No. 15-31

In The
Supreme Court of the United States

ALFREDO PRIETO,

Petitioner,

v.

HAROLD C. CLARKE, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION TO INTERVENE OR JOIN ON BEHALF OF MARK ERIC LAWLOR

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MOTION TO INTERVENE OR JOIN

Mark Eric Lawlor ("Movant") hereby respectfully moves to intervene—or, in the alternative, to join—in the above-captioned matter as an additional petitioner.[1] In this case, petitioner Alfredo Prieto challenges Virginia's practice of assigning inmates sentenced to death to extreme and atypical conditions of long-term solitary confinement without affording due process. Like petitioner, movant was convicted of capital murder in Virginia and sentenced to death. The Virginia Department of Corrections thereafter assigned movant to conditions of solitary confinement identical to those experienced by petitioner, pursuant to the same practice challenged by petitioner. Movant shares petitioner's interest in this case, is represented by the same counsel, and seeks the same relief. Accordingly, granting this motion will not alter the interests involved in this action, nor change the relief sought. It will entail no new evidentiary submissions and no new arguments on the merits. Movant's intervention or joinder will thus cause no prejudice to respondents nor necessitate any delay in this case.

Movant's intervention or joinder is necessary in light of recent developments that threaten to render petitioner inadequate to represent movant's substantial interest in this case. On August 19, 2015, shortly after this Court called for a response to the petition for a writ of certiorari, Virginia scheduled petitioner's execution for October 1, 2015. This case therefore presents the unusual circumstance where Virginia could

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[1] Petitioner consents to movant's intervention or joinder in this action. Respondents have advised petitioner that they do not consent to movant's intervention or joinder and will file an opposition.

prevent review of its own practice unless another inmate similarly situated to petitioner but whose execution is not imminent—like movant—is permitted to participate.[2]

This Court previously has granted parties leave to intervene or join in analogous circumstances in which the addition of a similarly-situated party was necessary, *inter alia*, to ensure a continued interest in the case. Movant also meets all the criteria under which appellate courts, including this Court, typically evaluate whether intervention or joinder is proper, using Federal Rules of Civil Procedure 24 or 21 as a guide. Movant has an obvious and substantial interest in petitioner's action, which seeks injunctive relief that, as a practical matter, would afford him identical relief. Movant also has an important additional interest in this case, having previously dismissed an identical claim in separate litigation against respondents subject to the specific right to "refile that claim in the event the *Prieto* decision is reversed." Order Granting Stipulation of Voluntary Dismissal Pursuant to F.R.C.P. 41(a)(1)(A)(ii) at 1, *Porter, et al. v. Clarke*, No. 14-cv-1588 (E.D. Va. Mar. 19, 2015), ECF No. 31 ("*Porter* Voluntary Dismissal Order"). Because those interests would be substantially prejudiced if movant is not permitted to intervene or join, the motion should be granted.

BACKGROUND

Movant is a Virginia inmate who, like petitioner, was convicted of capital murder and sentenced to death. Like all Virginia inmates sentenced to death, movant was directly assigned "to conditions of extreme isolation that 'differ in almost every

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[2] Movant only first filed his petition for a writ of habeas corpus under 28 U.S.C. § 2254 in federal district court on June 8, 2015. *See Lawlor v. Davis*, 15-cv-113 (E.D. Va. June 8, 2015), ECF No. 20. His case remains pending in district court.

meaningful respect' from the conditions experienced by all other 39,000 inmates in Virginia." Pet.2 (citation omitted). Movant was placed into those uniquely severe conditions in 2011. Like petitioner, he has never received any assessment of whether his conditions of confinement are appropriate given his individual circumstances.

In October 2012, petitioner filed an action under 42 U.S.C. § 1983, alleging, *inter alia*, that his ongoing confinement in extreme conditions of solitary confinement without due process violated the Fourteenth Amendment. *Id.* at 10. The district court agreed, and granted petitioner's motion for summary judgment in November 2013. *Id.* Respondents appealed.

Prior to the Fourth Circuit's decision in this case, several other Virginia inmates sentenced to death, including movant, filed a separate action against certain respondents here under 42 U.S.C. § 1983, raising, *inter alia*, an identical due process claim to that raised by Mr. Prieto. *See* Complaint ¶ 14, *Porter, et al. v. Clarke*, No. 14-cv-1588 (E.D. Va. Nov. 20, 2014), ECF No. 1 ("Defendants continue to deny Death Row inmates other than Mr. Prieto, including the plaintiffs, due process of law … leading to the same due process offenses as were found unconstitutional in *Prieto*.").

