CASE No. 22-55060 (L)
CASE No. 22-55587 (Con.)

In The United States Court Of Appeals
FOR THE NINTH CIRCUIT

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee,
v.

ACTIVISION BLIZZARD INC., BLIZZARD ENTERTAINMENT, INC.,
ACTIVISION PUBLISHING, INC. KING.COM, INC.,
and DOES ONE through TEN, inclusive,
Defendant-Appellee,
v.

CALIFORNIA DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING,
Proposed Intervenor-Appellant.

On Appeal from the United States District Court for
the Central District of California
No. 2:21-CV-07682 DSF-JEM; Honorable Dale S. Fischer

PROPOSED INTERVENOR-APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Rule 24 sets forth a straightforward standard that district courts must apply liberally to grant mandatory intervention to nonparties whose interests "may be" impaired by the action, and to grant permissive intervention where claims involve common legal or factual questions. Here, the district court erred by eschewing Rule 24's liberal standard, and substituting CRD's well-pled allegations of impairment with the parties' subjective statements about the consent decree's intent, and the court's own speculation about its impact. That speculation contradicts the decree's plain text and the actual impairments that CRD has since suffered.

Appellees do not refute these clear errors. Instead, they raise miscellaneous arguments that are premature and meritless. First, Appellees argue that the Court lacks jurisdiction over a substantive appeal of the decree because CRD failed to timely appeal it, but CRD filed an adequate and timely notice of appeal under Rule 3 through its second motion to intervene for purposes of appealing the decree. Second, they argue CRD's appeal is moot because the district court is unlikely to grant CRD relief, but mootness requires "impossibility," not unlikelihood. Effective relief is available, and even if the district court denies relief, CRD could substantively appeal the decree as an intervenor. Third, Appellees argue that CRD lacks standing, but CRD has alleged multiple redressable injuries based on its impaired enforcement interests, which are directly traceable to the decree.

As to the core Rule 24 analysis, Appellees' only meaningful engagement with CRD's Opening Briefs—on whether CRD's interests are impaired—is precluded by statute and California law establishing the broad nature of CRD's interest. Although Appellees portray the decree as solely impacting individual victims, CRD "ha[s] an independent [enforcement] interest" and the ability to

"seek remedies beyond those available in a suit brought by an employee." *Dep't of Fair Emp't & Hous. v. Cisco Sys., Inc.*, 82 Cal. App. 5th 93, 100-01 (2022). This separate interest squarely satisfies Rule 24(a). Appellees likewise fail to rehabilitate the district court's erroneous denial of permissive intervention based on a legal theory that is unfounded and untethered to Rule 24(b)'s required analysis. Lastly, CRD's decision not to file a "pleading" is consistent with Rule 24(c), as this Court's precedent confirms.

The district court's denial of intervention should be reversed.

II. ARGUMENT

A. CRD's Appeal Is Not Moot.

EEOC argues that this appeal is "moot" because the Court lacks jurisdiction over CRD's ultimate appeal of the consent decree, and the district court is unlikely to grant CRD relief on remand. EEOC Br. 31-37. Neither argument has merit. First, this Court has jurisdiction to hear the substantive appeal because CRD's second intervention motion provided timely notice of appeal under Rule 3(c). Second, the district court can still grant substantive relief, and reversal on appeal will provide it the opportunity to do so. Because it is not "impossible" for CRD to obtain relief, its appeal is not moot. *Ctr. for Biological Diversity v. Exp.-Imp. Bank of the U.S.*, 894 F.3d 1005, 1011 (9th Cir. 2018).

1. This Court Has Jurisdiction to Hear CRD's Substantive Appeal Because CRD Filed Timely Notice of Appeal.

After the district court orally approved the consent decree during the hearing on March 29th, 2022, CRD's counsel stated that it would be filing a second intervention motion for purposes of appealing the decree.

> MR. SAGAFI: [T]he [CRD] does plan to intervene here again just in an abundance of caution to ensure that it is absolutely clear that it can appeal the merits of the Consent Decree decision. . . . [We] want to be absolutely sure that the right to appeal the Consent Decree substance itself is preserved.

AB-SER-24.

The court stated that it would deny CRD's second motion, but that CRD was free to file the motion for purposes of appeal. AB-SER-54-55. ("I'm going to deny the request. . . . I will sign . . . the Consent Decree[,] and then whoever wants to take whatever to the Ninth Circuit can do so.") When CRD probed the issue, the court reiterated: "Talk to the Ninth Circuit." AB-SER-55. At this time, CRD had already timely appealed the district court's denial of its initial motion to intervene for purposes of challenging the decree. 2-ER-279.

The district court entered the final decree on March 29. 1-ER-55. On April 19, CRD filed its second intervention motion, titled *Motion to Intervene for Purposes of Appeal,* which stated "[CRD] seeks immediate intervention *to appeal [the consent decree] order*." 2-ER-112 (emphasis added).[1]

As promised, on June 3, the district court denied CRD's motion in a two-page order titled "*Order Denying Motion to Intervene for Purposes of Appeal.*" Supp-ER-3. That Order stated: CRD "has moved to intervene in this case for the purposes of appeal," and noted that "[t]he Court previously denied [CRD']s motion to intervene in the case for broader purposes." *Id.* Four days later, CRD appealed that order. Supp-ER-226. Because CRD filed the second motion providing notice of appeal on April 19, twenty days after entry of the decree on March 29, and well within its 60-day deadline, this Court has jurisdiction, and CRD's appeal of the decree is not moot. Fed. R. App. P. 4(a)(1)(B).

[1] At that point, this Court had not issued *Evans v. Synopsis, Inc.*, 34 F.4th 762 (9th Cir. 2022).

In this Circuit, "'documents which are not denominated notices of appeal will be so treated when they serve the essential purpose of showing that the party intended to appeal, are served upon the other parties to the litigation, and are filed in court within the time period otherwise provided by Rule 4(a).'" *Evans*, 34 F.4th at 775-76 (quoting *Rabin v. Cohen*, 570 F.2d 864, 866 (9th Cir. 1978)).[2] This Court is "extremely liberal in accepting . . . informally drawn and improperly labeled documents," *Firchau v. Diamond Nat'l Corp.*, 345 F.2d 269, 271 (9th Cir. 1965), where they "suffice[] to show the party intended to appeal," *Yanow v. Weyerhaeuser S.S. Co.*, 274 F.2d 274, 283 (9th Cir. 1959). Under Rule 3, a notice of appeal requires only "three pieces of information: (1) the parties taking the appeal, (2) the order or judgment being appealed, and (3) the court to which the appeal is taken." *Evans*, 34 F.4th at 775 (citing Fed. R. App. P. 3(c)).

