IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 18-1462

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

STATE OF RHODE ISLAND DEPARTMENT OF CORRECTIONS;
STATE OF RHODE ISLAND,

Defendants-Appellees

JAYSON BADILLO,

Claimant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES' MOTION TO DISMISS THE APPEAL

Nonparty appellant Jayson Badillo has appealed the district court's final approval of a settlement agreement between the United States and defendants-appellees the State of Rhode Island and the State of Rhode Island Department of Corrections. Pursuant to Federal Rule of Appellate Procedure 27(a) and Local Rule 27.0(c), the United States respectfully moves the Court to dismiss this appeal

because Badillo is not a party to this case and therefore may not appeal the judgment below.

BACKGROUND

1. In February 2014, the United States filed a lawsuit against defendants-appellees the State of Rhode Island and the Rhode Island Department of Corrections (collectively, Rhode Island) under Section 707 of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. 2000e-6. Doc. 1.[1] The complaint alleged that the State engaged in a pattern or practice of employment discrimination by using certain examinations to hire its correctional officers that had an unlawful disparate impact on African-American and Hispanic applicants, in violation of 703(k) of Title VII, 42 U.S.C. 2000e-2(k). Doc. 1, at 7-9. The United States further alleged that the challenged hiring practices were not sufficiently job related for the position of correctional officer or consistent with business necessity. Doc. 1, at 7-8.

In September 2017, after extensive discovery, motions practice, and negotiations, the parties reached a settlement agreement without any finding or stipulation as to liability. See Doc. 80-1. The agreement calls for both injunctive and individual relief. It requires Rhode Island, among other things, to implement a

[1] Citations to "Doc. __, at __" refer to documents in the district court record, as numbered on the district court's docket sheet, and page numbers within the documents.

new selection process for hiring correctional officers that complies with Title VII. Doc. 80-1, at 14-16. It also requires Rhode Island to offer two forms of individual relief to eligible African-American and Hispanic claimants who failed one of the challenged entry-level correctional officer exams. Doc 80-1, at 16, 19. The first form of individual relief is monetary relief totaling $450,000, to be distributed in amounts that take into consideration when a claimant was disqualified by the exam. Doc. 80-1, at 17, 20. The second form of individual relief is priority hiring relief for 37 claimants who successfully complete the State's current selection procedures, as described in the agreement. Doc. 80-1, at 19-20, 31-33.

To obtain either form of individual relief, a claimant must affirmatively accept such relief. To do so, a claimant must return an "Interest-in-Relief" form and then, upon receiving a final award determination, return an "Acceptance of Individual Relief Award and Release of Claims" form. Doc. 80-1, at 18, 26; Doc. 80-3, at 5-8; Doc. 80-6. By signing this latter form, the claimant agrees to release Rhode Island from all legal claims based on alleged race or national origin discrimination with respect to the appointment of correctional officers. Doc. 80-6, at 2. Absent such affirmative acceptance of relief and release of claims, the settlement does not provide any individual relief, bind any individual, or dispense with any individual's rights or claims. See Doc. 80-1, at 1, 18, 26-29.

On October 20, 2017, the district court provisionally approved the settlement agreement and scheduled a fairness hearing on the terms of the agreement for February 7, 2018. Doc. 82. As a result, and in accordance with the agreement, the parties undertook a notification process to inform potential claimants and other interested parties about the agreement and provide them an opportunity to object in writing and at the fairness hearing. Doc. 80-1, at 8-11; Doc. 80-2; Doc. 85-1, at 3-4 (describing process). As part of the notification process, the parties sent notice of the agreement and instructions for filing objections to all potential claimants 80 days prior to the hearing. Doc. 80-1, at 8-10. Also 80 days before the hearing, the United States and Rhode Island publicized the agreement and the fairness hearing in multiple print and online forums, including via social media. Doc. 80-1, at 10-11. Claimants were permitted to file written objections to the settlement agreement up to 50 days prior to the fairness hearing and present their objections to the court at the hearing. Doc. 80-1, at 11-12.[2]