On March 10, 2015, a divided panel of the Fourth Circuit reversed the district court's decision in petitioner's case. *See* Pet.App.1a. Nine days later, on March 19, 2015, movant voluntarily dismissed his own due process claim without prejudice, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii), "by reason of the United States Court of Appeals for the Fourth Circuit's recent decision in *Prieto v. Clarke*."

Porter Voluntary Dismissal Order at 1.[3] Pursuant to the parties' agreement in that case, however, the district court's dismissal order expressly provided that movant "may refile that claim in the event the *Prieto* decision is reversed." *Id.* On July 6, 2015, Mr. Prieto filed a petition for writ of certiorari. On July 20, 2015, respondents waived any response. On August 10, 2015, this Court called for a response to the petition, which is due on September 9, 2015.

Meanwhile, on June 30, 2015, the Fourth Circuit affirmed the denial of Mr. Prieto's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. *See Prieto v. Zook*, 791 F.3d 465, 465 (4th Cir. 2015). The court of appeals subsequently denied rehearing on July 28, 2015. Mr. Prieto's time to file a petition for a writ of certiorari regarding the Fourth Circuit's decision on his habeas claim will not expire until October 26, 2015. Nonetheless, on August 19, 2015, Virginia scheduled petitioner's execution for October 1, 2015, pursuant to Virginia's atypical practice of scheduling an inmate's execution prior to this Court's orderly resolution of that inmate's petition for a writ of certiorari during federal habeas proceedings.[4]

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[3] Federal Rule of Civil Procedure 41(a)(1)(A)(ii) permits a plaintiff to "dismiss an action without a court order by filing … a stipulation of dismissal signed by all parties who have appeared." Fed. R. Civ. P. 41(a)(1)(A)(ii).

[4] As far as movant is aware, no other state schedules inmates to be executed before this Court can review an inmate's petition for a writ of certiorari in the ordinary course during federal habeas proceedings. Numerous past and present members of this Court have strongly criticized Virginia's anomalous practice. *See, e.g.*, *Breard v. Greene*, 523 U.S. 371, 380 (1998) (Stevens, J., dissenting) ("There is no compelling reason for refusing to follow the procedures that we have adopted for the orderly disposition of noncapital cases."); *id.* at 381 (Breyer, J., dissenting) ("Like JUSTICE STEVENS, I can find no special reason here to truncate the period of time that the Court's rules would otherwise make available."); *Muhammad v. Kelly*, 558 U.S. 1019, 1019 (2009) (Stevens,

Since learning of Mr. Prieto's execution date, movant has proceeded with all due speed to seek intervention or joinder in this Court. Out of an abundance of caution, movant first sought reassurance from respondents that participating in this case would not violate a current stay in his separate litigation against respondents, nor prevent him from maintaining his Eighth Amendment claims in that litigation. On September 1, 2015, following both parties' agreement, the district court entered an order to that effect. *See* Order, *Porter v. Clarke*, 14-cv-1588 (E.D. Va. Sept. 1, 2015), ECF No. 100. This motion to intervene or join was filed approximately one week later.

ARGUMENT

Although the Federal Rules of Civil Procedure do not apply to appellate courts, *see* Fed. R. Civ. P. 1, this Court has consistently recognized that the policies underlying Federal Rules of Civil Procedure 21 and 24 provide guidance to appellate courts, including this Court, in evaluating whether a motion to intervene or join should be granted. Movant readily meets those standards.

This Court's precedents confirm that intervention or joinder is proper here. This Court previously has granted motions to intervene or join both at the certiorari and merits stages. *See, e.g.*, *Gonzales v. Oregon*, 546 U.S. 807 (2005); *Hunt v. Cromartie*, 525 U.S. 946 (1998); *Hunter v. Ohio ex rel. Miller*, 396 U.S. 879 (1969); *Banks v. Chicago Grain Trimmers Ass'n*, 389 U.S. 813 (1967). Moreover, it has specifically permitted joinder or intervention in analogous circumstances to address potential mootness issues,

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J., with whom Ginsburg & Sotomayor, JJ. joined, respecting the denial of the petition for writ of certiorari) (criticizing "the perversity of [Virginia's practice] of executing inmates before their appeals process has been fully concluded")

including those resulting from the potential death or dissolution of existing parties. *See, e.g.*, *Gonzales*, 546 U.S. at 807 (granting additional terminally-ill patients leave to intervene in litigation regarding the Oregon Death With Dignity Act, where existing terminally-ill parties might die before proceedings reached their conclusion); *Nat'l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 1133, 1133 (2012) (permitting new business owners to join where named business owner was entering bankruptcy). Because movant's participation in this case accords with Rule 24 and 21, as well as this Court's precedent, the motion should be granted.

