IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANGEL G. LUEVANO, et al.,

Plaintiffs,

v.

CHARLES EZELL, Acting Director, Office of Personnel Management, et al.,

Defendants,

and

AMERICAN MOMENT
c/o Nick Solheim
300 Independence Ave SE
Washington, DC 20003

Proposed Defendant-Intervenor,

and

FEDS FOR FREEDOM
401 Ryland St.
Suite 200-A,
Reno, NV 89502

Proposed Defendant-Intervenor.

Case No. 1:79-cv-00271-RBW

Judge Reggie B. Walton

MOTION OF AMERICAN MOMENT AND FEDS FOR FREEDOM TO INTERVENE AS DEFENDANTS

Pursuant to Federal Rule of Civil Procedure 24(b), American Moment and Feds for Freedom respectfully move to intervene as Defendants in the above-captioned case. In the alternative, American Moment and Feds for Freedom ask this Court to construe this motion as a request to participate as amicus curiae and grant them leave file a brief in support of Defendants.

Pursuant to Local Civil Rule 7(m), counsel for American Moment and Feds for Freedom has conferred with counsel for Plaintiffs and Defendants. Plaintiffs oppose intervention, but do not oppose an amicus brief. Defendants do not oppose either intervention or an amicus brief.

This motion is supported by an accompanying memorandum of law. In addition, Proposed Defendant-Intervenors have attached a declaration from American Moment Chief Executive Officer Nick Solheim as Exhibit A, a declaration from Feds for Freedom President Marcus Thornton as Exhibit B, a proposed motion to terminate the Consent Decree and accompanying memorandum of law as Exhibit C, and a proposed order as Exhibit D.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANGEL G. LUEVANO, et al.,

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and

AMERICAN MOMENT,

Proposed Defendant-Intervenor,

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FEDS FOR FREEDOM,

Proposed Defendant-Intervenor.

Case No. 1:79-cv-00271-RBW

Judge Reggie B. Walton

MEMORANDUM OF LAW IN SUPPORT OF MOTION OF AMERICAN MOMENT AND FEDS FOR FREEDOM TO INTERVENE AS DEFENDANTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page(s)**

OTHER AUTHORITIES

INTRODUCTION

At the end of the nineteenth century, Congress tried to discard the political spoils system in federal employment and strengthen the capability of the Executive Branch. The newly created U.S. Civil Service Commission and its successor, the Office of Personnel Management ("OPM"), subsequently endeavored to staff the civil service using quantifiable aptitude. But that ended in 1981, when this Court approved a Consent Decree between a class of federal job applicants and OPM. Plaintiffs challenged OPM's use of the Professional and Administrative Career Exam ("PACE"), which they alleged had an unlawful disparate impact under Title VII of the Civil Rights Act of 1964. While the government denied any violation of the law, it agreed to stop administering the test, and every subsequent attempt to impose a new examination failed.

OPM now seeks to dissolve the 44-year-old Consent Decree, arguing that it requires treating job candidates differently based on their race in violation of Title VII and the Fifth Amendment, as interpreted by recent Supreme Court decisions. *See* OPM's Mot. to Terminate at 9–15, ECF No. 2. Specifically, OPM claims the Consent Decree requires race-conscious decisionmaking, contrary to Title VII. *Id.* at 10–11. OPM further explains that the Consent Decree cannot satisfy the required strict scrutiny under the Fifth Amendment because it neither serves a "compelling interest" nor is "narrowly tailored," in part because it lacks either a sunset provision or clear goals that signal when it has outlived its purpose. *Id.* at 13–15. Indeed, there is still "no end … in sight." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 213 (2023).

Proposed Defendant-Intervenors American Moment and Feds for Freedom now move for permissive intervention to support dissolving the Consent Decree. American Moment is a 501(c)(3) organization committed to helping young people serve in government. Feds for Freedom

is also a 501(c)(3) organization with a membership of over 9,000 federal employees. Both offer unique perspectives on the harm caused by this Consent Decree to current and future federal employees, and they make distinct legal arguments in support of its dissolution. In the alternative, this Court should accept the attached proposed motion to terminate by American Moment and Feds for Freedom as an amicus brief. *See* Proposed Mot. to Terminate, Ex. C.

ARGUMENT

The Court should allow American Moment and Feds for Freedom to intervene in this case because they meet all the requirements for permissive intervention. Federal Rule of Civil Procedure 24(b) provides that "[o]n timely motion, the court may permit anyone to intervene who … has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1). When those criteria are satisfied, "the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Intervenors seeking to join existing Defendants are not required to show Article III standing. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 674 n.6 (2020); *Va. House of Delegates v. Bethune-Hill*, 587 U.S. 658, 663 (2019); *Childs.' Health Def. v. CDC*, No. 1:23-cv-431 (TNM), 2024 WL 3521593, at *5 n.3 (D.D.C. July 24, 2024).

The Court should grant this motion to intervene because it is timely, demonstrates a "claim or defense" that shares common questions with the main action, and would create no undue delay or prejudice. American Moment and Feds for Freedom also raise important legal arguments that will aid the Court in deciding whether to terminate the Consent Decree.