2. Jayson Badillo is a Hispanic resident of Rhode Island who alleges that he unsuccessfully sat for the examination to become a state correctional officer in 2011 and 2012. Doc. 84-1, at 1. As a potential claimant, he received notice of the

[2] Once a determination of each claimant's relief eligibility and monetary award is calculated, claimants will also have the opportunity to file a written objection to their individual relief determination and to be heard by the court at a second fairness hearing on individual relief. Doc. 80-1, at 21-25.

settlement agreement on December 6, 2017. Doc. 84-1, at 2. On December 19, 2017, Badillo filed a written objection to the settlement agreement arguing that the amount of monetary relief provided was unreasonable. Doc. 84; see Doc. 84-2, at 1. Specifically, he argued that the financial award was inadequate because it did not provide unlimited funds or sufficient funds to "make whole" all prospective claimants. He also argued the agreement was unfair because the parties offered no justification for the amount of monetary relief provided. Doc. 84-2, at 1, 6-12.

In their joint motion for final approval of the settlement agreement, the United States and Rhode Island responded to Badillo's objections. Doc. 85-1, at 10-15. The parties explained that Badillo's arguments conflated the adequacy of monetary relief when there is a finding of liability with the adequacy of relief in a settlement agreement, as here, with no stipulation of liability. Doc. 85-1, at 10-11. The parties also explained that an unlimited fund is neither required by Title VII nor necessary for a settlement agreement to be fair and adequate. Doc. 85-1, at 11-12. Finally, the parties maintained that the settlement represents a reasonable compromise of the United States' claims and Rhode Island's defenses, reached between two government entities after protracted litigation. Doc. 85-1, at 2, 12-15. The monetary relief component is itself a product of compromise and is just one of several remedies aimed at addressing Rhode Island's allegedly discriminatory practices. Doc. 85-1, at 14-15. Accordingly, the parties argued that the agreement

represents a fair and reasonable balancing of the goals and interests of the parties against the costs, uncertainties, and delays of litigation. Doc. 85-1, at 2, 15.

3. At the fairness hearing in February 2018, Badillo renewed his objections. He also argued that the agreement was the product of unfair procedure because the United States magistrate judge presiding over the fairness hearing also conducted the settlement conference. See Doc. 94, at 32-45. The magistrate judge ultimately concluded that the settlement was a reasonable compromise reached by government actors seeking to further the public interest, and recommended that the district court overrule all objections and approve the settlement. Doc. 88, at 2-3. Badillo objected to the magistrate judge's Report and Recommendation. Doc. 93.

On May 11, 2018, the district court entered an order adopting the Report and Recommendation, overruling Badillo's objection, and granting final approval of the settlement agreement. Doc. 99, at 1, 5. The court found Badillo's challenge to the adequacy of relief provided by the settlement unpersuasive because it was based on inapposite case law concerning the reasonableness of relief provided after a finding of liability, while no such finding had been made here. Doc. 99, at 3-4. The court further distinguished the authorities Badillo relied on as involving only private parties, whereas courts afford more deference to settlement agreements reached between government entities. Doc. 99, at 3-4. Finally, the court found no conflict of interest in the record with the magistrate judge's involvement in both

the settlement conference and fairness hearing. Doc. 99, at 4-5. Accordingly, the court concluded that the settlement is fair, reasonable, and adequate. Doc. 99, at 2.

At no time during the course of these proceedings did Badillo move to intervene in this case. His participation was limited to his written and oral objections as a potential claimant under the settlement agreement. Badillo now attempts to appeal from the district court's order approving the settlement. Doc. 100.

DISCUSSION

This Court should dismiss this appeal. It is a well-settled rule that only parties to a lawsuit may appeal from a final judgment in that suit. As a nonparty objector who did not intervene below, Badillo is not a party to this suit. Therefore, he may not bring this appeal.

