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May 31, 1985

United States of America v. Nassau County
77 Civ. 1881 (FXA)

Dear Judge Altimari:

Enclosed please find copies of papers we are serving today in the above-captioned case in support of a motion for intervention and class certification. As you will see, it is our current intention to seek intervention on the issue of relief. We are fully satisfied with and intend to join in and rely upon the analysis that the United States has done on the issue of the validity of the NCPOST. We do not intend to duplicate discovery taken by the United States or evidence presented by the United States. We, therefore, believe that the intervention we seek will not delay the trial currently scheduled for July 15, 1985.

However, we do feel that intervention on relief is necessary to safeguard the rights of intervenor-plaintiffs and the classes they represent to be free from the adverse effects of discriminatory hiring. To the present time, the United States has failed to commit to seek what we believe to be adequate relief and has stated that it cannot even tell us when a decision on relief will be made.

Respectfully,

Max R. Shulman

Hon. Frank X. Altimari,
United States District Court,
Eastern District of New York,
Uniondale Avenue and Hempstead Turnpike,
Uniondale, New York 11554

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, and NASSAU COUNTY GUARDIANS ASSOCIATION, INC., WINSTON T. GREEN, LAWRENCE A. HADDART, and LORENZO ROCHESTER, Applicants for Intervention as Plaintiffs, v. NASSAU COUNTY, et al., Defendants.	Civil Action No. 77 C. 1881 (FXA)

MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE AND FOR CLASS CERTIFICATION

Preliminary Statement

This Memorandum is submitted on behalf of three black citizens, Winston T. Green, Lawrence A. Haddart and Lorenzo Rochester, and an association of black police officers, The Nassau County Guardians Association, Inc. ("Guardians"). They seek to intervene in this case as plaintiffs on behalf of themselves and as representatives of two classes of proposed intervenors, on the issue of the

final relief to be granted after trial on the merits, scheduled for July 15, 1985.

The United States is currently challenging the validity of the Nassau County Police Officer Selection Test ("NCPOST"), which was administered by the Nassau County Police Department ("NCPD") in December 1983 for the purpose of compiling a list of eligible applicants for the NCPD. The United States asserts that the NCPOST violates the terms of the April 21, 1982, Consent Decree ("Consent Decree") entered into between the United States and defendants in this action, because of the test's adverse impact on blacks and Hispanics, and defendants' failure to validate the examination.

Despite its position on the invalidity of the NCPOST, the United States agreed that on May 31, 1985, defendants could commence the swearing in of 105 police officers--consisting, to the best of our information, of 104 white applicants, one black applicant and no Hispanic applicants--selected on the basis of the NCPOST. To the present date, the United States has failed to commit to seek relief in these proceedings which would require defendants to cure any adverse impact caused by the May 31, 1985, hiring through an additional hiring scheduled for September 1985 so that, when the May 31, 1985, and September 1985 hirings are added together, blacks and Hispanics will

The Consent Decree explicitly recognizes that hiring by the NCPD that is undertaken pursuant to an invalid and discriminatory examination--like the May 31, 1985, hiring pursuant to the NCPOST--shall be without "adverse impact" upon minority group applicants, and that the United States and defendants expect that minority group members will be appointed to the NCPD "at levels which approximate their proportions in the pool of qualified applicants". (Consent Decree, ¶¶ 6, 16.) If the United States fails to seek adequate relief to cure the May 31, 1985, hiring, it will be acting in a manner which conflicts with the intent of the parties in entering the Consent Decree and with its obligation to assure compliance with the objectives of the Decree.

At present, there is no way to know what the United States will ultimately do or when it will do it. On May 28, 1985, the United States informed intervenors that it was not prepared at this time to make any commitment as to the relief it will seek; on May 30, it stated that it could not provide a date by which that decision will be made. (See Declaration of Richard T. Seymour, dated May 30, 1985 ("Seymour Decl."), ¶ 8.) Given the substantial interests of intervenors in the question of relief, the failure of the United States to commit itself one way or the other or even to give a date by which it will decide, and the short time

remaining before trial, intervenors are faced with no choice but to seek to intervene now.

