No. 03-2343

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

CITY OF DETROIT,

Defendant-Appellee

COALITION AGAINST POLICE BRUTALITY,

Applicant in Intervention-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

PROOF BRIEF FOR THE UNITED STATES AS APPELLEE

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TABLE OF CONTENTS

PAGE

STATEMENT REGARDING ORAL ARGUMENT 1

STATEMENT OF JURISDICTION 2

STATEMENT OF THE ISSUES 2

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

1. *The Consent Judgments* 4

2. *Proceedings Below* 6

SUMMARY OF ARGUMENT 8

STANDARD OF REVIEW 12

ARGUMENT 13

I. THE DISTRICT COURT CORRECTLY DENIED THE COALITION'S MOTION TO INTERVENE AS OF RIGHT 13

A. *The Coalition Has Failed to Articulate a Substantial Legal Interest in this Matter Sufficient to Merit Intervention as of Right* 13

1. *Advocacy Interest* 17

2. *Pending Complaints* 20

3. *Enforcement Interest* 23

TABLE OF CONTENTS (continued): **PAGE**

B. *The Consent Judgments do not Impair the Coalition's Ability to Protect its Stated Interests* 24

C. *The Coalition's Interests are Adequately Represented by the United States* 28

II. THE COALITION IS NOT ENTITLED TO PERMISSIVE INTERVENTION 34

A. *The Coalition Should Not Be Permitted to Seek Permissive Intervention for the First Time on Appeal* 34

B. *The Coalition does not Merit Permissive Intervention* 36

CONCLUSION 37

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

APPELLEE'S DESIGNATION OF APPENDIX CONTENTS

TABLE OF AUTHORITIES

CASES: **PAGE**

Alexander v. *Aero Lodge No. 735*, 565 F.2d 1364 (6th Cir. 1977), cert. denied, 436 U.S. 946 (1978) 35

Athens Lumber Co. v. *FEC*, 690 F.2d 1364 (11th Cir. 1982) 16-18, 22

Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975), cert. denied, 489 U.S. 1015 (1989) 24

Bradley v. *Milliken*, 828 F.2d 1186 (6th Cir. 1987) . . . . . *passim*

Dahl, *Inc.* v. *Roy Cooper Co.*, 448 F.2d 17 (9th Cir. 1971) 24

Donaldson v. *United States*, 400 U.S. 517 (1971) 15

Foster v. *Barilow*, 6 F.3d 405 (6th Cir. 1993) 35

FTC v. *Owens-Corning Fiberglas Corp.*, 853 F.2d 458 (6th Cir. 1988) 23-24

Grutter v. *Bollinger*, 188 F.3d 394 (6th Cir. 1999) 14, 15, 18, 28

Hormel v. *Helvering*, 312 U.S. 552 (1941) 35

In re Morris, 260 F.3d 654 (6th Cir. 2001) 35

Jansen v. *City of Cincinnati*, 904 F.2d 336 (6th Cir. 1990) 15, 28-29

Jones v. *Prince George's County*, 348 F.3d 1014 (D.C. Cir. 2003) 14

McClune v. *Shamah*, 593 F.2d 482 (3d Cir. 1979) 27

Meyer Goldberg, *Inc.* v. *Goldberg*, 717 F.2d 290 (6th Cir. 1983) 28

Michigan State AFL-CIO v. *Miller*, 103 F.3d 1240 (6th Cir. 1997) . . . . . *passim*

Pinney Dock & Transp. Co. v. *Penn Cent. Corp.*, 838 F.2d 1445 (6th Cir.), cert. denied, 488 U.S. 880 (1988) 35

Purnell v. *City of Akron*, 925 F.2d 941 (6th Cir. 1991) . . . . . *passim*

CASES (continued): **PAGE**

SEC v. *Everest Mgmt.*, 475 F.2d 1236 (2d Cir. 1972) 27

Shea v. *Angulo*, 19 F.3d 343 (7th Cir. 1994) 27

Singleton v. *Wulff*, 428 U.S. 106 (1976) 35

South Dakota v. *Ubbelohde,* 330 F.3d 1014 (8th Cir. 2003), petition for cert. pending, No. 03-935 14

Stringfellow v. *Concerned Neighbors in Action*, 480 U.S. 370 (1987) 2

United States v. *Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976) 19

United States v. *City of Los Angeles*, 288 F.3d 391 (9th Cir. 2002) . . . . . *passim*

United States v. *Detroit Int'l Bridge Co.*, 7 F.3d 497 (6th Cir. 1993) 15

United States v. *Michigan*, 940 F.2d 143 (6th Cir. 1991) 18-19

United States v. *Tennessee*, 260 F.3d 587 (6th Cir. 2001) 12-14, 16

Wade v. *Goldschmidt*, 673 F.2d 182 (7th Cir. 1982) 29

STATUTES:

28 U.S.C. 1291 2

28 U.S.C. 1331 2

42 U.S.C. 14141 . . . . . *passim*

42 U.S.C. 14141(a) 3

42 U.S.C. 14141(b) 3

RULES: **PAGE**

Fed. R. App. P. 4 2

Fed. R. Civ. P. 24(a) 28

Fed. R. Civ. P. 24(a)(2) 12

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STATEMENT REGARDING ORAL ARGUMENT

The inquiry into the substantiality of the claimed interests in this case "is necessarily fact-specific," *Michigan State AFL-CIO* v. *Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997), and requires assessment of both this Court's precedent and the Ninth Circuit's analogous decision in *United States* v. *City of Los Angeles*, 288 F.3d 391 (9th Cir. 2002). The United States therefore believes that oral argument would assist the Court in its deliberations.

STATEMENT OF JURISDICTION

The district court has jurisdiction over the underlying action pursuant to 28 U.S.C. 1331. The court denied Appellant Coalition Against Police Brutality's (the "Coalition") motion to intervene as of right on August 26, 2003. (R. 31 Order, Apx. p. __).[1] Appellant filed a timely notice of appeal on October 15, 2003. (R. 47 Notice of Appeal, Apx. p.__). Fed. R. App. P. 4. The denial of a motion to intervene as of right is a final appealable order. *Stringfellow* v. *Concerned Neighbors in Action*, 480 U.S. 370, 377 (1987). This Court, therefore, has jurisdiction to hear the appeal on that issue pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Did the district court correctly deny Appellant's motion for intervention as of right?

2. Has the Coalition shown this case to be sufficiently extraordinary to allow it to seek permissive intervention for the first time on appeal?