CRD's second motion meets this standard. First, it names the parties and identifies CRD as the proposed intervenor seeking appeal. 2-ER-95, 2-ER-107, 2-ER-112. Second, it identifies the consent decree as the order being appealed. 2-ER-112 ("Now that the consent decree has been granted final approval, [CRD] seeks immediate intervention to appeal that order."). Third, it identifies the Ninth Circuit as the appellate court. 2-ER-104 (noting that intervention for appeal is

[2] Contrary to EEOC's argument that CRD was required to file a formal notice of appeal or obtain an extension of its appeal deadline, EEOC Br. 31-34, *Evans* acknowledges that alternative filings, including a motion to intervene, may suffice "when they serve the essential purpose" of showing the "inten[t] to appeal." 34 F.4th at 775-76 (citing cases); *see also, e.g.*, *Lacambra v. City of Orange*, No. 19-80012, 2019 U.S. App. LEXIS 13648, at *1 (9th Cir. May 7, 2019) (petition for leave to file interlocutory appeal was sufficient notice of appeal); *Intel Corp. v. Terabyte Int'l, Inc.*, 6 F.3d 614, 618 (9th Cir. 1993) (same, for timely appellate brief); *Berrey v. Asarco Inc.*, 439 F.3d 636, 642 (10th Cir. 2006) (same, for motion to certify); *Landano v. Rafferty*, 970 F.2d 1230, 1237 (3d Cir. 1992) (same, for petition for permission to appeal).

"regularly granted in the Ninth Circuit."). Finally, it provides clear notice of CRD's intent to appeal the decree. 2-ER-99 ("[CRD] moves to intervene for purposes of appeal. . ."). *See Ortberg v. Moody*, 961 F.2d 135, 137 (9th Cir. 1992) ("The purpose of Rule 3 is to ensure that the other party is informed of the intent to appeal."). Indeed, the district court understood that CRD intended its second motion to intervene to serve as the basis for appealing the entry of the consent decree. *See supra* 3.

EEOC's reliance on *Evans* is unavailing. The motion to intervene at issue in *Evans* did not constitute a "notice of appeal" because it sought further "substantive relief" in the form of a new crossclaim, cross-motion for summary judgement, and anticipated motion to reconsider summary judgment, which, if granted, would have "obviate[d]" the need for appeal. *Evans*, 34 F.4th at 776. Here, in contrast, CRD, as the denied intervenor, timely provided effective notice of appeal by requesting intervention *for purposes of appealing the decree*. This was in accordance with precedent holding that denied intervenors lack standing to file a formal notice of appeal. The judge had already denied intervention and a stay for broader purposes and stated she would do so again, AB-SER-54-55, so intervention would have merely given CRD party status to appeal, not "obviated" the need for it.

In finding that all litigants "face the same jurisdictional deadline" to appeal, *Evans* left undisturbed three well-established principles of law that co-exist in tension as to proposed intervenors. 34 F.4th at 770. First, *Evans* recognizes the "well settled" rule—going back as far as 1876— "'that only parties to a lawsuit, or those that properly become parties may appeal an adverse judgment.'" *Id.* at 769 (quoting *United States ex rel. Alexander Volkhoff, LLC v. Janssen Pharmaceutica N.V.*, 945 F.3d 1237, 1241 (9th Cir. 2020)); *see also Ex parte Cutting*, 94 U.S. 14, 22 (1876) ("Only parties, or those who represent them, can

appeal."). Second, it acknowledges *Marino v. Ortiz*, which holds that the proper way for non-parties to appeal is to seek intervention for purposes of appeal. 484 U.S. 301, 304 (1988) ("[T]he better practice is for such a nonparty to seek intervention for purposes of appeal" and then, if necessary appeal the "denial[] of [intervention]"). Third, it implicitly assumes that denied intervenors (who presently lack party status) can appeal a judgment if the denial of intervention is reversed, in accord with this Court's precedent. *Evans*, 34 F.4th at 773 n.10 (denial of intervention can be appealed); *see also Alaska v. Suburban Propane Gas Corp.*, 123 F.3d 1317, 1319 (9th Cir. 1997) (Court had jurisdiction where denied intervenor filed post-judgment motion to intervene for purposes of appealing class certification order); *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 719-20 (9th Cir. 1994) (same, as to post-judgment motion to intervene for purposes of appealing settlement).

As applied to denied intervenors who wish to appeal a judgment, these rules can only be harmonized by allowing denied intervenors to file *something* that provides timely notice of their intent to appeal (while lacking party status to do so formally). While *Evans* permits prospective intervenors to use Rule 4(a) to extend their appeal deadline while intervention is pending, this provides no recourse to denied intervenors like CRD. 34 F.4th at 773 & n.10. *Evans* further observes that denied intervenors may file a "protective notice of appeal," but does not suggest this is the only way to preserve their appeal, nor should it be. *Id.* at 776 n.15.

A new rule *requiring* denied intervenors to file a notice of appeal would be inconsistent with binding precedent holding they are *not permitted* to do so formally. *Marino*, 484 U.S. at 304 (non-parties "may not appeal from the consent decree approving that lawsuit's settlement"); *United States v. Kovall*, 857 F.3d 1060, 1068 (9th Cir. 2017) ("[U]nless the person [successfully] intervenes . . . , *the*

person cannot appeal a suit to which it has not become a party." (emphasis added)).

Such a ruling would also conflict with authority suggesting that denied intervenors can protect their substantive appeal rights by filing a timely post-judgment motion to intervene for purposes of appeal. In *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 390, 396 (1977), the Supreme Court found that a post-judgment motion to intervene for purposes of appeal filed 18 days after judgment (and within the 30 days to appeal) was timely for purposes of intervention, and, by implication, for appealing the underlying order denying class certification. Specifically, the Supreme Court found that the "purpose" of the intervention motion "was to obtain appellate review" of the order, and the motion "complied with . . . the time limitation for lodging an appeal" under Rule 4(a), such that "[s]uccess in" appellate review of the underlying order "would result in the certification of a class." *Id.* at 392.[3] Similarly in *Alaska*, 123 F.3d at 1319, this Court reached the merits of an appeal where the movant filed a post-judgment motion to intervene "on the twenty-ninth day of the thirty-day [appeal] period" for the "sole purpose of appealing the denial of class certification." The Court reversed the denial of intervention, but reached the merits in holding that denial was "harmless" because the underlying decision to deny class certification was "correct." *Id.* at 1321-22.

[3] *Evans* correctly notes that *McDonald* does not support the argument that intervenors have a "different" appeal deadline than parties, 34 F.4th at 770 n.5, but in *McDonald*, the Seventh Circuit heard denied-intervenors' appeal, both as to intervention and as to the underlying order, without jurisdictional impairment, because their intervention motion was filed for purposes of appeal and was timely under Rule 4(a), 432 U.S. at 390, 392.

As Rule 3 makes clear, "[a]n appeal must not be dismissed for informality of form or title of the notice of appeal," Fed. R. App. P. 3(c), and "so long as" the movant has filed "a paper indicating an intention to appeal, the substance of the rule has been complied with," *id.*, Advisory Committee Note to 1979 Amendments. Because CRD's second motion satisfies Rule 3(c), was timely under Rule 4(a), and provided adequate notice of its intent to appeal, this Court has jurisdiction. Applying *Evans* to foreclose CRD's substantive appeal rights here would be error, and grounds for rehearing *en banc*.