I. AMERICAN MOMENT AND FEDS FOR FREEDOM SATISFY THE REQUIREMENTS FOR PERMISSIVE INTERVENTION

A. This Motion is Timely

American Moment and Feds for Freedom timely move to intervene in this case. The

"timely motion" requirement in Rule 24(b) prescribes no specific deadline and must be "judged in consideration of all the circumstances." *Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001). Courts generally consider the "time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties in the case." *Id.*; *see United States v. Google LLC*, No. 20-CV-3010, 2025 WL 372072, at *1 (D.D.C. Jan. 27, 2025). Timeliness "must have accommodating flexibility toward both the court and the litigants," and "must consider whether the applicant was in a position to seek intervention at an earlier stage in the case." 7C Wright & Miller, *Federal Practice & Procedure* § 1916 (cleaned up). Even if a "substantial amount of time" has passed since the start of the litigation, a motion to intervene is timely if it carries "no risk of prejudicing the existing parties." *Roane v. Leonhardt*, 741 F.3d 147, 152 (D.C. Cir. 2014).

This flexible standard allows motions to intervene years after litigation begins. In *NRDC v. Costle*, chemical companies moved to intervene three years after the case started to ensure they could participate in the oversight and implementation of a settlement between EPA and environmental groups. 561 F.2d 904, 906–07 (D.C. Cir. 1977). The motion was timely because it came within weeks of their various counsel learning of the settlement and advanced the limited purpose of participating in settlement administration. *Id.* at 907–08. Similarly, in *Hodgson v. United Mine Workers of America*, the court held that a motion to intervene by mineworkers in a suit against their union was timely seven years into the litigation because their sole purpose was to participate in the ongoing remedial process. 473 F.2d 118, 129–30 (D.C. Cir. 1972).

The same principles support intervention after even longer periods. For example, the Ninth Circuit in *United States v. Oregon* allowed the State of Idaho to intervene 15 years after the start of litigation because the case had entered a "new stage" of settlement negotiations. 745 F.2d 550,

552 (9th Cir. 1984). The Sixth Circuit in *United States v. City of Detroit* likewise held that a union's motion to intervene was timely 34 years after the plaintiffs filed suit because it was for the limited purpose of challenging a proposed consent decree. 712 F.3d 925, 930–32 (6th Cir. 2013).

The motion here is timely for the same reasons. American Moment was founded in 2021 and exists to help young people find work in government. *See* Decl. of Nick Solheim, Ex. A, ¶ 3. American Moment did not exist when this Court approved the Consent Decree in 1981, and its members are generally between 20 and 30 years old and were not even born, so they could not have intervened at that time. *See id.* Feds for Freedom was also founded in 2021 and could not have intervened in 1981, either. Decl. of Marcus Thornton, Ex. B, ¶ 2. Analogous to *NRDC*, both American Moment and Feds for Freedom learned only weeks ago about the possible dissolution of this Consent Decree, after the United States filed its motion. And like the movants in *NRDC*, *Hodgson*, *Oregon*, and *City of Detroit*, American Moment and Feds for Freedom seek to intervene for the sole purpose of supporting that dissolution, a remedial process that has just begun. In other words, this filing is "presented contemporaneously" with its limited purpose. *NRDC*, 561 F.2d at 908.

Moreover, intervention at this time by American Moment and Feds for Freedom would not prejudice the existing parties. Both American Moment and Feds for Freedom seek only to make additional legal arguments in support of terminating the Consent Decree. *See* Proposed Mot. to Terminate, Ex. C. Their participation would involve "no additional factual development," *Roane*, 741 F.3d at 152, nor "require additional discovery, necessitate further proceedings, or delay resolution of the case," *Google LLC,* 2025 WL 372072, at *7. Further, a consent decree that regulates hiring across the federal government profoundly affects the public interest, including the

interests of current and future federal workers, so "getting all interested parties to the table promotes an effective and fair solution." *City of Detroit*, 712 F.3d at 932.

B. American Moment and Feds for Freedom Have Claims or Defenses that Share Common Questions with the Main Action

A permissive intervenor must demonstrate "a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B); *see EEOC v. Nat'l Childs.' Ctr.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998). The D.C. Circuit has "eschewed strict readings of the phrase 'claim or defense,' allowing intervention even in situations where the existence of any nominate claim or defense is difficult to find." *Ass'n of Wash. Bus. v. EPA*, No. 23-CV-3605 (DLF), 2024 WL 3225937, at *3 (D.D.C. June 28, 2024) (quoting *Nat'l Childs.' Ctr.*, 146 F.3d at 1046).

This Court has held that an intervenor "has a 'claim or defense' under Rule 24(b)'s liberal standard" when it "seeks to intervene to defend" an agency action that the intervenor "consistently uses," and thus "will support the Agency's efforts to defend" that action. *Id.* at *13 (cleaned up). Similarly, where intervenors "intend to oppose plaintiffs' claims and requests for relief, offer defensive arguments, and seek the same relief as the [defendant] Agency," they "easily satisf[y] the liberal 'claim or defense' requirement." *Id.* at *11 (cleaned up).

American Moment and Feds for Freedom "easily satisfy" this requirement. To begin, both seek to support OPM's efforts to dissolve a consent decree that harms their core interests. *Id.* at *13. One of American Moment's central goals is ensuring that young people with unconventional backgrounds can serve in government. *See* Solheim Decl., Ex. A, ¶¶ 3–4. Its flagship program, the "Fellowship for American Statecraft," advertises that "[n]o college degree or prior political experience [is] required for admission." *See* Am. Moment, *Fellowship for American Statecraft*, https://perma.cc/QKJ8-7ETA (visited May 7, 2025). Accordingly, American Moment supports the use of employment tests that enable talented potential public servants to demonstrate their ability

in the absence of more traditional signals, such as a college diploma. American Moment has a direct interest in and stands ready to "support [OPM's] efforts" to eliminate barriers to implementing appropriate and effective employment tests for civil service positions. *Ass'n of Wash. Bus.*, 2024 WL 3225937, at *13.