STATEMENT OF THE CASE

This appeal arises from an action filed by the United States against the City of Detroit to remedy unlawful and unconstitutional conduct by the Detroit Police Department. In June 2003, the United States filed a Complaint against the City of Detroit alleging a pattern or practice of police misconduct, including "subjecting

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[1] "R." refers to the district court record. "Tr." refers to the Transcript of Hearing: The Coalition Against Police Brutality's Motion to Intervene (July 14, 2003). Appellant's brief is cited as "App. Br."

individuals to uses of excessive force, false arrests, illegal detentions, and unconstitutional conditions of confinement." (R. 1 Complaint, p.1, Apx. p. __). The suit was filed pursuant to 42 U.S.C. 14141(a), which makes it unlawful for "any governmental authority * * * to engage in a pattern or practice of conduct by law enforcement officers * * * that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." The statute empowers the Attorney General of the United States to bring a civil action to "obtain appropriate equitable and declaratory relief to eliminate the pattern or practice." 42 U.S.C. 14141(b). The Statute vests no such similar authority in anyone other than the United States. Simultaneously with the Complaint, the United States and the City filed two proposed Consent Judgments and a Joint Motion to Appoint a Monitor. (R. 2 Joint Motion, Apx. p. __).

The Coalition initially sought to intervene in this action as of right and as defendant, filing an answer to the Complaint. (R. 10 Motion for Intervention as of Right, Apx. p. __). At oral argument, the Coalition clarified that it had intended to intervene as a plaintiff. (Tr. at 13, Apx. p. __). The Coalition, however, has failed to file a complaint-in-intervention. The district court heard oral argument on the motion to intervene on July 14, 2003, denied the motion orally on the record (Tr. at 30, Apx. p. __), and subsequently entered an order denying the motion on August 26, 2003, (R. 31 Order, Apx. p. __).

STATEMENT OF THE FACTS

The Complaint and proposed Consent Judgments in this case are the

culmination of intense and protracted negotiations between the United States and the City of Detroit ("City") following the Department of Justice's ("DOJ") investigation of the Detroit Police Department ("DPD"). The Department of Justice initiated the investigation in December 2000 following a request by the Mayor of Detroit. (R. 23 Consent Judgment Conditions of Confinement ¶ 6, Apx. p. __). A few weeks after the Mayor's request, Detroit's City Council passed a resolution that also requested a DOJ investigation. (R. 10 Motion to Intervene Exh. 6, Apx. p. __). The government's investigation identified a pattern or practice of police misconduct including "subjecting individuals to uses of excessive force, false arrests, illegal detentions, and unconstitutional conditions of confinement." (R. 1 at 1, Apx. p. __).

1. *The Consent Judgments*

The two Consent Judgments require the DPD and the City to adopt certain management practices and procedures to remedy the violations identified in the investigation. (R. 22 Consent Judgment Use of Force ¶ 13, Apx. p. __; R. 23 ¶ 13, Apx. p. __). The first decree, entitled "Consent Judgment Use of Force and Arrest and Witness Detention," addresses matters related to the use of force (R. 22 ¶¶ 14-26, Apx. p. __), and policies governing arrests and detention (R. 22 ¶¶ 42-60, Apx. p._). In addition, this decree sets out detailed provisions governing investigations of use of force incidents and prisoner injuries (R. 22 ¶¶ 27-41, Apx. p.__), as well as the receipt, investigation and review of citizen complaints (R. 22 ¶¶ 61-69, Apx. p. __). The decree may be terminated after five years if the City has been in

substantial compliance for at least the preceding two years. (R. 22 ¶ 148, Apx. p. __).

The second decree – "Consent Judgment Conditions of Confinement" – outlines procedures that DPD must follow with respect to its detention and prison facilities, including requirements for safe physical conditions (R. 23 ¶¶ 14-22, Apx. p.__), medical and mental health care (R. 23 ¶¶ 26-34, Apx. p.__), prisoner safety (R. 23 ¶¶ 35-38, Apx. p.__), and environmental health and safety (R. 23 ¶¶ 39-46, Apx. p.__). That decree also instructs the DPD to document, investigate, and review all uses of force, injuries to prisoners, and in-custody deaths occurring in DPD holding cells. (R. 23 ¶¶ 55-57, Apx. p.__). In addition, the decree provides specific requirements related to training, management and supervision of holding cell staff. (R. 23 ¶¶ 63, 66-71, 73-78, Apx. p.__). The decree further requires the DPD to accept and process all citizen complaints involving incidents in its holding cells consistent with the revised citizen complaint policies. (R. 23 ¶¶ 58-59, Apx. p. __). The decree may be terminated after two years if the City has been in substantial compliance for the preceding year. (R. 23 ¶ 106, Apx. p.__).

Both decrees provide for the appointment of an Independent Monitor who acts as an agent of the district court in monitoring and reporting on the City's compliance. (R. 22 ¶¶ 124-126, Apx. p. __; R. 23 ¶¶ 79-81, Apx. p.__). The City must file periodic reports with the district court, the Independent Monitor, and DOJ. (R. 22 ¶ 141, R. 23 ¶ 96, Apx. p.__). Of particular relevance for this case, both decrees expressly state that they are "not intended to impair or expand the

right of any person or organization to seek relief against the City or its officials, employees or agents for their conduct or the conduct of DPD officers." (R. 22 ¶ 11, R. 23 ¶ 11, Apx. p.__).

On July 18, 2003, the district court entered both decrees and granted the joint motion to approve an Independent Monitor. (R. 20 Joint Motion, Apx. p.__; R. 22, Apx. p.__; R. 23, Apx. p. __).

2. *Proceedings Below*

Appellant Coalition Against Police Brutality is an association of "persons and surviving family members who have suffered injury and the loss of loved ones as the result of the use of unlawful excessive force by the Detroit Police Department," persons with "pending complaints with the Detroit Police Department against individual officers based on the use of illegal excessive force," and individuals who "have had claims against the DPD resolved through the Courts and before the Board of Police Commissioners." (R. 10 Motion to Intervene ¶¶ 5-7, Apx. p. __). According to the Coalition, many of its members "have been victims of police brutality in the City of Detroit" and "have pending complaints against the Detroit Police Department that remain under review." (R. 10 Brief in Support, p. 10, Apx. p. __). The Coalition states that it "is dedicated to reform of the Detroit Police Department so as to end unconstitutional conduct including the unlawful use of excessive and deadly force." (R. 10 Motion to Intervene ¶ 4, Apx. p. __). In addition to these interests, the Coalition cites a "significant advocacy interest on behalf of victims of police brutality" and an interest in citizen input

concerning reforms at the DPD. (R. 10 Brief in Support, p. 10, Apx. p. __).

In its motion to intervene as of right, the Coalition claimed that these interests would be "significantly and irreversibly impaired" by entry of the Consent Judgments. (R. 10 Brief in Support, p. 11, Apx. p.__). In support of this claim, the Coalition argued that the decrees "make no provision for the impact of revised policies and practices upon complaints pending within the DPD; make no provision for input of or outreach to citizens regarding the policies and practices that are to be developed by the DPD as required by the Consent Judgments; and make[] no provision for the right of citizen input as exists under current law." (*Ibid.*) Finally, the Coalition argued that its interests would not be adequately represented in the case because no party would advocate positions not contained in the proposed Consent Judgments, and because the City and the United States had already colluded to reach a tentative agreement and thus were not adversaries. (R. 10 Brief in Support, pp. 11-13, Apx. pp. __).