Short of intervention, there is no way to assure that if the NCPOST is declared invalid after trial, adequate relief will be sought to cure the adverse impact of the May 31, 1985, hiring. Nor is there any assurance that relief will be sought which, as contemplated by the Consent Decree, would result in future minority applicants to the NCPD being hired "at levels which approximate their proportions in the pool of qualified applicants". (Consent Decree, ¶ 16.)

The intervenors represent, we submit, the very people for whose benefit this action was commenced in the first place--minority applicants who took the NCPOST and present minority officers on the NCPD--and they represent the people whose interests will be most adversely affected if the relief they seek is not granted. There is no other group of intervenors or parties who will be able adequately to represent intervenors' interests or as vigorously press for the relief necessary to cure any adverse impact of the discriminatory and unlawful actions of defendants. The United States--the only party now in this lawsuit that might

have done so--has failed either to commit itself one way or the other or even to say when it will decide. 2/

Statement of Facts

The United States commenced this action against defendants on September 21, 1977, alleging violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, et seq. ("Title VII"), the State and Local Fiscal Assistance Act of 1972, as amended, 31 U.S.C. §§ 1221, et seq. (the "Revenue Sharing Act"), the Omnibus Crime Control and Safe Streets Act of 1968, as amended 42

2/ It should be emphasized that intervenors are wholly satisfied with the effort to date of the United States on the issue of the validity of the NCPOST. As the Answers of Plaintiff United States To The Nassau County Defendants' Set of Interrogatories Accompanying First Request For Admission, appended to the Complaint in Intervention as Exhibit A, overwhelmingly demonstrate, the United States has compiled a compelling array of flaws, omissions and deficiencies in defendants' validation studies of the NCPOST, which indicate that defendants face a virtually impossible burden of proving the NCPOST valid. (See Exhibit A, pp. 2-50.) Intervenors do not intend to duplicate the discovery taken by the United States or the evidence presented by the United States at trial. To the extent the United States presses its analysis of the NCPOST's invalidity, intervenors intend fully to join in and rely upon it.

What concerns intervenors at this juncture is that, having made such a devastating showing of invalidity and adverse impact, the United States will fail to seek any meaningful relief. Intervenors believe, in short, that intervention is the only way they can adequately safeguard their interests to be free from the effects of discrimination.

U.S.C. § 3766(c)(3) ("Safe Streets Act"), and the Fourteenth Amendment to the Constitution of the United States. The parties, "desirous of eliminating any disadvantage to blacks, Hispanics and females that may have resulted from any past practice with respect to job opportunities in the NCPD", entered into a Consent Decree on April 21, 1982. (Consent Decree, Preamble ¶ 3.) The Consent Decree provides that Nassau County "shall not use a written examination . . . unless the County and the United States agree, or absent such agreement the County demonstrates . . ., that such . . . test either does not have an adverse impact upon blacks, Hispanics and females, or has been validated in accordance with Title VII and with [the Uniform Guidelines on Employee Selection Procedures, 28 C.F.R. 50.14, 29 C.F.R. 1607, 31 C.F.R. 51.53 ('Uniform Guidelines')] or successor guidelines". (Consent Decree, ¶ 6.) The Decree further provides that "[t]his Court shall retain jurisdiction of this action" for the purpose of assuring defendants' "full and complete compliance" with Title VII and the strictures of the Decree. (Consent Decree, ¶ 82.)

In an effort to comply with the Consent Decree, defendants engaged the Educational Testing Service of Princeton, New Jersey ("ETS"), to prepare a written examination to be used in the selection of police officers. ETS prepared the NCPOST, a 165 question multiple choice

examination purporting to measure eleven "cognitive abilities" allegedly required for the successful performance of police work. ETS "validated" the NCPOST as predictive of job performance and issued a final report on November 13, 1984, detailing the validation studies. (See Exhibit A, pp. 5-6.) ETS validated the NCPOST as suitable for use on a "rank-ordering" of scores basis. 3/ (Id., p. 5.)

On December 10, 1983, defendants administered the NCPOST to 19,585 applicants. When the results of the test were made public in late May or early June 1984, the adverse impact on blacks and Hispanics was immediately apparent. The passing rate for blacks was only 40% of the passing rate for whites and the passing rate for Hispanics was less than 60% of the passing rate for whites. (See Exhibit A, Appendix A.)