2. The District Court Could Order Effectual Relief if Intervention Is Granted.

Appellees cannot bear their "heavy" burden in establishing mootness on appeal because effectual relief is available. *Koala v. Khosla*, No. 17-55380, 2020 U.S. App. LEXIS 4818, at *4 (9th Cir. Feb. 14, 2020) ("burden to establish mootness" is "heavy" on appeal (quoting *Ctr. for Biological Diversity*, 894 F.3d at 1011)).

Contrary to EEOC's argument that CRD's appeal is moot because the district court is unlikely to grant relief, EEOC Br. 28, mootness does not depend on the *likelihood* of the court's ruling. It depends on the existence of an ongoing case or controversy. *Friends of the Earth, Inc. v. Laidlaw Envt'l. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000) (mootness is "underpin[ned]" by Article III's case-or-controversary requirement). EEOC's argument also ignores that the purpose of appeals is to "accord[] to the district court the opportunity to reconsider its rulings and correct its errors." *Mercury Interactive Corp. Sec. Litig. v. Mercury Interactive Corp.*, 618 F.3d 988, 992 (9th Cir. 2010).

Here, effectual relief is available because the district court maintains jurisdiction over the consent decree, and can redress some of CRD's injuries on

remand. For example, it could grant declaratory relief (e.g., holding that the decree does not limit CRD's claims and remedies in the State Action, or that releases obtained via the decree are ineffective as to CRD's claims). The district court could also require the parties to establish safeguards to prevent the destruction of relevant evidence, including employee termination records. The district court previously ruled that the "decree will not, and could not, affect" CRD's litigation, 1-ER-89, so it may order relief to limit the decree's adverse impacts on the State Action.

Nor does CRD's prior opportunity to participate as amicus curiae moot its interests here. Since its amicus submission, CRD has gathered additional information regarding the decree's infirmities and ongoing impairments in the State Action, which the district court has yet to address. Further, amicus participation "is insufficient to protect" CRD's rights because it does not allow CRD to "raise issues or arguments formally and gives it no right of appeal." *U.S. v. City of Los Angeles*, 288 F.3d 391, 400 (9th Cir. 2002). And even if the district court denies CRD relief on remand, CRD can still obtain relief from this Court through appeal. *Ctr. for Biological Diversity*, 894 F.3d at 1011 (mootness established "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party").

B. CRD Has Standing.

EEOC misconstrues CRD's allegations and misreads applicable caselaw in arguing that CRD lacks standing because its asserted injuries are "speculative" and traceable solely to the voluntary choices of settling claimants rather than to the consent decree. EEOC Br. 37-44. As described in CRD's opening briefs and below, CRD has alleged multiple particularized "injuries" that are "traceable" to the decree, and can be redressed via intervention and appeal, including that the

decree:

- Gives rise to Activision's defenses seeking to "bar" or limit CRD's claims and remedies in the State Action, which have already increased CRD's litigation risks, motion practice, and costs;
- Releases state-law claims that CRD is actively prosecuting for inadequate value;
- Thwarts CRD's ability to obtain discovery from and about settling claimants;
- Interferes with CRD's ability to prove retaliation by converting employee termination records to voluntary resignations; and
- Harms claimants on whose behalf CRD is currently litigating, and impairs CRD's ability to enforce California law.

Infra, Part C.

EEOC argues that Activision's defenses in the State Action cannot constitute injury because they might not prevail, and if they did, any injury would be solely traceable to the choices of third-party claimants. EEOC Br. 42. But CRD need not prove that Activision's defenses have prevailed to allege constitutional injury; rather, the resulting increased costs, risks, and burdens (including motion practice to rebut these defenses) that CRD faces now, coupled with the substantial risk that CRD will continue to face these burdens absent intervention, is sufficient. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 154-55 (2010) (increased costs and risks constituted "harms, which [movants] will suffer even if their crops are not actually infected," and were "sufficiently concrete" to constitute injury); *Wit v. United Behav. Health*, Nos. 20-17363, 21-15193, 20-17364, 21-15194, 2022 U.S. App. LEXIS 7514, at *8-9 (9th Cir. Mar. 22, 2022) ("plaintiffs need not have demonstrated that they were, or will be, actually denied benefits to allege a

concrete injury" because "material risk" was sufficient); *In re Sisk*, 962 F.3d 1133, 1142 (9th Cir. 2020) (standing satisfied where order allegedly "exposed [movants] to greater costs and payments, and increased their burdens").

EEOC further suggests that Activision's defenses are not "actually premised on" or "traceable to" the decree." EEOC Br. 38, 41. Yet some defenses reference the decree. Case No. 22-55060, ECF No. 26-3, Activision Answer to DFEH's First Amended Complaint ("Activision Answer") ¶¶ 224, 252. Activision has also confirmed its intention to preserve preclusion defenses based on the decree, including in its statements to Judge Dillon in the State Action. 2-ER-386 (suggesting the decree contemplates dismissal of some CRD claims). While certain defenses relate to individual releases, the releases are rooted in (and would not exist without) the decree. Moreover, some of Activision's defenses are wholly independent of the releases, including Activision's defense that the decree moots CRD's claims for injunctive relief. Activision Answer ¶ 252. EEOC's authority denying standing based on a "speculative chain of possibilities" involving the unforeseeable, intervening actions of third parties is thus inapplicable. *Cf. Clapper v. Amnesty Int'l, USA*, 568 U.S. 398, 414 (2013) (respondents lacked standing to challenge law based on speculation that government might one day target respondents' foreign contacts, receive judicial authorization to obtain such contacts' communications, and ultimately intercept respondents' communications with foreign contacts in the process).

Instead, the Supreme Court recently confirmed that standing merely requires "*de facto* causality" and can be established where the movant relies "on the predictable effect of Government action on the decisions of third parties," *DOC v. New York*, 139 S. Ct. 2551, 2566 (2019), as CRD does, in part, here. *See also Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011) ("A causal chain does

not fail simply because it has several 'links,' provided those links are 'not hypothetical or tenuous,'" and upholding standing where link was "plausible," despite independent factors). Here, the "predictable" (and actual) effect of the decree is that some Activision employees have signed agreements purporting to release claims in the State Action in order to receive money from the EEOC settlement. EEOC Br. 26 (EEOC "has distributed most of the $18 million fund"). To the extent CRD's injury depends, in part, on claimants' releases, that injury is traceable to the decree.

