No. 11-57098

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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DANIEL JAMES TREBAS,

Movant-Appellant

v.

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

STATE OF CALIFORNIA,

Defendant-Appellee

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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# BRIEF FOR THE UNITED STATES AS APPELLEE

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THOMAS E. PEREZ
Assistant Attorney General

MARK L. GROSS
HOLLY A. THOMAS
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 307-3714

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## STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. 1331. The court entered its order denying the motion for intervention on October 31, 2011. S.E.R. 424-427.[1] Pursuant to Federal Rule of Appellate Procedure 4(a), appellant filed a

[1] "S.E.R. ___" refers to the page number in the supplemental excerpts of record submitted with the United States' brief.

timely notice of appeal on November 14, 2011. S.E.R. 430-434. This Court has jurisdiction pursuant to 28 U.S.C. 1291.

## STATEMENT OF THE ISSUE

Whether the district court erred in denying appellant's motion for intervention.

## STATEMENT OF THE CASE

On May 2, 2006, the United States filed a complaint against the State of California, the Governor of California, the Director of the California Department of Mental Health, and two state hospital directors pursuant to the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. 1997. S.E.R. 1-9. The complaint alleged that the defendants were engaging in a pattern or practice of conduct that violated the constitutional and federal statutory rights of people confined within two California State Mental Health Hospitals: Metropolitan State Hospital (Metropolitan) and Napa State Hospital (Napa). S.E.R. 1-9. Simultaneously with its complaint, the United States filed a Consent Judgment reached between the parties, which the district court approved on May 15, 2006. S.E.R. 10-101.

On August 3, 2006, the United States filed an amended complaint, alleging the same course of constitutional and statutory violations at two more hospitals: Patton State Hospital (Patton) and Atascadero State Hospital (Atascadero or ASH). S.E.R. 102-110. On February 27, 2007, pursuant to a joint stipulation of the

parties, the district court approved an Amended Consent Judgment (Judgment) adding these hospitals to the original Consent Judgment's provisions, and adding the directors of those hospitals as defendants to the suit. See S.E.R. 119-212; see also S.E.R. 213-218; S.E.R. 219-221.

On June 21, 2011, appellant, a patient at Atascadero, along with 91 other hospital residents at Atascadero (collectively, applicants), moved to intervene in this suit. See S.E.R. 222-279. On July 28, 2011, and August 11, 2011, respectively, the State of California and the United States filed briefs opposing the motion for intervention. S.E.R. 280-394; S.E.R. 395-406. Applicants filed their response on August 25, 2011. S.E.R. 407-423.

On October 31, 2011, the district court denied applicants' motion for intervention. S.E.R. 424-427. Appellant filed a timely notice of appeal. S.E.R. 430-434.

On November 16, 2011, pursuant to the parties' joint stipulation, the district court entered an order declaring that Atascadero and Patton were no longer subject to the Amended Consent Judgment. S.E.R. 428-429.

## STATEMENT OF FACTS

This appeal arises from a 2007 Amended Consent Judgment entered between the United States, the State of California, and other officials responsible for California's mental health services (collectively, Defendants) regarding Defendants' provision of services at four California State Mental Health Hospitals:

Metropolitan, Napa, Patton, and Atascadero. The February 2007 Judgment, a 93-page document, requires Defendants to make comprehensive reforms in these institutions, and contains detailed requirements regarding: (1) integrated therapeutic and rehabilitation services planning; (2) integrated assessments; (3) discharge planning and community integration; (4) specific therapeutic and rehabilitation services (*e.g.*, psychiatric services, psychological services, nursing services); (5) the use of restraints, seclusion, and PRN and Stat medications; (6) protection from harm; and (7) First Amendment and Due Process rights. See S.E.R. 119-212. The Judgment also appointed an independent monitor who was to evaluate each hospital at least twice a year. See S.E.R. 201, 205. By its terms, the Judgment was to expire five years after its effective date. S.E.R. 208.

In June 2011, over four years after the original Consent Judgment had been amended to include Atascadero in its provisions, appellant and a group of 91 other residents of ASH filed a motion to intervene pursuant to Federal Rule of Civil Procedure 24(a)(2). S.E.R. 226-227, 279. Applicants claimed that the monitor appointed to oversee the Judgment was ineffective (S.E.R. 224-226), that Defendants were promulgating and enforcing "underground" regulations (S.E.R. 228), and that the "Consent Judgment does not address Defendant's numerous other violations against ASH residents" (S.E.R. 232).

