IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 13-2079, 13-2306

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

COMMONWEALTH OF PUERTO RICO;
PUERTO RICO POLICE DEPARTMENT,

Defendants

JORGE DIAZ-CASTRO,

Movant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES' MOTION TO DISMISS MOVANT-APPELLANT'S APPEALS FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO PRESENT A SUBSTANTIAL QUESTION

Movant-appellant Jorge Diaz-Castro, proceeding *pro se*, has appealed the district court's summary denial of his motion to intervene in this case, which the United States brought against defendants-appellees Commonwealth of Puerto Rico and the Puerto Rico Police Department under the Violent Crime Control and Law

Enforcement Act of 1994, 42 U.S.C. 14141. Pursuant to Federal Rule of Appellate Procedure 27(a) and Rule 27.0(c) of the Rules of this Court, the United States respectfully moves the Court to dismiss Diaz-Castro's appeals for lack of jurisdiction and failure to present a substantial question.

BACKGROUND

On December 21, 2012, the United States filed a complaint against defendants-appellees in the United States District Court for the District of Puerto Rico. Doc. 1.[1] The complaint alleged that the Puerto Rico Police Department (PRPD) engaged in unconstitutional and unlawful activity resulting from pervasive and longstanding institutional failures, in violation of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. 14141. Doc. 1 at 1, 3. On July 17, 2013, the United States and defendants-appellees filed in the district court a settlement agreement providing for reforms of the PRPD, and jointly moved the court for an order conditionally dismissing the action and approving the agreement. Docs. 57 and 60. On that same date, the district court entered an order granting the motion to dismiss, and a judgment conditionally dismissing the action and retaining jurisdiction to enforce the settlement agreement. Docs. 59 and 61.

[1] This Motion uses the abbreviation "Doc. __ at __" to refer to an entry on the district court's docket sheet.

On August 5, 2013, appellant Jorge Diaz-Castro, a self-described "concerned lobbyist" for the PRPD, filed in the district court a Motion for Leave to Intervene Under Federal Rule of Civil Procedure 24 (Motion to Intervene). Doc. 66 at 2. The Memorandum of Law in Support of the Motion to Intervene alleged that Diaz-Castro has been lobbying the legislature for the right of PRPD officers to hold a referendum on joining the federal social security system; that the settlement agreement did not mention the referendum situation; and that the referendum constituted a significant legal interest in the subject matter of the case for both himself and PRPD officers, warranting intervention. Doc. 66-1 at 3, 8, 12-13, 15. The district court summarily denied the Motion to Intervene by order dated August 7, 2013. Doc. 67. On August 12, 2013, Diaz-Castro filed a motion for leave to appeal the denial of his motion to intervene *in forma pauperis*, which the district court granted by order dated August 13, 2013. Docs. 68 and 69.

The district court treated Diaz-Castro's motion for leave to appeal as a notice of appeal and transmitted the record to this Court, which docketed the appeal as No. 13-2079. Docs. 72 and 73 (transmitting record to this Court on August 30, 2013, and showing appeal No. 13-2079 docketed in court of appeals on September 3, 2013, respectively). On October 7, 2013, Diaz-Castro filed a second notice of appeal from the district court's order denying intervention. Doc. 76. This Court docketed this appeal as No. 13-2306. Doc. 80 (showing appeal No. 13-

2306 docketed in court of appeals on October 21, 2013). On October 24, 2013, Diaz-Castro moved to consolidate these two appeals because they are both from the same order denying his Motion to Intervene. The United States did not oppose the Motion to Consolidate, but did oppose his additional request to hold appeal No. 13-2306 in abeyance pending resolution of unspecified state cases he alleges this Court could conceivably incorporate into that appeal. The Motion to Consolidate remains pending in this Court.

On December 2, 2013, Diaz-Castro filed in the district court a Motion for Preliminary Declaratory and Injunctive Relief, *Pendente Lite*, which requested the court to suspend implementation of the settlement agreement pending resolution of his appeals and to appoint a Technical Compliance Advisor. Doc. 99 at 2. The district court summarily denied this motion on December 5, 2013. Doc. 100. On December 9, 2013, Diaz-Castro filed in this Court (No. 13-2079) a Motion for Preliminary Injunction, *Pendente Lite*, and/or an Emergency Temporary Restraining Order (Motion for Preliminary Injunction), pursuant to Federal Rule of Appellate Procedure 8(a)(2). The Motion for Preliminary Injunction reiterated his requests to suspend implementation of the settlement agreement pending resolution of his appeals and to appoint a Technical Compliance Advisor. Concurrent with the filing of this Motion to Dismiss, the United States has filed a Response to the Motion for Preliminary Injunction.