Feds for Freedom comprises over 9,000 federal employees and exists to "advocate and litigate for constitutional rights" of federal employees and to "reform the federal service to be more accountable, transparent, and representative of the values of the American people." Thornton Decl., Ex. B, ¶¶ 2–3. It supports terminating a consent decree that requires the government to make employment decisions based on race and limits the use of employment tests, which promote accountability and transparency in hiring. *Id.* ¶ 4. Feds for Freedom will "support [OPM's] efforts" to return to a hiring process based on quantifiable aptitude and to end the race-conscious policies required by the Consent Decree. *Ass'n of Wash. Bus.*, 2024 WL 3225937, at *13.

Both American Moment and Feds for Freedom will also advance a "claim or defense" on behalf of their members. *See Wildearth Guardians v. Salazar*, 272 F.R.D. 4, 16 (D.D.C. 2010). The membership of American Moment includes young people born decades after this Consent Decree was initially entered. *See* Solheim Decl., Ex. A. American Moment members intend to pursue careers in federal public service and recognize that they will be more competitive if allowed to showcase their abilities on an employment test. *See id.* If this Consent Decree is lifted and OPM reinstates employment tests as part of the hiring process, American Moment members will "consistently use" those tests in seeking federal employment. *Ass'n of Wash. Bus.*, 2024 WL 3225937, at *13. Similarly, Feds for Freedom's members are already federal employees, and agencies may use assessments "to make a wide variety of decisions about applicants *and employees*." *Individual Assessment*, OPM, https://perma.cc/P9FJ-4PCY (visited May 7, 2025)

(emphasis added). Accordingly, Feds for Freedom's members will also "consistently use" any future employment tests OPM implements after this Consent Decree is terminated. *Ass'n of Wash. Bus.*, 2024 WL 3225937, at *13.

Finally, both American Moment and Feds for Freedom will "offer defensive arguments" while seeking the "same relief" as OPM. *Id.* at *11. While the American Moment, Feds for Freedom, and OPM all seek the same relief (termination of the Consent Decree), their specific arguments may diverge, as the attached proposed motion to terminate demonstrates. *See* Proposed Mot. to Terminate, Ex. C. Indeed, American Moment and Feds for Freedom will argue that disparate impact liability under Title VII is itself unconstitutional under recent Supreme Court precedent, making "legal what the decree was designed to prevent." *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 388 (1992). They also will further develop an argument briefly made by OPM—that there was no "strong basis in evidence" that OPM would have faced disparate impact liability if it did not adopt the Consent Decree's race-conscious remedy. *See* OPM's Mot. to Terminate at 10–11; *see also Ricci v. DeStefano*, 557 U.S. 557, 581–85 (2009).

C. Intervention Would Not Cause Undue Delay or Prejudice

Once a prospective intervenor satisfies the timeliness and claim-or-defense requirements, courts "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Intervention here would do neither. American Moment and Feds for Freedom are prepared to promptly file their own motion to terminate the Consent Decree upon being granted intervention, and the Plaintiffs will be able to respond to those arguments in the usual course. American Moment and Feds for Freedom seek intervention only to make additional legal arguments and will not impose any material burdens on the case procedurally or in terms of factual development.

II. NO SHOWING OF INADEQUATE REPRESENTATION IS REQUIRED

Unlike mandatory intervention, permissive intervention does not require showing that existing parties would inadequately represent the interests of the intervenors. *Compare* Fed. R. Civ. P. 24(a)(2), *with* Fed. R. Civ. P. 24(b)(1), (3). Accordingly, American Moment and Feds for Freedom need not make that showing here.

In any event, that showing "is not onerous" and is satisfied whenever "[t]he applicant … show[s] that representation of his interest 'may be' inadequate, not that representation will in fact be inadequate." *Oceans v. U.S. Dep't of the Interior*, No. 1:24-cv-00141-RCL, 2024 WL 1556005, at *4 (D.D.C. Apr. 10, 2024) (quoting *Hardin v. Jackson*, 600 F. Supp. 2d 13, 16 (D.D.C. 2009)). When the requirement applies, a movant "ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation." *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1293 (D.C. Cir. 1980). And the D.C. Circuit has held that courts should "look skeptically on government entities serving as adequate advocates for private parties." *Crossroads Grassroots Pol'y Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 321 (D.C. Cir. 2015).

American Moment and Feds for Freedom plan to make legal arguments distinct from those of Defendants. And Defendants here are government entities, while American Moment and Feds for Freedom are private parties with their own interests specific to their missions and members. Therefore, even though American Moment and Feds for Freedom are not required to show inadequate representation of their interests, they satisfy that standard anyway.

CONCLUSION

This Court should grant the motion of Proposed Defendant-Intervenors American Moment and Feds for Freedom for permissive intervention under Rule 24(b) and permit them to file a motion to terminate the Consent Decree. In the alternative, this Court should construe this motion

as a request to participate as amicus curiae and grant American Moment and Feds for Freedom leave file a brief in support of Defendants.

