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' REPLY IN SUPPORT OF ITS MOTION TO DISMISS

Plaintiff-appellee United States filed a motion to dismiss this appeal on July 3, 2018, in which the United States argued that claimant-appellant Jayson Badillo is not a party to this case and therefore may not appeal the judgment below. Badillo filed a response to the motion, urging the Court to deny it.

Badillo's arguments lack merit, and this Court should grant the United States' motion to dismiss the appeal.

It is a well-settled rule that only parties to a lawsuit may appeal from a final judgment in that suit. See *Marino* v. *Ortiz*, 484 U.S. 301, 304 (1988) (per curiam); U.S. Motion 7-9. As a claimant-objector who did not intervene, Badillo is not a party to this suit. Numerous decisions hold that nonparties in Badillo's position are not entitled to appeal. Additionally, the rule that nonnamed members of a certified class action may appeal the final approval of a class settlement without first intervening is not applicable to Badillo. That rule applies only to members of a *class action*, for whom a class settlement amounts to a final and binding determination of the class members' rights. See *Devlin* v. *Scardelletti*, 536 U.S. 1, 10-11 (2002). Because Badillo is neither a party nor a member of a class action, he may not bring this appeal. See U.S. Motion 7-15.

In his response, Badillo advances three arguments for why he is entitled to appeal. Response 1. First, he argues that the United States is judicially estopped from arguing that he may not appeal because he failed to intervene below, because that argument supposedly contradicts the United States' earlier representations that any individual claim Badillo may have against Rhode Island has been extinguished as untimely. Response 9-10. Second, Badillo argues that he is entitled to appeal because he is similarly situated to members of a class action who, as noted above,

may appeal the final approval of a class settlement without first intervening. Response 10-18. Lastly, Badillo argues that this Court should permit him to intervene *nunc pro tunc*. Response 20. All of these arguments lack merit.[1]

ARGUMENT

A. Badillo Misunderstands The United States' Argument That He May Not Appeal Because He Did Not Intervene To Protect His Interests Below

Badillo contends that the United States is judicially estopped from arguing that, because Badillo did not seek to intervene in this case, he is not entitled to appeal. Response 9-10. Badillo understands the United States to suggest that he was required to intervene so that he could bring *his own* Title VII claim against Rhode Island. Badillo misapprehends the United States' argument. The purpose of intervention would not have been for Badillo to pursue his own individual Title VII claim. Rather, it would have been to protect his interests, including his right to appeal, in challenging a settlement that, he claims, adversely affects his rights. See Fed. R. Civ. P. 24(a)(2) and (b)(1). In other words, Badillo could have moved to intervene in this case after he received notice of the proposed settlement "for the purpose of participating in the process established by the court for the evaluation of the proposed settlement," *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 29 n.3 (1st Cir. 2012) (citation omitted), or for "purposes of appeal," *Marino* v.

[1] Although Badillo also attacks the merits of the settlement agreement in his response, the United States does not intend to address those arguments at this time.

Ortiz, 484 U.S. 301, 304 (1988) (per curiam); see also *United States* v. *New Jersey*, 522 F. App'x 167, 168-169 (3d Cir.) (affirming denial of untimely motion by objectors to intervene to participate in the settlement process, while concluding the court had no jurisdiction to hear appeal by other objectors who failed to intervene to participate in the process), cert. denied, 571 U.S. 991 (2013).

Badillo contends that he has a distinct legal interest in the settlement agreement itself. Response 18. But had he intervened as a party following receipt of the notice of the proposed settlement, he could have vindicated his alleged interest not only by participating in the district court's evaluation of the proposed settlement but also, if necessary, appealing the outcome of that evaluation. Having eschewed the opportunity to intervene for these purposes, Badillo failed to become a party to this lawsuit and thus may not appeal the judgment below.

The United States has never taken a contradictory position on Badillo's status as a nonparty. Whether or not Badillo has a viable individual claim against Rhode Island is unrelated to the fact that he was required to intervene in the United States' lawsuit to protect any interest he may have relating to the settlement agreement. As such, the United States is not judicially estopped from arguing that Badillo may not bring this appeal.

