No. 12-2964

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

_____

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

STATE OF NEW JERSEY; NEW JERSEY CIVIL SERVICE COMMISSION,

Defendants-Appellees

*FRANCISCO BRITO, *et al.*,

*Appellants (Pursuant to Fed. R. App. R. 12(a))

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

_____

# BRIEF FOR THE UNITED STATES AS APPELLEE

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## STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had jurisdiction under 42 U.S.C. 2000e-6 and 28 U.S.C. 1343(a)(3) and 1345. On June 12, 2012, the district court denied proposed

intervenors' motion for intervention. App. 1:4.[1] On that same date, the district court approved and entered the Second Amended Consent Decree (Consent Decree). App. 1:3. On July 10, 2012, the appellants filed a timely notice of appeal. App. 1:1-2. This Court has jurisdiction under 28 U.S.C. 1291 to consider the district court's denial of intervention. This Court does not have jurisdiction to consider the appellants' challenge to the district court's approval of the Consent Decree. See pp. 37-42, *infra*.

## STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion in denying appellants' motion to intervene as untimely.

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

3. If so, whether the district court properly approved the Consent Decree as reasonable, fair, adequate, and consistent with federal law.

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[1] "App. __:__" refers, respectively, to the volume and page number of appellants' Appendix. "R. __:__" refers, respectively, to the document number on the district court docket sheet and page number. "Br. __" refers to the original page number of appellants' opening brief and not the pagination recorded by this Court.

## STATEMENT OF RELATED CASES

This case has not been before this Court previously, and the United States is not aware of any related case.

## STATEMENT OF THE CASE

On January 7, 2010, after an 18-month investigation, the United States filed a complaint alleging that the State of New Jersey and the New Jersey Civil Service Commission (CSC) (collectively, the State) engaged in a pattern or practice of race and national origin discrimination against blacks and Hispanics in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.* (Title VII). App. 2:86-95 (Complaint); R. 38-1:2 & n.3 (United States' Mem. in Supp. of Joint Entry of Consent Decree). More specifically, the United States alleged that, since 2000, the State's pass/fail use of candidates' results on the police sergeant's written examination and certification of police sergeant candidates in descending rank order based on a combination of the candidates' examination scores and seniority credits had resulted in an unlawful disparate impact upon black and Hispanic candidates in those jurisdictions that participate in New Jersey's civil service system. App. 2:88-93. Moreover, the United States alleged that this examination was not job related for the position of police sergeant or consistent with business necessity. App. 2:91-94.

After more than a year of extensive discovery, including the exchange of expert reports and depositions, the parties spent approximately five months negotiating a consent decree. On August 1, 2011, the parties filed a Joint Motion For Provisional Entry Of Consent Decree And Scheduling Of Initial Fairness Hearing (App. 2:205-213), with supporting documentation and a proposed consent decree. R. 38-1 (United States' Mem. in Supp. of Joint Entry of Consent Decree); App. 2:329-360 (Decl. of Bernard R. Siskin, Ph. D.; Decl. of David P. Jones, Ph. D.; State letter supporting entry; proposed order). On November 22, 2011, the parties submitted the Second Amended Consent Decree (Consent Decree), which incorporated ministerial corrections and other modifications. App. 4:641-736. In sum, the Consent Decree includes: (1) injunctive relief, including the State's obligation to develop a new, lawful examination; and (2) specific, individual relief in the form of a back pay award, or back pay and a priority promotion with limited retroactive seniority, to qualified "Claimants." App. 4:644-646 (¶¶ 3, 9-10), 652 (¶¶ 28-29), 663-664 (¶¶ 60-61), 669-674 (¶¶ 77-80). On November 22, 2011, the district court provisionally entered the Consent Decree. App. 4:678.

In December 2011, in compliance with the terms of the Consent Decree, the State provided expansive notice to individuals whose interests may be affected by the Consent Decree, including all incumbent police officers in covered jurisdictions, by individual letters, newspaper notices, and internet postings. App.

4:649-651, 715-720 (Consent Decree & Att. E-G); App. 5:955-962 (March 12, 2012, Fairness Hearing Transcript (Hrg. Tr.)). The notice summarized the terms of the Consent Decree, the procedures and deadline (January 27, 2012) for filing an objection to the Consent Decree, and the date of the fairness hearing (March 12, 2012) at which individuals could present objections. App. 4:715-718 (Consent Decree Att. E); App. 5:956 (Hrg. Tr.). The United States received 467 timely objections. R. 64-1:7, 10 (United States' Mem. in Supp. of Final Entry of Consent Decree And Resp. to Objections). Timely objectors include 27 police officers from Paterson, New Jersey. R. 64-5, Exhs. 18, 29, 34, 74-75, 95-96, 106, 111-112, 131, 138, 194, 199, 234, 262-263, 281, 321, 332, 342, 352, 358, 365, 410, 412-413.

On February 9, 2012, almost two weeks *after* the deadline for filing objections and one month prior to the fairness hearing, the same 27 Paterson police officers identified above who filed objections to the Consent Decree also filed a Motion To Intervene (App. 4:821-862), a Proposed Answer and Counterclaim (App. 4:737-820), and motions for discovery (App. 4:863-882) and a preliminary injunction (App. 4:883-884).[2] On February 21, 2012, the United States opposed the purported intervenors' motions (R. 60-62) (Brief in Opposition and Notice), and the proposed intervenors filed a reply brief. R. 63.

[2] Movants also filed memoranda of law in support of these pleadings, which are not included in the Appendix. R. 57-59.

On March 1, 2012, pursuant to the Consent Decree (App. 4:658-659 (¶ 46)), the United States filed the 467 individual objections and its response to those objections. R. 64. The attachments to this pleading included the Second Amended Declaration by the United States' expert, Dr. Bernard Siskin. App. 4:909-924. Dr. Siskin's Second Amended Declaration responds, in part, to the objections raised by the Paterson police officers. App. 4:918-920 (¶¶ 28-30).

On March 8, 2012, four days prior to the fairness hearing, the proposed intervenors moved to postpone the hearing based on the United States' response to the objections, including Dr. Siskin's Second Amended Declaration. App. 5:927-928. On the same date, the district court denied this motion. App. 5:929-930. In its order, the district court also denied the proposed intervenors' motions for discovery and a preliminary injunction as premature given the pendency of the motion to intervene, and ordered that the motion to intervene be heard at the fairness hearing. App. 5:930.

The district court held a day-long fairness hearing on March 12, 2012. App. 5:931-1031; R. 69.[3] Counsel for the proposed intervenors and the United States

[3] The Appendix includes the entire transcript for the morning session of the hearing at which the parties argued why the district court should enter the Consent Decree, and counsel for the United States and the proposed intervenors argued the motion to intervene. App. 5:931-1020. Only a limited portion of the afternoon session, at which all objectors who wished to speak had an opportunity to do so, is included in the Appendix. App. 5:1021-1031.

addressed the motion for intervention. App. 5:1000-1020. The United States and the State addressed why the district court should approve and enter the Consent Decree (App. 5:932-1000), and numerous individuals presented objections to the Consent Decree. App. 5:1021-1030; R. 69:95-198.

On June 12, 2012, the district court issued an order denying the motion for intervention. App. 1:4. That same day, the district court issued an order approving and entering the Consent Decree. App. 1:3. The district court also issued a 57-page opinion that discussed the reasons for its orders; namely, the motion to intervene was denied as untimely, and the Consent Decree was approved because it was fair, adequate, reasonable, and consistent with the law. App. 1:5-61.

On July 10, 2012, 60 individuals filed a joint notice of appeal. App. 1:1-2. The appellants include the 27 Paterson police officers who moved unsuccessfully to intervene (rejected-intervenor-appellants). App. 1:1. 32 of the remaining 33 appellants are also Paterson officers who filed objections but never moved to intervene in district court (objector-appellants). App. 1:1-2 (Notice of Appeal); R. 64-5, Exhs. 1-2, 8, 10, 15, 19, 21, 63-64, 73, 92, 120, 145, 147, 159, 189, 203, 219, 225, 250, 269, 294, 300, 305-306, 349, 361, 376, 379, 428, 435, 441-442, 457.[4]

[4] The United States does not have an objection form for appellant Timothy Tanis. The United States notes that two rejected-intervenor-appellants are Timothy Tabor and David Tanis, and the United States incorrectly identified an objector who wished to speak at the initial fairness hearing as Timothy Tanis.

## STATEMENT OF FACTS

*1. The Complaint And The United States' Expert Reports*

As noted, the United States' Complaint alleged that, since 2000, the State's pass/fail use of candidates' results on the police sergeant's written examination and certification of police sergeant candidates in descending rank order, based on a combination of the candidates' examination scores and seniority credits, resulted in an unlawful disparate impact upon black and Hispanic candidates in those jurisdictions that participate in New Jersey's civil service system. App. 2:88-93. Moreover, the United States alleged that this examination was not job related to the position of police sergeant or consistent with business necessity, and thus violated Title VII. App. 2:91-94.