Dated: May 15, 2025

Respectfully submitted,

/s/ R. Trent McCotter
R. TRENT MCCOTTER (DC BAR # 1011329)
JARED M. KELSON (DC BAR # 241393)
ANDREW W. SMITH (DC BAR # 90026919)
BOYDEN GRAY PLLC
800 Connecticut Ave NW, Suite 900
Washington, DC 20006
202-706-5488
tmccotter@boydengray.com
jkelson@boydengray.com
asmith@boydengray.com

NICHOLAS R. BARRY*
JACOB P. MECKLER (DC BAR # 90005210)
AMERICA FIRST LEGAL FOUNDATION
611 Pennsylvania Ave, SE #231
Washington, DC 20003
202-964-3721
Nicholas.Barry@AFLegal.org
Jacob.Meckler@AFLegal.org

*Pro hac vice motion forthcoming

CERTIFICATE OF SERVICE

I certify that on May 15, 2025, the foregoing was filed electronically with the Court's electronic filing system. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

Dated: May 15, 2025

/s/ R. Trent McCotter
R. Trent McCotter

Index of Exhibits

Exhibit	Description of Document
A	Declaration of Nick Solheim
B	Declaration of Marcus Thornton
C	Motion to Terminate the Consent Decree and Accompanying Memorandum of Law
D	Proposed Order

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANGEL G. LUEVANO, et al., *Plaintiffs*, v. CHARLES EZELL, Acting Director, Office of Personnel Management, et al., *Defendants*.	Case No. 1:79-cv-00271 Judge Reggie B. Walton

DECLARATION OF NICK SOLHEIM

I, Nick Solheim, declare as follows:

1. I am over 21 years old, of sound mind, not a convicted felon, capable of making this declaration, and fully competent to declare the matters below.
2. I am the Chief Executive Officer of American Moment.
3. American Moment was founded in 2021. It is a public charity organized consistent with I.R.C. § 501(c)(3) that administers programs to help identify, educate, and credential young people to serve in government. It was formed in part to enable young people from nontraditional backgrounds to engage in public service, including by serving in the federal government.
4. As part of that mission, American Moment supports the use of objective testing to demonstrate qualifications for employment, and advocates against the use of college degree requirements and subjective preconditions or considerations. If the consent decree

in this case is dissolved, American Moment will advocate to executive branch agencies to make full use of their statutory authorities to administer written tests for employment in the competitive service, so that people from nontraditional backgrounds have a fair opportunity to compete for employment.

Per 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 13th, 2025.

Nick Solheim

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANGEL G. LUEVANO, et al., *Plaintiffs*, v. CHARLES EZELL, Acting Director, Office of Personnel Management, et al., *Defendants*.	Case No. 1:79-cv-00271 Judge Reggie B. Walton

DECLARATION OF MARCUS THORNTON

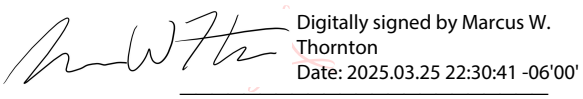
I, Marcus Thornton, declare as follows:

1. I am over 21 years old, of sound mind, not a convicted felon, capable of making this declaration, and fully competent to declare the matters below.
2. I am the President of Feds for Freedom, a non-profit organization registered in Nevada and founded in 2021. Feds for Freedom has over 9,000 members who are located in all 50 states and at embassies, consulates, and military bases around the world. They work for nearly every federal agency and dozens of federal contractors. Some members are prohibited by law or regulation from suing under their own names due to the sensitive positions they hold.
3. Feds for Freedom's mission is to build and work with a broad coalition of stakeholders, advocate and litigate for constitutional rights, and reform the federal service to be more accountable, transparent, and representative of the values of the American people.

4. As part of that mission, Feds for Freedom supports the federal government using employment tests, which can promote accountability and transparency in hiring, and opposes the federal government discriminating based on race in employment decisions.

Per 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 25, 2025.



Marcus Thornton

IN THE UNITED STATES DISTRICT COURT
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ANGEL G. LUEVANO, et al.,

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CHARLES EZELL, Acting Director, Office of Personnel Management, et al.,

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Proposed Defendant-Intervenor.

Case No. 1:79-cv-00271-RBW

Judge Reggie B. Walton

MOTION OF AMERICAN MOMENT AND FEDS FOR FREEDOM TO TERMINATE THE CONSENT DECREE

Proposed Defendant-Intervenors American Moment and Feds for Freedom move to terminate the Consent Decree in this case.[1] As explained in the accompanying memorandum of law, the Consent Decree entered in this case more than four decades ago should be terminated. The Proposed Defendant-Intervenors support the Office of Personnel Management's motion to terminate the Consent Decree and offer additional grounds to justify its end.

[1] American Moment and Feds for Freedom moved to intervene. If their motion to intervene is denied, they request that this Court treat the memorandum of law accompanying this motion to terminate the Consent Decree as an amicus brief in support of Defendants.

IN THE UNITED STATES DISTRICT COURT
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Case No. 1:79-cv-00271-RBW

Judge Reggie B. Walton

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO TERMINATE THE CONSENT DECREE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

For 44 years, the Consent Decree in this case has impeded the Office of Personnel Management ("OPM")'s ability to use employment tests to fill jobs based on quantifiable aptitude. The Consent Decree requires federal agencies considering an employment test to conduct extensive studies and guard against any "adverse impact" on certain racial groups. As a result, "[v]ery few agencies use job knowledge or cognitive ability tests," and the most frequently used assessment tool is a "simple resume." OPM Mot. to Terminate at 8, ECF No. 2.