A. Badillo Is A Nonparty Who Is Not Entitled To Appeal

1. "The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled." *Marino* v. *Ortiz*, 484 U.S. 301, 304 (1988) (per curiam); see also Fed. R. App. P. 3(c) ("The notice of appeal must * * * specify the *party* or *parties* taking the appeal.") (emphasis added). Both the Supreme Court and this Court have repeatedly confirmed this bedrock rule. See *Karcher* v. *May*, 484 U.S. 72, 77 (1987) ("[W]e have consistently applied the general rule that one who is not a party or has not been

treated as a party to a judgment has no right to appeal therefrom."); *In re Leaf Tobacco Bd. of Trade of N.Y.*, 222 U.S. 578, 581 (1911) (per curiam) ("One who is not a party to a record and judgment is not entitled to appeal therefrom."); *Brenner* v. *Williams-Sonoma, Inc.*, 867 F.3d 294, 295-296 (1st Cir. 2017) (reaffirming "our general rule that non-parties may not appeal"); *Microsystems Software, Inc.* v. *Scandinavia Online AB*, 226 F.3d 35, 39 (1st Cir. 2000) ("As a general rule, only parties to a civil action are permitted to appeal from a final judgment.").[3]

This Court has explained that, for purposes of this rule, the term "party" refers to a circumscribed and well-defined set of litigants. Specifically, it includes those who are parties in the case when judgment is entered; those who properly become parties, such as through intervention or joinder; those who have acted and been recognized as parties, but by some oversight were not formally made parties; and, in limited circumstances, those who were parties to an earlier judgment called into question by the appeal. *Microsystems Software*, 226 F.3d at 39. Additionally, as discussed in Part B, *infra*, objecting nonnamed members of a certified class

[3] Although this Court has sometimes referred to this issue in terms of "standing" to appeal, the issue does not implicate the jurisdiction of the courts under Article III of the Constitution. Rather, the question is whether Badillo is a party for purposes of appealing the district court's approval of the settlement. See *Devlin* v. *Scardelletti*, 536 U.S. 1, 6-7 (2002); *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 29 n.2 (1st Cir.), cert. denied, 568 U.S. 932 (2012).

action are considered parties for purposes of appealing the approval of a binding class settlement. *Devlin* v. *Scardelletti*, 536 U.S. 1, 14 (2002).

Badillo is not a party to this suit under any of these definitions, and thus is not entitled to appeal. He was not an original party to this case in the district court. Neither was he substituted for another party or joined in the action. He did not participate in bringing the case, conducting discovery, litigating pre-trial motions, or negotiating the settlement agreement. He is not bound by the settlement agreement or the district court's order. He will obtain no individual relief under the settlement and will release no individual claims unless he takes affirmative steps to do so. Moreover, Badillo had ample opportunity to move to intervene to become a party to this action, and yet he did not do so. Indeed, he eschewed that opportunity for months, from the time he received notice of the settlement in early December 2017 until the district court granted final approval of the settlement in May 2018. This Court is "powerless to extend a right of appeal to a nonparty who abjures intervention." *Microsystems Software*, 226 F.3d at 40. As a nonparty who forwent the opportunity to intervene, Badillo may not bring this appeal.

2. This conclusion is consistent with numerous decisions holding that nonparties in Badillo's position are not entitled to appeal. For example, the Supreme Court has confirmed that nonparty objectors to a settlement agreement, like Badillo, may not appeal a district court's final approval of that agreement.

Marino, 484 U.S. at 304. In *Marino*, the petitioners were a group of white police officers who sought to appeal a settlement agreement reached in a Title VII lawsuit against the New York City Police Department for administering a sergeant's examination that had a disparate impact on Hispanic and African-American officers. *Id.* at 303. Petitioners claimed the settlement agreement violated their rights by making the minority candidates who failed the exam eligible for promotion. *Ibid.* These petitioners presented their objections to the district court at a fairness hearing prior to the court approving the settlement agreement. *Ibid.* The petitioners were not original parties to the case and did not move to intervene. *Ibid.* Reaffirming the well-settled rule that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment," the Court held that these nonparty petitioners "may not appeal from the consent decree approving the lawsuit's settlement." *Id.* at 304.