The parties engaged in extensive discovery for more than one year. App. 2:86 (Complaint, Jan. 7, 2010); App. 152 (Pretrial Scheduling Order, Sept. 22, 2010); R. 27 (status letter on discovery, Feb. 9, 2011). Discovery included the production of voluminous materials; the exchange of expert reports addressing the test's results, disparate impact, job-relatedness, and test validity; and depositions. R. 27 (status letter on discovery, Feb. 9, 2011). The United States presented a report by its expert, Dr. Bernard Siskin, that assessed the sergeant's examination's disparate impact. Dr. Siskin's central findings are as follows:

- From 2000 through 2009 inclusive, black and Hispanic candidates passed the sergeant's examination at a statistically significant lower rate than white

candidates. The disparity in *pass rates* between black and white candidates from 2000 through 2009 equates to 17.33 units of standard deviation. The disparity in pass rates between Hispanic and white candidates from 2000 through 2009 equates to 12.88 units of standard deviation. App. 2:332-333 (Siskin Decl. ¶¶ 4-6); App. 5:911-912 (Second Amended (2d Am.) Siskin Decl. ¶¶ 4-6).[5]

- From 2000 through 2008 inclusive, the State's determination and use of final scores to certify candidates in descending rank order resulted in a statistically significant disparate impact upon blacks and Hispanics. During this time period, black and Hispanic candidates who passed the sergeant's examination received statistically significant *lower ranks* on eligibility lists than white candidates. The likelihood that a black candidate would be ranked high enough to be considered for appointment, compared to a white candidate, equates to 7.77 units of standard deviation. The likelihood that a Hispanic candidate would be ranked high enough to be considered for appointment, compared to a white candidate, equates to 4.66 units of standard deviation. App. 2:333-334 (Siskin Decl. ¶¶ 7-8); App. 5:912-913 (2d Am. Siskin Decl. ¶¶ 7-8).

- But for the disparate impact of the examination (in both the pass-fail utilization and the rank ordering of candidates) from 2000-2009, there would be 75 more black sergeants and 30 more Hispanic sergeants in the 43 jurisdictions that participate in the State's civil service system. App. 2:334 (Siskin Decl. ¶10); App. 5:913 (2d Am. Siskin Decl. ¶ 10).

After the State received Dr. Siskin's report, the State submitted its own expert reports that rebutted Dr. Siskin's report and asserted that the sergeant's

[5] Dr. Siskin's original declaration (App. 2:330-342) was submitted with the original, proposed consent decree. Dr. Siskin's First Amended Declaration (App. 4:588-601) was submitted with the parties' First Amended Consent Decree. The First Amended Declaration reflects changes in the process of interim appointments to sergeant (pending the development of a new examination) and the parties' modified definition of "Claimant." App. 3:489 (Joint Motion for Provisional Entry of First Amended Consent Decree). Dr. Siskin's Second Amended Declaration is identical to the First Amended version except for three additional paragraphs, 28-30. App. 4:918-920.

examination was job related and valid. R. 27:2 (status letter on discovery, February 9, 2011); App. 2:357 (Jones Decl. (identifying the State's expert report among material reviewed)). In turn, United States' expert Dr. David Jones addressed why the sergeant's exam was *not* job related or consistent with principles of business necessity. In sum, Dr. Jones concluded that the State's attempts to demonstrate content validity failed for the following reasons: (1) the State could not show that its job analysis met professionally accepted standards; (2) the State was unable to establish that it used reasonable competence in developing the examination; (3) the State could not demonstrate that the test content was either related to or representative of the content of the sergeant position; and (4) the State was unable to show that its two methods of use of the sergeant's examination (pass/fail and rank order) distinguished meaningfully among those candidates who can better perform the job of police sergeant. App. 2:344, 347-356 (Jones Decl. ¶¶ 6-11).

During the time period for fact and expert discovery, the State agreed to engage in settlement discussions. These arms-length negotiations included several mediation sessions with then-Magistrate Judge Shipp over three months (March – May 2011) and negotiations by the parties over approximately five months (March – August 2011). R. 28, 30, 33-35 (minute entries of settlement and status conferences with Magistrate Shipp); App. 2:203-204 (July 18, 2011, order granting

two-week extension for the parties to submit a proposed consent decree). In August 2011, the parties jointly submitted a proposed Consent Decree with supporting documentation.[6] App. 2:205-360.

*2. The Consent Decree*

Under the Consent Decree, the State will develop and administer a new, lawful procedure for selecting candidates for promotion to the position of police sergeant in local jurisdictions. App. 4:647 (¶ 15), 669 (¶ 77). The new procedure will include development of a new examination in consultation with the United States, which is underway. App. 4:669-774 (¶¶ 77-80).

The State will offer back pay only, or back pay and a priority promotion with limited retroactive seniority, to individuals who satisfy various criteria as a "Claimant." App. 4:644-646 (¶¶ 2-3, 9-10), 653 (¶ 31), 663 (¶ 60), 669 (¶ 76). Specifically, the State will provide $1 million for all back pay awards; $710,000

[6] On September 23, 2011, the parties re-filed the original Consent Decree with ministerial changes. App. 3:423-424 (letter requesting entry of amended Consent Decree); App. 3:426-486 (amended Consent Decree and attachments). On October 20, 2011, the parties submitted an Amended Consent Decree, which contained a revised definition of "Claimant" (and modified lists of potential "Claimants") and clarified the interim use of existing eligibility lists in certain jurisdictions. App. 3:487-490. The Second Amended Consent Decree, submitted to the district court on November 22, 2011, included final edits to modify the date of the initial fairness hearing and modify the list of Claimants based on the amended definition of "Claimant." R. 64-1:1 n.1 (United States' Mem. in Supp. of Final Entry of Consent Decree and Response to Objections).

will be allocated to black Claimants and $290,000 will be allocated to Hispanic Claimants in 43 jurisdictions that participate in the State's civil service system. App. 4:652 (¶¶ 28-29), 680-681 (Att. A). These 43 jurisdictions were identified because the United States determined that there is a "shortfall" of minority police sergeants; that is, black and/or Hispanic candidates in these jurisdictions were not promoted to sergeant due to the disparate impact of the examination. App. 2:334 (Siskin Decl. ¶ 10); App. 4:913-914 (2d Am. Siskin Decl. ¶ 10), 918-919 (¶ 28).[7]

Pursuant to the Consent Decree, the United States and the State also agreed that priority promotions will be awarded to 48 black and 20 Hispanic Claimants from 13 specified jurisdictions.[8] App. 4:663-664 (¶ 61), 736 (Att. K). Six priority promotions – five black Claimants and one Hispanic Claimant – are assigned to Paterson, New Jersey. App. 4:736 (Att. K). Claimants who receive the

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[7] The fund is allocated between black and Hispanic Claimants based on Dr. Siskin's determination that 71% of the "shortfall" was borne by black and 29% was borne by Hispanic candidates. App. 2:336-337 (Siskin Decl. ¶¶ 19-21); App. 4:916-917 (2d Am. Siskin Declar. ¶¶ 21-23).

[8] Dr. Siskin determined that a total of 105 individuals – 75 blacks and 30 Hispanics – were eligible for priority promotion due to the disparate impact of examinations administered between 2000-2009. App. 2:334-335 (Siskin Decl. ¶ 10); App. 4:913-914 (2d Am. Siskin Declar. ¶ 10). As a result of the negotiations, the parties agreed to provide priority promotions to jurisdictions where the United States concluded that *three* or more promotions to sergeant of black or Hispanic candidates would have been made absent the disparate impact of the sergeant's examination (including the pass/fail utilization and rank ordering). App. 2:334-335 (Siskin Decl. ¶ 10); App. 4:913-914 (2d Am. Siskin Declar. ¶ 10).

opportunity for a priority promotion must first pass the new, lawful examination to demonstrate that they are qualified to perform the police sergeant position. App. 4:663-664 (¶ 61).

Those who receive priority promotions will also receive limited retroactive seniority. The retroactive seniority date for a Claimant may be used to calculate the individual's seniority points for purposes of promotion, but cannot be used to satisfy an individual's eligibility to meet the time-in-grade requirement for a future promotional examination. App. 4:646 (Consent Decree ¶ 10).

The timing for implementation of priority promotions will depend on when vacancies arise and a local jurisdiction's other eligibility list(s) for promotion. For example, the City of Paterson, like many jurisdictions, has two eligibility lists for promotion to sergeant: a regular eligibility list established by the CSC based on the results of the last-administered sergeant's examination and the incumbent's seniority, and a special reemployment list for employees (28 in Paterson) who previously were in the position of sergeant, but were demoted due to budget constraints. App. 4:886-887 (Hill Decl. ¶¶ 2-3, 5, 9). Individuals on the special reemployment list have priority, and will be promoted before any individual on the regular eligibility list. App. 4:887 (Hill Decl. ¶ 10). Pursuant to the Consent Decree, individuals on the Decree's priority promotion list will be promoted,

generally, one-to-one with individuals recorded on a special reemployment list. App. 4:666-667 (¶¶ 66-67).[9]

Under the Consent Decree, before a new selection process is complete, New Jersey generally may make appointments from an existing eligibility list.[10] App. 4:647-648 (¶¶ 16-17). However, in ten jurisdictions in which continued use of an eligibility list may result in a shortfall of minority promotions (jurisdictions identified in the Consent Decree, Att. D), the State must obtain prior approval from the United States before making a selection from an existing eligible list. App. 4:648 (¶ 16), 714 (Att. D).[11]

[9] Claimants who have a retroactive seniority date within the range of seniority dates for individuals on an existing special reemployment list will not be appointed until their date matches or is later than the seniority date of an individual on the special reemployment list. Accordingly, a Claimant will not be appointed ahead of an individual with an earlier seniority date who is on the special reemployment list. App. 5:970 (Hrg. Tr.). Also, Claimants with priority promotion will be promoted before anyone on an existing or new, regular eligibility list. App. 4:663 (¶ 60).