In view of the adverse impact of the NCPOST on blacks and Hispanics, the United States immediately commenced discovery on the issue of the NCPOST's validity, pursuant to this Court's continuing jurisdiction under the Consent Decree. Based on that discovery, on May 22, 1985,

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3/ Hiring based on a rank-ordering of scores means that, barring some reason for disqualification, the highest scoring applicant is hired first, the second highest scoring applicant is hired second, etc.

the United States determined to challenge the NCPOST. Trial has been scheduled for July 15, 1983.

Although the United States has undertaken to challenge the NCPOST, it has to the present date failed to commit to seek relief necessary adequately to protect the interests of intervenors. (See Seymour Decl., ¶¶ 6-8.) In April 1985, the United States and defendants, with the consent of this Court, agreed that defendants could proceed with plans to swear in 105 officers--104 of whom, we believe, are white--on May 31, 1985. (Id., ¶ 6.) Because the May 31, 1985, hiring is based on the NCPOST, counsel for intervenors requested that the United States seek relief which (through the September 1985 hiring) would cure any adverse impact of the May 31, 1985, hiring. Counsel for intervenors indicated that intervenors would not seek to intervene if the United States agreed adequately to protect their interests by seeking the requested relief. (See Seymour Decl., ¶ 8; letter from Richard T. Seymour to John M. Gadzichowski, May 23, 1985, appended to the Complaint in Intervention as Exhibit B.)

On May 28, 1985, the United States informed intervenors that it was not now prepared to make any commitment on the issue of relief--including the relief requested by intervenors--and on May 30, 1985, the United States refused to give intervenors a date by which a decision on

relief would be made. (See Seymour Decl., ¶ 8.) As a result, this motion for leave to intervene and for class certification has become necessary, in order to protect the interests of intervenors and the classes they represent.

POINT I

THE PROPOSED INTERVENORS MEET ALL OF THE REQUIREMENTS FOR INTERVENTION SET FORTH IN FED. R. CIV. P. 24.

The proposed intervenors are clearly entitled to intervene as a matter of right under Fed. R. Civ. P. 24(a). 4/ First, intervenors have a substantial interest in the subject of this proceeding and the relief to be granted herein, particularly as it relates to the May 31 and September 1985 hirings. Second, intervenors' interests will be prejudiced unless they are permitted to intervene on the issue of relief, because (given the current position of the

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4/ Rule 24(a) of the Federal Rules of Civil Procedure provides in pertinent part:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

United States on the issue) no existing party adequately represents their interests. Third, the present application is timely made.

A. Intervenors have a substantial interest in the subject of this proceeding and the relief to be granted.

The subject of the present proceeding is the validity of the NCPOST administered by defendants in 1983 and taken by intervenors Winston T. Green and Lawrence A. Haddart. The May 31, 1985, hiring--which involves 105 officers, all but one of whom are white--is based on the NCPOST. Although the United States has decided to go to trial to have the NCPOST declared invalid under the Consent Decree, the United States has failed to commit to seek relief in this proceeding which (through the September 1985 hiring) would cure any adverse impact of the May 31, 1985, hiring. Nor has the United States committed to seek any specific relief with regard to future hirings.

The intervenors and the classes they represent obviously have a direct interest in assuring that the adverse impact of the May 31, 1985, hiring be cured through subsequent hirings and that any hirings in the future conform to the mandates of the Consent Decree, which contemplates that minority applicants to the NCPD be hired "at levels which approximate their proportions in the pool of qualified applicants". (Consent Decree, ¶ 16.) If such

relief is not granted--most immediately, if adequate action is not taken in subsequent hirings to cure the adverse impact of the May 31, 1985, hiring--black and Hispanic applicants to the NCPD, such as intervenors Green and Haddart and the class they represent, will lose the protections conferred upon them by the Consent Decree, including the right to be considered for hire by the NCPD on an equal footing with whites.

A lack of adequate curative action will also adversely affect current black police officers, such as intervenors Rochester and the Guardians and the class they represent. Without discrimination-free hiring, the percentage of blacks in the NCPD will not increase; in fact, it will decrease. 5/ With relatively few black officers in the NCPD it is easier for the NCPD to discriminate in the types of assignments given to officers. Courts recognize that "a variety of employment practices . . . such as psychological impact upon minority employees from a work environment heavily charged with discrimination, fall within the protection of the expansive statutory language". United States v.