These consequences directly harm current and future federal employees. Proposed Defendant-Intervenor American Moment endeavors to help young people, especially those without college degrees, to serve in government. *See* Nick Solheim Decl., Ex. A. When cognitive employment tests are replaced by resumes, talented young people without traditional credentials struggle to obtain federal employment, and the federal government misses out on qualified individuals who might have otherwise been identified. Likewise, current federal employees such as those represented by Proposed Defendant-Intervenor Feds for Freedom suffer dignitary harms when their employer sets hiring policies based on race. *See* Marcus Thornton Decl., Ex. B.

The Consent Decree must be vacated because "significant changes in law" make clear that it is an "instrument of wrong." *Sys. Fed'n No. 91, Ry. Emps.' Dep't v. Wright*, 364 U.S. 642, 647 (1961) (quotation omitted). First, this Court entered the Consent Decree without finding that the federal government's prior use of the Professional and Administrative Career Examination ("PACE") likely violated the prohibition on disparate impact under Title VII of the Civil Rights Act of 1964. The Supreme Court has since held that Title VII prohibits race-conscious acts like those required by the Consent Decree unless there is a "strong basis in evidence" that the employer

would otherwise face liability for disparate impact under Title VII. *Ricci v. DeStefano*, 557 U.S. 557, 563 (2009). No such evidence exists here.

Second, the Plaintiffs claimed that OPM's prior use of the PACE was illegal *only* because of its disparate impact under Title VII. Subsequent case law, however, makes clear that disparate-impact liability is unconstitutional. Because disparate-impact liability "place[s] a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes," *id.* at 594 (Scalia, J., concurring), it violates the equal protection requirements of the Fifth Amendment, which prohibits "all governmentally imposed discrimination based on race," *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 206 (2023) (cleaned up). Developments in the law preclude disparate-impact liability, making "legal what the decree was designed to prevent" and illegal what the decree requires. *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 388 (1992).

Third, the Consent Decree is not in the public interest because it has distorted hiring and promotion decisions throughout the federal government. Terminating the decree will permit a more efficient, fair, and merit-based federal hiring process.

For these reasons, as well as those set forth in OPM's motion, the Consent Decree must be terminated.

BACKGROUND

Title VII prohibits employment discrimination based on race. This includes both intentional discrimination, known as "disparate treatment," 42 U.S.C. § 2000e-2(a), and practices that are not intended to discriminate but have a "disparate impact" on protected groups and cannot be justified as job-related and consistent with business necessity, *id.* § 2000e-2(k).

In 1979, Plaintiffs in this case (individuals and civil rights groups seeking to represent a nationwide class) sued OPM, alleging that its use of the PACE violated Title VII. *Luevano v. Campbell*, 93 F.R.D. 68, 72 (D.D.C. 1981). Plaintiffs argued *only* that using the PACE violated Title VII because of the "disproportionately adverse effect of the PACE on Blacks and Hispanics." Compl. ¶ 14, *Luevano*, 93 F.R.D. 68 (No. 79-0271), https://perma.cc/5SN6-M9Z5.

OPM agreed to settle the case, even while denying that its use of the PACE violated Title VII. *See* Consent Decree ¶ 1, *Luevano*, 93 F.R.D. 68, 1981 WL 402614 ("Consent Decree"). The Consent Decree (1) permanently enjoined use of the PACE after a wind-down period, (2) required OPM to develop an alternative examination procedure that would eliminate "adverse impact against Blacks and against Hispanics," (3) required the use of two specific programs (Outstanding Scholars and Bilingual/Bicultural) to mitigate adverse impact, (4) required any new employment tests to be subjected to validity studies that would, among other things, measure disparate impact against blacks and Hispanics, and (5) required any hiring agency to consider whether any other procedures would satisfy its objectives with "no adverse impact or less adverse impact" than the primary test under review. *Id.* ¶¶ 2(a), 12(a)–(b), (i), 13(a), 16(a)–(b).

On March 10, 2025, OPM moved to terminate the Consent Decree. ECF No. 2. OPM explains that the Consent Decree discriminates on the basis of race because it requires employer agencies to measure new tests for their disparate impact specifically on blacks and Hispanics, but not for other racial groups, and to evaluate whether an alternative with less disparity exists. *Id.* at 10. OPM continues that such a race-conscious approach violates Title VII because there was no "strong basis in evidence" that the employer would be liable under Title VII if it failed to take those race-conscious actions. *Id.* at 10–11. OPM further claims that this race-conscious action by

the government is subject to strict scrutiny and cannot survive that test. *Id.* at 11–15. Finally, OPM lays out how the Consent Decree has become totally unworkable. *Id.* at 15–18.

ARGUMENT

Consent decrees that require "continuing enforcement of rights the statute no longer gives" must be vacated. *Sys. Fed'n No. 91*, 364 U.S. at 652. The Consent Decree is just such a decree. First, it violates Title VII because it requires OPM to take race-conscious remedial action without the "strong basis in evidence" of liability that could justify such action under *Ricci v. DeStefano*, 557 U.S. 557. Second, the entire premise of this lawsuit is that OPM's employment tests in the 1970s might have been illegal for resulting in a disparate impact against certain racial groups, yet recent equal protection decisions indicate that disparate-impact liability *itself* is unconstitutional. Both problems with the Consent Decree became clear after "subsequent changes" in "decisional law," and this Court must "modify" the "consent decree in light of such changes." *Agostini v. Felton*, 521 U.S. 203, 215 (1997). Moreover, the Consent Decree causes significant harm to present and future federal employees and is no longer in the public interest. It should be terminated because it "is no longer equitable." Fed. R. Civ. P. 60(b)(5).