Specifically, the proposed intervenors claimed that: (1) "Release requirements are extended beyond the basis for confinement"; (2) Defendants were

conducting "[u]nconstitutional forced medicating with less due process than for prisoners"; (3) there was an "[a]bnormal and abusive use of Administrative segregation"; (4) "Standards used for providing daily meals are worse than for prisoners"; (5) "The actual facility fails to meet current state licensing requirements"; (6) there were "[o]verly restrictive property allowances and options for procurement"; (7) Defendants were making "[a]rbitrary and capricious violations of applicable labor laws"; and (8) that Defendants were engaged in "IRS and Voter Registration violations." S.E.R. 232-235. As a remedy, the proposed intervenors asked the court to (1) have ASH "and the other state hospitals under the Consent Judgment * * * decertified from the Medicaid program, and any and all other federal financial assistance programs"; (2) "order the dismissal of the court monitor"; and (3) "[rescind] the Consent Judgment with directions for moving the underlying case forward by the original plaintiff and defendants, with the inclusion of the contentions and issues presented herein." S.E.R. 237.

Both Defendants and the United States objected to the motion to intervene. S.E.R. 280-394; S.E.R. 395-406. The United States argued that the district court should deny the motion because it was untimely and prejudicial, because the lawsuit did not affect the proposed intervenors' ability to file any future claim, and because the present parties to the suit adequately represented the proposed intervenors' interests regarding any issue within the suit. See S.E.R. 397. The

United States also stated that the parties had worked together for over five years to institute the reforms mandated by the original Consent Judgment. S.E.R. 396.

The district court denied the motion for intervention. See S.E.R. 424-427. The court stated that this Court "has identified four requirements [for intervention] under Rule 24(a)." S.E.R. 425. First, "the applicant must timely move to intervene"; second, "the applicant must have a significantly protectable interest relating to the property or transaction that is the subject of the action"; third, "the applicant must be situated such that the disposition of the action may impair or impede the party's ability to protect that interest"; and, lastly, "the applicant's interest must not be adequately represented by existing parties." See S.E.R. 425 (quoting *Arakaki* v. *Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003)). Noting that "[t]imeliness is 'the threshold requirement' for intervention as of right," and that if a court "finds the motion untimely, [it] 'need not reach any of the remaining elements of Rule 24,'" the district court proceeded to apply this Court's three-part test for examining timeliness: the stage of the proceedings; possible prejudice to other parties; and the reason for delay. See S.E.R. 425 (quoting *League of United Latin Am. Citizens* v. *Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997) (*LULAC*)).

With regard to the stage of proceedings, the district court held that the fact that the motion to intervene was filed four years after Atascadero was added to the Consent Judgment "strongly weighs against finding their request timely." S.E.R. 425. Turning to the second factor, the court found that the prejudice arising from

the proposed motion was "manifest, not only because it would inject new issues years after the case was settled and remedies were implemented and monitored, but also because the Proposed Intervenors have admitted that they seek to undo the consent judgment and litigate the merits of the case." S.E.R. 426. The court found that this would both "delay the final resolution of the case indefinitely and create 'havoc' with the carefully balanced consent judgment entered by the parties and approved by the Court." S.E.R. 426.

With regard to the length or reason for the delay, the court found that the proposed intervenors admitted to being aware that a court monitor was inspecting the hospitals, and had stated that they "were given no notice of their interests being included under the Consent Judgment *prior to the Amendment on February 27, 2007*." S.E.R. 426 (citing S.E.R. 412) (emphasis added). The district court thus found that "Proposed Intervenors have presented no adequate reason why they waited to seek intervention until four years after the consent judgment was extended to ASH." S.E.R. 426. The court held that if the proposed intervenors were "arguing that they had to wait some period of time to determine whether the consent judgment would remedy the violations it addressed, they should have known at the outset" that Defendants might not comply. S.E.R. 426.

Having considered each of these factors, the district court concluded that the motion for intervention was untimely, and should be denied. S.E.R. 427.

