 (5th Cir. 1981) (the review is "akin, but not identical"). Of course, the terms of a Title VII decree must be consistent with the law. *Williams*, 729 F.2d at 1559. Moreover, the Court must determine that a proposed decree "represents a reasonable factual and legal determination based on the facts of the record, whether established by evidence, affidavit, or stipulation." *Ibid.* (citing *Miami*, 664 F.2d at 441).

This Court has not yet addressed whether the "strong basis in evidence" standard of *Ricci* v. *DeStefano* applies to approval of a consent decree. 557 U.S. 557 (2009). In *Ricci*, the Supreme Court held that an employer must have a "strong basis in evidence" that its employment practices will have an unlawful disparate impact before it may unilaterally engage in action that will result in disparate treatment. *Id.* at 583-585. The Supreme Court held that the defendant in *Ricci* did not have a "strong basis" to act because it did not assess whether the test

was job related and consistent with business necessity. *Id.* at 587. The United States does not believe that this Court must resolve whether *Ricci* applies in order to affirm the district court's decision. However, should this Court conclude that *Ricci* applies, the evidence here satisfies *Ricci*.

Here, the district court appropriately and reasonably concluded that the Consent Decree is "lawful, reasonable and equitable, and that the relief provided is adequate and sufficient." ROA.14-51132.3805. Prior to reaching its decision, the district court had received thorough briefing by the Parties (ROA.14-51132.1005-1040) and four declarations from the United States' two experts on statistics and test validity. ROA.14-51132.320-355, 1064-1091. The district court also received the appellants' objections and memoranda filed before and after the fairness hearing with exhibits, including two declarations by their retained expert. *E.g.*, ROA.14-51132.1882-2009, 3738-3752. The district court also held a fairness hearing. ROA.14-51132.3916-3985. The district court's analysis is consistent with *Parker*, 667 F.2d at 1209-1210, and other precedent. Cf. *Ricci*, 557 U.S. at 587-589; *Williams*, 729 F.2d at 1559. Thus, whether this Court applies the *Parker* standards or makes a more searching inquiry, this Court should affirm the district court's approval of the Consent Decree.

2. The Evidentiary Basis For The Parties' Settlement

The district court's approval of the Decree reflects full consideration of the United States' analyses of the 2012 and 2013 selection procedures, the City's and appellants' assertions, and well-established principles of disparate impact. ROA.11-51132.3794-3801, 3805-3812. The court cited the United States' "credible evidence" of a statistically significant disparate impact in the scoring of the 2012 cognitive examination (NFSI) and the rank ordering of African-American and Hispanic applicants. ROA.14-51132.3796-3797. The disparities ranged from the equivalent of 4.96 to 9.72 units of standard deviation as compared to white applicants. ROA.14-51132.3796-3797; see p. 12, *supra*. These figures greatly exceed the standard to establish a *prima facie* case. *Hazelwood Sch. Dist.* v. *United States*, 433 U.S. 299, 308 n.14 (1977); *Stagi* v. *National R.R. Passenger Corp.*, 391 F. App'x 133, 140 (3d Cir. 2010) ("2 to 3 standard deviations or greater[] will typically be sufficient" to establish disparate impact); *McClain* v. *Lufkin Indus., Inc.*, 519 F.3d 264, 279-280 (5th Cir.), cert. denied, 555 U.S. 881 (2008).

The district court also reviewed Dr. Jones' ample and "credible" evidence regarding why the setting of the effective passing score on the 2012 NFSI examination and the rank ordering of applicants were not job related or consistent with business necessity. ROA.14-51132.3797-3798; see pp. 12-14, *supra*. For

example, there was "no meaningful relationship between NFSI scores and the job performance of incumbent Austin firefighters." ROA.14-51132.3797-3798. In addition, the 2012 Austin firefighter applicants had only two hours to take the NFSI. The original NFSI, however, was validated as a two and one-half hour examination. This difference in administration is one of several independent factors that defeated validity transportability and reliance on the original assessment of the NFSI's validity. ROA.14-51132.3798.