I. THE CONSENT DECREE VIOLATES TITLE VII

The Supreme Court clarified in *Ricci* that, under Title VII, an employer can undertake race-based remedial action to avoid disparate-impact liability only if it has a "strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute." *Ricci*, 557 U.S. at 563; *see United States v. Brennan*, 650 F.3d 65, 109 (2d Cir. 2011). Importantly, "the standard is objective, not subjective, and it therefore focuses on the strength of the *evidence of liability*, not the strength of the employer's *fear of litigation*." *Brennan*, 650 F.3d at 110; *see Ricci*, 557 U.S. at 585.

The same standard applies to consent decrees. In "the eyes of the law," a voluntary consent decree requiring race-conscious action "is nothing more than a voluntary affirmative action program." *Dean v. City of Shreveport*, 438 F.3d 448, 464 (5th Cir. 2006); *see In re Birmingham Reverse Discrimination Emp. Litig.*, 833 F.2d 1492, 1501 (11th Cir. 1987); *see also Cleveland Firefighters for Fair Hiring Pracs. v. City of Cleveland*, 669 F.3d 737, 741 (6th Cir. 2012). Therefore, courts must apply *Ricci* and reject consent decrees that order race-conscious action to avoid a disparate impact when the "Defendant has steadfastly denied that its hiring or selection process had any impermissible disparate impact" and no fact-finding revealed that liability was likely. Order at 4, *United States v. Cobb County*, 1:24-cv-2010 (N.D. Ga. Jan. 16, 2025), ECF No. 13, https://perma.cc/3A9W-CZ7H.

In this case, the Consent Decree ordered race-conscious action to avoid the unintentional disparate impact alleged by the Plaintiffs. As *Ricci* established, the decision to cease use of an exam because of the racial breakdown of results is "race-based action" that "discriminates" based on race. 557 U.S. at 562–63, 579–80, 584. After all, hiring is "zero-sum," so changing a policy to benefit "some applicants" but not others "necessarily advantages the former group at the expense of the latter." *Students for Fair Admissions*, 600 U.S. at 218–19. Further, the Consent Decree compelled future race-conscious action by requiring OPM to measure any alternative exam for disparate impact on blacks and Hispanics, but not any other racial group. *See* OPM Mot. to Terminate at 10 (citing Consent Decree ¶ 8(1)). Accordingly, this Consent Decree complies with Title VII only if there were a "strong basis in evidence that," without this race-based action, OPM "would have been liable under the disparate-impact statute." *Ricci*, 557 U.S. at 563.

Neither this Court nor the parties ever objectively determined that OPM's use of the PACE was likely illegal. To the contrary, "OPM expressly denied that use of the PACE by OPM …

violated Title VII, and further denied that the PACE had not been properly validated in accordance with applicable Federal guidelines and Title VII." Consent Decree ¶ 1. Even while agreeing to the Consent Decree, OPM continued to deny "any such allegations in the Complaint and deny that defendants are subject to any liability." *Id.* This Court also never found that the use of the PACE was likely unlawful when it approved the negotiated settlement between the parties. *See Luevano*, 93 F.R.D. at 72–74. Indeed, this Court concluded that "[b]ased on the present record, it is not possible to state that either side could have been completely confident of victory." *Id.* at 87. That is a far cry from finding the "strong basis in evidence" that *Ricci* requires.

To be sure, the statistical breakdown of PACE results by race was known when this Court entered the Consent Decree. *See* Consent Decree ¶ 10(h). But "a threshold showing of a significant statistical disparity … is far from a strong basis in evidence that [OPM] would have been liable under Title VII." *Ricci*, 557 U.S. at 587. Disparate-impact liability under Title VII requires the additional findings that the test is not "job related for the position in question" and is not "consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i); *cf. Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (noting the "touchstone" for disparate-impact liability "is business necessity").

In addition, no factual findings in the Consent Decree provided "objectively strong evidence of non-job-relatedness or a less discriminatory alternative." *Brennan*, 650 F.3d at 113; *see Luevano*, 93 F.R.D. at 72–74 (recounting the court's factual findings before entering the Consent Decree). Indeed, to the extent evidence existed, it showed that the PACE *was* job-related and consistent with business necessity. As OPM points out, the PACE was thoroughly researched to ensure validity and job-relatedness. *See* OPM Mot. to Terminate at 3. In 1979, the Government Accountability Office called the PACE the "most thoroughly researched test in the history of

Federal civil service examining." U.S. Gov't Accountability Off., *The Impact and Validity of PACE: A Federal Employment Examination* 2 (May 15, 1979), https://perma.cc/GK3M-3GF2.

On this record, the Consent Decree violates Title VII as clarified by *Ricci*. The Consent Decree thus provides to Plaintiffs "rights the statute no longer gives" and must be vacated. *Sys. Fed'n No. 91*, 364 U.S. at 652.

II. DISPARATE-IMPACT LIABILITY IS UNCONSTITUTIONAL

This Court should also terminate the Consent Decree because "the statutory or decisional law has changed to make legal what the decree was designed to prevent." *Rufo*, 502 U.S. at 388. The Plaintiffs sought to prevent OPM from using the PACE, on the theory that it violated Title VII's prohibition of policies causing unjustified disparate impacts. But even if OPM's test had such an impact, disparate-impact liability itself violates the Fifth Amendment, as clarified by recent Supreme Court decisions.