I. THE MOTION TO INTERVENE SHOULD BE GRANTED

Intervention is warranted under Federal Rule of Civil Procedure 24. *See Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., AFL-CIO, Local 283 v. Scofield*, 382 U.S. 205, 216 n.10 (1965) (noting policies underlying Rule 24 "may be applicable in appellate courts."). Appellate courts routinely apply Rule 24 in determining whether or not to grant motions to intervene at the appellate stage. *See, e.g.*, *United States v. Am. Bar Ass'n*, 118 F.3d 776, 779 (D.C. Cir. 1997) ("[I]ntervention in the court of appeals is governed by the same standards as in the district court." (citations omitted)). *But see United States v. Laraneta*, 700 F.3d 983, 985 (7th Cir. 2012) (citing cases in which appellate courts have permitted intervention even outside of Rule 24's strictures). Because movant meets the criteria to justify intervention as of right under Rule 24(a) and permissive intervention under Rule 24(b), as well as this Court's precedent, intervention is warranted.

A. Intervention As Of Right

Rule 24(a)(2) provides for intervention as of right when a party "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." Fed. R. Civ. P. 24(a)(2). Generally, a "party seeking to intervene as of right must meet four requirements: (1) the applicant must timely move to intervene; (2) the applicant must have a significantly protectable interest relating to the property or transaction that is the subject of the action; (3) the applicant must be situated such that the disposition of the action may impair or impede the party's ability to protect that interest; and (4) the applicant's interest must not be adequately represented by existing parties." *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003); *see also Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 732 (D.C. Cir. 2003) (applying similar standard). Courts construe these requirements liberally, "in favor of intervention." *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998); *Purnell v. City of Akron*, 925 F.2d 941, 950 (6th Cir. 1991) ("Rule 24 is broadly construed in favor of potential intervenors."). In this case, movant satisfies all four requirements to justify intervention as of right.

1. Timeliness

As an initial matter, this motion is timely. Although courts evaluating timeliness consider "the totality of the circumstances," *United States v. Alcan Aluminum, Inc.*, 25 F.3d 1174, 1181 (3d Cir. 1994), "[p]rejudice is the heart of the timeliness requirement," *Jones v. Caddo Parish Sch. Bd.*, 735 F.2d 923, 946 (5th Cir. 1984) (en banc). Indeed,

"courts are in general agreement that an intervention of right under Rule 24(a) must be granted unless the petition to intervene would work a hardship on one of the original parties." *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1073 (5th Cir. 1970) (citation omitted). Here, because movant possesses the same interest as petitioner, seeks the same relief, and will present no new arguments on the merits, respondents will not be prejudiced in any manner by movant's intervention. And because briefing on this motion will conclude even before briefing is complete on the petition for a writ of certiorari, intervention will not delay proceedings at all.

By any measure, movant also acted quickly after learning that Virginia had scheduled petitioner for execution, threatening to leave him without any party to adequately protect his substantial interest in this case. *See Geiger v. Foley Hoag LLP Ret. Plan*, 521 F.3d 60, 65 (1st Cir. 2008) (intervention timely despite intervenor's substantial prior knowledge of action because intervenor had reason to believe her interests would be protected by an existing party until shortly before filing). Here, movant advised respondents of his interest in intervention only days after learning of Mr. Prieto's execution date and filed this motion shortly thereafter.

2. Significant Protectable Interest

Movant also has a significant protectable interest in this action. As this Court has acknowledged, the 1966 revisions to the Federal Rules of Civil Procedure expanded the circumstances in which an absentee's interest is sufficient to warrant intervention. *See Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 133-34 (1967). Today, "[i]f an absentee would be substantially affected *in a practical sense* by the

determination made in an action, he should, as a general rule, be entitled to intervene." *Id.* at 134 n.3 (emphasis altered) (quoting Fed. R. Civ. P. 24 advisory committee's note to 1966 amendments); *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967) ("[T]he 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process."). For several reasons, that standard is met here.