## SUMMARY OF ARGUMENT

Appellant claims that the district court (1) failed to consider two documents the applicants filed in the district court; (2) failed to consider prejudice to the proposed intervenors when concluding that the motion for intervention was untimely; (3) failed to support the denial of the motion for intervention with relevant legal authorities and denied the motion contrary to established authority; (4) failed to use proper legal standards for reviewing the motion; and (5) that the Defendants' alleged subsequent abandonment of Judgment reforms shows that the parties would not have been prejudiced by the district court's grant of the motion to intervene. See Appellant's Br. 3.

Each of these arguments fails. The district court's timeliness analysis properly took into account the three factors this Court set forth regarding the timeliness of intervention motions: (1) the stage of the proceedings; (2) the prejudice to other parties; and (3) the reason for delay. See *LULAC*, 131 F.3d 1297, 1302 (9th Cir. 1997). Examining these factors, the court appropriately concluded that the applicants' motion to intervene, coming four years after the Amended Consent Judgment had been entered, was untimely and should therefore be denied. The district court was under no obligation to consider prejudice to the proposed intervenors – a factor present in the Eleventh Circuit's, but not the Ninth Circuit's, timeliness examination – nor was it required to *sua sponte* reconsider the motion for intervention based upon occurrences in the case after the motion was

denied. Furthermore, because the two documents appellant claims that the district court did not consider do not appear to actually have been filed, the district court was under no obligation to consider those documents in its ruling.

The district court's judgment should be affirmed.

## ARGUMENT

## THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN HOLDING THAT APPLICANTS' MOTION FOR INTERVENTION WAS UNTIMELY

### *A. Standard Of Review*

"The district court's denial of a party's motion to intervene as a matter of right is reviewed de novo, except for the issue of timeliness, which is reviewed for abuse of discretion." *County of Orange* v. *Air California*, 799 F.2d 535, 537 (9th Cir. 1986) (citations omitted), cert. denied, 480 U.S. 986 (1987). Under that standard, the reviewing court should not reverse unless it has "a definite and firm conviction that the district court committed a clear error of judgment after weighing the relevant factors." *In re Dual-Deck Video Cassette Recorder Antitrust Lit.*, 10 F.3d 693, 695 (9th Cir. 1993) (citation omitted).

### *B. The District Court Appropriately Denied Applicants' Motion As Untimely*

"In the absence of a statute conferring an unconditional right to intervene, Federal Rule of Civil Procedure 24(a)(2) governs a party's application for intervention as of right in the federal courts." *LULAC*, 131 F.3d 1297, 1302 (9th Cir. 1997). Rule 24(a) provides that, "[o]n timely motion, the court must permit

anyone to intervene who * * * claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2).

This Court has set forth a four-part test for examining a motion to intervene under Rule 24(a)(2): "(1) the application must be timely; (2) the applicant must have a 'significantly protectable' interest relating to the transaction that is the subject of the litigation; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest must be inadequately represented by the parties before the court." *LULAC*, 131 F.3d at 1302 (citing *Northwest Forest Res. Council* v. *Glickman*, 82 F.3d 825, 836 (9th Cir. 1996)).

"Timeliness is 'the threshold requirement' for intervention as of right." *LULAC*, 131 F.3d at 1302 (quoting *United States* v. *Oregon*, 913 F.2d 576, 588 (9th Cir. 1990), cert. denied, 501 U.S. 1250 (1991)). "In other words, if [a court] find[s] that the motion to intervene was not timely, [it] need not reach any of the remaining elements of Rule 24." *Ibid*. (citation and alteration omitted). In determining whether a motion for intervention is timely, this Court considers: "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *County*

*of Orange*, 799 F.2d at 537 (citation omitted). This Court applies these factors "bear[ing] in mind that any substantial lapse of time weighs heavily against intervention." *LULAC*, 131 F.3d at 1302 (internal quotation marks and citation omitted).

In this case, the district court appropriately and correctly applied the timeliness examination to conclude that applicants' motion for intervention, filed four years after the Consent Judgment was amended to include ASH, should be denied. Its decision was in no way an abuse of discretion.

*1. Stage Of Proceedings*

The district court cited this Court's decisions in *County of Orange*, *LULAC*, *Alaniz* v. *Tillie Lewis Foods*, 572 F.2d 657 (9th Cir.) (per curiam), cert. denied, 439 U.S. 837 (1978), and *Oregon*, to hold that applicants' decision to file their motion four years after Atascadero was added to the Consent Judgment "strongly weighs against finding their request timely." S.E.R. 425. Appellant argues, however, that because "[t]here have been no court ordered injunctions, no motions for Summary Judgment or rulings on such, no setting of a Discovery deadline or trial date, and no dismissal of the claim," this case, unlike those the district court cited, is still in the "initial stage of proceedings." Appellant Br. 8. This argument is clearly incorrect and finds no support in this Court's precedents.