The district court heard oral argument on the Coalition's motion to intervene on July 14, 2003. (Docket Sheet, Apx. p.__). After affording the Coalition a full opportunity to make such argument and factual showing as it wished, the district court denied the motion and explained its reasoning. (Tr. at 25-30, Apx. pp. __). The district court found the motion to be timely, and assumed that the Coalition has articulated a sufficiently significant legal interest to support intervention. (Tr. at 25-26, Apx. pp.__).

However, for six different reasons, the district court concluded that the

Coalition failed to establish that its interests would be impaired by the litigation: (1) the Consent Judgments do not impair the Coalition's members' right to file and prosecute complaints against DPD; (2) the mere existence of pending complaints does not create an interest that will be impaired; (3) the Consent Judgments have no bearing on cases brought against DPD by individual litigants; (4) the Consent Judgments in no way impair the Coalition's ability to promote citizen input on reforms; (5) the Consent Judgments expressly provide that DPD must make proposed policy revisions public for review, comment, and education, and finally; (6) were the Coalition allowed to intervene, the "case could easily become unmanageable" as other groups would also seek to participate. (Tr. at 27-28, Apx. pp. __).

The district court also concluded that the Coalition had failed to show that its interests were not adequately represented by the United States. (Tr. at 28-30, Apx. pp.__). It concluded that all parties shared the same goal of advancing improvement in policing in Detroit, and rejected the Coalition's claim of collusion and inaction by the United States and DPD. (Tr. at 28-30, Apx. pp. __). The district court also denied the Coalition's request to participate as an amicus. (Tr. at 30, Apx. p.__).

SUMMARY OF ARGUMENT

The Coalition cannot satisfy three of the four criteria required to qualify for intervention as of right. First, the Coalition has not demonstrated that any of its asserted interests – in advocating for citizen participation in the reform processes,

in its members' pending administrative complaints, and in ensuring enforcement of the Consent Judgments – is directly and significantly related to the specific subject matter of this litigation. Under this Court's intervention standards, those interests cannot be the basis of a claim for intervention as of right.

The Coalition asserts an interest in advocating for victims of police brutality and in favor of citizen input into the City's deliberations on police reform. But citizen participation in Detroit's political and administrative processes is not the subject of this litigation. Rather, this case regards the United States' obligation under 42 U.S.C. 14141 to ensure that Detroit's policing does not violate protected federal rights. While the Coalition discusses at great length its involvement in the political processes advocating for police reform, its ability to advocate is unaffected by this case. Moreover, the majority of its concerns raise local political questions, not matters related to the disputed legal substance of this lawsuit. This interest therefore cannot provide the Coalition the direct, significant, and legally protectable interest required for intervention as of right.

In addition, the Coalition has not carried its burden of defining its interest in the pending administrative complaints filed by its members, or of demonstrating a direct and significant relationship between those complaints and the actual subject matter of this litigation. The Coalition failed to introduce any evidence into the record detailing the DPD's current administrative complaint procedures or the relief that a complainant may obtain upon a favorable finding, much less to demonstrate how those existing procedures might be affected by the Consent

Judgments. While the Consent Judgments require the City and DPD to revise the policies governing investigations to ensure that investigations are thorough and complete, they do not address processing pending complaints. Moreover, the clear intention of the Consent Judgments is to institute procedures that are more protective of complainants than the existing system. Claims as unfocused as those of the Coalition do not warrant intervention as of right.

The Coalition has similarly failed to carry its burden with regard to its asserted interest in assuring enforcement of the Consent Judgments. The interest it articulates is one shared by all citizens of the City of Detroit. Yet, the Coalition makes no showing why this interest should specifically entitle the Coalition to intervene as of right.

Second, the Coalition's asserted interests are not impaired by the Consent Judgments. The Consent Judgments in no way impede the Coalition from actively participating in the political processes involving the Detroit City Council and other City officials. In fact, the Consent Judgments require the City to continue to make proposed policy revisions available to the community for comment and review. As for the Coalition's assertion of its interest in pending administrative complaints, the Consent Judgments expressly state that they are not intended to impair or expand the existing rights of any person to seek relief for a claim against the City or the DPD. While the Consent Judgments require the City and DPD to adopt new policies and procedures for processing complaints, the revised procedures will be more protective of complainants than the status quo. Clearly, the decree causes no

harm to persons with pending complaints. Finally, the Coalition has made no showing that the Consent Judgments will not be enforced in the appropriate manner.

Third, the Coalition also failed to overcome the presumption that the United States will adequately represent the Coalition's interests. The United States and the Coalition have the identical ultimate objective – improving the practices and policies of the DPD to stop the pattern and practice of unlawful and unconstitutional misconduct. Indeed, the United States filed this case after concluding that DPD was violating citizens' constitutional rights. In such circumstances, this Court applies a strong presumption of adequate representation.

While the Coalition claims that it would have sought specific citizen representation on certain compliance committees, this Court has held that mere disagreement over individual aspects of a remediation plan is not sufficient to establish inadequacy. Existing provisions of law permit citizen input, and the United States continues to welcome information from the public to assist in monitoring compliance.

This Court also has rejected arguments analogous to the Coalition's unsupported and baseless attempt to equate the United States' tentative agreement with the City with collusion. There is no support, and no evidence provided by the Coalition, for its claim that the United States will not enforce the Consent Judgments that it drafted, negotiated, and signed less than one year ago.

Finally, because the Coalition did not seek permissive intervention in the

district court, this Court should not address its request for permissive intervention for the first time on appeal. The Coalition has not identified any facts bringing this case within the rare circumstances warranting departure from the general rule that appellate courts do not consider issues not raised below.

STANDARD OF REVIEW

"A district court's denial of intervention as of right is reviewed *de novo*, except for the timeliness element which is reviewed for an abuse of discretion." *United States* v. *Tennessee*, 260 F.3d 587, 592 (6th Cir. 2001).

A district court's denial of permissive intervention is reviewed for clear error. *Purnell* v. *City of Akron*, 925 F.2d 941, 950-951 (6th Cir. 1991).

ARGUMENT

In this Court, the Coalition seeks intervention both as a matter of right, and of permission. It merits neither, and the district court should be affirmed.

I

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

The Federal Rules of Civil Procedure provide that, upon timely application, an applicant shall be permitted to intervene as of right

> when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a)(2). Thus, Rule 24(a)(2) requires "(1) timeliness of the

application to intervene, (2) the applicant's substantial legal interest in the case, (3) impairment of the applicant's ability to protect that interest in the absence of intervention, and (4) inadequate representation of that interest by parties already before the court." *United States* v. *Tennessee*, 260 F.3d 587, 591-592 (6th Cir. 2001).