5/ There could not be a more telling demonstration of this than the May 31, 1985, hiring. If left uncured, that hiring will deprive blacks of an almost one-third increase in their numbers on the NCPD--an increase to which they are clearly entitled.

City of Buffalo, 457 F. Supp. 612, 631 (W.D.N.Y. 1978). Similarly, in Gray v. Greyhound Lines, East, 545 F.2d 169, 176 (D.C. Cir. 1976), the court held that black bus drivers had standing to challenge their employer's hiring practices since the hiring practices, which limited the number of black employees, resulted in their subjection to discriminatory treatment in the workplace and supported an atmosphere of discrimination.

Finally, the recruitment efforts of the Guardians will be hampered unless the adverse impact of hiring pursuant to the invalid NCPOST is cured. Because of the NCPOST's adverse impact on blacks, potential black applicants to the NCPD will be discouraged from applying. As a result, fewer blacks and more whites will be hired, thereby perpetuating the pattern of and opportunity for discrimination within the NCPD.

B. Intervenors' interests will be prejudiced unless they are permitted to intervene on the issue of relief because no existing party adequately represents their interests on that issue.

It is clear that intervenors will suffer serious harm if they are not permitted to intervene. The May 31, 1985, hiring of 104 white officers and one black officer is based on a clearly invalid test. The United States is committed to establishing that fact at trial. Absent a

further commitment by the United States (which it has not yet given) to seek relief through the September 1985 hiring to eliminate the adverse impact of the May 31, 1985, hiring, the ability to cure that adverse impact could be permanently lost.

Obviously, the presence of 105 new police recruits on the NCPD will make fewer positions available for black and Hispanic applicants discriminated against in the May 31, 1985, hiring. Applicants discriminated against will lose currently existing employment opportunities and the opportunity for on-the-job experience without any assurance of sufficient available positions in the future. See Gavagan v. Danbury Civil Service Commission, 32 Empl. Prac. Dec. (CCH) ¶ 33,674 (D. Conn. 1983). Black police officers now on the NCPD will also be severely harmed by the increased opportunity for discrimination within the Department and by the negative impact on the conditions of their employment. As a result, the applicant intervenors might well lose the opportunity to be hired at all by the NCPD while the police officer intervenors will lose their right to be members of a police department free from the adverse effects of discriminatory hiring.

Moreover, there is no existing party that adequately represents the intervenors' interests with regard to relief. The current relief plan agreed to by the United

States and defendants relating to the May 31, 1985, hiring is, in broad brush, as follows: upon a declaration that the NCPOST is invalid, a new test will be created to be given to all new NCPD applicants as well as to all persons hired on May 31, 1985; the seniority dates of the May 31, 1985, hires will then be adjusted based on the results of this new test; however, no provision will be made to hire a proportionately increased number of blacks or Hispanics to cure the adverse impact of the May 31, 1985, hiring, or to hire any current applicant who has been discriminated against by the existing test.

The manifold problems with such a relief plan are immediately apparent. First, it ignores the fact that the preparation and administration of a new valid examination will take a long time--months, if not years. During that time, the NCPD has plans to hire a substantial number of additional officers. The Department has indicated that it will hire 100 new officers in September 1985 and a total of 500 officers based on the NCPOST. The parties' current relief plan would allow those hirings to go forward, pursuant to what would be by then a judicially declared invalid examination with a proven discriminatory effect on minorities. Such a result, which would increase rather than decrease the impact of discrimination within the NCPD, obviously is totally unacceptable.

Second, the current relief plan does not address the problem of retaining those hires who would not have been hired, based on their scores on the new, valid test. Unqualified officers--as measured by a valid examination--could remain on the NCPD, quite possibly filling positions that should have been filled by qualified minority applicants--again, as measured by a valid test.

Third, an adjustment to seniority does not compensate for the on-the-job experience that will be gained by those officers hired pursuant to the invalid NCPOST--and lost by minority applicants discriminated against by the NCPOST--during the time it will take to prepare and administer a new, valid examination. The months or years of additional practical experience will necessarily benefit the May 31, 1985, hires both in taking the new examination and in their comparative on-the-job performance with the new hires, any adjustment to seniority notwithstanding.

Fourth, the current plan would leave in place and undisturbed the discriminatory racial and ethnic makeup of the NCPD which results from the May 31, 1985, hiring.