[10] The majority of jurisdictions subject to the Consent Decree had sergeant eligibility lists that expired in March 2012, and the remaining jurisdictions have eligibility lists that currently will expire in June 2013. App. 4:886 (Hill Decl. ¶ 4).

[11] As of February 2012, the State had requested and received the United States' consent to make appointments from certifications in three Attachment D jurisdictions. App. 4:888 (Hill Decl. ¶ 15).

*3. Notice To Individuals Potentially Affected By The Consent Decree*

Upon the district court's preliminary approval of the Consent Decree on November 22, 2011, the Decree's provisions that address the process of giving notice of the agreement, the process for filing objections, and a fairness hearing were set in motion. App. 4:649-651 (¶¶ 19-26).[12] More specifically, in December 2011, the State sent form notices to: (1) prospective Claimants (approximately 1300 individuals); (2) all sergeants in 176 jurisdictions participating in the State's civil service system; (3) the appointing authority for the 176 jurisdictions; (4) all unions that represent officers in the covered jurisdictions; and (5) all police officers in the 13 jurisdictions where priority promotions will be awarded and the ten jurisdictions subject to preliminary approval by the United States before appointments to sergeant are made (approximately 2400 individuals). App. 5:955-960 (Hrg. Tr.). Thus, several thousand notices to individuals who may be affected

[12] After the district court's final approval of the Consent Decree, the parties began a separate, extensive procedure as set forth in the Decree to identify Claimants who will receive individual relief. App. 4:653-663 (Consent Decree, Pt. VI, §§ C-K). This process includes notice of preliminary eligibility, submission of a claim form, an assessment and agreement by the parties of Claimants' eligibility for back pay and a potential Claimant's preliminary eligibility for priority promotion, a second fairness hearing on specific relief, administration of a new sergeant's examination, and coordination of priority appointments of qualified Claimants. App. 4:653-663 (Consent Decree, Pt. VI, §§ C-K). On January 18, 2013, the district court scheduled a fairness hearing on individual relief for May 8-9, 2013, in response to the parties' notification to the district court that they have completed the process of determining eligible Claimants. R. 80.

by the Consent Decree were hand-delivered or sent by mail.[13] Pursuant to the Consent Decree, notice of the proposed Consent Decree, the objection process, and the scheduled fairness hearing was also published in the Trenton Times and posted on www.nj.com and the CSC's website. App. 5:960-961 (Hrg. Tr.).

The notice summarized the terms of the Consent Decree; gave instructions on how an individual could submit an objection to the Consent Decree; notified the recipient that the deadline to mail objections was January 27, 2012, and the fairness hearing was scheduled for March 12, 2012; and included an objection form. App. 4:715-718 (Att. E). The United States received 467 objections by the January 27 deadline, including objection forms from all but one of the appellants. R. 64-1:7, 10 (United States' Mem. in Supp. of Final Entry of Consent Decree And Resp. to Objections); see pp. 5, 7, *supra*.

*4. The Proposed Intervenors' Motion For Intervention*

On February 9, 2012, 13 days after the deadline for submitting an objection and approximately one month prior to the scheduled fairness hearing, 27 Paterson officers who filed objections to the Consent Decree also filed their motion to intervene (App. 4:821-862), a Proposed Answer and Counterclaim (App. 4:737-

[13] In September and October 2011, the State also sent notice of the proposed Consent Decree to mayors of the affected jurisdictions, including the Mayor of Paterson. App. 4:892-897. The September correspondence refers to an earlier letter dated August 1, 2011, that discussed the terms of the Consent Decree. App. 4:893.

820), and motions for discovery (App. 4:863-882) and a preliminary injunction (App. 4:883-884). Significantly, one proposed intervenor first learned about the proposed Consent Decree in August 2011, 24 proposed intervenors learned of the proposed Consent Decree in mid-September 2011, and two proposed intervenors learned of the proposed Decree in October 2011. See App. 4:766-820 (Proposed Intervenors' Certifications).

In sum, the proposed intervenors assert that the priority promotion relief afforded under the Consent Decree to six officers in Paterson unlawfully interferes with their opportunity for promotion to sergeant. App. 4:754-755 (Proposed Answer ¶¶ 49-50). All 27 Paterson officers are on the current, regular eligibility list for sergeant for Paterson. App. 4:767-820 (certifications by proposed intervenors), 4:887 (Hill Decl. ¶ 11). Five of the 27 Paterson officers are also on the city's special reemployment list for sergeant. App. 4:887 (Hill Decl. ¶ 11).[14]

*5. The Fairness Hearing*

The district court conducted a day-long fairness hearing on March 12, 2012. App. 5:931-1031; R. 69. The court heard from the parties on the course of this litigation; the defendants' decision to settle this litigation; the terms of the Consent Decree; why the objections are not sufficient bases to reject the proposed Consent

[14] The five officers are Officers Barone, Botbyl, Latrecchi, Morgan, and Pacelli. App. 4:887 (Hill Decl. ¶ 11).

Decree; and why the Consent Decree is fair, adequate, reasonable, and consistent with federal law. App. 5:932-985. Dr. Siskin explained the principles of disparate impact and summarized his results. App. 5:989-1000. Dr. Jones responded to the court's and individual objectors' questions on test validity. App. 5:981-982, 1022-1023; R. 69:112-114. The court also heard argument from counsel for the United States and the proposed intervenors on the merits of the motion for intervention and proposed intervenors' objections to the Consent Decree. App. 5:1003-1020.

The district court provided ample opportunity for individuals to voice their objections. App. 5:1020-1031; R. 69:95-197. More than ten objectors or counsel representing groups of objectors addressed the court and/or directed specific questions to the United States' experts. App. 5:1021-1031; R. 69:97-197.

*6. The District Court's Opinion*

On June 12, 2012, the district court entered an opinion denying the motion to intervene as untimely and entering the Consent Decree. App. 1:5-61.

*a. The District Court's Reasons For Denying Intervention*

Citing this Court's precedent, the district court identified the elements of intervention as of right pursuant to Federal Rule of Civil Procedure 24(a)(2). App. 1:56-57. With respect to the threshold requirement of timeliness, the court noted that timeliness depends on the "totality of the circumstances," which considers "(1) the stage of the proceeding; (2) the prejudice that delay may cause the parties; and

(3) the reason for the delay." App. 1:57 (citation omitted). Addressing the stage of the proceeding, the district court noted that the Complaint had been filed in January 2010, the parties first submitted a proposed Consent Decree in August 2011, and the district court provisionally entered the Consent Decree on November 22, 2011. App. 1:58. The court stated that the movants filed their motion to intervene on February 9, 2012, "at a point in which the decree had been [provisionally] entered, notice had been dispensed, the time for objections had closed, and the initial fairness hearing was on the horizon." App. 1:58.

The district court emphasized that the United States and the State had not only engaged in significant discovery and negotiated a decree, but also "bore the administrative burdens incumbent with giving notice to parties in advance of the fairness hearing." App. 1:58. Given these efforts, and noting that intervention would require "restructuring of the consent decree, new notice, [and] a new fairness hearing," the court opined that the movants must have a "very strong reason for the failure to intervene earlier." App. 1:58.

The district court noted that the majority of proposed intervenors acknowledged they knew of the proposed Consent Decree by mid-September 2011, and one movant knew as early as August 2011, yet the pleadings failed to give any reason for the delay in filing the motion. App. 1:59. The district court concluded that the reason for delay presented by counsel at oral argument, which was based

on "costs, financial and otherwise," was "inadequate" given the progression of this case. App. 1:59; App. 1:60 (movants failed to provide a "compelling explanation" for their failure to act earlier than a month prior to the fairness hearing). Finally, the district court explained that the delay was "unusually long" and "especially significant," given the "real-world impact" if intervention was granted; *i.e.*, "[the] disrupt[ion of] the administration of a consent decree negotiated over a lengthy period of time following extensive discovery." App. 1:60.

*b. The District Court's Reasons For Approving The Consent Decree*

The district court approved the Consent Decree after assessing whether it was "fair, adequate, and reasonable, and consistent with the law." App. 1:19-39 (Opinion). In reaching this conclusion, the court first assessed the strength of the United States' claim of disparate impact (App. 1:20-28), and the lack of the examination's job relatedness or business necessity. App. 1:28-33. The court reviewed the expert's statistical analysis and concluded that the "United States has produced ample evidence to demonstrate that it has a strong case against the State for a claim of disparate impact." App. 1:33. The court also rejected proposed intervenors' assertions that principles set forth in *Ricci* v. *DeStefano*, 557 U.S. 557 (2009), foreclosed approval of the Consent Decree. App. 1:33-39. The court found that the facts of this case – including the State's hard-fought battle to establish the validity of the examination during the United States' lengthy

investigation and the initial period of the litigation – established that the "agreement behind the consent decree was not prompted by fear of litigation." App. 1:35. Moreover, the court noted that in *Ricci*, the defendant acted only upon evidence of a test's disparate impact without consideration of whether the test was valid. App. 1:35. Here, in contrast, the court explained that the State agreed to settle because the "evidence of disparate impact discrimination is stronger than it was in *Ricci*," because there was strong evidence of disparate impact *and* the test's lack of job relatedness or business necessity. App. 1:35-36. Thus, the court ruled that there was a sufficient "underlying evidentiary basis" to support the State's settlement of the United States' claims. App. 1:27.