Indeed, in this case there was a "judgment" entered four years ago. In February of 2007, Atascadero was added to the Consent Judgment that was

originally entered on May 15, 2006; this was an appealable court order. Applicants' motion was filed *four years* after this injunctive relief was first entered. This Court has repeatedly rejected intervention motions brought after a lengthy delay, even where judgment has not been entered, and even where no trial has yet taken place. See *County of Orange*, 799 F.2d at 537-538 (no abuse of discretion in denial of intervention request made after five years of litigation and one month after applicant became aware of a settlement, but before judgment was entered); *LULAC*, 131 F.3d at 1302-1303 (no abuse of discretion in denial of intervention request made 27 months after the original actions had commenced, but before trial); *Alaniz*, 572 F.2d at 658-659 (motion for intervention filed 17 days after a consent decree had become effective was untimely where applicants "surely * * * knew the risks" of delay). None of these cases support the proposition that the entry of a consent judgment is not a significant occurrence in terms of the timeliness examination – indeed, such a judgment is appealable as a court order. It is thus clear that the district court was correct to conclude that the stage of the proceedings here, where the motion for intervention was filed four years after Atascadero was added to the Consent Judgment, weighed against finding the request timely. Indeed, that decision is precisely in keeping with this Court's precedents.

*United States* v. *Oregon*, 839 F.2d 635 (9th Cir. 1988), cited by appellant for support (Appellant Br. 8), is inapposite.[2] There, "[t]he parties agree[d] that the application [wa]s timely," so the issue was never in dispute. *Oregon*, 839 F.2d at 637. Appellant's further claim that the motion for intervention was not unduly delayed because applicants "were given no notice of their interests being included under the Consent Judgment prior to the Amendment on February 27, 2007," (Appellant Br. 7-8) is also unpersuasive. As the district court correctly held, this argument still "does not explain why they waited until four years after ASH was added to the judgment to bring the motion." S.E.R. 425.

Under these circumstances, the district court correctly concluded that the stage of proceedings heavily weighed against the timeliness of applicants' motion.

*2. Prejudice To Other Parties*

The district court held that the "prejudice from the Proposed Intervenors' motion is manifest, not only because it would inject new issues years after the case was settled and remedies were implemented and monitored, but also because the Proposed Intervenors have admitted that they seek to undo the consent judgment and litigate the merits of the case." S.E.R. 426. Appellant argues here that (1)

[2] Appellant cites to the case of "*United States* v. *State of Oregon* v. *Residents*, 839 F.3d 1499 (9th Cir. 1991)." Appellant Br. 8. This is not a recognized citation; however, the United States believes that appellant may have intended to cite to the case of *United States* v. *Oregon*, 839 F.2d 635 (9th Cir. 1988), which discusses a motion to intervene in a CRIPA case.

applicants were not injecting "new issues" into the case (Appellant Br. 8-11); (2) the district court's holding that the "case was settled and remedies were implemented and monitored" is contrary to the facts of the case and the Consent Judgment (Appellant Br. 11); (3) "[t]he only reason to think that 'years of progress' would be undone * * * would be if the defendants have not * * * made necessary changes" (Appellant Br. 12); (4) the United States has "partially stipulated to" lack of prejudice by citing to the case of *Glickman*, 82 F.3d at 837 (Appellant Br. 12-13); and (5) Defendants have now "abandoned Consent Judgment reforms," which shows they never intended to comply with constitutional standards (Appellant Br. 12).