This Court also has repeatedly affirmed the "general rule that non-parties may not appeal" in holding that would-be appellants similarly situated to Badillo are not entitled to appeal. See *Brenner*, 867 F.3d at 295-298 (finding a litigant who sought to amend a class action complaint and substitute himself as lead plaintiff, but not to intervene, was a nonparty who could not appeal); *In re Auerhahn*, 724 F.3d 103, 114-115 (1st Cir. 2013) (holding that bar counsel appointed to pursue a disciplinary action was not a party who could appeal that

action's outcome); *National Ass'n of Chain Drug Stores* v. *New England Carpenters Health Benefits Fund*, 582 F.3d 30, 40-41 (1st Cir. 2009) (*Nat'l Drug*) (holding that a group of pharmacies, which did not assert class membership or move to intervene but claimed an interest in the class settlement, was not entitled to appeal). This Court's consistent precedents confirm that Badillo is a nonparty who may not bring this appeal.

In a case highly similar to this one, in which the United States brought a pattern or practice discrimination lawsuit under Title VII against New Jersey, the Third Circuit also dismissed an appeal by nonparty objectors. See *United States* v. *New Jersey*, 522 F. App'x 167, 168, cert. denied, 571 U.S. 991 (2013). In that case, the Third Circuit held it lacked jurisdiction over an appeal by a non-intervening group of police officers who objected to the approval of a consent decree between the United States and New Jersey. *Ibid.* The consent decree settled allegations by the United States that New Jersey's process for selecting police sergeants had a disparate impact on African-American and Hispanic applicants in violation of Title VII. *Ibid.* The court reasoned that, despite having participated in the fairness hearing, the objectors were not parties to the proceedings below because they had the opportunity to intervene but declined to do so. *Ibid.* The court held that such non-intervening objectors are not parties who may appeal a district court's final approval of a settlement agreement. *Ibid.*

Just like the would-be appellants in *Marino* and *New Jersey*, Badillo is attempting here to appeal from a settlement agreement approved by the district court in a Title VII lawsuit to which he is not a party. In this case, the United States sued Rhode Island, alleging that the exams the State used to hire its correctional officers had a disparate impact on African-American and Hispanic applicants in violation of Title VII. Doc. 1. These parties reached a settlement agreement that calls for general injunctive relief, individual monetary relief, and a priority hiring system for eligible minority applicants who failed the exam. Doc. 80-1. Badillo objected to the fairness and adequacy of the settlement agreement but did not move to intervene in the case. Accordingly, just like the would-be appellants in *Marino* and *New Jersey*, Badillo is not an original party to this lawsuit and did nothing to become a party later. Therefore, he is not entitled to appeal the district court's order approving the settlement agreement.

B. This Court Has Declined To Recognize Exceptions To This Rule

1. The Supreme Court has been "inhospitable" to exceptions to the rule that only parties may appeal from an adverse judgment. *Microsystems Software*, 226 F.3d at 40; see also *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 29 (1st Cir. 2012) (*Lupron*). For example, the Supreme Court in *Marino* held that objectors to a settlement who participate in the proceedings below but do not intervene do not warrant an exception to the rule. 484 U.S. at 304. Likewise, the

Court rejected the argument that an exception is warranted "when the nonparty has an interest that is affected by the trial court's judgment." *Ibid.* (citation omitted). Instead, the Court insisted that the "better practice is for such a nonparty to seek intervention for purposes of appeal." *Ibid.*[4] This Court has read the Supreme Court's strict application of the general rule and its unwillingness to craft exceptions to it as "teach[ing] that if any exceptions to the rule exist, those exceptions are few and far between." *Microsystems Software*, 226 F.3d at 40.