The District Court correctly rejected the Coalition's petition to intervene as of right because the Coalition cannot satisfy three of these four requirements. Certainly, its application was timely. Yet, it has failed to articulate a relevant substantial legal interest, has not demonstrated - and in fact has admitted quite the opposite - that its interests will be adversely affected, and has made no credible demonstration that its interests will be inadequately represented.

A. *The Coalition Has Failed To Articulate A Substantial Legal Interest In This Matter Sufficient To Merit Intervention As Of Right*

The Coalition asserts, at most, three different interests in intervention. It asserts an *advocacy interest* - that it has a "significant advocacy interest on behalf of victims of police brutality," and also that it "represents citizens with a direct interest in citizen input concerning reforms at the DPD." (App. Br. 15). Second, it asserts an *interest in pending complaints* - its members include "victims of police brutality" and their family members, who have "pending complaints" against DPD. (App. Br. 15-16). Third, and lastly, it asserts an *enforcement interest* - neither the monitor nor the United States, it complains, is moving with sufficient alacrity to enforce the terms of the Consent Decree. (App. Br. 16).

In order to intervene, however, the Coalition must demonstrate a relevant "substantial *legal* interest" in the proceedings. This interest should be related to the disputed legal substance of the matter. The Coalition's asserted interests, however, relate chiefly to political disputes in the City of Detroit and to complaints not implicated by this lawsuit. Accordingly, this lawsuit is an inappropriate forum for litigating the Coalition's purported interests.

This Court has indeed adopted "a rather expansive notion of the interest sufficient to invoke intervention of right." *Michigan State AFL-CIO* v. *Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997). Accordingly, a putative intervenor need not demonstrate the standing necessary to bring the suit in the first instance, or advance a specific legal or equitable interest.[2] *Grutter* v. *Bollinger*, 188 F.3d 394, 398 (6th Cir. 1999); *AFL-CIO*, 103 F.3d at 1245. Nevertheless, contrary to the Coalition's suggestion (App. Br. 14), this Court has never indicated any intention of rendering the requirement entirely hortatory. Failure to demonstrate the requisite interest remains a bar to intervention. See, *e.g.*, *Tennessee*, 260 F.3d at 595-596 (barring intervention for failure to demonstrate a substantial legal interest in the

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[2]The "expansive" nature of this interpretation is best understood in contrast with the interpretation adopted by some other Circuits, which have adopted a more narrow construction of Rule 24, requiring, for instance, intervenors to satisfy constitutional standing requirements, see, *e.g.*, *Jones* v. *Prince George's County*, 348 F.3d 1014, 1017 (D.C. Cir. 2003); *South Dakota* v. *Ubbelohde,* 330 F.3d 1014, 1023 (8th Cir. 2003), petition for cert. pending, No. 03-935, or requiring them to "assert an interest that is protected under some law," *United States* v. *City of Los Angeles*, 288 F.3d 391, 398 (9th Cir. 2002).

proceedings). Thus, a putative intervenor still must demonstrate a "significantly protectable interest," *Donaldson* v. *United States*, 400 U.S. 517, 531 (1971), or as this Court has put it, a "direct, significant legally protectable interest" in the disputed subject matter of the pending litigation. *United States* v. *Detroit Int'l Bridge Co.*, 7 F.3d 497, 501 (6th Cir. 1993); *Jansen* v. *City of Cincinnati*, 904 F.2d 336, 341 (6th Cir. 1990).

This Court's prior decisions bear this out. For instance, in *Grutter*, the Court weighed a petition filed by minority individuals, who had applied or intended to apply to the University of Michigan, and who sought to intervene into a lawsuit challenging the school's race-conscious admissions program. 188 F.3d at 396-397. As the challenged program would advantage such applicants, they clearly had a specific and significant legal interest in not losing that benefit. Similarly, in *AFL-CIO* this Court held that, due to the unique nature of its involvement in its enactment, and the field generally, the Michigan Chamber of Commerce had a sufficient interest in a campaign finance statute then under challenge. The Chamber was:

> (1) a vital participant in the political process that resulted in the legislative adoption of the 1994 amendments in the first place, (2) a repeat player in Campaign Finance Act litigation, (3) a significant party which is adverse to the challenging union in the political process surrounding Michigan state government's regulation of practical campaign financing, and (4) an entity also regulated by at least three of the four statutory provisions challenged by the plaintiffs.

103 F.3d at 1247. Based on these "particularly compelling facts," proved by the Chamber, the Chamber merited intervention as of right. *Id.* at 1246. See also

Purnell v. *City of Akron*, 925 F.2d 941 (6th Cir. 1991) (purported illegitimate children of decedent may state a significant legal interest in a wrongful death action even before paternity is established).

Conversely, where a putative intervenor's asserted interest has been unrelated or tangential to the legal dispute, or where it has been diffuse and generalized, the Court has found intervention as of right improper. For instance, in *United States* v. *Tennessee*, an association of non-profit agencies serving individuals with disabilities sought to intervene into an action brought by the United States against the State of Tennessee challenging the State's operation of its mental health system. 260 F.3d at 590-591. There, as here, the United States had negotiated consent judgments with the jurisdiction, and the applicant sought to "participate in the implementation of the settlement agreements" to "assur[e] adequate funding for implementation of the settlement agreements." *Id.* at 593, 595. The Court noted, however, that the association "does not challenge the terms of these agreements or contend that they fall below what federal law requires." *Id.* at 595. Moreover, its asserted interest did not regard the "constitutional and statutory violations alleged in the litigation," but rather, only the funding to be provided by the state under the agreements. *Ibid.* Therefore, because they did not engage the disputed legal issue, they did not merit intervention as of right. *Ibid.*

Similarly, in *AFL-CIO*, the Court noted its agreement with the Eleventh Circuit's decision in *Athens Lumber Co.* v. *FEC*, 690 F.2d 1364 (11th Cir. 1982). In that case, a labor union sought to intervene alongside the FEC in a challenge to a

limit on corporate election contributions. The union asserted "an interest in not being harmed financially in federal elections by corporate contributions." *AFL-CIO*, 103 F.3d at 1246. This Court agreed that, on the facts of that case, intervention was improper because the "sole basis of [the union's] interest is a general concern . . . shared with all unions and all citizens concerned about the ramifications of direct corporate expenditures." *Ibid.* (quoting *Athens Lumber*, 690 F.2d at 1366. An "interest [that] is so generalized * * * will not support a claim for intervention as of right." *Ibid.*

None of the Coalition's interests satisfy these precedents.

1. *Advocacy Interest*

We begin by considering the Coalition's advocacy interest. As noted, the Coalition advances its interest in advocating on behalf of victims of police brutality, and in representing citizens interested in police reform. (R. 10 Motion to Intervene ¶ 10, Apx. p. __). Simply put, this interest is neither germane to the disputed subject matter of this suit, nor is it sufficiently specific to the Coalition.