The court similarly concluded that the United States presented "credible" evidence that the City's 2013 firefighter selection process would have had a disparate impact on African-American and Hispanic applicants if the City had hired applicants based on their rankings. ROA.14-51132.3799-3800. The evidence established a significant statistical disparity in ranking between white applicants and African-American and Hispanic applicants equivalent to 2.85 and 4.80 units of standard deviation, respectively. ROA.14-51132.324-325. The applicants' scores for ranking were based, in part, on their performance on the cognitive examination (NELF). ROA.14-51132.324-325. In addition, while Dr. Jones found "modest but incomplete" evidence of the NELF's validity, Dr. Jones also "credibly concluded" that an alternative scoring method to determine the applicants' rank order (using scores on two rather than five elements of the NELF examination) was at least equally job related and would have less adverse impact

on African-American and Hispanic applicants. ROA.14-51132.3801; see p. 15, *supra*.

Based on these findings, the district court reasonably concluded that the United States presented "significant evidence through its two experts to show a sufficient likelihood of success on the merits under *Parker*." ROA.14-51132.3809; see *Reed*, 703 F.2d at 172-174; *Parker*, 667 F.2d at 1209-1210; *McClain*, 519 F.3d at 279 (factual findings of disparity, which include assessment of experts' evidence, will not be reversed unless clearly erroneous). While not resolving these claims – as it need not do – the district court concluded that these disputes would result in costly litigation and "substantial risks and expenses to both sides" and that the Decree reflected a "lawful, reasonable and equitable" resolution. ROA.14-51132.3799, 3805. Appellants cannot show that this determination is an abuse of discretion. See *Williams*, 729 F.2d at 1558-1559; *Reed*, 703 F.2d at 172-174; *Parker*, 667 F.2d at 1209-1210.

To the extent required, the strength and scope of evidence presented here is substantially greater than that at issue in *Ricci*, 557 U.S. at 587-589, and therefore the "strong basis in evidence" standard also is met. Unlike the defendants in *Ricci*, the City evaluated and considered not only the 2012 and 2013 selection procedures' statistical impact but also evidence challenging each procedures' job relatedness. The extensive pre-suit investigation included experts' competing

analyses of these procedures' validity. The City made a reasoned, calculated decision regarding the risks and potential success of its possible defenses of the 2012 and 2013 selection procedures before it engaged in arms-length negotiations that resulted in the Decree. Accordingly, there is a strong basis in evidence to support the Consent Decree. Cf. *Ricci*, 557 U.S. at 587-589.

3. The Consent Decree's Relief Is Lawful, Reasonable And Fair

The district court reasonably concluded that the injunctive and individual relief strikes "an appropriate balance between the strength of the United States' case and the uncertainty and delay inherent in contested and protected litigation." ROA.14-51132.3809. The court also appropriately determined that the individual and injunctive relief was "narrowly tailored." ROA.14-51132.3811. Appellants have waived any challenge based on narrow tailoring. See *Stevens* v. *Hayes*, 535 F. App'x 358, 359 (5th Cir. 2013) (per curiam) (party's failure to fully brief arguments consistent with Fed. R. App. P. 28(a)(9) are abandoned), cert. denied, 134 S. Ct. 948 (2014). Even if considered, appellants cannot show that, in reaching these conclusions, the district court abused its discretion. Cf. *Williams*, 729 F.2d at 1558-1559.

a. The Decree's Injunctive Relief Is Warranted And Appropriate

Injunctive relief that requires the City to develop and utilize a Title VII-compliant examination is well within the scope of appropriate, equitable relief. 42

U.S.C. 2000e-6(a) (authority of the Attorney General to file suit for pattern and practice claims and seek injunctive relief); cf. *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 361 (1977) (award of injunctive relief for proven violation); *Bouman* v. *Block*, 940 F.2d 1211, 1233 (9th Cir.), cert. denied, 502 U.S. 1005 (1991). When, as here, there is ample evidence to support resolution of allegations that the City's current practices violate Title VII, a parties' agreement that the City develop a new procedure that complies with Title VII is eminently reasonable. Indeed, were this case to go to trial, new testing procedures would be virtually required after a determination of liability. To be sure, injunctive relief that requires the City to develop and use a Title VII-compliant examination will benefit not only the victims of the 2012 selection process but all future applicants. Yet appellants cannot reasonably challenge an examination that ensures all applicants have a fair opportunity to succeed. Title VII requires as much.