B. Badillo Does Not Stand In The Same Position As A Nonnamed Class Member Who May Appeal A Class Settlement Without First Intervening

Badillo further relies on *Devlin* v. *Scardelletti*, 536 U.S. 1 (2002), to argue that he may bring this appeal. Response 10-17. As discussed in the United States' motion to dismiss, the Supreme Court held in *Devlin* that nonnamed *members of a certified class action* who object to a class settlement may appeal the final approval of that settlement. U.S. Motion 14; *Devlin*, 536 U.S. at 9-11, 14. The Court's holding was premised on the binding nature of a class action settlement, which disposes of class members' claims and amounts to a final determination of class members' rights. U.S. Motion 14.

Badillo is not similarly situated to such class members. He is not a member of a class action but a nonparty objector to a settlement agreement. As such, he is not bound by the settlement agreement. Absent an affirmative acceptance of relief under the settlement, and release of claims by Badillo, the settlement will not provide him any individual relief, bind him, or dispense with any individual rights or claims he may have. U.S. Motion 3. All that said, Badillo still had an opportunity to object to the settlement in the district court, which he exercised, and the district court considered his concerns that the settlement was not fair,

reasonable, or adequate. But Badillo did not intervene in the case, and therefore, he is not a party for purposes of appeal.[2]

Nonetheless, Badillo argues that certain facets of this case make it akin to a class action, placing him in the same position as the class members in *Devlin*. Specifically, he asserts that: (1) the United States has acted like a named class representative with a fiduciary duty to represent his interests; (2) the settlement agreement is his only opportunity to obtain relief; and (3) the non-mandatory nature of the settlement is not relevant to whether he is in the same position as a class member. These assertions are either incorrect or immaterial.

First, the United States does not have a fiduciary obligation to represent Badillo's individual interests. The United States brought this case against Rhode Island under its Title VII authority to sue a state government employer engaged in a pattern or practice of unlawful employment discrimination. 42 U.S.C. 2000e-

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[2] Badillo cites *Binker* v. *Commonwealth of Pennsylvania*, 977 F.2d 738 (3d Cir. 1992), as "holding that an individual for whose benefit a Title VII enforcement action was filed could appeal the settlement without intervening." Response 10. The case is distinguishable. *Binker* permitted three non-intervenor employees to appeal the approval of a settlement agreement negotiated by the Equal Employment Opportunity Commission (EEOC) under the Age Discrimination in Employment Act (ADEA). Because that case was brought by the EEOC under the ADEA, subsequent litigation by or on behalf of the individual employees was prohibited. 977 F.2d at 745-746. Indeed, the Third Circuit distinguished *Binker* when presented with the same circumstances presented here—in which "Non-Intervenors had an opportunity to intervene as parties but declined to do so." *New Jersey*, 522 F. App'x at 168. In any event, this Court has expressly declined to allow non-intervenors to appeal simply because they have an interest in the outcome of the litigation. See U.S. Motion 13-14 (citing cases).

5(f), 2000e-6(a). In so doing, the United States acted pursuant to its institutional interests in enforcing federal civil rights law and protecting employees from unlawful discrimination by state and local government employers. Where, as here, the United States brings a lawsuit to vindicate the public interest, courts recognize that it has a separate and different interest than an individual complainant in a Title VII lawsuit or private class action. As the Supreme Court aptly expressed: "[T]he EEOC is not merely a proxy for the victims of discrimination and [its] enforcement suits should not be considered representative actions subject to Rule 23." *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 288 (2002) (quoting *General Tel. Co. of the Nw.* v. *EEOC*, 446 U.S. 318, 318 (1980)). Unlike a class representative, therefore, the United States does not (and, indeed, could not) act as Badillo's legal representative or trustee in this litigation.

In support of his argument, Badillo mistakenly relies on cases relating to the United States' fiduciary duty to Native American tribes when it represents them in litigation regarding tribal property rights. Response 13. This obligation stems from the unique trustee relationship between the United States and the sovereign Native American tribes, which arises from the Constitution, treaties, and statutes. See, *e.g.*, *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 408 (1980) (recognizing that the federal government acts as guardian for native interests); *Seminole Nation* v. *United States*, 316 U.S. 286, 297 (1942) (recognizing that when

Congress delegates to federal officials the power to manage tribal land, their actions with respect to those resources must be "judged by the most exacting fiduciary standards"). Furthermore, the cases Badillo cites relate to the United States' obligations under specific statutes pertaining to the management of Native lands. Response 13. These cases have no bearing on the United States' role in the entirely different context of enforcing Title VII against state and local government employers.