The district court separately assessed whether the relief set forth in the Consent Decree was "fair, adequate, reasonable, and consistent with federal statutory and constitutional law." App. 1:39. The court identified four elements of relief: the interim, pre-approval of certification of candidates in 10 jurisdictions (Att. D jurisdictions (App. 4:714)), (2) back pay, (3) priority promotions in 13 jurisdictions (Att. K jurisdictions (App. 4:736)), and (4) development of a new examination. App. 1:39-40. First, given that the United States could have barred any promotion under an existing, unlawful system, the agreement for preliminary review and approval in a limited number of jurisdictions was deemed "inherently reasonable." App. 1:41. Second, the court cited several objectors' statements that

the back pay pool should have been greater. App. 1:42-43. The court acknowledged, however, notwithstanding the strength of its case, there was no guarantee that the United States would have received the "maximum relief available" had it won. App. 1:43. In addition, since "[l]ines are inevitably drawn" for a settlement, the parties' agreement to provide back pay relief to individuals in jurisdictions with a shortfall of at least one individual in either or both minority categories was "neither unreasonable or inequitable," and the "totality of the relief afforded is adequate." App. 1:43-44.

In response to several objections to priority promotion relief, the district court found that this relief was consistent with Title VII precedent awarding make-whole relief. App. 1:46-50. The court stated that the priority promotion relief struck "an appropriate balance," because the impact on innocent third parties is limited to those jurisdictions where the examination's "disparate impact has been most profound." App. 1:47-48. The court also concluded that the State's obligation to develop a new test was "reasonable and fair," (App. 1:52), and referred to Jones's testimony that alternative measures to the current, written sergeant's examination can be used to assess candidates' qualifications and have less disparate impact. App. 1:52.

*7. The Appellants*

The appellants filed a timely notice of appeal on July 10, 2012, which states that they are appealing both the denial of the motion to intervene and the entry of the Consent Decree. App.1:1-2. The appellants fall within two categories. First, 27 appellants are the Paterson police officers who filed objections and unsuccessfully moved to intervene in district court (rejected-intervenor-appellants). App. 1:1 (Notice of Appeal). Second, 32 appellants are individuals who filed objections to the consent decree but did *not* move for intervention in district court (objector-appellants). App. 1:1-2 (Notice of Appeal). The objector-appellants are Paterson police officers, most of whom assert they were on a regular eligibility list for sergeant and/or the special reemployment list. R. 64-5, Exhs. 1-2, 8, 10, 15, 19, 21, 63-64, 73, 92, 120, 145, 147, 159, 189, 203, 219, 225, 250, 269, 294, 300, 305-306, 349, 361, 376, 379, 428, 435, 441-442, 457. See note 4, *supra*.

## SUMMARY OF ARGUMENT

1. The district court did not abuse its discretion in denying the motion to intervene because the motion was untimely. *NAACP* v. *State of New York*, 413 U.S. 345, 365 (1973); *Choike* v. *Slippery Rock Univ. of Pa.*, 297 F. App'x 138, 140 (3d Cir. 2008). Prior to the motion to intervene, the parties had engaged in extensive discovery and negotiations that produced a Consent Decree; the district court had preliminarily approved the Consent Decree; the court had scheduled a

fairness hearing; notice had been sent to several thousand individuals informing them about the fairness hearing and procedures for filing objections; and the deadline for filing objections had closed. Given the advanced stage of the proceedings, the parties would have been unduly prejudiced by the delay intervention would have caused. Moreover, appellants failed to identify any adequate reasons for their delay in filing their motion, despite their awareness for approximately five months that their interests might be affected by this litigation. On this record, the district court acted well within its discretion in denying the motion to intervene as untimely.

2. Because the rejected-intervenor-appellants are not parties in this case, they do not have the right to appeal the district court's approval of the Consent Decree. *Marino* v. *Ortiz*, 484 U.S. 301, 304 (1988) (per curiam). This Court has long held that applicants who are properly denied intervention – such as the rejected-intervenor-appellants in this case – are not entitled to appeal any merits determination entered in the case. *American Lung Ass'n* v. *Kean*, 871 F.2d 319, 326 (3d Cir. 1989); *Harris* v. *Pernsley*, 820 F.2d 592, 603 (3d Cir.), cert. denied, 484 U.S. 947 (1987).

Moreover, the narrow exception that permits nonparties to pursue an appeal that this Court adopted in *Binker* v. *Pennsylvania*, 977 F.2d 738, 745 (3d Cir. 1992), should not be applied to permit the objector-appellants to challenge the

district court's entry of the Decree. Given the denial of the motion to intervene pursuant to Federal Rule of Civil Procedure 24 (Rule 24), the equities in this case weigh strongly against allowing the objector-appellants to challenge entry of the Decree when the unsuccessful applicants for intervention may not. Doing so would amount to a *sub silentio* revocation of the requirements of Rule 24. Allowing the objector-appellants to challenge entry of the Decree in this appeal would also be inconsistent with 42 U.S.C. 2000e-2(n)(1)(B)(i), which eliminates opportunities to challenge a consent decree that resolves a Title VII claim by individuals who had "actual notice" and a "reasonable opportunity" to object to the decree. Accordingly, the district court's order entering the Consent Decree is not properly before the Court in this appeal.

3. Should this Court nevertheless decide to address the propriety of the Consent Decree, it should affirm the district court's decision to enter the Decree. The appellants had ample opportunity to present and argue their objections before and at the fairness hearing and the district court thoroughly and thoughtfully analyzed these (and other) objections prior to its approval of the Consent Decree. On this record, there is no basis to disturb the district court's decision to enter the Decree on the ground that it is reasonable, fair, adequate, and consistent with federal law. Indeed, even if appellants had been allowed to intervene, there is no

reason to believe that the district court would have declined to enter the Consent Decree.

## ARGUMENT

## I

## THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PROPOSED INTERVENORS' MOTION AS UNTIMELY

### *A. Standard Of Review*

The denial of a motion for intervention as of right is reviewed for an abuse of discretion. *NAACP* v. *State of New York*, 413 U.S. 345, 365 (1973); *United States* v. *New Jersey*, 373 F. App'x 216, 220 (3d Cir. 2010); *Harris* v. *Pernsley*, 820 F.2d 592, 597 (3d Cir.), cert. denied, 484 U.S. 947 (1987). This Court will reverse a district court's order denying intervention only if the court "[has] applied an improper [legal] standard or reached a decision * * * we are confident is incorrect." *Benjamin* v. *Department of Pub. Welfare*, Nos. 11-3684, 11-3685, 2012 WL 6176984, at *7 (3d Cir. Dec. 12, 2012) (citation and internal quotation marks omitted); *New Jersey*, 373 F. App'x at 220.

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

Pursuant to Federal Rule of Civil Procedure 24(a)(2), a proposed intervenor must satisfy four criteria for intervention as of right: "(1) the application for intervention is timely; (2) the applicant has a sufficient interest in the litigation; (3) the interest may be affected or impaired, as a practical matter by the disposition of

the action; and (4) the interest is not adequately represented by an existing party." *Harris*, 820 F.2d at 596. If any of these criteria are not met, the court must deny intervention. *Mountain Top Condo. Ass'n* v. *Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 366 (3d Cir. 1995).

Timeliness is a threshold requirement for intervention. *NAACP*, 413 U.S. at 365; *Pennsylvania* v. *Rizzo*, 530 F.2d 501, 506 (3d Cir.) (quoting *NAACP*, 413 U.S. at 365-366), cert. denied, 426 U.S. 921 (1976). This Court has explained that timeliness, in turn, requires consideration of "all [of] the circumstances," and assesses three factors: "(1) how far the proceedings have gone when the movant seeks to intervene, (2) the prejudice which resultant delay might cause to other parties, and (3) the reason for the delay." *Choike* v. *Slippery Rock Univ. of Pa.*, 297 F. App'x 138, 140 (3d Cir. 2008) (quoting *In re Fine Paper Antitrust Litigation*, 695 F.2d 494, 500 (3d Cir. 1982)); *NAACP*, 413 U.S. at 365; *Mountain Top Condo.*, 72 F.3d at 369; *Rizzo*, 530 F.2d at 506.

In *Choike*, for example, this Court affirmed the district court's denial of intervention because the putative intervenors' request was untimely. 297 F. App'x at 141-142. A group of male student wrestlers challenging a school's decision to terminate the wrestling program moved to intervene in litigation brought by female student athletes alleging inequitable athletic opportunities under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* The potential intervenors

filed their motion after the district court had granted preliminary approval of a settlement. *Choike*, 297 F. App'x at 139, 141. In addition, the wrestlers filed their motion at least 11 months after the complaint was filed (and when proposed intervenors were first aware of the litigation and the potential impairment of their legal rights); more than five months after discovery had closed; and five months after the court had granted a preliminary injunction. *Choike*, 297 F. App'x at 139, 141. This Court also noted in *Choike* that the denial of intervention was appropriate, given the advanced stage of the proceedings; the significant "potential for prejudice" that would result for the parties who had negotiated a tentative settlement; and the absence of a legitimate reason for the proposed intervenors' delay in filing their motion after learning that their rights may be affected. 297 F. App'x at 141-142.