First, the Coalition's advocacy interest is unrelated to the disputed subject matter of this litigation. The United States filed suit pursuant to 42 U.S.C. 14141, which authorizes it to seek prospective relief to redress DPD's excessive use of force, unconstitutional conditions of confinement, and to effect the policies and procedures necessary to correct those violations. Accordingly, at issue is whether the Detroit Police Department engaged in substantive rights violations.

Such a lawsuit does not even implicate the Coalition's advocacy interests.

The Coalition's right to advocate, and specifically to participate in Detroit's political process, stands wholly apart from the disputed legal issues raised by the United States' complaint. Unlike *Grutter*, where the prospective minority applicants' interest was in the very benefit challenged in the lawsuit, 188 F.3d at 396-397, the Coalition's interest in continued advocacy is at best tangentially related to the dispute in this lawsuit. And, unlike *AFL-CIO*, the Coalition has failed to demonstrate its particular interest either in any of the specific remedies advanced in the Consent Judgments or in the disputed subject matter of the litigation. Compare 103 F.3d at 1247.

Second, the Coalition's interest manifestly is too broad and diffuse to justify intervention as of right. The fact is that every resident of the City of Detroit shares the Coalition's interest in being free from police brutality, and in advocating for police reform. As was the case in *Athens Lumber*, the Coalition's advocacy interest "is [a] general concern . . . shared with * * * all citizens * * *." *AFL-CIO*, 103 F.2d at 1246 (quoting *Athens Lumber*, 690 F.2d at 1366). An "interest [that] is so generalized * * * will not support a claim for intervention as of right." *Ibid.* The district court noted this very problem, asking "what is to prevent another group or many other groups who claim and allege that they have similar interests from joining in the lawsuit and becoming parties?" (Tr. at 15, Apx. p. __). The answer clearly is "nothing."

In this regard, the Coalition's advocacy interest is really more akin to the types of interests advanced by the "litigating amic[ii]" at issue in *United States* v.

Michigan, 940 F.2d 143, 162-163 (6th Cir. 1991). In that case, this Court took a dim view of that sort of interested third party litigant. See *id*. at 164 (describing "litigating amicus" as a "legal mutant" contributing to "cascading acrimony" and undermining the "core stability of American adversary jurisprudence"). The Court should be similarly hesitant to permit a similar form of advocacy by allowing intervention by a party asserting only the interest of "the public at large." (App. Br. 18).

The Coalition's reliance on *United States* v. *City of Los Angeles*, 288 F.3d 391 (9th Cir. 2002), and on *United States* v. *Allegheny-Ludlum Industries*, *Inc.*, 517 F.2d 826, 845 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976), is misplaced. In *City of Los Angeles*, the Ninth Circuit did not determine whether the community organizations had a significant interest in the case because it easily concluded that the applicants had not overcome the presumption that the United States adequately represented their interests. 288 F.3d at 402-403. As for *Allegheny-Ludlum Industries*, the Coalition represents that decision as holding that the National Organization of Women's (NOW) claimed interest in a hiring discrimination suit was sufficient for intervention as of right. But, in fact, the Fifth Circuit did not decide whether NOW's interest was sufficient because it held that NOW did not satisfy the other two criteria. 517 F.2d at 845.

As applicant for intervention, the Coalition bore the burden of pleading and proving facts demonstrating its substantial legal interest in the subject of the litigation. Yet, not only did it fail to adduce any actual evidence before the district

court of its involvement, but indeed failed even to file a complaint-in-intervention. The organizing and lobbying activities the Coalition has asserted here and in the District Court (see, *e.g.*, R.10 Motion to Intervene ¶ 8; Apx. p. __, App. Br. 15), do not constitute facts sufficient to establish a significant and direct interest in any particular remedy or relief at issue in this suit, nor do they suggest an interest sufficiently particular to the Coalition to merit intervention.[3]

2. *Pending Complaints*

Second, the Coalition posits an interest in pending complaints its members have filed against the DPD. (App. Br. 16). This interest does not warrant intervention as of right as, again, the Coalition has neither sufficiently defined its interest nor demonstrated a direct and significant relationship to the actual disputed subject matter of this litigation.

Again, as applicant, the Coalition bore the burden of pleading and proving this relationship. But the Coalition has not introduced any evidence into the record detailing either the DPD's current complaint procedures or the relief that a complainant may obtain upon a favorable finding, much less explained how its interests in the procedures and possible relief might be affected by the Consent Judgments.

With regard specifically to its members' pending complaints, the Consent

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[3]The Coalition's suggestion that the fact that other community organizations in other cities in other cases have participated in other consent judgments demonstrates its own right to intervene in this case proves too much. (App. Br. 16). Absent the requisite proof in this case, the Coalition has no such right.

Judgments do not make specific provision. Certainly they do not require DPD to stop investigating or adjudicating pending complaints, nor to delay or fail to thoroughly investigate pending complaints. In fact, the Use of Force Consent Judgment requires the City to "ensure that adequate resources are provided to eliminate the backlog of disciplinary cases and that all disciplinary matters are resolved as soon as reasonably possible." (R. 22 ¶ 103, Apx. p. ___). Furthermore, both Consent Judgments state expressly that they are "not intended to impair or expand the right of any person or organization to seek relief against the City or its officials, employees or agents for their conduct or the conduct of DPD officers." (R. 22 ¶ 11, Apx. p. __; R. 23 ¶ 11, Apx. p.__). As Counsel for the City made clear below, these judgments neither hinder nor advance the Coalition's members pending private causes of action. (Tr. at 20, Apx. p. __). The clear intent of the Consent Judgments is to develop and implement procedures that are more protective of complainants than the existing system.

With regards to complaints more generally, the Consent Judgments require DPD and the City to "revise their policies regarding the conduct of all investigations to ensure full, thorough and complete investigations." (R. 22 ¶ 27, Apx. p.___). Accordingly, all investigations must, "to the extent reasonably possible, determine whether the officer's conduct was justified." It is impermissible to close an investigation "simply because a subject or complainant is unavailable, unwilling or unable to cooperate." (R. 22 ¶ 27, Apx. p. __). To avoid direct conflicts of interest, the investigator must be a supervisor "who did not

authorize, witness or participate in the incident." (R. 22 ¶ 28, Apx. p. __). The Consent Judgment also requires procedures to identify each officer involved in the incident or on the scene, to obtain timely statements, and to canvass and interview other witnesses. (R. 22 ¶¶ 28-29, Apx. p.__).