Appellants raise various claims (Br. 31-33) that the Decree's injunctive relief exceeds the evidence of discrimination and permissible relief. Not so. First, appellants misconstrue the relevance of the 2013 selection process to the Decree's relief. The evidence and the district court's assessment of the 2013 procedure had a limited role in the terms of the Decree. To be sure, when determining the merits of a Consent Decree and the injunctive relief, the district court considered the evidence of disparate impact that would have resulted had the City relied on the

2013 selection process. ROA.14-51132.3813. However, while the 2013 process supports injunctive relief, it is not essential to affirmance. ROA.14-51132.3813. Moreover, no individual relief is based on the 2013 selection process.

Appellants provide an inconsistent and at times incorrect description of the injunctive relief to assert that it exceeds the evidence of discrimination or a permissible decree. *E.g.*, Br. 31-32, 40 (the Decree gives the City "unfettered discretion" to identify a selection procedure subject only to DOJ approval). Appellants' assertions are without merit. As explained, the Decree requires the City to develop a Title VII-compliant selection process. ROA.14-51132.3837-3838. The City does not have a limitless opportunity to use any test of its devise. The United States has an opportunity to review the City's proposed selection process before and after administration to ensure it complies with Title VII. ROA.14-51132.3838-3841. Yet the United States' review is constrained by principles of Title VII, and therefore it does not allow the United States to reject the City's proposal absent justification. Given the ample evidence regarding the numerous flaws in the 2012 (and 2013 procedures), appellants' claim that any remedy should be limited to the City using the same 2012 selection process with a two and one-half hour allotment for the NFSI is baseless.[14]

[14] Appellants other challenges to the evidence underlying injunctive relief are addressed below. See pp. 56-63, *infra*.

b. The Decree's Individual Relief Is Lawful And Appropriate

All of the Decree's relief responds directly to the City's use of unlawful selection procedures that had a disparate impact on African-American and Hispanic applicants. In addition, all of the individual relief – backpay awards and a limited number of priority hires with narrow retroactive seniority benefits to qualified Claimants – is commonly approved by courts and within the range of relief the United States would obtain if it prevailed at trial. See, *e.g.*, *United States* v. *New Jersey*, No. 10-cv-91, 2012 WL 3265905, at *1 (D.N.J. Jun. 12, 2012), aff'd, 522 F. App'x 167 (3d Cir.), cert. denied, 134 S. Ct. 529 (2013); *Salinas*, 802 F.2d at 789-790 (class settlement included backpay, transfers, and retroactive seniority for some class members). Finally, all of the individual relief here is afforded only to victims of the discriminatory 2012 selection process.

In some pre-*Ricci* cases, this Court has applied strict scrutiny in evaluating challenges to race-conscious remedies in proposed consent decrees. *Black Fire Fighters Ass'n of Dallas* (*BFFA*) v. *City of Dallas*, 19 F.3d 992, 995 (5th Cir. 1994); *Williams*, 729 F.2d at 1560-1565. To satisfy strict scrutiny, race-based actions must be narrowly tailored to further a compelling government interest. Narrow tailoring examines the necessity for affirmative relief and the efficacy of alternatives, the flexibility and duration of the relief, and the degree of impact on third parties. See *United States* v. *Paradise*, 480 U.S. 149, 171 (1987); *BFFA*, 19

F.3d at 995. A proposed decree's effect on third parties must be "neither unreasonable nor proscribed." *Countie* v. *City of Houston*, 48 F. App'x 103 (5th Cir. 2002) (citing *Williams*, 729 F.2d at 1560).