Each of these arguments must fail. First, despite appellant's claim that the issues raised in applicants' intervention motion were not "new," the fact remains that, as appellant admits, many of the issues applicants pressed "were not being addressed by the Consent Judgment." See Appellant Br. 9. An examination of the Amended Consent Judgment against the Motion for Intervention confirms this conclusion. Applicants sought to introduce issues regarding whether Defendants' meal services and culinary standards are adequate (S.E.R. 233), whether Defendants are failing to meet state licensing requirements for housing and lighting (S.E.R. 233), whether violations of IRS or voter registration requirements are occurring at hospitals (S.E.R. 234-235), whether Defendants are arbitrarily and capriciously applying labor laws (S.E.R. 234), or whether patient property

allowances are overly restrictive (S.E.R. 234). None of these issues were presented in the original complaint or the Amended Consent Judgment. Yet, these are all issues pressed in applicants' Motion for Intervention. Consideration of these issues would thus have required either undoing or again amending the Consent Judgment, four years after it had gone into effect at Atascadero. This would plainly have prejudiced the United States' and the Defendants' interests in the settlement that had been achieved.

Moreover, it is beyond dispute that, as the district court found, applicants' ultimate request was really that the Judgment be undone and the merits of the case litigated. S.E.R. 426. Indeed, the motion to intervene requested that "the court order the dismissal of the court monitor with additional order rescending (sic) the Consent Judgment with directions for moving the underlying case forward by the original plaintiff and defendants, with the inclusion of the contentions and issues presented herein." S.E.R. 237. The Judgment in this case was agreed to and entered after repeated hospital investigations by the United States and extensive negotiations between the parties. See S.E.R. 287-288, 396. It has been followed by years of semi-annual on-site inspections and evaluations by the court monitor, all aimed at helping Defendants meet their constitutional and statutory obligations. See S.E.R. 297-288, 396. A trial on the merits of the United States' amended complaint, as well as the applicants' newly-introduced issues, certainly would have

disrupted, and could well have put a halt to, the critical progress being made in improving services at these facilities.

In rejecting the applicants' motion, the district court cited this Court's holdings in *Alaniz*, 572 F.2d at 657, and *Smith* v. *Marsh*, 194 F.3d 1045 (9th Cir. 1999). In *Alaniz*, this Court held that allowing a motion for intervention filed two and one-half years after a lawsuit suit was filed and 17 days after a consent decree had been entered would "create havoc and postpone * * * needed relief." 572 F.2d at 659. This Court highlighted the "seriousness of the prejudice which results when relief from long-standing inequities is delayed." *Ibid*. Similarly, in *Smith*, this Court held that the district court properly determined that prejudice would accrue to the original litigating parties where applicants waited 15 months after the commencement of a suit before attempting to intervene and "many substantive and procedural issues had already been settled by the time of the intervention motion." 194 F.3d at 1051. As in this case, the proposed intervenors in *Smith* sought to inject new issues into the suit. *Ibid*. Observing that "[a]s a general rule, intervenors are permitted to litigate fully once admitted to a suit," this Court held that the district court had soundly concluded that "introducing these additional issues at such a late stage in the proceedings would cause undue delay." *Ibid*. (citation omitted).

In light of this Court's holdings in *Alaniz* and *Smith*, the district court in this case was doubtless correct to conclude that prejudice stemming from granting

applicants' motion would be manifest. See S.E.R. 426. Were the motion granted, applicants' ultimate aim to have the Judgment abandoned, to add new issues, and to litigate the merits of the suit would have been extremely disruptive to the parties. Granting the motion would have, as the district court held, "creat[ed] 'havoc' with the carefully balanced consent judgment" and "delay[ed] final resolution of the case indefinitely."[3] S.E.R. 426.

Finally, the question whether Defendants have "abandoned Consent Judgment reforms" in the wake of Atascadero's dismissal from the Judgment (Appellant Br. 12) plainly has no bearing on the district court's decision regarding the motion to intervene. The motion was filed while Atascadero was still under the Judgment. Atascadero was dismissed from the Judgment after the motion was denied. If applicants felt that circumstances after the district court's denial of their motion and after the dismissal of Atascadero warranted reconsideration of the court's denial of intervention, they could have filed a new motion to intervene. But "[i]t is rarely appropriate for an appellate court to take judicial notice of facts that were not before the district court," and the dismissal of Atascadero was not before the district court when it denied the motion to intervene. See *Flick* v.

[3] Appellant's argument that the Judgment's allowance of a three-year compliance period meant that the case was not actually settled (Appellant Br. 11) is also without merit. The fact that the Judgment required further action plainly does not decide the question of prejudice to the original parties, especially where applicants sought to upset a four-year old Consent Decree, add new issues, and litigate the entire suit anew.

*Liberty Mut. Fire Ins. Co.*, 205 F.3d 386, 392 n.7 (9th Cir.) (citation omitted), cert. denied, 531 U.S. 927 (2000).