Similarly, in *In re Fine Paper Antitrust Litigation*, 695 F.2d at 497-501, this Court affirmed the denial of a motion for intervention on timeliness grounds. In *Fine Paper*, putative intervenors filed a motion more than two and one-half years after the court's ruling on class certification that excluded them, and almost six months after the court entered final judgment approving the parties' settlement. *Id.* at 497, 499. Given the closure of the litigation, the potential prejudice to the parties (including "dilution of the settlement fund, relitigation of the class issue, or reevaluation of the adequacy of the settlement"), and the absence of a reason for

the purported intervenors' failure to act in a timely manner, this Court found no abuse of discretion in denying the motion. *Id.* at 500-501; see also *United States* v. *Yonkers Bd. of Educ.*, 801 F.2d 593, 596-597 (2d Cir. 1986) (motion to intervene untimely when homeowners filed their motion more than three months after they were on notice of potential locations for multi-family housing construction; after extensive hearings were held on the issue; and one month after the court had issued an order on the choices).

In contrast, in *Mountain Top Condominium*, 72 F.3d at 370, this Court held that a motion to intervene was timely when it was filed approximately one month after the proposed intervenors learned that their interests might be affected, and the original parties had engaged in only nominal discovery over a four-year period, and had not filed dispositive motions or a proposed settlement. See also *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 314-315 (3d Cir. 2005) (motion to intervene by class members six weeks prior to fairness hearing on a proposed settlement and within the time limit for class members to opt-out was "presumptively timely"; a remand was required because the district court did not adequately address claims of collusion or explain its denial of intervention based on prejudice); *United States* v. *Alcan Aluminum, Inc.*, 25 F.3d 1174, 1182 (3d Cir. 1994) (a motion to intervene after a consent decree was filed was timely when government counsel had

"induced" intervenors' counsel to believe its interests were not affected by the consent decree).

### *C. The District Court Did Not Abuse Its Discretion In Determining That Appellants' Motion To Intervene Was Untimely*

In accordance with this Court's precedents, the district court correctly considered the totality of the circumstances, and determined that the motion to intervene was untimely because of the advanced stage of the proceedings; the prejudice intervention would have caused to the parties; and the inadequacy of appellants' reasons for their delay in filing their motion. App. 1:57-61.

#### *1. The Advanced Stage Of The Proceedings*

After briefly setting out the procedural history of the proceedings, the district court observed that appellants "filed their motion to intervene at a point in which the decree had been entered, notice had been dispensed, the time for objections had been closed, and the initial fairness hearing was on the horizon." App. 1:58. The court concluded that this advanced stage of the proceedings supported the denial of intervention, noting that intervention would "disrupt the administration of a consent decree negotiated over a lengthy period of time following extensive discovery." App. 1:60. Furthermore, the court observed that intervention "would undo months of work, including not only provisional entry of the decree, but also the subsequent distribution of notice and processing of objections." App. 1:60. In these circumstances, the district court correctly

concluded that the extensive proceedings that had taken place in this case supported the denial of intervention. See, *e.g.*, *Choike*, 297 F. App'x at 141-142 (intervention denied where district court had preliminarily approved a consent decree prior to the motion for intervention); *Brown* v. *Bush*, 194 F. App'x 879, 882-883 (11th Cir. 2006) (oral motion to intervene at fairness hearing was untimely when putative intervenors were aware of the litigation either five months prior to the hearing, or seven weeks prior upon receipt of court notice of the hearing; a delay of the litigation and fairness hearing and renotification of the class were not "mere inconveniences" to the parties); *D'Amato* v. *Deutsche Bank*, 236 F.3d 78, 84 (2d Cir. 2001) (motion to intervene filed three days before a fairness hearing was untimely when putative intervenor was aware of litigation, had no explanation for delay, and intervention would "potentially derail the settlement" negotiated over several months); *Donovan* v. *United Steelworkers of Am., AFL-CIO*, 721 F.2d 126, 127 (3d Cir. 1983) (motion to intervene was untimely when it was filed thirteen months after the complaint was filed, all pretrial proceedings had been completed, and the case was scheduled for trial), cert. denied, 467 U.S. 1252 (1984).

*2. The Potential Prejudice To The Parties*

The district court also correctly determined that the prejudice the parties would suffer if intervention were granted supported denial of appellants' motion.

Citing this Court's decision in *Mountain Top Condominium*, 72 F.3d at 370, the district court correctly recognized that the prejudice the parties may suffer as a result of the appellants' delay in seeking intervention is inherently tied to the stage of the proceedings. App. 1:58. After noting that the parties had completed discovery and arrived at a proposed Consent Decree, the court went on to state that the parties "also bore the administrative burdens incumbent with giving notice to parties in advance of the fairness hearing." App. 1:58. Because intervention "would require restructuring of the consent decree, new notice, [and] a new fairness hearing," the court found that appellants had "sat on their rights until the process * * * would scuttle much of the progress that the parties [had] made toward settling." App. 1:58, 60. In the court's view, "[t]his unwelcome result after all the notice given requires a very strong reason for the failure to intervene earlier." App. 1:58.

The district court's assessment of this factor is entirely consistent with this Court's decisions. See, *e.g.*, *Choike*, 297 F. App'x at 141-142 (motion to intervene filed after preliminary approval of settlement agreement has significant "potential for prejudice" to parties); *Donovan*, 721 F.2d at 127 (motion to intervene filed after all discovery and pretrial proceedings were complete could impose "substantial prejudice" on parties); *Rizzo*, 530 F.2d at 507 ("basic fairness to the parties and the expeditious administration of justice mandates the denial of the [untimely] motion

to intervene"). Accordingly, the district court properly found that the prejudice the parties would suffer if intervention were granted supported denial of appellants' motion.

*3. The Reasons For Appellants' Delay In Moving To Intervene*

The district court also properly concluded that consideration of the proposed intervenors' stated reasons for their delay in moving to intervene weighed against allowing appellants to intervene. App. 1:59. In accordance with this Court's decisions in *Mountain Top Condominium*, 72 F.3d at 370, and *Alcan Aluminum*, 25 F.3d at 1183, the court correctly recognized that any delay in moving for intervention should be measured from the time the applicant knew or should have known that his or her rights might be affected by the litigation. App. 1:59. Reviewing the proposed intervenors' certifications, the court determined that one applicant learned of the Consent Decree in August 2011, and 24 applicants "received actual notice [of the Consent Decree] in mid-September 2011, with the last [two] receiving actual notice sometime in October 2011." App. 1:59. The court noted that the applicants' briefs did not contain any explanation of why they waited until February 9, 2012, to move to intervene, and that, at oral argument, their "attorney's explanation was based on the costs, financial and otherwise, of litigating sooner." App. 1:59. The court had little difficulty concluding that, "[b]ased on the circumstances of this case and how far the litigation had progressed

by the time the movants file[d] their motion, this explanation for the delay is inadequate." App. 1:59.

Again, the district court's analysis of this third timeliness factor is fully in accord with this Court's decisions. This Court has consistently refused to allow intervention when the potential intervenor has failed to adequately explain the reason for the delay between his knowledge of the litigation (or knowledge that his interests may be affected) and his motion to intervene.

In *Choike*, 297 F. App'x at 141, for example, this Court held that the district court did not abuse its discretion in denying a motion to intervene as untimely when, *inter alia*, the proposed intervenors did not "convincingly explain [their] reason for the [four-month] delay in filing their motion to intervene." In *Donovan*, 721 F.2d at 127, the Court held that "tactical decisions" for delay do not provide a "meaningful justification" for the delay in filing a motion to intervene until shortly before trial, and more than a year after the complaint was filed. Moreover, in *In re Fine Paper Antitrust Litigation*, 695 F.2d at 501, this Court held that the district court did not abuse its discretion in denying intervention, when putative intervenors "presented no reason" for the delay in seeking intervention after they knew or should have known about the litigation. See also *Delaware Valley Citizen's Council for Clean Air* v. *Pennsylvania*, 674 F.2d 970, 975 (3d Cir. 1982) (state legislator-intervenors' explanation that they did not file a motion to intervene

until more than 21 months after entry of a consent decree because they are members of an "extremely busy [legislative] body" is not a "satisfactory" reason).