Here, appellants' challenge to the Decree's relief (Br. 30-38) focuses solely on the injunctive relief provisions. Appellants have waived any challenge to the Decree's individual relief, including challenges based on strict scrutiny, by failing to raise it in their opening brief. *Alabama-Coushatta Tribe of Tex.* v. *United States*, 757 F.3d 484, 486 & n.3 (5th Cir. 2014) (by failing to argue district court's statutory jurisdiction in opening brief, party waives that argument); *Stevens*, 535 F. App'x at 359. Appellants only assert in their summary of argument (Br. 11) that "the consent decree is far from the narrowly tailored relief permissible under federal law – it bears no relation to the alleged problems with the 2012 and 2013 hiring processes." Given the absence of citation to authority and discussion that satisfies Federal Rule of Appellate Procedure 28(a)(9), this argument should be deemed waived and abandoned, and not considered on the merits.

Even if considered on the merits, the relief here satisfies strict scrutiny. All Claimants who will receive individual relief are African-American and Hispanic applicants who were victims of the 2012 discriminatory selection process. To be sure, not every victim of the discriminatory process would necessarily have been hired by the City in 2012. Yet that latter factor need not be established with

certainty for individual relief to satisfy strict scrutiny. See *Howard* v. *McLucas*, 871 F.2d 1000, 1010-1011 (11th Cir.) (approving consent decree's method of identifying "victims" when employer's records precluded identifying "actual victims"), cert. denied, 493 U.S. 1002 (1989); *Williams*, 729 F.2d at 1557 (race-conscious relief in a decree need not be limited to actual victims). Here, a meritorious Claimant for backpay must have participated in the discriminatory 2012 selection process and not been selected. See p. 16 n.7, *supra*.[15] Even then, priority hire relief will be restricted to no more than 30 victims of the 2012 selection process who meet additional criteria, including strong performance on the City's future selection process for fire cadets. See pp. 16-17, *supra*. The Decree's award of 30 Priority Hires to the top-scoring African-American and Hispanic applicants on the new examination is a reasonable and close approximation of the opportunities that would have been had if the City used lawful selection procedures in 2012. See *Howard*, 871 F.2d at 1010-1011. Finally, each Priority Hire Claimant will be given one of two sets of retroactive seniority dates that apply to either of the two academies of applicants selected based on the 2012 examination. ROA.14-51132.3868-3869.

[15] The Decree's provisions for backpay relief are also within the range of relief that the United States could obtain had it succeeded at trial. See p. 16 n.8, *supra*.

In addition, the district court's conclusion that priority hire relief with retroactive seniority is narrowly tailored is consistent with circuit precedent. ROA.14-51132.3814-3817; cf. *Williams*, 729 F.2d at 1560-1565. The priority hire relief is of limited duration and will have minimal impact on other employees. The Decree allows for only 30 Priority Hires, who will be selected over the City's first two hiring cycles under the newly designed selection procedure. ROA.14-51132.3849-3850. No more than 15 Priority Hires will be selected for a given fire cadet academy, which typically includes 30-35 new hires. Priority hires, at most, may result in a delay – but not a denial – of a hiring opportunity. This approach balances the goals of timely relief for Claimants with the opportunities of all others on the fire cadet eligibility list, and therefore this relief is "neither unreasonable nor proscribed." *Countie*, 48 F. App'x 103, at *2 (approving a consent decree that, *inter alia*, reserved 16 of 18 new sergeant's positions for minorities without remedial seniority benefits) (citing *Williams*, 729 F.2d at 1560).