The Fifth Amendment prohibits the federal government from discriminating based on race. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 215–16 (1995); *Bolling v. Sharpe*, 347 U.S. 497 (1954). There are no "benign" racial classifications, because such distinctions "'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Shaw v. Reno*, 509 U.S. 630, 642–43 (1993) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). Racial and ethnic classifications "stimulate our society's latent race consciousness," *id.* at 643 (quoting *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 173 (1977) (Brennan, J., concurring in part)), "perpetuat[e] the very racial divisions the polity seeks to transcend," *Schuette v. Caol. to Def. Affirmative Action, Integration, and Immigrant Rts. and Fight for Equality by Any Means Necessary (BAMN)*, 572 U.S. 291, 308 (2014), and "delay the time when race will become … truly irrelevant," *Adarand*, 515 U.S. at 229. Accordingly, "all racial

classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." *Id.* at 227.[2]

Disparate-impact liability requires employers to classify employees and job applicants based on race. As Justice Scalia explained, it "affirmatively *requires* [race-based] actions when a disparate-impact violation *would* otherwise result," even though the Constitution prohibits the government "from discriminating on the basis of race." *Ricci*, 557 U.S. at 594 (Scalia, J., concurring). He further observed that disparate impact liability "requires consideration of race on a wholesale, rather than retail, level," which stands in contrast to the Court's admonition that governments must "treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Id.* at 595 (quotation omitted). Therefore, disparate-impact liability must satisfy strict scrutiny, which requires a compelling governmental interest and narrow tailoring to that end. *See Students for Fair Admissions*, 600 U.S. at 206–07.

Race-based disparate impact liability under Title VII fails strict scrutiny because it lacks a compelling governmental interest. The two most logical justifications for disparate-impact liability—diversity and remedying past societal discrimination—were recently rejected by the Supreme Court as not compelling. In *Students for Fair Admissions*, the Court made clear that diversity for its own sake is insufficient. *Id.* at 219–20. And the Court likewise reaffirmed that "[a]n effort to alleviate the effects of societal discrimination is not a compelling interest." *Id.* at 226 (quoting *Shaw v. Hunt*, 517 U.S. 899, 909–10 (1996)); *see also Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 731–32 (2007); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989). Accordingly, just as a general "racial imbalance … without more"

[2] The equal protection component of the Fifth Amendment is coterminous with the Fourteenth Amendment's Equal Protection Clause. *Adarand*, 515 U.S. at 217.

does not justify race-based action in schools, *Parents Involved*, 551 U.S. at 721 (quotation omitted), it cannot justify race-based action in employment, either.

Neither of the two compelling interests the Court has recognized as justifying race-based action—"remediating specific, identified instances of past discrimination that violated the Constitution or a statute," and "avoiding imminent and serious risks to human safety in prisons, such as a race riot"—would likely ever justify disparate impact cases under Title VII. *Students for Fair Admissions*, 600 U.S. at 207. Disparate-impact liability "sweep[s] too broadly" to serve the interest of remediating specified instances of past, intentional discrimination. *Ricci*, 557 U.S. at 595 (Scalia, J., concurring). Indeed, Plaintiffs never claimed the Consent Decree would remediate past, *intentional* discrimination by OPM. Instead, they claimed only that OPM policies resulted in a disparate impact on certain racial groups, even though the practices did not facially discriminate based on race and were not adopted to favor one race over another. And disparate-impact liability in the workplace has nothing to do with preventing race riots in prisons.

Disparate-impact liability is also not narrowly tailored. It turns on statistical analysis considering racial categories as general groups. But in *Students for Fair Admissions*, the Court rejected those very categories as "imprecise," "overbroad," "arbitrary or undefined," and "underinclusive." 600 U.S. at 216. Thus, reliance on those categories to achieve diversity led to a "mismatch between the means [the universities] employ and the goals they seek." *Id.* at 217. Moreover, like the affirmative action policies at Harvard, disparate-impact liability under Title VII has "no end … in sight." *Id.* at 213. To be narrowly-tailored, racial classifications must have "a logical end point." *Id.* at 221 (quotation omitted). Disparate-impact liability—like the Consent Decree itself—is missing an end point.

Moreover, disparate-impact liability under Title VII violates equal protection doctrine for the additional reason that it relies on unconstitutional stereotyping and treats employees as members of a racial group, not as individuals. "[T]he Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*," *Adarand*, 515 U.S. at 227, and "the Government must treat citizens as individuals, not as simply components of a racial class," *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (quotation omitted); *see Students for Fair Admissions*, 600 U.S. at 231 (emphasizing that universities must assess an applicant "based on his or her experiences as an individual—not on the basis of race"). By its very nature, disparate-impact liability requires employers (and courts) to distinguish between racial groups using statistical data and make decisions to avoid statistical disparities across those groups. To avoid liability, employers must ensure that their policies do not lead to an imbalance in outcomes across racial groups, inevitably pressuring employers to adopt *de facto* racial quotas. By requiring employers to evaluate outcomes based on race and respond accordingly, disparate-impact liability furthers "stereotypes that treat individuals as the product of their race," which is "contrary" to the "'core purpose' of the Equal Protection Clause." *Students for Fair Admission*, 600 U.S. at 221.