DISCUSSION

Rule 27.0(c) of this Court provides, in relevant part, that "on motion of [the] appellee * * *, the court may dismiss the appeal * * * if the court lacks jurisdiction, or if it shall clearly appear that no substantial question is presented." This Court should dismiss these appeals for lack of jurisdiction, because Diaz-Castro lacks standing to intervene in this litigation, both on behalf of himself and the third parties he purports to represent. Dismissal of these appeals is warranted for the additional reason that they clearly present no substantial question.

1. This Court should dismiss the appeals for lack of jurisdiction because Diaz-Castro lacks standing to intervene in this litigation, both on behalf of himself and the third parties he purports to represent. See *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 541-542 (1986) (standing is jurisdictional issue). The "core component of standing" is Article III's limitation of federal jurisdiction to actual cases and controversies. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). At minimum, Article III standing mandates a plaintiff to show that it suffered an "injury in fact" – *i.e.*, "an invasion of a legally protected interest" that is "concrete and particularized." *Ibid.* The injury, moreover, must be "actual or imminent, not 'conjectural' or 'hypothetical.'" *Ibid.* (quoting *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990)). A plaintiff also must show that the injury is "fairly . . . trace[able] to the challenged action of the defendant," and that it is

"'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 560-561 (quoting *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1976)).

Diaz-Castro fails to make the required showing for Article III standing that he suffered an actual, concrete, and particularized injury arising from the settlement agreement's omission of any discussion of the right of PRPD officers to hold a referendum on joining the federal social security system. In his Memorandum of Law in Support of the Motion to Intervene, Diaz-Castro alleged an interest in this case based upon the more than five years he has spent lobbying the legislature for this referendum. Doc. 66-1 at 3, 12-13, 15. Diaz-Castro's role as a self-described "concerned lobbyist" for the PRPD, however, affords him no legally protectable interest – much less one that could conceivably be impaired by entry of the settlement agreement in this case. The settlement agreement says nothing about the referendum in which Diaz-Castro asserts an interest, and does not impede his ability to present his interest in a referendum in an appropriate forum. Because the settlement agreement causes Diaz-Castro no legally cognizable injury, his appeals from the order denying him intervention in this case must be dismissed for lack of jurisdiction.

Nor can Diaz-Castro avail himself of third-party standing to assert the rights of PRPD officers.[2] "Prudential limitations" on a federal court's exercise of jurisdiction generally require that a plaintiff "assert his own legal rights and interests, and [not] rest his claim to relief on the legal rights or interests of third parties." *Warth* v. *Seldin*, 422 U.S. 490, 498-499 (1975). This rule against *jus tertii* standing is subject to limited exceptions. A plaintiff who seeks to bring an action on behalf of a third party must satisfy the following three criteria: (1) the plaintiff "must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute"; (2) the plaintiff "must have a close relation to the third party"; and (3) "there must exist some hindrance to the third party's ability to protect his or her own interests." *Powers* v. *Ohio*, 499 U.S. 400, 411 (1991) (citation omitted).

[2] Because Diaz-Castro is not an attorney, his purported representation of PRPD officers appears to be the unauthorized practice of law. See 28 U.S.C. 1654 (providing, in relevant part, that "[i]n all courts of the United States the parties may plead and conduct their own cases *personally or by counsel*") (emphasis added); *Herrera-Venegas* v. *Sanchez-Rivera*, 681 F.2d 41, 42 (1st Cir. 1982) (interpreting 28 U.S.C. 1654 to bar a *pro se* litigant from representing anyone in federal court other than himself). In its recent order denying Diaz-Castro's Motion Requesting a Statement of Facts and/or Issues, the district court observed that Diaz-Castro "is not an attorney, but rather a lobbyist who sought to directly represent the interests of the PRPD officers in this case, who did not file any amicus brief, nor sought to intervene." Doc. 96.