The relief afforded here is unlike the provisions of proposed decrees that were rejected in *BFFA*, 19 F.3d at 995-997, and *Williams*, 729 F.2d at 1560-1565. In *Williams*, this Court upheld the district court's exercise of discretion to approve some race-conscious provisions of a consent decree, but to reject other provisions that imposed a 50% goal of minorities in all promotional positions and required one-for-one hiring of minority/nonminority candidates over at least 12 years. *Id.* at

1560-1565. This Court found that the 50% goal was not supported by the workforce demographics and the 12-year duration could curtail incumbents' promotional opportunities for a substantial portion of their career. *Id.* at 1562, 1564. Neither of those factors is present here. An allocation of 30 Priority Hires is consistent with evidence of a shortfall based on the 2012 selection procedure. Neither the duration nor the extent of the hiring and seniority relief here bears any resemblance to what occurred in *Williams*. Cf. *id*. at 1562, 1564. This relief also is distinguishable from the skip promotions in *BFFA*, 19 F.3d at 995-997. There, this Court affirmed the district court's rejection of a proposed decree's 28 "skip promotion" remedy for non-victims when, *inter alia*, actual victims could be identified and the recipients of race-conscious relief likely were *not* victims. *Ibid*.

The retroactive seniority provisions of the Consent Decree will have a limited impact, if any, on a Claimant's opportunity for promotion vis-à-vis an incumbent. As discussed above, seniority points are one element of an employee's total score that is used to rank order an applicant on a promotional eligibility list. See pp. 17-18, *supra*. At most, 15 Claimants will have an eight week advantage (.153 points) over individual appellants and other members of their fire academy class. In addition, a substantial number of contingencies must occur simultaneously before a Claimant's retroactive seniority points will even impact a limited group of incumbents. See pp. 31-32, *supra*. Given the limited impact on

others, the retroactive seniority allowance here is narrowly tailored and is neither "unreasonable nor unlawful." *BFFA*, 19 F.3d at 995; cf. *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 781 n.41 (1976) ("rightful-place seniority relief" for identifiable victims should be presumed notwithstanding that this relief will inevitably have some impact on third parties). Accordingly, the district court's approval of this relief is well within its discretion. Cf. *Williams*, 729 F.2d at 1560-1565.

4. The Appellants' Objections Do Not Establish An Abuse Of Discretion

As part of its review, the district court fully considered and reasonably rejected appellants' (and others') objections to the Consent Decree. ROA.14-51132.3803-3805, 3809-3818. Appellants continue to argue an extensive list of alleged flaws in the district court's reasoning and conclusions. Numerosity does not establish merit, however. Appellants cannot show the district court abused its discretion in approving the Decree. Cf. *Williams*, 729 F.2d at 1558-1559.

Appellants repeatedly assert (Br. 12-16, 33-34) that the district court erred in not making judicial findings of liability prior to approval of the Consent Decree. Appellants' claim is without merit as they rely on cases inapposite to the circumstances here. To be sure, this Court has applied more searching inquiries and more stringent standards to proposed decrees in circumstances *not* present here. For example, in pre-*Ricci* cases, this Court has required a finding of liability

before it would approve terms of a proposed decree that are contrary to an *existing* collective bargaining agreement and are challenged by a union who is a *party* to the case. *Equal Employment Opportunity Comm'n* v. *Safeway Stores, Inc.*, 714 F.2d 567, 578-580 (5th Cir. 1983), cert. denied, 467 U.S. 1204 (1984); *City of Miami*, 664 F.2d at 437, 448. Also pre-*Ricci*, this Court has required a judicial finding before this Court approved a decree that was inconsistent with state law. *Overton* v. *City of Austin*, 748 F.2d 941, 956-957 (5th Cir. 1984). While these holdings may not withstand *Ricci*, 557 U.S. at 583, even if they did, as discussed above (pp. 24-28, *supra*), this Decree neither violates an existing CBA nor state law. Accordingly, there is no basis to assert the district court must make a liability determination prior to approving this Decree.