Fifth, and perhaps most callous, the current plan creates the distinct possibility that particular black and Hispanic applicants discriminated against by the NCPOST--the most grievously harmed victims of the NCPD's discrimination--will never receive adequate relief. That is because

there is no way to know when future vacancies will be filled by the NCPD or whether, when those vacancies are filled, the applicants who have now been discriminated against will be identifiable or available for hiring. (See Seymour Decl., ¶ 9.)

In contrast, the relief urged by intervenors--in particular, that the adverse impact of the May 31, 1985, hiring be rectified by proportionately increased hiring of blacks and Hispanics in September with back pay and retroactive seniority--is a wholly workable, predictable and assured way of solving the problems created by the NCPOST. 6/ Moreover, it carries out the mandate of the

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6/ Indeed, this precise type of relief has been explicitly endorsed by the Second Circuit as an appropriate and effective means of curing the adverse impact of an invalid and discriminatory hiring examination. See, e.g., Berkman v. City of New York, 705 F.2d 584 (2d Cir. 1983); Guardians Association v. Civil Service Commission, 630 F.2d 79 (2d Cir. 1980), cert. denied, 452 U.S. 940 (1981). In Guardians, the Court recognized that where "interim hiring provisions . . . are to be used prior to the development and approval of a valid selection procedure . . . one appropriate way to assure Title VII compliance on an interim basis is to avoid a disparate racial impact". 630 F.2d at 109. In Berkman, the Court noted that an interim hiring order cures the adverse impact of a discriminatory and invalid examination if it "(a) orders the hiring of members of the plaintiff class whom the court has found to be victims of the defendant's discrimination, and (b) calculates the number of victims to be so hired . . . by reference to the percentage the victims constituted of the total applicant pool". 705 F.2d at 595.

Consent Decree that any hiring that is undertaken pursuant to an invalid and discriminatory examination shall be without "adverse impact" upon minority group applicants, and fulfills the expectation underlying the Consent Decree that minority group members should be appointed to the NCPD "at levels which approximate their proportions in the pool of qualified applicants". (Consent Decree, ¶¶ 6, 16.) Under the parties' current relief plan, it is unlikely that either of those two objectives will be achieved.

Obviously, since the United States has failed to commit to seek the relief requested by intervenors, has refused even to give a date by which a decision on relief will be made, and has embarked on a course which threatens to leave intervenors without sufficient relief, the United States is not adequately representing intervenors' interests on the relief issue.

C. The present application is timely made.

The NCPOST was administered on December 10, 1983. The results were made public in late May or early June 1984. It was not until May 22, 1985, that the United States decided to proceed with a challenge to the NCPOST. And it was only on May 28, 1985, that the United States informed intervenors that it could not now commit to seek relief which (through the September 1985 hiring) would cure the adverse impact of the May 31, 1985, hiring. Thus, only a

very short time elapsed between the events provoking this application for intervention--the United States' decision to proceed with a challenge to the NCPOST without committing to appropriate relief--and the filing of the application.

It is well-settled that the timeliness of a motion for leave to intervene is measured from the date that the rationale for intervention arose. See United States v. Hooker Chemicals & Plastics Corp., 540 F. Supp. 1067, 1082 (W.D.N.Y. 1982). Cf. Legal Aid Society v. Dunlop, 618 F.2d 48 (9th Cir. 1980). Here, the rationale arose on May 28, 1985, when the United States informed intervenors of its position on relief, and this motion followed on May 31, 1985, only three days thereafter.

Moreover, intervention will cause no delay in this proceeding. Intervenors currently plan fully to join in the United States' challenge to the validity of the NCPOST, and are seeking to intervene only on the issue of relief. Through a Freedom of Information Act request, partially granted on May 22, 1985, intervenors have sought access to--and will rely on--the discovery already taken by the United States. Intervenors do not intend to duplicate that discovery or the evidence presented by the United States. Intervention will, therefore, not delay the trial now scheduled for July 15, 1985.

Even if intervenors are not entitled to intervene as a matter of right--and by all indications they are so entitled--this is clearly a proper case for permissive intervention under Fed. R. Civ. P. 24(b). 7/ The same issues of law are involved in the United States' claim and in intervenors' claim, viz. the adverse impact and validity of the NCPOST, and the relief to be granted to cure any hiring done pursuant to the NCPOST. As mentioned above, intervention on the issue of relief will not delay or prejudice the adjudication of the rights of the existing parties. Indeed, it is precisely because the intervenors' rights will be prejudiced without a commitment by the United States to seek appropriate relief, that this intervention has become necessary.