Accordingly, this Court likewise has declined to recognize any exceptions to the general rule. See *Lupron*, 677 F.3d at 29-30; *Microsystems Software*, 226 F.3d at 42-43. Rather, this Court has continually stressed the rarity of exceptions and limited nature of any that do exist. See *Nat'l Drug*, 582 F.3d at 39, 41. Following *Marino*, this Court has made clear that a "mere interest in the outcome of litigation will not suffice to confer standing upon a nonparty." *Microsystems Software*, 226 F.3d at 42; accord *Nat'l Drug*, 582 F.3d at 41 ("[T]he fact that a decision against a defendant may practically impact a third party is not ordinarily enough for appellant status absent intervention or joinder in the trial court."). Moreover, this Court has consistently rejected equitable considerations as immaterial or insufficient to permit an appeal by a nonparty. See, *e.g.*, *Brenner*, 867 F.3d at 297-

[4] Of course, denials of motions to intervene are themselves appealable. *Marino*, 484 U.S. at 304.

298; *Nat'l Drug*, 582 F.3d at 41-42, *Microsystems Software*, 226 F.3d at 42. For these reasons, this Court has explicitly "decline[d] to follow" other courts of appeals that have permitted nonparties to appeal where the nonparty has an interest in the outcome of the litigation or participated in the proceedings below. *Microsystems Software*, 226 F.3d at 42. In short, this Court has recognized no exception to the general rule that would permit Badillo to bring this appeal.

2. Our argument here is consistent with the Supreme Court's decision in *Devlin* v. *Scardelletti*, 536 U.S. 1 (2002). In *Devlin*, the Court recognized that nonnamed members of a certified class who object to a binding class settlement *are* parties for purposes of appealing the final approval of that settlement. *Id.* at 14. The Court identified the binding nature of a class action settlement as requiring this outcome, to avoid depriving class members of the opportunity to protect their rights and interests in a mandatory and binding settlement to which they object. *Id.* at 9-11. Thus, under *Devlin*, a district court's approval of a class action settlement that amounts to a final determination of the class members' rights justifies treating an objecting class member as a party entitled to appeal without that objector having to intervene first. *Id.* at 14; see also *United States ex rel. Eisenstein* v. *City of N.Y.*, 556 U.S. 928, 934 n.3 (2009) (Court's decision in *Devlin* was a determination of party status that was "premised on the class-action nature of the suit").

Badillo is not a party for purposes of appeal under *Devlin*. First, this lawsuit is not a class action, and Badillo is not a member of a class. The United States brought this case against Rhode Island under its authority to enforce Title VII's antidiscrimination mandates. Badillo is simply a member of a group of eligible claimants identified by the settlement agreement as potential beneficiaries of that agreement. Second, the settlement agreement reached between the United States and Rhode Island does not bind Badillo in any way. Badillo must affirmatively opt in to participate in the remedial scheme established by the settlement agreement. If he declines to do so, he is free to pursue his own claims independently. Thus, the settlement does not amount to a final decision on any claim Badillo may have or finally dispose of any rights he may enjoy. Simply put, none of the reasons that led the Court in *Devlin* to recognize bound class members as parties for purposes of appeal are implicated here.

In sum, Badillo is a nonparty who is not entitled to bring this appeal.

CONCLUSION

For the foregoing reasons, the Court should dismiss this appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this motion:

(1) complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2)(a) because it contains 3518 words; and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Word 2016, in 14-point Times New Roman font.

s/ Francesca Lina Procaccini
FRANCESCA LINA PROCACCINI
Attorney

Date: July 3, 2018

CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2018, I electronically filed the UNITED STATES' MOTION TO DISMISS THE APPEAL with the United States Court of Appeals for the First Circuit by using the CM/ECF system.

I certify that all participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Francesca Lina Procaccini
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