Appellants' repeated argument (Br. 17, 20, 27) that the district court inappropriately relied on declarations from experts when the underlying data on which the experts relied was not in the record ignores the difference between a court's review and approval of a Consent Decree, and the evidence required for summary judgment or a finding on the merits. See *Union Asset Mgmt. Holding A.G.* v. *Dell, Inc.*, 669 F.3d 632, 642 (5th Cir. 2012). Presenting that data to the district court was neither required nor outcome-determinative. The United States' declarations, especially Dr. Jones' declarations, described the extensive underlying data that he considered and explained how that data supported his assessment and

findings on the validity of the 2012 and 2013 procedures. *E.g.*, ROA.14-51132.345-349, 1086-1087. This Court has affirmed a district court's approval of a settlement where there had been no formal discovery and the court relied on declarations and counsel's arguments at a fairness hearing. *E.g.*, *Dell*, 669 F.3d at 639, 641-642. Accordingly, it is appropriate and adequate for the district court to rely on declarations, other record evidence, and counsel's arguments. See *id.* at 642.

a. Appellants' Challenges To The Evidence Regarding The 2012 Selection Procedure Are Meritless

Appellants' several challenges (Br. 18-22) to the evidence of disparate impact in the 2012 selection procedure are similarly without merit. Appellants' assertion (Br. 18) that statistical disparity is based on selection rates – and not test scores or rank order – ignores fundamental principles of disparate impact liability. A disparate impact analysis focuses on requirements that impose a discriminatory bar to opportunities, not absolute numbers of persons hired or promoted. *Connecticut* v. *Teal*, 457 U.S. 440, 450 (1982); *Stagi*, 391 F. App'x at 136 (citing *Teal*, 457 U.S. at 450); *Isabel* v. *City of Memphis*, 404 F.3d 404, 409-413 (6th Cir. 2005) (relying on applicants' mean score results to find adverse impact); *Bridgeport Guardians, Inc.* v. *City of Bridgeport*, 933 F.2d 1140, 1147-1148 (2d Cir.) (rejecting employer's focus on total number of individuals hired rather than the applicants' disparate examination results), cert. denied, 502 U.S. 924 (1991).

In addition, appellants ignore Dr. Siskin's determination that 2012 applicants' NFSI test scores, rank ordering, mean scores, *and* the processing rates for final selection each had a disparate impact on African-American and Hispanic applicants. See ROA.14-51132.322-324. Appellants' mere reliance on their expert's alternative assessment of this data does not show the district court abused its discretion. See *McClain*, 519 F.3d at 279. The district court appropriately concluded that the United States' experts' "credible" and "significant evidence" of a disparate impact and a "bona fide dispute" regarding this claim supported the Parties' resolution by the Consent Decree. ROA.14-51132.3797, 3800, 3809; see *Ricci*, 557 U.S. at 587-589; *Reed*, 703 F.2d at 172-173; *Parker*, 667 F.2d at 1209. Given those findings, the district court's approval of the Decree was appropriate.

Appellants' assertion (Br. 23-24) that an "inadvertent mistake" in the administration of the 2012 examination does not warrant injunctive relief is without merit. First, appellants have no basis to claim (Br. 23) that the two-hour allotment for the 2012 examination (rather than two and one-half) could be the sole factor for the adverse effect on African-American and Hispanic applicants. Ample, credible evidence challenged the validity of the 2012 process on several fronts. See pp. 12-14, *supra*. In any event, the district court appropriately concluded that Dr. Jones' analysis "undermin[ed]" appellants' claim. For example, the NFSI's nationwide validation study – which was based on applicants having two and one-

half hours for the examination – had essentially the same disparate results for white, African-American and Hispanic applicants as Austin's NFSI results. ROA.14-51132.3810. Given that the 2012 process would not become valid even with a two and one-half hour administration, injunctive relief to develop a new examination is appropriate.

Second, the cases that appellants cite in support of their argument that disparate impact liability cannot be based on an inadvertent error (Br. 24) are inapposite. In *Wright* v. *National Archives & Records Service*, 609 F.2d 702, 712-713 (4th Cir. 1979), the court explained that a disparate impact analysis did not apply to personnel actions that affected only four individuals, three of whom were African-American, and allegedly harmed only one African-American. In *Boneparte* v. *City of New York, Department of Personnel*, No. 85-cv-4369, 1986 WL 6172, at *3-4 (S.D.N.Y. May 23, 1986), plaintiff raised a claim of retaliation that can be rebutted by any nondiscriminatory reason – including inadvertent error. There was no disparate impact claim. Here, by contrast, the underlying claim involved allegations of disparate impact, which cannot be defeated by an assertion regarding defendant's state of mind.

b. Appellants' Challenges To The Evidence Regarding The 2013 Selection Procedure Are Meritless

Appellants' various challenges (Br. 26-30) to the assessment of the 2013 selection procedure and evidence of disparate impact on African-American and Hispanic applicants are similarly without merit.