The investigatory report must contain a detailed description of all relevant evidence and reasonable credibility determinations. The investigator may not automatically credit an officer's statements over non-officers' statements, or discount statements by complainants who are found or plead guilty. The report also must include a finding on whether the officer complied with applicable DPD policies. (R. 22 ¶ 32, Apx. p.__). With respect to review, the Consent Judgments require policy revisions ensuring that investigations are reviewed up the chain of command, and that supervisors identify and correct deficiencies. Any supervisor disagreeing with an investigation's finding or departing from a recommended corrective action must explain that departure in writing. (R. 22 ¶ 33, Apx. p.__). Similar requirements apply to investigations of prisoner injuries and use of force incidents involving prisoners. (R. 22 ¶¶ 34-36, Apx. p.__).

The Coalition nowhere explains the nature or the contours of its interest in the pending complaints, nor how the improvements in DPD's policies and procedures will affect this ill-defined interest. This Court should not consider intervention as of right on the basis of such generalized claims. *AFL-CIO*, 103 F.3d at 1246 (quoting *Athens Lumber*, 690 F.2d at 1366).

3. *Enforcement Interest*

Finally, the Coalition cites as an interest the fact that it has asked the district court to add a recent report by the independent monitor to the record, and specifically notes that according to the report, DPD failed to meet several deadlines set forth in the Consent Decree. (App. Br. 16). Elsewhere in its brief, the Coalition suggests that neither the court-appointed monitor, nor the United States, is taking sufficient steps to enforce the Consent Judgments.[4] (App. Br. 21-23). To the extent that the Coalition intends these observations to constitute an interest, that interest presumably is in the full enforcement of the laws, and in whatever remedy is ordered in this matter.

In the first instance, with regard specifically to the Consent Decree that has been entered below, it merits mention that this Court has made clear that only the United States may enforce its Consent Decrees. "[A] well-settled line of authority * * * establishes that a consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it even though they were intended to be benefitted by it." *FTC* v. *Owens-Corning Fiberglass Corp.*, 853 F.2d 458 (6th Cir.

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[4]The Coalition notes its intention to supplement the record through the district court with a report submitted by the monitor detailing DPD's progress thus far. (App. Br. 16). Presumably, were that motion granted, the Coalition would then rely on that report before this Court. The United States does not oppose the Coalition's effort to supplement the record, but does expect that should that report be submitted and relied upon, that the Court will allow it a supplemental opportunity to address the report and any arguments flowing therefrom.

1988) (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 750 (1975)), cert. denied, 489 U.S. 1015 (1989). This Court also cited the Ninth Circuit's observation that "[o]nly the Government can seek enforcement of its consent decrees." *Ibid.* (quoting *Dahl*, *Inc. v. Roy Cooper Co.*, 448 F.2d 17, 20 (9th Cir. 1971)). Accordingly, the Coalition has no right to enter the lawsuit to enforce these agreements.

The Coalition's argument may be more general – that it had a right to intervene prior to approval of the decrees, and to advocate for a different consent decree. On that score, however, it has failed to introduce any evidence, or adduce any argument, as to why its interest in seeing laws and remedies enforced differs from that held by any other citizen or group. (App. Br. at 18). Absent evidence of involvement on the order of that proffered in *AFL-CIO*, related specifically to the disputed subject matter of this lawsuit, this cannot constitute the requisite "substantial legal interest."

B. *The Consent Judgments Do Not Impair The Coalition's Ability To Protect Its Stated Interests*

The Court need not actually resolve whether the Coalition has identified a substantial legal interest, because it clearly fails to meet the remaining criteria for intervention as of right. The Consent Judgments impair neither its advocacy interest, nor its interest in pending complaints, nor do they affect its interest in seeing the laws enforced. While this showing need only be "minimal," the Coalition has made no showing whatsoever.

In order to demonstrate its advocacy interest, the Coalition cites its accomplishments in the City of Detroit. By its own account, it has appeared before the City Council and the Board of Police Commissioners on numerous occasions (App. Br. 15); was commended by the City Council for work in redressing police brutality (App. Br. 6); has successfully petitioned the City Council to hold hearings on the issue (*ibid.)*; and was invited to participate in a Citizens Review Panel convened by the chief of police to review the DPD's use of deadly force (App. Br. 8).

The Consent Judgments leave these activities entirely untouched. Counsel for the Coalition admitted as much to the district court:

> THE COURT: Is there anything in the proposed Consent Judgments that in your opinion would preclude The Coalition from advancing its cause or to express to the Monitor those concerns that The Coalition's members have experienced and are concerned with?
>
> MR. DAVIS: There is no formal bar.

(Tr. at 10, Apx. p.__). As noted, this lawsuit regards only the United States' authority under Section 14141 to ensure that the Detroit Police Department is practicing constitutional policing. Accordingly, neither Consent Judgment creates any obstacle to the Coalition's advocacy efforts in the media, before the city's legislative and administrative officials, or with DPD. The Coalition remains free to join with other organizations and concerned citizens to lobby officials and to testify in hearings and proceedings before the City Council or other city officials.

This was precisely the conclusion reached in a nearly identical case in Los Angeles. In *City of Los Angeles*, several community groups and minority individuals sought to intervene citing similar concerns. The Ninth Circuit held it "doubtful that their [advocacy] interests [were] impaired by the litigation." 288 F.3d at 402. As in that case, this litigation "does not prevent any individual from initiating suit against [DPD] officers who engage in unconstitutional practices or against the City defendants for engaging in unconstitutional patterns or practices. Nor does any aspect of the litigation prevent the community organizations from continuing to work on police reform." *Ibid.*

Before the District Court, and again here, the Coalition explained that its concerns arise not from any express bar but from the fact that the agreement *does not* provide for citizen input. (Tr. at 10-13, Apx. pp.__; App. Br. 18). "The proposed Consent Judgments require a complete overhaul of the DPD's policies and practices regarding processing of citizen complaints, use of force, arrest, detention, etc." (App. Br. 17 (emphasis in original)). In the first instance, the Coalition is simply wrong. As the district court noted, the Consent Judgments specifically obligate the City and the DPD to "continue to make available proposed policy revisions to the community for their review, comment and education." (Tr. at 27-28, Apx. p. __ (quoting R. 22 ¶ 71, Apx. p. __; R. 23 ¶ 61, Apx. p.__)). Second, the Coalition has not shown how it would be negatively impacted by requiring the DPD to rewrite policies and abandon illegal practices. Quite the opposite, such a step manifestly benefits the Coalition's members.

With regard to its interest in pending complaints, the Coalition gives no specifics about how revisions to police policies and practices, or any other requirement of the Consent Judgments, might *impair* its members' interests in the pending complaints. This is hardly surprising as both Consent Judgments provide expressly that they are "not intended to impair or expand the right of any person or organization to seek relief against the City or its officials, employees or agents for their conduct or the conduct of DPD officers." (R. 22 ¶ 11, Apx. p. __; R. 23 ¶ 11, Apx. p.__). The Use of Force Consent Judgment further requires the City to "ensure that adequate resources are provided to eliminate the backlog of disciplinary cases and that all disciplinary matters are resolved as soon as reasonably possible." (R. 22 ¶ 103, Apx. p. __).