The district court did not abuse its discretion in its prejudice examination.[4]

*3. Length And Reason For The Delay*

As to the final prong of this Court's timeliness examination, length and reason for the delay, the district court properly held that the delay is "measured from the time the movant 'knows or has reason to know that his interests might be adversely affected by the outcome of the litigation,'" and that the relevant date in this case was 2007, when Atascadero was added to the Consent Judgment. S.E.R. 426 (quoting *Oregon*, 913 F.2d at 589). Because the applicants "presented no adequate reason why they waited to seek intervention until four years after the consent judgment was extended to [Atascadero]," the court found that the four-year delay weighed strongly against intervention. S.E.R. 426-427.

Appellant argues that because "not all Proposed Intervenors had been at [Atascadero] since 2007," their delay was excusable. Appellant Br. 13-14. He argues that, in any event, the relevant date for determining timeliness is not the

[4] The United States also rejects appellant's claim that it "partially stipulated" to a lack of prejudice (Appellant Br. 12-13). The citation appellant relies upon in making this assertion is a "compare" citation differentiating this matter from *Glickman*. In *Glickman*, this Court held that a motion to intervene was timely when filed less than one week after plaintiff filed its claim, before defendant filed an answer, and before any proceedings had taken place – totally unlike the circumstances at issue here. See *id*. at 837.

February 2007 date of the Amended Consent Judgment, but rather the (allegedly later) date at which applicants should have been aware that their interests would no longer be protected adequately by the parties. Appellant Br. 14. Appellant also claims that because this is a CRIPA action, it is presumed that the applicants were not "able to adequately present there [sic] own interests in a manner that would comport with needed legal requirements for form, content and timeliness." Appellant Br. 14.

Each of these arguments is, again, unavailing. First, while it may be true that not all of the applicants had been at Atascadero since 2007, that cannot serve as a basis for excusing the delay in this case. Some of the applicants were at the hospital at that time (see Appellant Br. 14), and applicants themselves have pointed to facts showing their awareness of the Amended Consent Judgment since that date. See S.E.R. 426 (citing S.E.R. 226 and S.E.R. 412). Appellant has in any event cited no authority that would stand for the proposition that intervention must be indefinitely permitted because of changes in the identities of members of a group of potential intervenors. Indeed, such policy would fly in the face of this Court's recognition that where a "decree is already being fulfilled[,] to

countermand it * * * would create havoc and postpone the needed relief."[5] *Alaniz*, 572 F.2d at 659.

Second, given that many of the issues raised by the applicants were not being addressed by the Judgment – and that their ultimate goal of trial on the merits was facially at odd with the settlement's purposes – applicants should have been aware starting in 2007 that their interests in those issues might not be protected by the Amended Consent Judgment. See S.E.R. 426; cf. Appellant Br. 14. If applicants were concerned that the parties might not enforce the issues that were covered in the Decree, they could have so alleged in 2007. As the district court held, if appellant is arguing now that applicants "had to wait some period of time to determine whether the consent judgment would remedy the violations it addressed, [applicants] should have known at the outset that this risk existed." S.E.R. 426.

Finally, appellant argues that the fact that the suit between the United States and Defendants arises under CRIPA means that the district court should have applied a presumption that applicants – as dependent adults – were unable to meet legal requirements as to the timeliness of their intervention motion. Appellant Br. 14. On this basis, he seems to argue, the timeline for their intervention should

[5] As a further matter, the United States would note that neither appellant nor any other applicant provided the district court with factual information that would have allowed the court to assess the timelines for their individual awareness of the Amended Consent Judgment.

have been extended beyond usual legal requirements. Appellant Br. 14-15. This argument was not presented to the district court, and thus need not be considered on appeal. See *AlohaCare* v. *Hawaii Dept. of Human Servs.*, 572 F.3d 740, 744 (9th Cir. 2009) ("Absent exceptional circumstances, we generally will not consider arguments raised for the first time on appeal, although we have discretion to do so.") (citation omitted). The passages cited in appellant's brief stem from a section of applicants' reply brief below entitled "Failure to Grant Motion to Intervene Will Impair Applicants' Ability to Protect Their Interests." S.E.R. 415. This section of their brief is wholly separate from those portions of that pleading regarding the timeliness issue, and in no way presents (or even implies) the argument that the fact that this is a CRIPA case should delay the timeline for an intervention motion. See *AlohaCare*, 572 F.2d at 745 ("[W]e will not 'reframe an appeal to review what would be (in effect) a different case than the one the district court decided below.'") (citation and brackets omitted).