First, movant has an obvious interest in the questions presented in this case, which govern whether respondent may maintain Virginia inmates sentenced to death in uniquely severe conditions of long-term solitary confinement without affording them due process. Because movant is identically situated to petitioner, this Court's resolution of the questions presented necessarily would determine whether movant is entitled to identical equitable relief under the Fourteenth Amendment. *See Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011) ("To demonstrate a significant protectable interest, an applicant must establish that the interest is protectable under some law and that there is a relationship between the legally protected interest and the claims at issue."). Movant's interest in avoiding extreme conditions of solitary confinement absent due process plainly is substantial. *See Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring) ("Years on end of near-total isolation exact a terrible price.").

Second, movant has a particularized legal interest in the outcome of this case in light of the disposition of his identical due process claim against respondents. Pursuant to both parties' agreement in that case, the district court dismissed movant's claim

without prejudice in light of the Fourth Circuit's decision in *this* matter, subject to movant's right to "refile that claim *in the event the* Prieto *decision is reversed*." *Porter* Voluntary Dismissal Order at 1 (emphasis added). Because that right is tied to the outcome of this case, it necessarily would be prejudiced if this case is mooted by Virginia's execution of petitioner. That interest is sufficient to warrant intervention. *See Cascade Natural Gas Corp.*, 386 U.S. at 135-36 (Rule 24's "interest" requirement satisfied where party has an interest in "'further proceedings' in pending actions").

Finally, other courts repeatedly have recognized that "the *stare decisis* effect of an adverse judgment constitutes a sufficient impairment to compel intervention." *Sierra Club v. Glickman*, 82 F.3d 106, 109-10 (5th Cir. 1996); *see also Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014) (permitting inmate sentenced to death to intervene in challenge to lethal injection protocol, because case could "establish unfavorable precedent that would make it more difficult for [Intervenors] to succeed on similar claims"). Here, the practical effect of *stare decisis* from the decision below is exacerbated because movant's ability to obtain this Court's review—even if he could refile his due process claim—is time-limited by his death sentence.

3. The Disposition Of This Action Would Impair Movant's Ability To Protect His Interest

For the reasons explained above, the disposition of this action without movant would significantly compromise movant's ability to protect his interests. If movant is not permitted to intervene and Virginia executes petitioner, movant's substantial interest in this case, including his specific right to "refile [his due process] claim in the event the *Prieto* decision is reversed," will be compromised. *Porter* Voluntary

Dismissal Order at 1. Moreover, if the decision below is left undisturbed by this Court, its *stare decisis* effects will, "*as a practical matter* impede [intervenor's] ability to protect [his] interest." *Purnell*, 925 F.2d at 949. That is sufficient to satisfy this prong. *See, e.g.*, *Roane*, 741 F.3d at 151; 7C Charles Alan Wright et al., *Federal Practice and Procedure* § 1909 (3d ed. 2007) (Rule 24 allows a person "who is so situated that disposition of the action may as a practical matter impair or impede the ability to protect that interest to intervene [as] of right").

4. Movant's Interests Would Not Be Adequately Represented By Existing Parties

Finally, it is clear that movant's interests will not be adequately represented by existing parties to this action if Virginia carries out its planned execution of the petitioner in this case. In that circumstance, movant's interests would not be represented at all. That necessarily would satisfy movant's "minimal" burden under this prong. *See Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (noting this "requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal."); *Purnell*, 925 F.2d at 950 ("[I]t is well established that if the interest of the absent party is not represented at all ... then she or he is not adequately represented." (citation and internal quotation marks omitted)).

Because all four criteria to intervene as of right are satisfied here, movant's motion to intervene should be granted.

B. Movant Meets The Requirements For Permissive Intervention

In the alternative, petitioner meets the requirements for permissive intervention. Federal Rule of Civil Procedure 24(b)(1)(B) provides that "[o]n timely motion, the court may permit anyone to intervene who … has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). In exercising its discretion to permit intervention, "the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

For the reasons discussed above, movant meets each of those criteria. First, movant's intervention is timely. *See supra* at 7-8. Second, because movant's legal claim is identical to petitioner's, his claim "shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Finally, because intervention would neither delay this proceeding, nor prejudice respondents in any way, *see supra* at 7-8, movant satisfies the requirements of Rule 24(b)(3).

C. Intervention Here Is Consistent With This Court's Precedents

This Court previously has granted motions to intervene in other cases in which the death or potential death of a named party threatens to leave other similarly-situated parties without adequate representation. In *Gonzales*, for instance, after 11 of 13 original terminally-ill patients passed away, this Court granted a motion to intervene by other terminally-ill patients, to ensure that their identical interest in the Oregon Death With Dignity Act was adequately represented. 546 U.S. at 807. As in this case, permitting intervention was both necessary to protect the substantial interests of

identically-situated parties and warranted in the absence of any prejudice to the other parties. Moreover, intervention was particularly appropriate in light of intervenors' terminal conditions, which may have left them without sufficient time to litigate a new action raising identical claims in order to obtain review from this Court.[5] Each one of those considerations is applicable here and weighs equally in favor of intervention.