After considering each of these three factors separately, the court considered the totality of the circumstances of the case. App. 1:59-61. Considering the litigation in its entirety, the court certainly did not abuse its discretion in concluding "that the motion to intervene is untimely." App. 1:59.[15]

*D. Appellants' Brief Fails To Demonstrate Any Error In The District Court's Rejection Of Their Motion To Intervene*

Appellants devote only four pages of their brief to the only issue that is properly before this Court; *i.e.*, whether the district court properly denied their motion to intervene as untimely. Br. 25-28. Their argument does not cite Rule 24(a)(2), does not discuss any of the factors this Court considers in deciding

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[15] This Court's recent decision in *Benjamin*, 2012 WL 6176984, is not to the contrary. *Benjamin*, *id.* at *1, is a class action by individuals with intellectual disabilities in intermediate care facilities who assert violations of the integration mandate under the Americans with Disabilities Act and the Rehabilitation Act. In *Benjamin*, this Court vacated an order denying the Appellants' motion to intervene at the remedy stage of the litigation. *Ibid.* *Benjamin* has an unusual procedural history, and is plainly distinguishable from this case on its facts. In *Benjamin*, for example, Appellants filed their motion *before* the deadline for filing objections to the Settlement Agreement. *Id.* at *9. In addition, the parties did not object to the motion to intervene to challenge the remedy on grounds of timeliness, and this Court stated that "we do not see how [Appellees] could suffer any real prejudice if Appellants' attempt to intervene" to challenge class certification also was allowed. *Id.* at *10. Accordingly, this Court's decision in *Benjamin* does not call into question the district court's decision that Appellants' motion to intervene was untimely.

whether a motion to intervene is timely under that Rule, and completely fails to come to grips with any of the reasons the district court gave for concluding that their motion to intervene was untimely. Accordingly, appellants have presented no valid basis on which this Court could reverse the order denying intervention.

Instead, appellants' complain about "the secrecy that surrounded [the] consent decree, [and] the constant stream of confidential documents which hid the proceedings from the public and now continues to hide the proceedings from the attorneys for the proposed interven[o]rs." Br. 25. These and their similar allegations are belied by the record, which demonstrates the extraordinary efforts the parties made to inform all interested persons of the provisions of the proposed Consent Decree, and to invite objections to the Decree. See pp. 15-16, *supra*. And even if appellants' allegations were true (which they are not), they would not excuse appellants' delay in moving to intervene. In short, appellants have presented no valid grounds on which to overturn the district court's ruling that their motion to intervene was untimely.[16]

[16] In a separate argument (Br. 24-25), appellants contend that the State of New Jersey has failed to adequately represent their interests. That assertion, too, is belied by the record, which establishes that the State acted appropriately in reaching a settlement that was in its best interests, given the strength of the United States' case of a disparate impact violation. See pp. 8-10, *supra*. And even if it were true (which it is not), this allegation would not serve to undermine the district court's holding that their intervention motion was untimely.

## II

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

### *A. Standard Of Review*

Whether this Court has subject matter jurisdiction is a question of law, which is subject to *de novo* standard of review. *In re W.R. Grace & Co.*, 591 F.3d 164, 170 n.7 (3d Cir. 2009), cert. denied, 131 S. Ct. 200 (2010).

### *B. This Court Does Not Have Jurisdiction To Consider Rejected-Intervenor-Appellants' Challenge To The Consent Decree*

Appellants have challenged not only the denial of their motion to intervene, but also the district court's approval of the Consent Decree. Because appellants are not parties to this case, and because the district court appropriately denied the motion to intervene, they are not "parties" within the meaning of Federal Rule of Appellate Procedure 3(c)(1)(A), and therefore are not entitled to appeal the district court's disposition of this case.

It is well-settled that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Marino* v. *Ortiz*, 484 U.S. 301, 304 (1988) (per curiam). Rejecting the court of appeals' acknowledgement of judicial exceptions to the general rule that only parties may appeal a ruling, the Supreme Court instructed: "We think the better practice is for such a nonparty to seek intervention for purposes of appeal; denials of such motions are, of course,

appealable." *Ibid.* See also *United States* v. *Stoerr*, 695 F.3d 271, 276 (3d Cir. 2012); *Pennsylvania* v. *Rizzo*, 530 F.2d 501, 507 (3d Cir.), cert. denied, 426 U.S. 921 (1976). Moreover, this Court has repeatedly held that a putative intervenor may appeal the denial of his motion to intervene, but a person or entity that is properly denied intervention may *not* appeal any merits determinations in the underlying suit. *American Lung Ass'n* v. *Kean*, 871 F.2d 319, 326 (3d Cir. 1989); *Harris* v. *Pernsley*, 820 F.2d 592, 603 (3d Cir.), cert. denied, 484 U.S. 947 (1987); *Hoots* v. *Pennsylvania*, 495 F.2d 1095, 1096 (3d Cir.), cert. denied, 419 U.S. 884 (1974).

As discussed in Argument I, *supra*, the district court appropriately denied rejected-intervenor-appellants' motion to intervene because it was not timely, and therefore they are not parties in this case. Because none of the rejected-intervenor-appellants are parties to this litigation, they are not entitled to appeal the merits of the district court's order approving the Consent Decree, and this Court should dismiss this aspect of the appeal. See, *e.g.*, *Marino*, 484 U.S. at 304; *Stoerr*, 695 F.3d at 276.

### *C. This Court Does Not Have Jurisdiction To Consider Objector-Appellants' Challenge To The Consent Decree*

To be sure, this Court has recognized a narrow exception to the rule that nonparties may not appeal an adverse judgment. In exceptional circumstances, this Court has permitted nonparties to pursue an appeal when "the equities favor

hearing the appeal, where the nonparties participated in the settlement agreement, and where the nonparties had a stake in its proceeds discernible from the record." *Binker* v. *Pennsylvania*, 977 F.2d 738, 745 (3d Cir. 1992); see also *Northview Motors, Inc.* v. *Chrysler Motors Corp.*, 186 F.3d 346, 348-349 (3d Cir. 1999).

As indicated (pp. 7, 23 *supra*), some of the appellants filed objections to the Consent Decree, but did not join in the motion to intervene (*i.e.*, the objector-appellants). Although appellants did not cite the so-called "*Binker* exception" in their Jurisdictional Statement (Br. 1) or elsewhere in their Brief, this Court may wish to consider its application here, as it relates to the Court's jurisdiction. See, *e.g.*, *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) ("[E]very federal appellate court has a special obligation to satisfy itself * * * of its own jurisdiction.") (citation and internal quotation marks omitted); *United States* v. *Touby*, 909 F.2d 759, 763 (3d Cir. 1990), aff'd on other grounds, 500 U.S. 1160 (1991). We submit that the *Binker* exception does not permit the objector-appellants to appeal the district court's order entering the Consent Decree.

*Binker* permits an appeal by nonparties who have *not* moved for intervention, but only "where the equities favor hearing the appeal." 977 F.2d at 745. Significantly, in *Binker*, the appellants were statutorily barred from any opportunity to intervene in the underlying litigation, because the "EEOC's

[ADEA] suit extinguished their individual rights on the date the complaint was filed." 977 F.2d at 747.

Here, the equities weigh strongly against allowing the objector-appellants to appeal. As indicated (pp. 37-38, *supra*), because their motion to intervene was properly denied, the *rejected-intervenor-appellants* may not appeal the district court's order entering the Consent Decree. It makes little sense to allow mere *objectors* to appeal, while similarly-situated individuals who unsuccessfully sought to intervene are precluded from doing so. Such an anomalous result would have the undesirable effect of discouraging individuals from moving to intervene in litigation they thought might adversely affect their interests. Those who choose not to become a party in a case should not be afforded greater appeal rights than those who try but fail to do so. Granting a right to appeal to the objector-appellants under *Binker* would thus amount to a "*sub silentio* reversal" of the district court's ruling denying intervention under Rule 24. *American Lung Ass'n*, 871 F.2d at 327. Because allowing the objector-appellants to appeal here would effectively nullify the requirements for intervention under Rule 24, the equities do not favor allowing an appeal of the district court's order entering the Consent Decree. Since the first *Binker* factor is not satisfied here, this Court does not have jurisdiction to consider the objector-appellants' challenge to the entry of the Decree.

In addition, 42 U.S.C. 2000e-2(n), part of the 1991 amendments to Title VII of the Civil Rights Act of 1964, counsels against application of the *Binker* exception in this appeal. Section 2000e-2(n)(1)(A)-(B) provides that "an employment practice that implements and is within the scope of a * * * consent judgment or order that resolves a claim of employment discrimination under the * * * Federal civil rights laws *may not be challenged*" by an individual who had a reasonable opportunity to present objections at a fairness hearing (emphasis added).

Section 2000e-2(n) was enacted to reverse *Martin* v. *Wilks*, 490 U.S. 755 (1989). *Martin* "affirmed Congress's power to adopt a 'special remedial scheme' balancing the rights of nonlitigants against the need for finality of judgments and prompt relief for discrimination," and Section 2000e-2(n) "responds to the [*Martin*] decision by adopting just such a remedial scheme." H.R. Rep. No. 40(I), 102d Cong., 1st Sess. 54-55 (1991). Thus, Congress generally eliminated the opportunity for any challenge to a consent decree that resolved Title VII claims, as long as the individual challenging the decree had "actual notice" of the judgment or order and a "reasonable" opportunity to present objections to the decree or order – as *all* appellants did here. See 42 U.S.C. 2000e-2(n)(1)(B)(i)(I)-(II); see also R. 64-5 (objections), R. 69 (Hrg. Tr.). Moreover, Section 2000e-2(n)(2)(A) states that

this provision does *not* "alter the standards" for Rule 24 intervention, or "apply to the rights" of individuals who have intervened pursuant to Rule 24.

For these reasons, this Court should rule that the *Binker* exception does not permit the objector-appellants to challenge the district court's entry of the Consent Decree in this appeal.