First, appellants mischaracterize and ignore the United States' evidence presented through Dr. Siskin's and Jones' original and supplemental declarations. The United States' experts explained in detail that using two components (memorization and reading comprehension) rather than five components of applicants' scores on the NELF examination to calculate applicants' composite and total score for rank ordering would result in less adverse impact. ROA.14-51132.324-326, 350-353, 1065-1067, 1074-1084. In addition, the United States provided ample evidence that using two rather than five components of the NELF to identify a 2013 candidate's composite score for ranking would retain essentially the same criterion-related validity. ROA.14-51132.350-354. In fact, in some measures, using the two-factor NELF slightly improved predictability of an individual's on-the-job performance. ROA.14-51132.1074-1084.

Appellants inappropriately rely on a comparison of the statistical disparities among white, African-American and Hispanic applicants' performance on the two- or five-part assessment of the NELF examination alone to argue the test had no disparate impact on African-American applicants. Br. 28-30; see Br. 29 (chart). In

doing so, appellants misunderstand the basis of the United States' challenge to the 2013 selection process. The appropriate assessment and evidence of disparate impact is based on the rank ordering of applicants, which is based, in part, on their NELF performance. ROA.14-51132.1065-1067. That evidence showed the disparity in rank ordering of white applicants as compared to African-American and Hispanic applicants was equivalent to 2.85 and 4.80 units of standard deviation, respectively. See p. 14, *supra*.

Appellants ignore a central tenet of negotiation when they assert (Br. 26) that the Decree provision allowing the City to make interim hires based on the 2013 selection process either reflects that the process is, in fact, valid or the Decree should be rejected. The Parties negotiated and agreed that up to 90 applicants who completed the 2013 process may be hired to address the City's firefighter shortage. ROA.14-51132.3834-3835, 3870-3872. Agreeing that the City may use this process on a limited basis is not any concession of validity nor does it reflect an abuse of the district court's discretion. See *Salinas*, 802 F.2d at 790.

Finally, appellants' reliance (Br. 32-33) on *Bazile* v. *City of Houston* to argue the district court abused its discretion in approving the Decree is misplaced. 858 F. Supp. 2d 718, 720-721 (S.D. Tex. 2012). The central facts in *Bazile* are inapposite. Unlike here, the proposed Consent Decree under review in *Bazile* conflicted with both state civil service law and an existing collective bargaining

agreement. Cf. *id.* at 729, 733. In *Bazile*, the union, which objected to terms of the Decree, was permitted to intervene and therefore had party status. Cf. *id.* at 729, 732. Moreover, the proposed Consent Decree in *Bazile* included numerous, detailed provisions regarding how the City would assess promotional applicants. Cf. *id.* at 729-735. The district court's review in *Bazile* of that Decree's proposed terms are simply not applicable here. Cf. *id.* at 760-761, 772.

The appellants' various claims do not change the determination that the district court acted within its discretion in approving the Consent Decree. Accordingly, should the Court reach this issue, it should affirm the district court's entry of the Consent Decree.

CONCLUSION

The district court's order denying intervention should be affirmed. Insofar as appellants seek to challenge the district court's entry of the Decree, their appeal should be dismissed for lack of jurisdiction. Should this Court nevertheless

address the merits of the district court's entry of the Decree, it should affirm the district court's order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 21, 2015, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Jennifer Levin Eichhorn
JENNIFER LEVIN EICHHORN
Attorney

CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF FOR THE UNITED STATES AS APPELLEE:

(1) complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 13,872 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font.

s/ Jennifer Levin Eichhorn
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Date: April 21, 2015