The same infirmities underlie EEOC's arguments regarding witnesses and evidence. The predictable risk that claimants will be less likely to participate as witnesses in the State Action suffices, without proof that they would be absolutely prevented from providing evidence. *DOC*, 139 S. Ct. at 2557-58 (affirming states' standing based on risk that census citizenship question would predictably cause noncitizen households to respond at lower rates, resulting in undercounting that would harm states); *cf.* EEOC Br. 38. Relatedly, the decree does not prevent, and Activision's risk of spoliation does not mitigate, the likely loss of relevant discovery resulting from the destruction of evidence and reclassification of termination records, another concrete injury. The decree's record-keeping provisions apply solely to employee allegations, complaints, and compliance records, not reclassification documents, and therefore fail to allay the harm. 1-ER-25, 47-48. *See FEC v. Akins*, 524 U.S. 11, 21 (1998) ("deprivation of information" supports standing); *Nat'l Urban League v. Ross*, 489 F. Supp. 3d 939, 967-68 (N.D. Cal. 2020) ("degradation of data" constitutes injury to support standing).

C. CRD Satisfies Rule 24's Straightforward Standard for Mandatory Intervention.

1. Appellees Fail to Rebut CRD's Showing that the Decree Impairs and Impedes Multiple Cognizable Interests.

Notwithstanding CRD's showing of multiple interests that the decree "may" impair, Fed. R. Civ. P. 24(a)(2), Appellees argue that mandatory intervention is unwarranted because the decree does not resolve state claims, or to the extent it does, CRD lacks any interest in such claims. EEOC Br. 46, Activision Br. 39. These arguments are wrong. The decree expressly purports to resolve state law claims that CRD has a *separate, cognizable* interest in enforcing. *See Cisco Sys.*, 82 Cal. App. 5th at 100-01 (CRD "ha[s] an independent [enforcement] interest" above and beyond employees' interests, to "seek [additional] remedies" and to advocate for the interests of the State).

Appellees further fail to meaningfully address clear impairments to CRD's interests in prosecuting the State Action, protecting the interests of California and its workers, and preserving its enforcement rights against federal encroachment.

a. The Decree Purports to Resolve CRD's Claims, and Impairs Its State Action.

Ignoring the plain language of the decree (which purports to expressly release state law claims) and Activision's litigation position in the State Action (which wields the consent decree as a shield to bar CRD's state claims), Appellees argue that the decree resolves *only federal claims*. EEOC Br. 18, 46; Activision Br. 3. This is false.

Multiple passages of the decree explicitly seek to release state claims. First, the "Recitals" to the decree state the parties' intent "to resolve all issues through this Decree," including "all allegations. . . whether arising under Title VII or *analogous state and local laws*." 1-ER-8 (emphasis added). Second, the

"Release" actualizes this intent, stating that the "this Decree completely and finally resolves all allegations, issues, and claims raised by the EEOC," where the "*allegations* [and] *issues raised*" in EEOC's complaint encompass those pursued in EEOC's and CRD's joint investigation, including harassment claims that CRD is litigating in the State Action. 1-ER-11. Third, the consent decree's individual releases require claimants to specifically acknowledge CRD's State Action, and to "release[e] any claims for sexual harassment" and others asserted under "state, or local law," including claims asserted by "any government agency" including CRD, and to waive any entitlement to "monetary damages or other relief the [CRD] may recover in the [State Action]." 1-ER-78.

These releases have already concretely impaired CRD's interests by giving rise to affirmative defenses that CRD would not otherwise face in the State Action. With respect to liability, Activision states that it has "entered into settlement agreements and/or releases of claims with employees" including those pursuant to the EEOC decree, and that CRD's "Complaint and each of its causes of action . . . is barred, in whole or part, and no individual relief is available, to the extent that any putative class members are covered by any settlement agreement and/or release of claims covering any claims alleged in this action." Activision Answer ¶ 224. In Activision's view, *all* of CRD's claims (including claims for equitable relief) are "barred" to the extent any class members have released claims under the decree. Activision's novel argument on appeal that "all the releases do is prevent double recovery," Activision Br. 29, is contradicted by its position in the State Action that the releases *extinguish* CRD's claims outright, Activision Answer ¶ 224 (CRD's claims are "*barred*, in whole or part, and no individual relief is available") (emphasis added).

As to remedies, Activision's defenses likewise extend beyond offsets to prevent double recovery, contrary to the assertion in its answering brief. Activision states that CRD's remedies "are limited by the doctrine of estoppel," *id.* ¶ 234; that CRD is "barred" from recovering for released claims, *id.* ¶ 224; and that "[CRD's] request for injunctive relief is moot, at least in part, to the extent the Consent Decree in the EEOC action remedies the claims asserted in this action," *id.* ¶ 252. Instead of simply asserting an offset, Activision has consistently argued that CRD's claims are barred or otherwise precluded based on the decree, as to both liability and damages.

CRD has already had to muster additional time and resources to preserve its claims and remedies due to the decree. Because Activision has vigorously asserted its decree-based defenses, CRD recently moved for summary adjudication to resolve these issues, including by arguing that Activision cannot establish claim or issue preclusion (due to lack of privity) and EEOC cannot settle CRD's claims.[4] Meanwhile, CRD faces continued risks based on these defenses. For example, CRD risks a finding that its injunctive relief claim is mooted by the decree, even though the decree's injunctive relief falls short of what CRD seeks.

The decree further impairs CRD's State Action by making it harder for CRD to obtain discovery from and about settling claimants. Appellees do not deny that the decree's releases will predictably decrease claimants' voluntary participation in the State Action (by removing their financial incentive to do so). That it is still technically *possible* for claimants to provide evidence, EEOC Br. 28, does not undo the *"practical" risk* of impairment, satisfying Rule 24.

[4] *See* Declaration of Jahan C. Sagafi in support of CRD's Motion for Judicial Notice ("Sagafi Decl."), Ex. A (CRD's Motion for Summary Adjudication) 21-24.

Neither do Appellees deny that the decree's reclassification of employee terminations as "voluntary resignations," "may" hinder CRD's ability to prove retaliation. 1-ER-25. EEOC argues that claimants themselves *choose* to have their terminations reclassified, EEOC Br. 42-43, but this has no bearing on the "practical" risk that relevant termination records "may be" altered or lost. Appellees further counter that the decree's record-keeping provisions protect CRD's interests, but, again, those provisions cover only employee complaints and training, performance and compliance documents, 1-ER-25, 47-48, not reclassification records. Similarly, the fact that Activision may face an adverse spoliation inference in the State Action for altering or destroying such documents does not cure the harm.

This Court has held that the risk of interference with an ongoing (or even anticipated) litigation meets Rule 24's standard for mandatory intervention. In *United States v. Oregon*, this Court reversed denial of intervention where the action could have a "*stare decisis*" effect and "more important[ly]," could "impair appellants' ability to obtain effective remedies in later litigation." 839 F.2d 635, 638 (9th Cir. 1988); *see also Yniguez v. Arizona*, 939 F.2d 727, 736-37 (9th Cir. 1991) (same, where district court's ruling could have persuasive effect, thereby weakening ballot sponsor's position in subsequent state court action); *cf. United States v. Michigan*, No. G84-63, 1984 U.S. Dist. LEXIS 18315, at *21-22 (W.D. Mich. Mar. 23, 1984) (intervention warranted where federal action "may quite possibly impair" movants' "efforts to seek relief" in a prior state lawsuit).