In any event, no loosening of the timeliness standard is warranted here. Appellant points to no case law loosening the timeliness standards because a suit has been filed under CRIPA, and, in all frankness, we can locate none. Applicants themselves pointed to facts demonstrating their awareness of the Amended Consent Judgment and its ramifications for them in 2007. See S.E.R. 226 (noting that residents of Atascadero "can tell when the court monitor * * * will be at [the hospital] based on the flurry of activity immediately prior to the monitor's

arrival."); S.E.R. 412 ("Applicants were given no notice of their interests being included under the Consent Judgment *prior to the Amendment on February 27, 2007*.") (emphasis added). CRIPA does not alter that equation.

*4. Prejudice To Proposed Intervenors*

Appellant finally argues that the district court "failed to consider the fourth element in relation to evaluating relative timeliness": the prejudice to proposed intervenors. Appellant Br. 15. Appellant cites in support two district court cases, *Ruderman* v. *Washington Nat'l Ins. Co.*, 263 F.R.D. 670 (S.D. Fla. 2010), and *Boca Raton Cmty. Hosp., Inc.* v. *Tenet Healthcare Corp.*, 271 F.R.D. 530 (S.D. Fla. 2010), which set forth the Eleventh Circuit's timeliness examination under Federal Rule of Civil Procedure 24(a). That timeliness test differs from this Court's own, and includes a prong examining the "prejudice to the would-be intervenor if his petition is denied." See *Ruderman*, 263 F.R.D. at 677; *Boca Raton*, 271 F.R.D. at 534; see also *Georgia* v. *United States Army Corps of Eng'rs*, 302 F.3d 1242, 1259 (11th Cir. 2002) (setting forth timeliness test). The district court here, however, properly applied the Ninth Circuit's test for evaluating timeliness, and was not required to evaluate the applicants' motion under precedent from another court of appeals.

In any event, as the United States argued below, because this litigation resulted in a Consent Judgment, res judicata, collateral estoppel, and stare decisis would not affect any separate litigation applicants may wish to bring. See S.E.R.

401; *County of Orange*, 799 F.2d at 538 (holding that where the "product of the litigation * * * was a Stipulated Judgment made pursuant to a negotiated settlement effecting only the signing parties" there is "no stare decisis effect to any future proceedings" a proposed intervenor may wish to initiate). Denial of intervention caused the applicants no prejudice.[6]

[6] Appellant also claims that the district court erred in failing to consider two documents – an "initial response to defendants' Response" and a "Supplemental Brief and Motion for a ruling…/Restraining Order" – which he asserts were filed before the district court on August 8, 2011, and October 21, 2011, respectively. Neither of these documents appears on the district court docket sheet, and the district court did not mention them in its decision. Applicants never filed a motion to correct the docket, or any other motion in the district court challenging the court's alleged failure to consider these documents. There being no evidence that these documents were actually filed in the district court, this argument cannot serve as a basis for reversal of the district court's decision.

## CONCLUSION

For the reasons stated above, the district court's judgment should be affirmed.

Respectfully submitted,

THOMAS E. PEREZ
Assistant Attorney General

s/ Holly A. Thomas
MARK L. GROSS
HOLLY A. THOMAS
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 307-3714

## STATEMENT OF RELATED CASES

The United States is not aware of any related cases, as described in Local Rule 28-2.6, that are pending in this Court.

s/ Holly A. Thomas
HOLLY A. THOMAS
Attorney

## CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE:

(1) complies with Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5391 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/ Holly A. Thomas
HOLLY A. THOMAS
Attorney

Date: June 21, 2012

## CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2012, 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 Ninth Circuit by using the appellate CM/ECF system.

I certify that service will be accomplished via the appellate CM/ECF system for all participants in this case who are registered CM/ECF users.

I further certify that on June 21, 2012, an identical copy of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE was served on the following party via First Class Mail:

Daniel James Trebas
ASH - ATASCADERO STATE HOSPITAL
P.O. Box 7001
Atascadero, CA 93423-7001

s/ Holly A. Thomas
HOLLY A. THOMAS
Attorney