Diaz-Castro fails to establish the right to *jus tertii* standing under these criteria. As noted above, he has not suffered an injury in fact that gives him "a sufficiently concrete interest in the outcome of the issue in dispute." *Powers*, 499 U.S. at 11. Nor did he satisfy the second requirement, *i.e.*, he did not allege a "close relation" to the PRPD officers he claims to represent. *Ibid.* And even if he does have such a relation with one or more of the officers he claims to represent, he has failed to allege that he has satisfied the third factor: "that some barrier or practical obstacle (*e.g.*, third party is unidentifiable, lacks sufficient interest, or will suffer some sanction) prevents or deters [these officers] from asserting [their] own interest." *Benjamin* v. *Aroostook Med. Ctr., Inc.*, 57 F.3d 101, 106 (1st Cir. 1995). While Diaz-Castro asserted (Doc. 66-1 at 14) the possibility of collusion between the parties to the settlement agreement affecting the rights of PRPD officers as justification for *jus tertii* standing, he offers no support for that allegation. Accordingly, Diaz-Castro's appeals from the order denying intervention should be dismissed for lack of jurisdiction.

2. This Court should dismiss these appeals for the additional reason that they clearly present "no substantial question." Local Rule 27.0(c). Diaz-Castro's appeal presents no substantial question because it "clearly appear[s]" that the district court acted properly in summarily denying his motion seeking intervention

as of right under Federal Rule of Civil Procedure 24(a)(2) and permissive intervention under Federal Rule of Civil Procedure 24(b).

a. Rule 24(a)(2) provides:

> On 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). The Court has interpreted this Rule to require a would-be intervenor demonstrate *each* of the following elements to warrant intervention as of right: (1) a timely motion; (2) "an interest relating to the property or transaction that forms the foundation of the ongoing action"; (3) a "threat[] to impair or impede its ability to protect this interest" resulting from "the disposition of the action"; and (4) the lack of an existing party that "adequately represents its interest." *Ungar* v. *Arafat*, 634 F.3d 46, 50 (1st Cir. 2011).

Diaz-Castro failed to demonstrate Rule 24(a)(2)'s first three factors. With regard to timeliness, Diaz-Castro moved to intervene in this case in early August 2013, nearly three weeks *after* the United States and defendants-appellees filed the settlement agreement in the district court, and the court accepted the agreement and entered a judgment conditionally dismissing the action. See Docs. 60 and 61. Diaz-Castro conceded (Doc. 66-1 at 11) that "intervention after Judgment is rarely granted," but seemed to contend (Doc. 66-1 at 10-11) that intervention would not

prejudice the settling parties because they did not actively litigate this case. Diaz-Castro also argued (Doc 66-1 at 12, 15) that he did not realize he needed to intervene until he read the settlement agreement, and that disallowing intervention would prejudice him and the PRPD officers he purports to represent by requiring him to file a new action in district court to vindicate their interests.

This Court has set forth the following factors to determine the timeliness of a motion to intervene:

> (i) the length of time that the putative intervenor knew or reasonably should have known that his interests were at risk before he moved to intervene; (ii) the prejudice to existing parties should intervention be allowed; (iii) the prejudice to the putative intervenor should intervention be denied; and (iv) any special circumstances militating for or against intervention.

R & G Mortg. Corp. v. *Federal Home Loan Mortg. Corp.*, 584 F.3d 1, 7 (1st Cir. 2009). "Under this approach, motions to intervene that will have the effect of reopening settled cases are regarded with particular skepticism because such motions tend to prejudice the rights of the settling parties." *Ibid.*; see *id.* at 10 ("Requests for post-settlement intervention are rarely granted.").

Diaz-Castro's arguments do not come close to overcoming this skepticism. Because this Court is loath to allow post-settlement intervention, a putative intervenor generally cannot wait until a settlement agreement is entered and he has actual knowledge of an alleged threat to his interests before moving to intervene; instead, he must act promptly after receiving "constructive notice of [an]

impending threat." *R & G Mortg. Corp.*, 584 F.3d at 8. In early April 2013, Diaz-Castro made a belated, and unsuccessful, attempt to appear as amicus curiae after the district court's deadline for such appearances. See Doc. 96. Diaz-Castro's proposed amicus brief would assert the same interest in the referendum that he subsequently asserted in his Motion to Intervene (see Doc. 29 at 3, 6), indicating that he had constructive notice of a possible threat to his asserted interests at that time. The Motion to Intervene Diaz-Castro filed four months later thus is untimely under the first timeliness factor. See *R & G Mortg. Corp.*, 584 F.3d at 8-9 (finding delay of two and one-half months to be unreasonable); Doc. 96 (observing that Diaz-Castro sought to intervene "much after" the district court denied his attempt to appear as amicus).