Here, CRD faces an even more drastic risk: collateral estoppel barring CRD's ability to obtain "effective remedies." *Oregon*, 839 F.2d at 638. Besides simply requiring an offset, the decree (and the defenses it has engendered) threatens CRD's claims and frustrates its ability to obtain additional damages or

civil penalties for claimants, and equitable relief for all workers. The decree thus has "a direct and immediate effect" on CRD's claims and remedies, which is not merely "attenuated through the private choices of independent third parties." EEOC Br. 52-53.

The district court cited no legal authority supporting its decision to deny intervention, and Appellees' cases are inapposite because they involve intervenors whose interests were not impacted by the settlement at issue, either because the interests were unrelated or resolved, or because they could be protected by excluding themselves from the settlement. *See Donnelly v. Glickman*, 159 F.3d 405, 409-11 (9th Cir. 1998) (denying intervention by male employees into female employees' hostile work environment suit because the two sets of claims were "unrelated"); *Fortune Players Grp., Inc. v. Quint*, No. 16 Civ. 00800, 2016 U.S. Dist. LEXIS 176031, at *2-3 (N.D. Cal. Dec. 19, 2016) (same, where DFEH's sole interest in avoiding a ruling on constitutional issues was resolved by early settlement); *United States v. Jackson*, 519 F.2d 1147, 1149-51 (5th Cir. 1975) (same, where dissatisfied employees could not opt into consent decree and pursue a private action).

b. The Decree Impedes CRD's Interest in Protecting Workers and the State of California.

By diminishing the rights of California workers and limiting CRD's ability to prosecute state law claims on their behalf, the decree interferes with CRD's statutory interest in "protect[ing]" the rights of California workers to "hold employment without discrimination." Cal. Gov. Code § 12920.

Although the releases are "voluntary," EEOC Br. 18-19, Activision Br. 25, they are also *disadvantageous* because they require claimants to waive state law

relief (for no additional value)[5] as a condition for receiving federal relief, with no feasible way to obtain both. EEOC lacks the jurisdiction to assert, the expertise to value, and the standing to resolve such claims, while CRD is currently prosecuting them in the State Action.

This structure is intrinsically improper. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48 (1974) (Title VII's history "manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII" and other law) (citing 42 U.S.C. § 2000e-5); *State Pers. Bd. v. Fair Emp't & Hous. Comm'n.*, 39 Cal. 3d 422, 431 (1985) (FEHA should not be "supplanted by" other remedies "in order to give employees the maximum opportunity to vindicate their civil rights"). It also diminishes workers' rights, as EEOC's own policies affirm. 3-ER-526 (EEOC Manual) ("Conditioning an individual's relief in a Commission suit on the release of [state law] claims *would diminish rather than enhance his or her rights*") (emphasis added); 2-ER-272 (improper for claimants to be deprived during bargaining process of a "legal advocate [who could] seek[] greater relief for additional state and local claims during settlement discussions").

Appellees do not deny this clear impairment. Instead, they argue that CRD lacks any "interest" in the decree because the legislature has not explicitly granted it authority to review private settlement releases. EEOC Br. 49-50; Activision Br. 27. But the legislature need not enumerate every illustration of CRD's authority; it has granted CRD broad and plenary authority "to enforce the civil rights of

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[5] In negotiating the $18 million fund with Activision, EEOC settled state law claims for no additional value beyond that of its Title VII claims. As EEOC's policies state: "because the [EEOC] could not have recovered on . . . [state law] claims if it prevailed at trial, *the relief received* in a Commission settlement *cannot constitute consideration for a release of the [state] claims*."). 3-ER-526 (emphasis added).

California citizens as 'an exercise of the police power of the state for the protection of the welfare, health, and peace of [its] people,'" *Dep't of Fair Emp't & Hous. v. Law Sch. Admission Council, Inc.*, 941 F. Supp. 2d 1159, 1167 (N.D. Cal. 2013) ("*LSAC*") (quoting Cal. Gov. Code § 12920), which it seeks to protect here. This Court further rejects the argument that intervention requires an interest specifically codified by law. *See Cty. of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980) ("reject[ing] the notion that Rule 24(a)(2) requires a specific legal or equitable interest"); *State ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006) (same).

Appellees' related argument, EEOC Br. 50, Activision Br. 26, (echoed by the district court, 1-ER-89), that only claimants (not CRD) have an interest in the decree's releases likewise falls flat. This reductive view fails to account for CRD's multiple interests in advocating not only as a "proxy for the victims of discrimination," but also "to vindicate the public interest in . . . preventing discrimination." *LSAC*, 941 F. Supp. 2d at 1169. The California Court of Appeal has squarely rejected the theory that "only the employee has an interest in the suit," holding instead that the employee's status as "real party" in interest "does not undermine or conflict with the [CRD] having an independent [enforcement] interest" and the ability to "seek remedies beyond those available in a suit brought by an employee." *Cisco Sys.*, 82 Cal. App. 5th at 100-01; *see also State Pers. Bd*, 39 Cal. 3d at 443 (CRD is "'a public prosecutor testing a public right,' when it pursues civil litigation to enforce statutes within its jurisdiction").

CRD's interests are thus parallel to (not adverse to) those of the claimants,[6] and broader in that they encompass the interests of the public and all California

[6] The parties argue that CRD seeks to "veto[]" or "stymie" workers' choice to settle their claims, EEOC Br. 28, Activision Br. 2, but this is hyperbole. Rather

Activision employees (claimants and non-claimants alike). By viewing the decree as singularly impacting private interests held solely by the claimants (rather than multiple interests held by *both* CRD *and* claimants), Appellees and the district court improperly diminish the breadth of the California Legislature's assignment of authority to CRD.

c. The Decree Impairs CRD Interest in Protecting Its State Enforcement Powers Against Federal Interference.

CRD has an interest in preserving its jurisdiction and protecting its ability to enforce state law claims according to the powers granted to it by the legislature, and the federalist balance established by Congress, reflecting limited federal power and deference to the states. ECF No. 24, CRD Opening Br. 4-10. The Supreme Court, this Court, and others have accordingly recognized states' right to intervene in actions impacting their interests. *See, e.g.*, *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1006 (2022) (reversing denial of intervention by the Kentucky Attorney General and holding that states "clearly ha[ve] a legitimate interest in the continued enforceability of [their] own statutes");[7] *Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co.*, 386 U.S. 129, 135-36 (1967) (State had protectable interest to intervene in hearings about federal government's antitrust suit against

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than limiting workers' rights, CRD seeks a seat to preserve workers' rights (to recover additional relief) by challenging the improper release of California claims. In contrast to a private settlement negotiated at arms-length by individuals with standing to sue, impacted workers had no voice, and EEOC could not have represented their interests under FEHA because it lacks standing to negotiate or resolve California claims.