Second, this case is not like a class action even if it may represent Badillo's only remaining opportunity to obtain relief. In *Devlin*, the nonnamed class members could not obtain relief outside the class settlement because the class settlement itself disposed of all rights and claims they may have had. It was this feature of class action litigation that led the Court to conclude that nonnamed class members are entitled to appeal class settlements to which they object. *Devlin*, 536 U.S. at 10-11. Here, by contrast, the settlement agreement does not, by its own operation, extinguish any individual right or claim Badillo may have. Indeed, as explained in the United States' motion to dismiss, Badillo must affirmatively opt *in* to participate in the remedial scheme established by the agreement. See U.S. Motion 3 (describing opt-in procedure). For these reasons, Badillo is not in the same position as the class members in *Devlin*.

Third, Badillo contends that the fact that he is not required to participate in the settlement agreement has no bearing on whether he is in the same position as a bound class member. Whatever force this argument may have in the class action context, it is meritless here. Unlike Badillo, members of a non-mandatory class action are parties for purposes of appealing a class settlement because, unless and until they choose to opt out of the class, class members remain bound by a judicially approved class settlement. This Court has concluded as much, reasoning that "*Devlin*, after all, is all about party status and one who could cease to be a party is still a party until opting out." *National Ass'n of Chain Drug Stores* v. *New England Carpenters Health Benefits Fund*, 582 F.3d 30, 40 (1st Cir. 2009). Badillo, however, was never a party to begin with, and he remains unbound by the settlement unless and until he affirmatively chooses to opt in. This puts him in a different position from members of a non-mandatory class action, who are bound by class proceedings unless they affirmatively opt out.

C. Nunc Pro Tunc *Relief Is Not Warranted*

Lastly, this Court should not permit Badillo to intervene *nunc pro tunc*. Badillo had ample time to move to intervene in the district court to protect his interests in this settlement but failed to do so. Indeed, he demonstrated continued attention to the settlement process for months, from December 2017 until the district court granted final approval of the settlement in May 2018, and yet he

forwent intervention. This Court is "powerless to extend a right of appeal to a nonparty who abjures intervention." *Microsystems Software, Inc.* v. *Scandinavia Online AB*, 226 F.3d 35, 40 (1st Cir. 2000). Badillo's actions hardly warrant a departure from the traditional function of the Court's *nunc pro tunc* authority, which is to retroactively correct inadvertent or clerical errors. See *Fernandes Pereira* v. *Gonzales*, 417 F.3d 38, 47 (1st Cir. 2005); *Vargas-Colón* v. *Hospital Damas, Inc.*, 561 F. App'x 17, 19-22 (1st Cir. 2014).[3]

[3] Badillo cites *Mangual* v. *Rotger-Sabat*, 317 F.3d 45, 62 (1st Cir. 2003), as an example of this Court "permitting intervention at the appellate level." Response 20. The case does not help him. The intervenors in *Mangual* had moved to intervene in the district court, but their motion was denied. This Court granted the motion to intervene rather than remanding the issue and then went on to decide the merits of the case. 317 F.3d at 62. Similarly, in *Linton* v. *Commissioner of Health & Environment, State of Tennessee*, 30 F.3d 55, 56 (6th Cir. 1994), which Badillo also cites, the court noted that in an earlier appeal (*Linton I*), it reversed the district court's denial of a motion to intervene, which led the district court to grant the motion on remand and enter the intervenors' notices of appeal in *Linton I nunc pro tunc*. Unlike in *Mangual* and *Linton*, Badillo never moved to intervene below.

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)(c) because it contains 2339 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 24, 2018

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2018, I filed the UNITED STATES' REPLY IN SUPPORT OF ITS MOTION TO DISMISS with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system.

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

s/ Francesca Lina Procaccini
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