## III

## THE DISTRICT COURT PROPERLY CONCLUDED THAT THE CONSENT DECREE IS FAIR, REASONABLE, AND CONSISTENT WITH FEDERAL LAW

As explained in the preceding argument, appellants are not proper parties in this case, and do not have the right to challenge the district court's entry of the Consent Decree. Should this Court nevertheless reach the issue, it should affirm the court's entry of the Decree because appellants' challenges are entirely without merit.

### *A. Standard Of Review*

A district court must review a proposed consent decree to determine whether it is fair, reasonable, and consistent with federal law. *In re: Tutu Water Wells CERCLA Litig.*, 326 F.3d 201, 207 (3d Cir.), cert. denied, 540 U.S. 984 (2003). This Court reviews a district court's approval of a consent decree under these standards for an abuse of discretion. *Ibid.*; see *Walsh* v. *Great Atlantic & Pac. Tea Co.*, 726 F.2d 956, 965 (3d Cir. 1984) (approval of ERISA class action settlement

agreement); *EEOC* v. *AT&T*, 556 F.2d 167, 178 (3d Cir. 1977), cert. denied, 438 U.S. 915 (1978).

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

The district court appropriately concluded that the Consent Decree is fair, reasonable, and consistent with federal law. App. 1:18-56. In reaching this conclusion, the court fully assessed the strength of the United States' claims; determined that the injunctive and individual relief were fair, reasonable, and consistent with law; and held that the objections raised, including appellants', did not have sufficient merit to prevent entry of the Consent Decree. App. 1:18-56. Given the district court's reasoned analysis, this Court should affirm the district court's approval of the Consent Decree. See *Tutu Water*, 326 F.3d at 207; *AT&T*, 556 F.2d at 178 ("considerable deference must be accorded the decision of the trial judge as to [a] remedy" set forth in a consent decree); *Bryan* v. *Pittsburgh Plate Glass Co.*, 494 F.2d 799, 801 (3d Cir.) (Title VII class action settlement affirmed under abuse of discretion standard), cert. denied, 419 U.S. 900 (1974).

#### *1. The Evidentiary Basis For The Parties' Settlement*

The district court stated that "[i]n assessing the reasonableness of the decree, the paramount question is whether the United States has presented a strong claim on the merits." App. 1:19. The court assessed, in detail, the United States' evidence in light of the principles of disparate impact (App. 1:19-33), and the

"strong basis in evidence" standard of *Ricci* v. *DeStefano*, 557 U.S. 557 (2009). App. 1:33-39 (quoting *Ricci*, 557 U.S. at 583).[17]

The district court appropriately found that the United States "made an ample showing that a statistically significant disparity exists between the passage rates and placement positions of white candidates as opposed to African American and Hispanic candidates." App. 1:26. The district court cited, *inter alia*, aggregated data that established the disparity in pass rates for white candidates as compared to black and Hispanic candidates was, respectively, 17.33 and 12.88 units of standard deviation, and the disparity in rank order of white candidates as compared to black and Hispanic candidates was, respectively, 7.77 and 4.66 units of standard deviation. App. 1:24-25; see *NAACP* v. *North Hudson Reg'l Fire & Rescue*, 665 F.3d 464, 476-477 (3d Cir. 2011), cert. denied, 132 S. Ct. 2749 (2012); *Stagi* v. *National R.R. Passenger Corp.*, 391 F. App'x 133, 140 (3d Cir. 2010) ("2 to 3 standard deviations or greater[] will typically be sufficient" to establish disparate impact); App. 1:22-28. The court also reviewed the ample evidence establishing that the sergeant's examination was not job related or consistent with business necessity based on principles of validity, and that a test with less disparate impact can be administered to objectively assess whether a candidate is qualified for a

[17] In district court, appellants argued that the proposed consent decree violated *Ricci*'s requirements. See R. 57-2:8-10.

sergeant position. App. 1:28-33, 51-52; see *North Hudson*, 665 F.3d at 476-477. In sum, the United States presented expert evidence of at least four ways in which the current sergeant's examination failed to meet standards of job relatedness or business necessity. See p. 10, *supra*.

The district court also concluded (App. 1:35-36) that the parties' agreement to settle the litigation by this Consent Decree is consistent with the principles set forth in *Ricci*, and that analysis is sound and reasonable. In *Ricci*, the Supreme Court held that an employer must have a "strong basis in evidence" that its employment practices will have an unlawful disparate impact before it may unilaterally engage in action that will result in disparate treatment. 557 U.S. at 583-585. The Supreme Court held that the defendant in *Ricci* did not have a "strong basis" to act because it considered only a test's disparate impact, and did not assess whether the test was valid; that is, whether it was job related and consistent with business necessity. *Id.* at 587.

The district court correctly held that the strength and scope of evidence presented here is substantially different than that at issue in *Ricci*, and that therefore the "strong basis in evidence" standard is met. App. 1:35-36. Unlike the defendants in *Ricci*, New Jersey evaluated and considered not only evidence of its test's disparate impact, but had engaged in extensive litigation (and a pre-suit investigation) that led it to make a "calculated decision based on an evaluation of

significant evidence," including a reassessment of the likelihood of proving that the sergeant's test was valid. App. 1:35. Long-standing precedent that favors voluntary Title VII settlements, and the principle that a court need not resolve the merits of underlying claims to approve a settlement, support application of *Ricci*'s "strong basis in evidence" standard when parties agree to resolve litigation by a consent decree. *Ricci*, 557 U.S. at 583 (strong basis in evidence standard applied to an employer's "voluntary compliance efforts"); *Bryan* v. *Pittsburgh Plate Glass Co.*, 494 F.2d 799, 801 (3d Cir.) (a court is "not required to weigh and decide each "contention" before approving a settlement, but must balance the "probable result at trial" with the "probable costs * * * of continued litigation"), cert. denied, 419 U.S. 900 (1974).

*2. The Consent Decree's Relief Is Fair, Reasonable, And Consistent With Law*

The district court also reasonably concluded that development of a valid examination, back pay awards, priority promotions and limited retroactive seniority to qualified Claimants, and the interim procedures for approval of certifications for promotions in certain jurisdictions are fair, reasonable, and consistent with Title VII and constitutional standards. App. 1:39-50. Appellants

cannot show that these conclusions are an abuse of discretion.[18] See *Bryan*, 494 F.2d at 801-803; *Pennsylvania* v. *O'Neill*, 100 F.R.D. 354, 359-361 (E.D. Pa. 1983), aff'd, 746 F.2d 1465, 1466 (3d Cir. 1984).

The district court concluded that the Consent Decree's award of 68 priority promotions with limited retroactive seniority "strikes an appropriate balance" between full relief to individuals adversely affected by the sergeant's examination and expectations of nonminority employees that is "fair" and "workable." App. 1:47 (citing *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 374-375 (1977)); see *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 763 (1976). The district court correctly noted significant limitations of this relief that confirm its lawfulness: (1) it is afforded only to "qualified Claimants who constitute the most probable victims of the disparate impact"; (2) it is "narrowed to such a point that it has an impact only on those jurisdictions in which the examination's disparate

[18] While appellants have only challenged the priority hire and remedial seniority relief, the district court's approval of all of the relief afforded by the Consent Decree is reasonable. The Consent Decree's requirement that defendants develop a new, valid examination is "reasonable and fair" and consistent with Title VII. App. 1:52; see *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 361 (1977). The district court also reasonably approved a back pay fund of $1 million and monetary relief to Claimants in jurisdictions with a shortfall of at least one minority sergeant in light of the parties' "leeway in crafting the terms of a settlement," the "[l]ines [that] are inevitably drawn," and because the agreement is "a product of arms-length negotiation." App. 1:43-44, 50; see *Tutu Water*, 326 F.3d at 208-209 (approval of settlement negotiated at arms-length).

impact has been most profound," that is, jurisdictions with a shortfall of at least three minority candidates; and (3) the number of priority placements per jurisdiction is limited and based on the number of anticipated minority promotions absent the test's disparate impact.[19] App. 1:47-48; see *North Hudson*, 665 F.3d at 485-486 ("Title VII cases demonstrate that inequities to one group accruing from remedies for discrimination against another group cannot forestall those remedies"; upholding elimination of residency requirement for employment and expanding candidate pool of applicants for hire); *O'Neill*, 100 F.R.D. at 359 ("there is ample authority for approving a voluntary [Title VII] settlement which * * * include[s] * * * remedial measures to alleviate past discriminatory injustices"; upholding priority promotions and hiring for minorities).

Moreover, the benefit of retroactive seniority under the Consent Decree is limited: it is used to calculate the individual's seniority points for future promotion and does not satisfy any time-in-grade requirement for a future promotional examination. App. 4:646 (Consent Decree ¶ 10). Finally, the one-to-one process (with exceptions) for appointment between Claimants and individuals on a special

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[19] The total number of eligible Claimants who will receive priority promotion (68) is approximately two-thirds of the calculated shortfall for all jurisdictions (105, as calculated by Dr. Siskin, see. p. 12, note 8, *supra*), and nominal in comparison to the total number of sergeants in the 43 affected jurisdictions. No more than nine Claimants will be awarded priority relief in any one jurisdiction, except the City of Newark, with 15 Claimants. App. 4:736 (Consent Decree, Att. K)

reemployment list, and priority promotion for Claimants ahead of individuals on a regular certification list balances the goals of timely relief for Claimants with the special circumstances of individuals on a special reemployment list. See *Franks*, 424 U.S. at 765-766, 775 (by its nature, make-whole relief will affect the interests of other employees).