[7] The parties argues that *Cameron*'s holding is confined to cases involving constitutional challenges to state laws, EEOC Br. 49, Activision Br. 31-32, but its text is not so limited; *Cameron* broadly teaches that the Constitution grants states "a residuary and inviolable sovereignty," which "federal court[s] must 'respect.'" 142 S. Ct. at 1011.

private gas company); *California v. IntelliGender, LLC*, 771 F.3d 1169, 1179-80 (9th Cir. 2014) (State seeking to secure compensation for class members in a related CAFA suit can "do so by intervening," even though CAFA provides no express right of intervention); *WildEarth Guardians v. Zinke*, No. 18-CV-00048, 2018 U.S. Dist. LEXIS 120771, at *8-9 (D. Ariz. July 18, 2018) (granting state agency intervention in action challenging federal plan based on state's interests in managing wildlife within its borders); *cf. United States v. Enter. Ass'n of Steam, etc.*, 347 F. Supp. 164, 165 (S.D.N.Y. 1972) (granting human rights commission permissive intervention in Title VII action where an anticipated decree might supersede commission's administrative proceedings).

Given CRD's clear showing of impairment and supporting authority, Appellees must stretch to find support for their argument that CRD's authority to enforce state anti-discrimination law in the specific circumstances of this case does not create a protectable interest justifying intervention. *Brewer* and *Blake* do not support their position. In *Brewer v. Republic Steel Corp.*, the Sixth Circuit denied the Ohio Civil Rights Commission's motion to intervene in a private action raising solely *federal* claims. 513 F.2d 1222, 1223 (6th Cir. 1975). The Commission's only interest was that the plaintiffs' federal claims were "similar" to Ohio claims. *Id.* Unlike in this case, the Commission had not filed its own state court action; the federal action did not in any way compromise state claims or the Commission's ability to litigate state claims; and, critically, the interests of plaintiffs and the Commission were aligned. *Id.* at 1123-24. Here, the consent decree directly impairs CRD's enforcement interests by releasing, and threatening to bar state claims that CRD is actively litigating, for inadequate value, where the parties' interests are clearly opposed to CRD's.

In *Blake v. Pallan*, this Court confirmed that the California Commissioner of Corporations was not entitled to *mandatory* intervention, because the only "impairment" raised (apart from the inconvenience of litigating in multiple fora) was potential *stare decisis* impact in a related state action. 554 F.2d 947, 954 (9th Cir. 1977).[8] However, in *Blake* the district court *granted* permissive intervention, the federal suit did not threaten the Commissioner's action, and again, the Commissioner's interests were adequately represented. *Id.* (contrasting the Commissioner's interest with "a situation where specific property rights are being determined in such a way that for all practical purposes the initial judicial decision will foreclose the absent party's claims to an interest in the property").

While Appellees warn of a slippery slope leading to a parade of interventions, EEOC Br. 50, Activision Br. 32, CRD's particularized interests here contrast sharply with generalized concerns applicable to "any employment action in California," 1-ER-88–89, or those asserted in *Brewer* and *Blake*. As CRD has consistently argued, where a case threatens to undermine CRD's ongoing litigation—whether by releasing or barring its claims, foreclosing its remedies, or compromising discovery—CRD likely has a strong basis to intervene. This is particularly so where, as here, the party negotiating the resolution of CRD's claims lacks standing to assert or settle them. Such occurrences are extremely rare.

2. EEOC Does Not Adequately Represent CRD's Interests.

The district court did not find that EEOC adequately represents CRD's interests, and it does not. Indeed, CRD seeks relief that EEOC has not sought, including disapproval of the consent decree, a fairness hearing, and declaratory

[8] To the extent *Blake* suggests that *stare decisis* impact may be insufficient under Rule 24, this is called into question by the Court's subsequent rulings in *Oregon*, 839 F.2d at 638, and *Yniguez*, 939 F.2d at 736-37.

relief, as EEOC acknowledges. EEOC Br. 69. EEOC also opposes CRD's appeal. There is therefore no plausible basis for EEOC's assertion that it "adequately represents" CRD in these proceedings, given the divergence in the parties' ultimate goals.

Because the agencies do not "have the same ultimate objective," and their interests are far from "identical," no presumption of adequacy arises. *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003). *Compare Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, 960 F.3d 603, 620 (9th Cir. 2020) (presumption met where intervenor and party shared objective of upholding city ordinance), *with City of Los Angeles*, 288 F.3d at 402 (no presumption where the parties demonstrated "a marked divergence of positions concerning key elements of the decree"). CRD is also not EEOC's "constituent," and EEOC is not charged with representing CRD's interests, nor could it be. *Id.*; *see also EEOC v. Fed. Express Corp.*, 268 F. Supp. 2d 192, 203 (E.D.N.Y. 2003) (EEOC and state agencies often have "conflicts of interest," as they do here).

Even if a presumption applied, CRD has satisfied any heightened burden by showing that EEOC has "take[n] undesirable legal position[s]" to CRD, *City of Oakland*, 960 F.3d at 620, both below and on appeal.

D. The District Court Erred in Denying Permissive Intervention.

Permissive intervention must be decided based on "the factors identified in Rule 24(b)," as interpreted by this Court, not freewheeling conjecture. *City of Los Angeles*, 288 F.3d at 403-04 (reversing denial of permissive intervention where district court "did not specifically apply the standards for permissive intervention," but instead relied on an unsupported interpretation of law). Under the required factors, permissive intervention is warranted because CRD's motion was timely, its claims overlap in law and fact with EEOC's (as the district court found, 1-ER-89),

and CRD's motion would not have "unduly delay[ed] or prejudice[d] . . . the rights of the original parties" (but instead could have safeguarded workers' rights and avoided further motion practice and the instant appeals). Fed. R. Civ. P. 24(b)(3); *see also Donnelly*, 159 F.3d at 412 (listing factors courts "must" consider). Further, the discretionary factors identified by this Court all favor intervention. *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977).

Instead of relying on *any* of these (required or discretionary) factors, the district court denied permissive intervention on the sole basis that CRD is "litigating [its claims] in state court regardless of the outcome" of the decree. 1-ER-90. The district court's underlying legal theory—that the pendency of an adversely impacted action weighs against intervention—has no basis in logic or law. *City of Los Angeles*, 288 F.3d at 403 (reversing denial of intervention based on principle that this Court has "never so held"); *Cameron,* 142 S. Ct. at 1005-06 (same, for denial based on "an erroneous view of the law"). The district court's error is especially glaring here, where the crux of CRD's motion is that the decree impairs its State Action (so the State Action *supports*, rather than detracts from, the need for intervention).