II. ALTERNATIVELY, THE MOTION TO JOIN SHOULD BE GRANTED

Movant also moves, in the alternative, to join this action as an additional petitioner. Joinder under Federal Rule of Civil Procedure 21 is even broader than Permissive Intervention under Rule 24(b). Rule 21 provides that a court may join parties to an action "[o]n motion [of any party] or on its own … at any time [and] on just terms." Fed. R. Civ. P. 21; *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 832 (1989) (noting the policies behind Rule 21 apply to appellate courts). Indeed, this Court has frequently exercised its authority to add similarly-situated parties to avoid a potential mootness or other jurisdictional problem where doing so entails no prejudice to any party and requiring the movant "to start over in the District Court would entail needless waste and run[] counter to effective judicial administration." *Mullaney v. Anderson*, 342 U.S. 415, 417 (1952). Joinder is warranted here for identical reasons.

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[5] Although the case did not involve intervention in this Court, this Court also appeared to find intervention unobjectionable in *Baxter v. Palmigiano*, on facts nearly identical to this case. 425 U.S. 308, 316 (1976). In *Baxter*, inmates at California's San Quentin prison filed suit under 42 U.S.C. § 1983, alleging due process was violated when the prison allegedly failed to provide adequate procedural safeguards during disciplinary proceedings that could result in inmates' prolonged isolation. 425 U.S. at 310 & n.1. By the time the case reached this Court one of the two named plaintiffs had since been paroled, while the other had died. *Id.* at 310 n.1. This Court noted without objection, however, that the case could move forward because a similarly-situated plaintiff had intervened prior to the named plaintiff's death. *Id.*

This Court previously has permitted additional parties to join to avoid potential jurisdictional problems. *See, e.g.*, *Rogers v. Paul*, 382 U.S. 198, 199 (1965) (permitting students to join suit seeking to desegregate Fort Smith, Arkansas high schools where named plaintiffs either had graduated or were nearing graduation); *Mullaney*, 342 U.S. at 416-17 (permitting new parties to join to "remove … from controversy" a question of standing that had arisen for the first time before this Court); *see also Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 833 (1989) (affirming *Mullaney*'s analysis). As those cases reflect, the addition of parties for reasons of justice or sound judicial administration "represent[s] the exercise of an appellate power that long predates the enactment of the Federal Rules." *Newman-Green, Inc.*, 490 U.S. at 834.

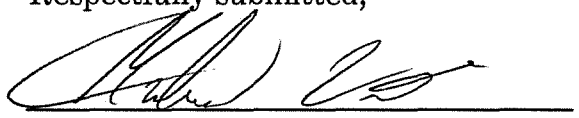
This Court recently exercised that authority in *National Federation of Independent Business v. Sebelius*, where this Court permitted certain similarly-situated business owners to join after the business of an existing plaintiff entered bankruptcy—raising concerns that her claim was moot. As the business owners explained in their motion in that case, this Court historically has granted motions to add parties to a case before this Court when such "special circumstances" arise, and "(1) the addition of the parties would 'in no wise embarrass' the opposing party; (2) an earlier joinder would not 'in any way' have 'affected the course of the litigation'; and (3) to dismiss the petition and require the new parties 'to start over in the District Court would entail needless waste and run[] counter to effective judicial administration.'" Unopposed Mot. for Leave to Add Parties Dana Grimes & David Klemencic at 1-4, *NFIB*, 132 S. Ct. 1133 (2012) (U.S. Nos. 11-393, 11-398, 11-400).

Each is true here. There is no prejudice to respondents from the addition of a similarly-situated party making an identical argument. For the same reason, movant's earlier joinder would not have affected the course of this litigation. And even if movant could start over in district court, it would entail needless waste and run counter to efficient judicial administration. Particularly given the "special circumstances" of this case—in which Virginia's execution of petitioner could prevent review of the Virginia practice petitioner is challenging—and given movant's identical interest in the questions presented, joinder is warranted to protect movant's substantial interest in this action and to permit this Court to reach the important questions presented.

CONCLUSION

For the foregoing reasons, the motion to intervene or join should be granted.

Respectfully submitted,



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