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

Appellants argue (Br. 13-19) that the current workforce data for Paterson, New Jersey, which purportedly reflects a complement of minority supervisors that is comparable to Paterson's percentage of minority police officers, refutes the test's disparate impact. However, appellants' head count data for the Paterson police department's workforce, apart from significant questions as to its accuracy, is not relevant to a disparate impact analysis, which focuses on requirements that impose a discriminatory bar to opportunities, not absolute numbers of persons hired or promoted. *Connecticut* v. *Teal*, 457 U.S. 440, 450 (1982); *North Hudson*, 665 F.3d at 477; *Stagi*, 391 F. App'x at 136 (citing *Teal*, 457 U.S. at 450). As discussed, the test's disparate impact was established for candidates' pass-fail rates and rank ordering based not only on the aggregate results of the test's administration over nine years, but also statewide results assessed on an annual basis, and by specific shortfall analyses for each jurisdiction, including Paterson. App. 4:911-913, 919-920 (Dr. Siskin 2d Am. Decl. ¶¶ 4-10, 30). Moreover, the

percentage of minority candidates from Paterson who took the sergeant's examination in 2000, 2003, and 2006 (the only years between 2000-2009 for which Paterson officers were eligible to take the test), were "*overrepresented* in the police sergeant candidate pool in Paterson when compared to their representation in the rank of police officer." App. 4:911, 919-920 (Dr. Siskin 2d Am. Decl. ¶¶ 4, 30(c)) (emphasis added).

Appellants' assertion that the disparate results for white and minority candidates were the result of studying and preparation was rejected by the district court, as it should be here. App. 1:36-39; see *North Hudson*, 665 F.3d at 476 (addressing elements and defenses of disparate impact); *Bouman* v. *Block*, 940 F.2d 1211, 1227-1228 (9th Cir.) (no known authority "for the proposition that a defendant need not validate an examination if the disparate impact of that examination correlates with some [other] facially non-discriminatory factor"), cert. denied, 502 US. 1005 (1991); 42 U.S.C. 2000e-2(k)(1)(A). Assertions of test preparedness are irrelevant to the disparate impact assessment. As the district court explained, "[i]f the examination is invalid, then it does not matter whether more effort could have resulted in a better performance." App. 1:38.[20] If performance on an examination does not distinguish between candidates who are

[20] Significantly, while appellants challenge the evidence of disparate impact, they did not present any evidence or argument regarding how the sergeant's examination is job related or consistent with business necessity.

qualified and unqualified for the position in issue, studying more to improve performance on this examination does not establish that the candidate is better able to perform the duties of the job.

Appellants claim (Br. 19-20) they were denied due process because (1) they did not get notice at the time of the suit; (2) the district court's fairness hearing was a "sham"; (3) the district court denied discovery prior to the fairness hearing; and (4) certain materials were filed under seal or kept confidential. These assertions are baseless and fail to establish a lack of due process.

Appellants' claims (Br. 20-21) that they were "denied any opportunity to be heard before the Consent Decree was approved," that the district court "totally ignored [a]ppellants' argument that there was no disparity" in the test results, and that the fairness hearing was a "sham" are belied by the record. Appellants, and thousands of individuals who may be affected by the Consent Decree, were provided ample notice of the proposed Consent Decree and had an opportunity to present written objections. See pp. 15-16, *supra*. Appellants cite no authority (see Br. 19), nor is the United States aware of any, to support their allegation that due process required the parties to give them notice when the Complaint was filed. At the fairness hearing, counsel for appellants had a full opportunity to present all of his arguments to support his motion for intervention and his objections to the Consent Decree. App. 5:1000-1020. As discussed, all objectors had ample

opportunity to voice their concerns and question the government's experts. See p. 18, *supra*. Moreover, in its opinion, the district court thoroughly assessed the terms of the Consent Decree and its practical impact, and why the objections did not warrant rejection of the Decree. *E.g.*, App. 1:41-42, 49-50, 53-56; see *Walsh*, 726 F.2d at 965-966 (rejecting due process challenges based on district court's conduct of an ERISA class action fairness hearing).

Appellants' claim (Br. 20, 28) that, if they received discovery, they would be able to bolster their claims ignores the district court's appropriate assessment, in the first instance, whether proposed intervenors satisfy the criteria for intervention under Rule 24(a)(2). Only if Rule 24's criteria are met (and therefore party status is established), should a court address the parameters of future discovery. Moreover, appellants had, *inter alia*, Dr. Siskin's and Dr. Jones's declarations at the time they moved to intervene and they had an opportunity to question these experts at the fairness hearing. However, as discussed herein, appellants' challenges to the experts' conclusions are without merit. Appellants' claim that they were denied access to relevant and critical information as a result of redactions to Dr. Hill's declaration – redactions of his home address and telephone number – is equally without merit. See App. 3:361-384 (motion to redact and court order).

Appellants' cursory assertion (Br. 22-23) that the Consent Decree's priority promotion relief is subject to strict scrutiny review is waived, since they failed to present this argument to the district court. *United States* v. *Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994); *Peoples* v. *Discover Fin. Servs., Inc.*, 387 F. App'x 179, 184 (3d Cir. 2010), cert. denied, 131 S. Ct. 1008 (2011). Even if considered, this claim has no merit.

As the district court correctly said, neither the Supreme Court nor this Court has said what the appropriate standard is in cases like this. App. 1:18. But even if strict scrutiny applies, it is plainly satisfied here. The district court held that there is a strong basis in evidence to conclude that there was disparate impact and a lack of job relatedness. Remedying disparate impact discrimination is a compelling governmental interest. *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 492 (1989). The limited race conscious relief entered here is plainly narrowly tailored to remedy that discrimination. Narrow tailoring examines the necessity for affirmative relief and the efficacy of alternatives, the flexibility and duration of the relief, and the degree of impact on third parties. See *United States* v. *Paradise*, 480 U.S. 149, 171 (1987). Here, the priority promotion relief satisfies the elements of narrow tailoring: it is necessary to provide qualified Claimants appropriate relief; it is of limited duration because it applies only in jurisdictions with a shortfall greater than three, and the number of Claimants per jurisdiction is the

number of minorities who were denied opportunities due to the test's adverse impact; the timetable for priority promotions is fair vis-à-vis other incumbents; and it results only in a delay – not a denial – of promotional opportunities. See *ibid.* (one-to-one promotion relief approved); *Howard* v. *McLucas*, 871 F.2d 1000, 1008-1010 (11th Cir.), cert. denied, 493 U.S. 1002 (1989) (1:1 alternating promotions between Claimants and other incumbents for 240 appointments satisfied strict scrutiny and provided "expeditious" remedy to past discrimination).

Accordingly, on this record, there is no reason to believe that the district court would have refused to enter the Consent Decree even if appellants had been allowed to intervene. As the district court explained, the appellants (and all objectors) "had a voice in the process" by filing written objections and having an opportunity to participate at the fairness hearing. App. 1:61. Appellants' counsel argued at the fairness hearing. The district court "considered carefully" all of the objections and, notwithstanding those objections, approved the Consent Decree, correctly, under governing legal principles. App. 1:61.

Finally, appellants' bald assertion (Br.19) that their "right to promotion" is "mandated" by New Jersey's Constitution is equally without merit. The State Constitution provides that civil service promotions "be made according to merit and fitness to be ascertained, as far as practicable, by examination, which, as far as practicable, shall be competitive." N.J. Const., Art. VII, § 1, ¶ 2. There will likely

always be more qualified candidates than there are openings for a given position, and New Jersey's Constitution does not bar the use of criteria, competitive and otherwise, to select among qualified candidates. Thus, by its terms, New Jersey's Constitution does not guarantee any promotion to appellants, nor does it foreclose the district court's determination that the relief here, for candidates who also satisfy "merit and fitness," is lawful. N.J. Const., Art. VII, § 1, ¶ 2.

Accordingly, should the Court reach this issue, it should affirm the district court's entry of the Consent Decree.

## CONCLUSION

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

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

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 13,087 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14-point Times New Roman font.

3. I also certify that the copy of this brief that has been filed electronically is an exact copy of what has been submitted to the Court in hard copy. I further certify that the electronic copy has been scanned with the most recent version of Trend Micro Office Scan Corporate Edition (version 8.0) and it is virus-free.

s/ Jennifer Levin Eichhorn
JENNIFER LEVIN EICHHORN
Attorney

Date: January 23, 2013

**CERTIFICATE OF EXEMPTION FROM BAR MEMBERSHIP**

I certify that, as an attorney representing the United States, I am not required to be a member of the bar of this Court. See L.A.R. 28.3(d) and Committee Comments.

s/ Jennifer Levin Eichhorn
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Attorney

Date: January 23, 2013

## CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2013, I electronically filed the foregoing Brief for the United States as Appellee with the United States Court of Appeals for the Third Circuit by using the CM/ECF system, and that ten paper copies identical to the brief filed electronically were sent to the Clerk of the Court by the U.S. Postal Service, certified mail.

I further certify that all participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system. In addition, I certify that on January 23, 2013, I sent two paper copies of the foregoing brief to counsel of record by the U.S. Postal Service, certified mail.

s/ Jennifer Levin Eichhorn
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