Nothing in the Consent Judgments disposes of or even affects any rights of the Coalition or its members. Persons with pending complaints remain free to pursue any and all independent claims against the City or the DPD. Accordingly, this interest does not satisfy the requirements of Rule 24(a). See, *e.g.*, *Shea* v. *Angulo*, 19 F.3d 343, 347 (7th Cir. 1994) (holding that where applicant in intervention remains free to protect his rights by initiating his own suit "there is no potential impairment" of those rights); accord *McClune* v. *Shamah*, 593 F.2d 482, 486 (3d Cir. 1979); *SEC* v. *Everest Mgmt.*, 475 F.2d 1236, 1239 (2d Cir. 1972).

Finally, with regard to the universal interest in the enforcement of the laws, it cannot be that the entering into a Consent Judgment to require constitutional policing negatively impacts an interest in constitutional policing.

Thus, this case differs from others where this Court has found the "minimal" impairment required to satisfy Rule 24(a). In *Grutter* the Court found "little room for doubt" that access to the University of Michigan for minority students would be "impaired to some extent," and that a substantial decline in minority enrollment "m[ight] well result" from a decision striking down a racial preference program. 188 F.3d at 400. And in *AFL-CIO*, where the Chamber of Commerce had been successful in the legislature to remedy what it perceived as a disadvantaged position in campaign financing, judicial defeat of that legislation clearly would have returned it to that relatively disadvantaged position. 103 F.3d at 1247.

Here, in contrast, the Consent Judgments remedy unlawful conditions to which Coalition members were previously subject, and do not implicate the interest cited by the Coalition.

C. *The Coalition's Interests Are Adequately Represented By The United States*

Finally, in order to intervene as of right, the Coalition must demonstrate that its purported interests will not be adequately represented by an existing party - in this instance, by the United States. It has failed to do so.

The Coalition bears "the burden of demonstrating inadequate representation." *Meyer Goldberg, Inc.* v. *Goldberg*, 717 F.2d 290, 293 (6th Cir. 1983). To do so, it must "overcom[e] the presumption of adequacy of representation that arises when the proposed intervenor and a party to the suit . . . have the same ultimate objective." *Purnell*, 925 F.2d at 950 (quoting *Bradley* v. *Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987)); accord *Jansen v. City of Cincinnati*,

904 F.2d at 343. Moreover, "mere disagreement[s] over litigation strategy or individual aspects of a remediation plan does not, in and of itself, establish inadequacy of representation." *Bradley*, 828 F.2d at 1192. In fact, an applicant for intervention fails to meet its burden "when no collusion is shown between the representatives and an opposing party, when the representative does not have or represent an interest adverse to the proposed intervenor, and when the representative has not failed in its fulfillment of his duty." *Ibid.* (quoting *Wade* v. *Goldschmidt*, 673 F.2d 182, 186 n.7 (7th Cir. 1982) (per curiam)). The Coalition has made no such showing.

Any legitimate interest the Coalition might have in this case is adequately represented by the United States. First, the Coalition and the United States share the same interest in this lawsuit – advocating constitutional policing. Accordingly, it must be presumed that the United States will adequately address the Coalition's interests. *Purnell*, 925 F.2d at 950; *Bradley*, 828 F.2d at 1192.

The Coalition argues that its interests will not be represented because "at no time was the Coalition contacted by the parties for the Coalition's input concerning the proposed judgments * * *." (App. Br. 19). Nor, it complains, did the parties hold community hearings, or create a vehicle for victims' and citizens' groups to express their concerns regarding the judgments. (*Ibid.)*. Had such consultation occurred, the Coalition argues, it would have sought citizen monitoring of the Consent Judgments, citizen representation on the Compliance Review Committee for detention facilities, and a Compliance Review Committee for the use of force.

(App. Br. 20). Moreover, it would have opposed the provisions vesting broad authority under the Consent Judgments in the office of the Mayor. (*Ibid.*).

The Coalition's position pre-supposes a right to be so contacted, or an obligation on the part of the United States to hold such meetings. No such obligation exists. See 42 U.S.C. 14141. Moreover, such disagreements over the form of relief requested are insufficient to support intervention as of right. *Bradley* is instructive on this point. There, seeking to intervene into a school desegregation suit, the applicant intervenors argued that the class representatives no longer adequately represented their interests because class counsel had agreed to allow the school superintendent, rather than an independent commission, to monitor compliance. 828 F.2d at 1193. This Court disagreed, noting that the plaintiffs and proposed intervenors shared "the same ultimate objective in a unitary school district. Although the litigation strategy has altered, this objective has not been abandoned by current counsel." *Ibid.* Intervenors proffered no evidence that changes in the monitoring authority "so harm members of the plaintiff class and the proposed intervenors that the class representative have failed to fulfill their duty." *Ibid.*

The Coalition's preference for citizen representation on monitoring boards, like the preference of the *Bradley* intervenors for an independent monitoring commission, is not sufficient to prove inadequate representation of their interest. The United States shares the Coalition's ultimate objective of ending the pattern and practice of police misconduct by DPD. Simply asserting that, were it

empowered to sue under Section 14141 (which it is not), it would have sought some different relief, cannot leverage the Coalition into this lawsuit. Indeed, such a standard would open the Court's doors to myriad intervenors in numerous cases.

In an effort to overcome the presumption against it, the Coalition makes two additional charges: that the United States is in collusion with the DPD; and that the United States will not enforce its own Consent Judgments. Neither allegation should move the Court.

With regard to the first, the Coalition has introduced no direct evidence of collusion. Rather, its conclusory allegation rests entirely on the fact that the parties engaged in pre-suit negotiations. (App. Br. 20). But as the district court correctly noted, "[t]he fact that the parties have conferred and agreed upon a proposed resolution of the dispute prior to filing a complaint does not in my opinion suggest or imply that the parties have improperly engaged in a collusion." (Tr. at 29-30, Apx. pp.__). Pre-suit negotiations are common both in public and private litigation. In fact, courts generally favor settlement over litigation. To conclude that such pre-suit discussions indicate collusion would greatly undermine any incentive to do so.

Nor is the difference in preferred monitoring authorities evidence of collusion. Even proposing that the defendant monitor its own compliance was not deemed evidence of collusion in *Bradley*. 828 F.2d at 1193. "[W]hile the proposed intervenors strongly oppose abandoning an adversarial role vis-a-vis the Detroit School Board, such a decision is not the equivalent of 'collusion' with the opposing

party." *Ibid.* Here, in fact, the United States has demanded an independent monitor acting as agent of the court.