EEOC seeks to anchor the district court's holding by citing to dicta from *Beckman Indus. v. Int'l Ins. Co.*, 966 F.2d 470, 472 (9th Cir. 1992), noting that "the primary focus of Rule 24(b)" is intervention to litigate claims. EEOC Br. 75. But *Beckman* held that permissive intervention was proper to challenge a protective order (not to litigate claims), and used the language EEOC quotes to *refute* the argument that Rule 24(b) "only permits intervention" for this purpose. *Id.* at 472. *Beckman* does not support the district court's holding.

To the contrary, this Court has clarified that permissive intervention is often appropriate for purposes other than litigating additional claims together. *City of*

Los Angeles, 288 F.3d at 396 (reversing denial of permissive intervention where intervenors sought to enjoin decree); *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 844 (9th Cir. 2011) (same, where intervenor sought to assert additional arguments but not claims); *Venegas v. Skaggs*, 867 F.2d 527, 528 (9th Cir. 1989) (same, to confirm attorney's fee lien). Because the factors required by Rule 24(b) and the discretionary factors endorsed by this Court all support intervention, and because law and logic counsel against the district court's conclusion, its denial of permissive intervention was an abuse of discretion.

E. Rule 24(c) Is Inapplicable.

Contrary to EEOC's argument, Rule 24(c) does not require a complaint, and the district court did not find otherwise. "[T]he Ninth Circuit allows for courts to approve 'intervention motions without a pleading where the court [is] otherwise apprised of the grounds for the motion.'" *Thompson v. Thompson*, No. 18 Civ. 04269, U.S. Dist. LEXIS 236115, at *10 (C.D. Cal. July 31, 2018) (quoting *Beckman*, 966 F.2d at 474).

CRD does not seek to litigate claims here, but instead seeks to challenge the decree to protect ongoing litigation in the State Action and its related enforcement interests. Because CRD has "describe[d] the basis for intervention with sufficient specificity to allow the district court to rule," no complaint is required. *Beckman*, 966 F.2d at 474-75.

F. Appellees' Factual Arguments Regarding the Agencies' Investigatory Relationship Are False, Misleading or Irrelevant.

While not directly relevant to the legal issues on appeal, Appellees make several factual assertions that warrant correction.

1. CRD Never Ceded Its Jurisdiction or Agreed Not to Prosecute Harassment Claims.

Appellees misread the record to suggest that CRD "agreed that EEOC had jurisdiction over [its] harassment claims," Activision Br. 7, and further "agreed not to pursue" such claims, EEOC Br. 2. Those statements are false.

The scope of each agency's *jurisdiction* is rigid, based in statute, and can be changed only by Congress or the legislature within the confines of the Constitution. In contrast, the *division of labor* in a joint investigation is flexible, and is determined by each agency, based on their respective interests.

Pursuant to statute, CRD has jurisdiction to prosecute FEHA claims, while EEOC does not. Cal. Gov. Code §§ 12900 *et seq.* This is reflected in the agencies' Worksharing Agreement, which states: "In situations involving harassment," CRD "has jurisdiction over" employers "under FEHA" (and other state laws), while EEOC only "has jurisdiction" over "Title VII" (and other federal laws). AB-SER-32. It further clarifies that the "delegation of authority to receive charges *does not include the right of one Agency to determine the jurisdiction of the other Agency* over a charge." AB-SER-39. Thus, the agencies' agreement to allocate tasks during their parallel investigations had no impact on CRD's exclusive jurisdiction to pursue state claims. CRD could not cede its jurisdiction, and EEOC could not take it.

The agencies' contemporaneous communications confirm that CRD never ceded, and EEOC never assumed, jurisdiction. In June 2021, when discussions over CRD's intent to pursue state harassment claims arose, CRD explained that it "is not deferring the [CRD's] Director's Complaint[,] as it asserts the Department's state law claims that cannot be pursued by EEOC." AB-SER-206. EEOC's lead lawyer briefly considered asserting jurisdiction over state claims, but after CRD

corrected her, she conceded: "[I]t is clear that [CRD] has jurisdiction to investigate claims in its Director's Complaint under state law. Please accept our apologies for any misunderstanding or miscommunication regarding jurisdiction over state law. *It was not our intent to appear to assert jurisdiction over California law*." EEOC-SER-135 (emphasis added).

There is no legal or record support for Appellees' ex post argument that CRD somehow overcame the law to cede jurisdiction. *Cf.* EEOC Br. 14 (accusing CRD of acting "directly contrary to the agencies' agreement" in asserting state law harassment claims).[9] As Judge Dillon held in the State Action: "To the extent that [Activision] argue[s] that . . . [CRD] ceded its authority to the EEOC to investigate the harassment and retaliation claims, *the argument is negated* based on the terms of the Worksharing Agreement." ECF No. 49-3, Order Denying Activision's Motion for Summary Adjudication 25 (emphasis added).

2. CRD Properly Filed Suit After Its Efforts to Mediate or Toll State Claims Were Rebuffed.

Appellees' remaining challenges to the propriety of CRD's investigation and litigation are similarly irrelevant and unsupported.

[9] EEOC's emphasis on its "primary" authority to prosecute and settle *Title VII* claims, EEOC Br. 11-12, is irrelevant, because CRD does not challenge EEOC's ability to pursue Title VII claims. That EEOC's charge preceded CRD's by several weeks is also irrelevant, as the Worksharing Agreement only governs priority regarding *Title VII* enforcement. AB-SER-32 (agreement applies solely "*to the extent of the common jurisdiction . . . of the two (2) Agencies*" (i.e., Title VII)). EEOC also mischaracterizes the "deferral provisions" as an effort by Congress to limit or "foreclose" state jurisdiction, EEOC Br. 9-10, when in fact they were created to *enhance* state FEPAs' work. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755 (1979).

First, CRD investigated this matter for three years before filing suit. 3-ER-535-36. It determined it had no choice but to pursue its own enforcement action after EEOC began conciliation negotiations with Activision and it became clear that CRD could not participate without being subject to a new federal regulation requiring it to share its confidential investigative file with defendants in conciliation. 3-ER-542-43. There is no basis for Activision's assertion that CRD rushed to file suit without adequately investigating.

Second, CRD sought to conciliate before filing suit. In June 2021, CRD scheduled a mandatory dispute resolution session for July 2021 with Activision, but Activision never appeared, nor attempted to reschedule. 3-ER-535. Activision does not contend otherwise. CRD concurrently sought a tolling agreement that would have reasonably limited CRD's risks regarding the EEOC decree and paused CRD's limitations period for filing suit. AB-SER-225-30. When negotiations over the tolling agreement broke down, and in light of CRD's approaching statute of limitations deadline, CRD had no choice but to file suit in late July 2021. Between July and November 2021, after filing suit, CRD invited EEOC to participate in its mediation with Activision (which was not subject to the information-sharing rule), but EEOC never accepted the invitation. 3-ER-542-43.

Activision raised similar arguments challenging CRD's enforcement processes in the State Action, but was rejected by the trial court, ECF No. 49-3, Order Denying Activision's Motion for Summary Adjudication 20-33, and denied relief by the California Court of Appeal, Sagafi Decl., Ex. B, and California Supreme Court, Sagafi Decl., Ex. B, C. This Court should reject them as well.

III. CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's denial of CRD's motion to intervene, and remand with instructions to grant intervention for purposes of objecting to and appealing the consent decree.

Dated: December 21, 2022

By: */s/ Jahan C. Sagafi*
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Local Rules 32-1(b) and 32-2(b) because this brief contains 8,380 words excluding the parts of the brief exempted by Federal Rule of Appellate Procedure Rule 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: December 21, 2022

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ADDENDUM

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ADDENDUM

UNITED STATES CODE

42 U.S. Code § 2000e-5. Enforcement provisions

(a) POWER OF COMMISSION TO PREVENT UNLAWFUL EMPLOYMENT PRACTICES

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e–2 or 2000e–3 of this title.

(b) CHARGES BY PERSONS AGGRIEVED OR MEMBER OF COMMISSION OF UNLAWFUL EMPLOYMENT PRACTICES BY EMPLOYERS, ETC.; FILING; ALLEGATIONS; NOTICE TO RESPONDENT; CONTENTS OF NOTICE; INVESTIGATION BY COMMISSION; CONTENTS OF CHARGES; PROHIBITION ON DISCLOSURE OF CHARGES; DETERMINATION OF REASONABLE CAUSE; CONFERENCE, CONCILIATION, AND PERSUASION FOR ELIMINATION OF UNLAWFUL PRACTICES; PROHIBITION ON DISCLOSURE OF INFORMAL ENDEAVORS TO END UNLAWFUL PRACTICES; USE OF EVIDENCE IN SUBSEQUENT PROCEEDINGS; PENALTIES FOR DISCLOSURE OF INFORMATION; TIME FOR DETERMINATION OF REASONABLE CAUSE

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain

such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

(c) STATE OR LOCAL ENFORCEMENT PROCEEDINGS; NOTIFICATION OF STATE OR LOCAL AUTHORITY; TIME FOR FILING CHARGES WITH COMMISSION; COMMENCEMENT OF PROCEEDINGS

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or

local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) [1] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) STATE OR LOCAL ENFORCEMENT PROCEEDINGS; NOTIFICATION OF STATE OR LOCAL AUTHORITY; TIME FOR ACTION ON CHARGES BY COMMISSION

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) TIME FOR FILING CHARGES; TIME FOR SERVICE OF NOTICE OF CHARGE ON RESPONDENT; FILING OF CHARGE BY COMMISSION WITH STATE OR LOCAL AGENCY; SENIORITY SYSTEM

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(3)

(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this subchapter, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

(B) In addition to any relief authorized by section 1981a of this title, liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

(f) CIVIL ACTION BY COMMISSION, ATTORNEY GENERAL, OR PERSON AGGRIEVED; PRECONDITIONS; PROCEDURE; APPOINTMENT OF ATTORNEY; PAYMENT OF FEES, COSTS, OR SECURITY; INTERVENTION; STAY OF FEDERAL PROCEEDINGS; ACTION FOR APPROPRIATE TEMPORARY OR PRELIMINARY RELIEF PENDING FINAL DISPOSITION OF CHARGE; JURISDICTION AND VENUE OF UNITED STATES COURTS; DESIGNATION OF JUDGE TO HEAR AND DETERMINE CASE; ASSIGNMENT OF CASE FOR HEARING; EXPEDITION OF CASE; APPOINTMENT OF MASTER

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or

(d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b), is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application

by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the

employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) INJUNCTIONS; APPROPRIATE AFFIRMATIVE ACTION; EQUITABLE RELIEF; ACCRUAL OF BACK PAY; REDUCTION OF BACK PAY; LIMITATIONS ON JUDICIAL ORDERS

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such

unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)

(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e–3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e–2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e–2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) PROVISIONS OF CHAPTER 6 OF TITLE 29 NOT APPLICABLE TO CIVIL ACTIONS FOR PREVENTION OF UNLAWFUL PRACTICES

The provisions of chapter 6 of title 29 shall not apply with respect to civil actions brought under this section.

(i) PROCEEDINGS BY COMMISSION TO COMPEL COMPLIANCE WITH JUDICIAL ORDERS

In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) APPEALS

Any civil action brought under this section and any proceedings brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, title 28.

(k) ATTORNEY'S FEE; LIABILITY OF COMMISSION AND UNITED STATES FOR COSTS

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 24(a). Intervention of Right

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Rule 24(b). Permissive Intervention

(b) Permissive Intervention.

(1) In General. On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a federal statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) By a Government Officer or Agency. On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) Delay or Prejudice. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

Rule 24(c). Notice and Pleading Required.

(c) Notice and Pleading Required. A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 3(a). Filing the Notice of Appeal

(a) Filing the Notice of Appeal.

(1) An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d).

(2) An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal.

(3) An appeal from a judgment by a magistrate judge in a civil case is taken in the same way as an appeal from any other district court judgment.

(4) An appeal by permission under 28 U.S.C. § 1292(b) or an appeal in a bankruptcy case may be taken only in the manner prescribed by Rules 5 and 6, respectively.

Rule 3(c). Contents of the Notice of Appeal

(c) Contents of the Notice of Appeal.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X";

(B) designate the judgment—or the appealable order—from which the appeal is taken; and

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.

(4) The notice of appeal encompasses all orders that, for purposes of appeal, merge into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal.

(5) In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates:

(A) An order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or

(B) an order described in Rule 4(a)(4)(A).

(6) An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal.

(7) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice, or for failure to properly designate the judgment if the notice of appeal was filed after entry of the judgment and designates an order that merged into that judgment.

(8) Forms 1A and 1B in the Appendix of Forms are suggested forms of notices of appeal.

Rule 4(a)(1)(B). Appeal in a Civil Case

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

(i) the United States;

(ii) a United States agency;

(iii) a United States officer or employee sued in an official capacity; or

(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf — including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

CALIFORNIA GOVERNMENT CODE

Cal. Gov. Code § 12900 *et seq.*

This part may be known and referred to as the "California Fair Employment and Housing Act."

Cal. Gov. Code § 12920

It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability,

medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status.

It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment for these reasons foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advancement, and substantially and adversely affects the interests of employees, employers, and the public in general.

Further, the practice of discrimination because of race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, veteran or military status, or genetic information in housing accommodations is declared to be against public policy.

It is the purpose of this part to provide effective remedies that will eliminate these discriminatory practices.

This part shall be deemed an exercise of the police power of the state for the protection of the welfare, health, and peace of the people of this state.

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December, 2022, I filed the foregoing brief electronically in PDF format through the Court's CM/ECF system. I further certify that service of this document on counsel for EEOC and Activision was accomplished via the Court's CM/ECF system

Dated: December 21, 2022

By: */s/ Jahan C. Sagafi*
Jahan C. Sagafi

Attorney for Proposed Intervenor-Appellant California Civil Rights Department (formerly Department of Fair Employment and Housing