7/ Fed. R. Civ. P. 24(b) provides in pertinent part:

> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

POINT II

THE INTERVENORS MEET ALL THE REQUIREMENTS NECESSARY TO MAINTAIN THIS ACTION AS A CLASS ACTION PURSUANT TO FED. R. CIV. P. 23.

Both classes sought to be represented by intervenor-plaintiffs meet the prerequisites to a class action set forth in Fed. R. Civ. P. 23(a). 8/ In addition, both classes here may be certified under Fed. R. Civ. P. 23(b)(2). 9/

8/ Fed. R. Civ. P. 23(a) provides in pertinent part:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

9/ Fed. R. Civ. P. 23(b) provides in pertinent part:

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> > (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . .

A. Both the class of present unhired black and Hispanic applicants for the NCPD and the class of current black NCPD police officers are so numerous that joinder of all members is impracticable.

The class of present unhired black and Hispanic applicants to the NCPD consists, potentially, of thousands of people. Records indicate that 3,946 black applicants and 2,675 Hispanic applicants took the December 1983 NCPOST test for police officer hiring. (See Exhibit A, Appendix A.) Similarly, the class of current black police officers of the NCPD is numerous, consisting of approximately 65 officers.

B. In both classes sought to be represented by intervenors there are questions of law and fact common to the class.

Each current unhired black and Hispanic applicant has applied and taken the NCPOST test for police officer hiring. The NCPOST clearly has a substantial adverse impact on blacks and Hispanics, and the United States is committed to establishing that fact at trial. In order to assure that all black and Hispanic applicants are not denied their equal opportunity for employment with the NCPD, not only must the NCPOST be struck down (as the United States is seeking to do), but relief must be granted (which the United States so far has not committed to) to cure, by later hirings, the adverse impact of any hiring that is done pursuant to the

NCPOST. Similar relief is necessary to assure that all current black police officers on the NCPD are not denied their right to be members of a police department free from the adverse effects of discriminatory hiring.

The May 31, 1985, hiring pursuant to the NCPOST will only aggravate the racial underrepresentation of blacks and Hispanics on the NCPD and will only increase the discrimination and opportunity for discrimination in the Department. The United States has failed to commit to any action which will adequately rectify these problems. The relief sought by intervenors is therefore necessary, and will redound to the benefit of all black and Hispanic applicants and all black officers. Absent such relief, all black and Hispanic applicants and all black officers will be adversely affected by the NCPOST and the May 31, 1985, hiring in the same way.

C. The claims or defenses of the representative parties of both classes are typical of the claims or defenses of the classes.

It is the case with each class sought to be represented that the representative intervenors can only prevail on their own claims by prevailing generally as to the claims of their classes.

D. The intervenors will fairly and adequately protect the interests of their classes.

The interests of intervenors Green and Haddart are identical to the interests of the class of unhired black and Hispanic applicants to the NCPD. They can prevail on their own behalf only by prevailing generally on behalf of their class. Consequently, they have no conflict with the interests of the class. Similarly, intervenors Rochester and the Guardians have direct personal interests in correcting the adverse impact of hiring pursuant to the invalid NCPOST examination and can prevail on their own behalf only by prevailing generally on behalf of their class. Thus, they have no conflicts with the interests of the class they seek to represent.

E. Defendants have acted or refused to act on grounds generally applicable to the classes sought to be represented by intervenors, thereby making appropriate injunctive relief with respect to the classes as a whole.

By hiring applicants on the basis of the invalid and discriminatory NCPOST, defendants have acted in a manner that will damage the interests of the members of both classes. Consequently, each member of both classes seeks to obtain relief from this Court requiring that steps be taken to cure the adverse impact of the May 31, 1985, hiring. The United States has so far failed to commit to seek such

relief. Absent such relief, defendants will be allowed to use a court adjudicated invalid test as a means of perpetuating discrimination and the opportunity for discrimination within the NCPD.

Conclusion

For all the foregoing reasons, intervenors submit that their motion to intervene and their motion to certify the classes intervenors represent should be granted.

May 31, 1985

Respectfully submitted,

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