Disparate-impact liability also violates the Constitution because it requires race to "be used as a 'negative.'" *Id.* at 218. Like university admissions, an employee's race "may never be used against him" in an employment process. *Id.* But employment is often "zero-sum," so providing a benefit "to some applicants" based on race "but not to others necessarily advantages the former group at the expense of the latter." *Id.* at 218–19. Disparate-impact liability requires that employers provide such a race-based benefit to certain employees over others, as it "is a race-conscious mechanism designed to reallocate opportunities from some racial groups to others." Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 Harv. L. Rev. 493, 494 (2003)

(cited in *Ricci*, 557 U.S. at 594–95). Because disparate-impact liability forces employers to make help certain groups over others because of race, it violates the principle that government may not "intentionally allocate preference" on that basis. *Students for Fair Admissions*, 600 U.S. at 220.

Accordingly, disparate-impact liability is unconstitutional, so the Consent Decree predicated on it must be vacated.

III. THE CONSENT DECREE HARMS CURRENT AND FUTURE FEDERAL EMPLOYEES

In addition to its legal problems, the Consent Decree should be terminated because it "is no longer equitable." Fed. R. Civ. P. 60(b)(5). The experiences of Proposed Defendant-Intervenors illustrate the damage caused by the Consent Decree. American Moment, a nonprofit organization committed to helping young people serve in government, and Feds for Freedom, whose membership includes over 9,000 federal employees, have endeavored to join this lawsuit because of the distorting effects of this Consent Decree for the federal workforce. *See* Solheim Decl., Ex. A; Thornton Decl., Ex. B.

Terminating the Consent Decree will enable agencies to make hiring and promotion decisions based on aptitude, rather than mere credentials. And as a result, the hiring process will more fairly include any American with talents that can help the civil service, not just those with typical resumes. As OPM's motion explained, after the Consent Decree enjoined the use of the PACE and placed barriers in the way of replacement tests, agencies naturally moved away from using tests that identify talent in candidates without traditional credentials and replaced them primarily with resume reviews. *See* OPM Mot. to Terminate at 7–8. But for candidates with unconventional backgrounds, such as those without a college degree, this shift makes it nearly impossible to break through the hiring process.

For this reason, the use of employment tests may often *reduce* racial disparities compared to reliance on resumes. According to U.S. Census Bureau data for Americans over 25 years old in 2022, approximately 26.1 percent of non-Hispanic whites and 32.6 percent of Asians had a bachelor's degree, compared to only 17.1 percent of blacks and 14.5 percent of Hispanics. *See* U.S. Census Bureau, *Educational Attainment in the United States*, Table 3, https://www.census.gov/data/tables/2022/demo/educational-attainment/cps-detailed-tables.html (last revised Feb. 10, 2023). A resume-focused hiring process, which will naturally focus on credentials such as a college diploma, thus places many black and Hispanic applicants at a disadvantage. That means there is "little reason to suspect that … job tests are *more* biased against minorities than are informal screens," meaning the "presumed equality-efficiency trade-off" from using employment tests is "largely irrelevant in practice." David H. Autor & David Scarborough, *Does Job Testing Harm Minority Workers? Evidence from Retail Establishments*, 123 Q.J. Econ. 219, 269 (2008).

Terminating the Consent Decree will help the federal government draw from a broader pool of talented individuals that tests can identify, while also making civil service hiring and promotion decisions fairer and more merit-based.

CONCLUSION

For the foregoing reasons, the Consent Decree should be vacated.

Dated: May 15, 2025

Respectfully submitted,

/s/ R. Trent McCotter
R. TRENT MCCOTTER (DC BAR # 1011329)
JARED M. KELSON (DC BAR # 241393)
ANDREW W. SMITH (DC BAR # 90026919)
BOYDEN GRAY PLLC
800 Connecticut Ave NW, Suite 900
Washington, DC 20006
202-706-5488
tmccotter@boydengray.com
jkelson@boydengray.com
asmith@boydengray.com

NICHOLAS R. BARRY*
JACOB P. MECKLER (D.C. BAR # 90005210)
AMERICA FIRST LEGAL FOUNDATION
611 Pennsylvania Ave, SE #231
Washington, DC 20003
202-964-3721
Nicholas.Barry@AFLegal.org
Jacob.Meckler@AFLegal.org

*Pro hac vice motion forthcoming

CERTIFICATE OF SERVICE

I certify that on May 15, 2025, the foregoing was filed electronically with the Court's electronic filing system. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

Dated: May 15, 2025

/s/ R. Trent McCotter
R. Trent McCotter

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANGEL G. LUEVANO, et al.,

Plaintiffs,

v.

CHARLES EZELL, Acting Director, Office of Personnel Management, et al.,

Defendants,

and

AMERICAN MOMENT
c/o Nick Solheim
300 Independence Ave SE
Washington, DC 20003

and

FEDS FOR FREEDOM
401 Ryland St.
Suite 200-A,
Reno, NV 89502,

[*Proposed*] *Defendant-Intervenors*.

Case No. 1:79-cv-00271-RBW

Judge Reggie B. Walton

[PROPOSED] ORDER

This matter came before the Court on a Motion to Intervene as Defendants by Proposed Defendant-Intervenors American Moment and Feds for Freedom. The Court, having reviewed the files and records herein, hereby:

ORDERS that the Motion to Intervene as Defendants filed by American Moment and Feds for Freedom is hereby GRANTED.

DATED this ___ day of _____ 2025.

_____
Reggie B. Walton
United States District Judge