The remaining timeliness factors point the same way. The second and third factors, "which together involve the balance of harms," *R & G Mortgage Corp.*, 584 F.3d at 9, weigh heavily against Diaz-Castro. "Because [Diaz-Castro's] proposed intervention was aimed at disrupting" the settlement agreement reached by the United States and defendants-appellees, "the harm that intervention would have worked to the[se] * * * parties was manifest," regardless of whether the parties actively litigated the case. *Ibid.* (proposed intervention prejudiced settling parties who moved for court approval of settlement two months after complaint was filed). On the other side, the settlement agreement imposes no restrictions on

Diaz-Castro's ability to assert his claims in any appropriate forum, thus negating "any plausible claim of prejudice." *Id.* at 10. Finally to the extent that special circumstances exist, they militate against allowing intervention at this late stage of the proceedings. See *ibid.*

Timeliness aside, Diaz-Castro also did not show an interest relating to the transaction that it is the subject of this case. This Court has interpreted this factor to require "that an aspiring intervenor's claim * * * [']bear a sufficiently close relationship to the dispute between the original litigants.'" *Ungar*, 630 F.3d at 51 (quoting *Travelers Indem. Co.* v. *Dingwell*, 884 F.2d 629, 638 (1st Cir. 1989)) (internal quotation marks omitted in original). The United States brought the complaint against defendants-appellees under the Violent Crime Control and Law Enforcement Act of 1994 to address unconstitutional and unlawful actions by PRPD officers, and the agreement settling the case implemented institutional reforms of the PRPD to prevent future occurrences of this conduct. Diaz-Castro's asserted interest in a referendum for PRPD officers to decide whether to join the federal social security system has no relationship to this dispute, much less a "sufficiently close" one to warrant intervention as of right.

For essentially the same reasons, Diaz-Castro fails to establish the third element for standing: *i.e.*, that the disposition of this case would impair his ability to protect his asserted interest. Because the settlement agreement says nothing

about the referendum in which he professes an interest, it has no adverse effect upon his ability to advance that interest in an appropriate forum. Accordingly, the district court's decision summarily denying Diaz-Castro intervention as of right presents no substantial question warranting this Court's review.

b. Diaz-Castro's request for permissive intervention under Rule 24(b) need not detain this Court long. "[W]hen a putative intervenor seeks both intervention as of right and permissive intervention, a finding of untimeliness with respect to the former normally applies to the latter (and, therefore, dooms the movant's quest for permissive intervention)." *R & G Mortg. Corp.*, 584 F.3d at 11. Diaz-Castro failed to offer any argument why the timeliness factor should be measured differently regarding his request for permissive intervention. See Doc. 66-1 at 17 ("Intervenor's application [for permissive intervention] is also timely. Intervention will not unduly prejudice the adjudication of the rights of the original parties, and will prevent their collusion."). The reasons why Diaz-Castro's motion for intervention as of right was untimely, see pp. 9-12, *supra*, thus foreclose his motion for permissive intervention as well. See *R & G Mortg. Corp.*, 584 F.3d at 11. Moreover, because the settlement agreement says nothing about the referendum in which Diaz-Castro asserts an interest, his motion for permissive intervention fails because he has no "claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B).

CONCLUSION

For the foregoing reasons, this Court should dismiss the appeals for lack of subject matter jurisdiction and failure to present a substantial question.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2013, I electronically filed the foregoing UNITED STATES' MOTION TO DISMISS MOVANT-APPELLANT'S APPEALS FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO PRESENT A SUBSTANTIAL QUESTION with the United States Court of Appeals for the First Circuit by using the CM/ECF system. All participants in this case other than movant-appellant are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

I further certify that movant-appellant will be served via e-mail and U.S. Mail postage prepaid at the following address:

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