With regard to its second contention, the Coalition again failed below to adduce an iota of evidence supporting its accusation that the United States will not enforce its own Consent Judgment.[5] The Ninth Circuit faced the same argument in *City of Los Angeles*, where the proposed intervenors also alleged hostility to Consent Decrees. 288 F.3d at 403. However, "[c]ampaign rhetoric and perceived philosophic differences without more specific objective evidence in the record are insufficient by themselves to demonstrate adversity of interest." *Ibid.* Indeed, it cannot be that a party's right to intervene under Rule 24 changes with "the mere change of administration." *Ibid.* The Coalition attempts to distinguish *City of Los Angeles* by noting that, there, the Consent Decree had been entered into by the prior administration, whereas here, the Consent Judgments were negotiated by this Administration. Let us be clear – this Administration is firmly committed to the full and appropriate enforcement of all open Consent Decrees. That said, the Coalition's argument is nonsensical. Were an Administration to be selective in which decrees to enforce, it would be much more likely to enforce those it itself

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[5]In an effort to correct its failure to build a record below, the Coalition suggests that the Court "take judicial notice of the trend by the current administration and the Department of Justice (DOJ) specifically to oppose consent decrees * * *." (App. Br. 22-23). The Coalition provides neither support nor citation for this bold statement, of which the Court is supposed to take notice. Such a perceived "trend" is hardly appropriate matter for judicial notice. Moreover, had the Coalition attempted to make such a case below, the United States would have shown the Coalition's speculation to be, in fact, demonstrably wrong.

signed, rather than those it inherited.

The United States must retain the discretion to employ its experience with such institutional reform cases to determine when to seek the district court's intervention to enforce its decree. The United States is committed to identifying and correcting violations of citizens' statutory and constitutional civil rights by law enforcement officers pursuant to its authority under Section 14141. Indeed, it was the United States that undertook the investigation of the DPD's abuses, crafted the Consent Judgments in question, and sought their entry in the district court. There is absolutely no basis for contending and clearly no evidence suggesting that the United States does not intend to enforce these Consent Judgments, which it entered less than a year ago.

The Coalition also wrongly suggests that because DOJ has not instituted court proceedings following the monitor's first report on compliance, "it appears that neither the Monitor, the City or the DOJ will take any action to require compliance with the Consent Decrees * * *." (App. Br. 21). The United States is actively working with the City and recognizes that it may take time for the City and DPD to achieve compliance. The Coalition recognizes as much: "Institutionalized patterns and practices resulting in violation [sic] constitutional rights are not easily rooted out of large urban police departments with their own internal cultures." (App. Br. 9). The United States meets with the Monitor and DPD on a monthly basis to help DPD develop the systems necessary to accomplish the mandates of the Consent Judgments. In the six months since the Consent Judgments were

approved, DOJ has reviewed and provided comments on revised policies and procedures, provided technical assistance on use of force investigations, and offered guidance on the range of expertise needed by those developing new policies. It is our considered judgment that seeking contempt at this early stage would not advance compliance efforts.

In the final analysis, the Coalition does not merit intervention as of right because it has failed to demonstrate a relevant significant legal interest, has not shown that its interests would be impaired by this litigation, or that any interest it might have in this litigation would not be adequately represented by existing parties. The district court should be affirmed.

II

THE COALITION IS NOT ENTITLED TO PERMISSIVE INTERVENTION

In addition to seeking intervention as of right, the Coalition also asks the Court for permissive intervention. This request should be denied. First, the Coalition failed to seek permissive intervention below, but rather requests it for the first time before this Court. Second, the district court made clear that such intervention would not be proper.

A. *The Coalition Should Not Be Permitted To Seek Permissive Intervention For The First Time On Appeal*

The Coalition quotes at length from the portion of *United States* v. *City of Los Angeles*, 288 F.3d 391 (9th Cir. 2002), vacating the denial of the community organizations' motion for permissive intervention (App. Br. 24-27). But this

decision is inapplicable. Unlike the associations in *City of Los Angeles*, the Coalition did not seek permissive intervention in the district court.

A federal appellate court generally will not consider an issue that was not considered below. *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976). In this Circuit, the general rule is viewed as an accepted practice or rule of procedure rather than a jurisdictional bar to hearing issues for the first time on appeal. *Pinney Dock & Transp. Co.* v. *Penn Cent. Corp.*, 838 F.2d 1445, 1461 (6th Cir. 1988) (quoting *Hormel* v. *Helvering*, 312 U.S. 552, 557 (1941)), cert. denied, 488 U.S. 880 (1988). "Deviations are permitted in exceptional cases or particular circumstances, or when the rule would produce a plain miscarriage of justice." *Ibid.* (quoting *Hormel,* 312 U.S. at 557-558 (internal citations and quotations omitted)). In addition, this Court must be convinced that "the issue is presented with sufficient clarity and completeness and its resolution will materially advance the progress of * * * litigation * * *." *Ibid*. (citing *Alexander* v. *Aero Lodge No. 735*, 565 F.2d 1364, 1370-1371 (6th Cir. 1977), cert. denied, 436 U.S. 946 (1978)). This Court has "reiterated that the exceptions to the general rule are narrow and intended to promote finality in litigation." *In re Morris*, 260 F.3d 654, 664 (6th Cir. 2001) (citing *Foster* v. *Barilow*, 6 F.3d 405, 407 (6th Cir. 1993)).

The Coalition provides no basis for the Court to construe this case as

exceptional or to conclude that a miscarriage of justice would result. The Coalition has not identified any circumstances bringing this case within the rare circumstances warranting departure from the general rule.

B. *The Coalition does not Merit Permissive Intervention*

Whether to grant permissive intervention is committed to the sound discretion of the district court, and reviewed only for clear error. *Purnell* v. *City of Akron*, 925 F.2d 941, 950-951 (6th Cir. 1991). Here, while the Coalition did not raise the issue of permissive intervention before the district court, counsel for the United States did. We noted that it was inappropriate because "it is unnecessary, it will complicate the case, and it will lead to undue delay." (Tr. at 17, Apx. p.__). In ruling, the Court expressly found that were the Coalition permitted to intervene, the litigation would "become absolutely unmanageable and would present problems within problems." (Tr. at 28, Apx. p.__). In light of that finding, it would be particularly improvident for this Court to consider permissive intervention for the first time on appeal.

We also note that notwithstanding its concerns about the impact on the litigation, the district court denied the Coalition's request to participate as amicus without prejudice, noting that it was "too early in the process" to determine if such status was warranted. (Tr. at 30, Apx. p.__). The district court thus left open the

possibility that the Coalition may be allowed to participate as an amicus in the future. This question is best left to the district court in the first instance.

CONCLUSION

This Court should affirm the district court's order denying Appellant's motion to intervene as of right.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation pursuant to Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect 9.0 and contains 9327 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

_____

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Proof Brief For The United States As Appellee was served upon counsel of record via Federal Express next-day service this 7th day of April 2004, at the addresses listed below.

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APPELLEE'S DESIGNATION OF APPENDIX CONTENTS

Appellee United States does not wish to designate any additional appendix contents beyond those contained in the designation of appendix contents filed by the Applicant in Intervention-Appellant.