08-5171-cv (L)

Nos. 08-5171-cv (L), 08-5172-cv (xap), 08-5173-cv (xap),
08-5375-cv (xap), 08-5149-cv (con), 08-4639-cv (con)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff – Appellee – Cross-Appellant,

JANET CALDERO, CELIA I. CALDERON, MARTHA CHELLEMI, SALIH CHIOKE, ANDREW CLEMENT, KRISTEN D'ALESSIO, LAURA DANIELE, CHARMAINE DIDONATO, DAWN L. ELLIS, MARCIA P. JARRETT, MARY KACHADOURIAN, KATHLEEN LUEBKERT, ADELE A. McGREAL, MARGARET McMAHON, MARIANNE MANOUSAKIS, SANDRA D. MORTON, MAUREEN QUINN, HARRY SANTANA, CARL D. SMITH, KIM TATUM, FRANK VALDEZ, and IRENE WOLKIEWICZ,

Intervenors – Appellees – Cross-Appellants,

(Caption continued inside cover)

Appeal from the United States District Court
for the Eastern District of New York

BRIEF OF INTERVENORS-APPELLEES PEDRO ARROYO ET AL.

NAACP Legal Defense &
Educational Fund, Inc.

John Payton, Director-Counsel
Debo P. Adegbile
Matthew Colangelo
Joy Milligan
99 Hudson Street, 16th Floor
New York, NY 10013
212-965-2200

Joshua Civin
1444 I Street, NW, 10th Floor
Washington, DC 20005

(Continuation of caption)

PEDRO ARROYO, JOSE CASADO, CELESTINO FERNANDEZ, KEVIN LaFAYE, STEVEN LOPEZ, ANIBAL MALDONADO, JAMES MARTINEZ, WILBERT McGRAW, SILVIA ORTEGA DE GREEN, and NICHOLAS PANTELIDES,

Intervenors – Appellees

v.

JOHN BRENNAN, JAMES G. AHEARN, SCOTT SPRING, and DENNIS MORTENSEN,

Intervenors – Appellants – Cross-Appellees,

NEW YORK CITY DEPARTMENT OF EDUCATION, CITY OF NEW YORK, MARTHA K. HIRST, Commissioner, New York City Department of City Administrative Services, NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES,

Defendants – Appellees.

No. 08-5149-cv (con)

JOHN BRENNAN, JAMES AHEARN, SCOTT SPRING, DENNIS MORTENSEN, JOHN MITCHELL, and ERIC SCHAUER,

Plaintiffs – Appellants,

v.

ATTORNEY GENERAL OF THE UNITED STATES, ASSISTANT ATTORNEY GENERAL OF THE UNITED STATES FOR CIVIL RIGHTS, U.S. DEPARTMENT OF JUSTICE, NEW YORK CITY DEPARTMENT OF EDUCATION, CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES, MARTHA K. HIRST, Commissioner, New York City Department of City Administrative Services,

Defendants – Appellees,

(Caption continued on next page)

(Continuation of caption)

JANET CALDERO, CELIA I. CALDERON, MARTHA CHELLEMI, SALIH CHIOKE, ANDREW CLEMENT, KRISTEN D'ALESSIO, LAURA DANIELE, CHARMAINE DIDONATO, DAWN L. ELLIS, MARCIA P. JARRETT, MARY KACHADOURIAN, KATHLEEN LUEBKERT, ADELE A. McGREAL, MARGARET McMAHON, MARIANNE MANOUSAKIS, SANDRA D. MORTON, MAUREEN QUINN, HARRY SANTANA, CARL D. SMITH, KIM TATUM, FRANK VALDEZ, and IRENE WOLKIEWICZ,

Intervenors – Appellees,

PEDRO ARROYO, JOSE CASADO, CELESTINO FERNANDEZ, KEVIN LaFAYE, STEVEN LOPEZ, ANIBAL MALDONADO, JAMES MARTINEZ, WILBERT McGRAW, SILVIA ORTEGA DE GREEN, and NICHOLAS PANTELIDES,

Intervenors – Appellees.

No. 08-4639-cv (con)

RUBEN MIRANDA,

Plaintiff – Appellant,

v.

NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendant – Appellee.

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PRELIMINARY STATEMENT

Custodian and Custodian Engineer positions in New York City public schools are highly desirable jobs. These permanent civil service positions offer good pay, benefits, and job security, as well as extensive supervisory and operational opportunities. Yet, the New York City Board of Education has historically denied employment to minorities in these jobs, and as of the mid-1990s blacks and Hispanics held less than 8% of permanent positions, compared to their representation in the qualified labor pool of nearly 45%. Three civil service exams that the Board administered in 1985, 1989, and 1993 to screen job applicants had a severe adverse impact on black and Hispanic candidates and perpetuated this long-standing occupational segregation.

The history and persistence of racial discrimination in this job category prompted the United States to initiate a lawsuit against the City in 1996, alleging that the use of the three civil service exams violated Title VII of the Civil Rights Act of 1964.[1] The gross disparities in the challenged exams established an uncontested prima facie case of a Title VII disparate impact violation against blacks and Hispanics, and analysis from the federal government's experts raised

[1] The federal government's lawsuit also alleged that the City's recruitment practices for Custodians and Custodian Engineers violated Title VII by excluding women and minorities. The evidence of discrimination in the City's recruitment practices, and the effects of that discrimination, are discussed in more detail in the brief of Intervenors-Appellees-Cross-Appellants Janet Caldero et al.

doubts that the City would be able to satisfy its rebuttal burden by showing that the challenged exams identified the best candidates to serve in these posts. Moreover, an equally valid, less discriminatory alternative was available: Civil service law permitted the City to make "provisional" hires without reliance upon the challenged exams, and blacks and Hispanics held a larger percentage of these provisional jobs and performed equally as well as their permanent counterparts, although they did not receive the same job security or benefits.

Faced with ample evidence of a Title VII violation, the City agreed to a settlement in 1999 that provided permanent positions and retroactive seniority to, among others, blacks and Hispanics harmed by the discriminatory tests, all of whom had already been serving successfully as provisional employees. A decade later, this carefully circumscribed remedy for significant discrimination remains in limbo. When incumbent employees protested, the United States, with new counsel assigned after a change in presidential administration, shifted its position and announced that it would not defend the settlement fully. Because of this change in position, the Arroyo Intervenors—a group of black and Hispanic beneficiaries of the settlement—intervened to protect their own rights and to preserve Congress's intent that voluntary employer compliance, as through a settlement agreement, should be the "preferred means of achieving the objectives of Title VII." *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 515 (1986).

JURISDICTIONAL STATEMENT

This is an appeal from a judgment in three consolidated cases in the United States District Court for the Eastern District of New York: *United States v. New York City Board of Education*, Case No. 1:96-cv-00374-FB (E.D.N.Y.); *Brennan v. Ashcroft*, Case No. 1:02-cv-00256-FB (E.D.N.Y.); and *Miranda v. New York City Department of Education*, Case No. 1:06-cv-02921-FB (E.D.N.Y.). The district court (Judge Frederic Block) had subject-matter jurisdiction over the first action pursuant to 28 U.S.C. §§ 1331, 1345, and 42 U.S.C. § 2000e-6(b), and had subject-matter jurisdiction over the second and third actions pursuant to 28 U.S.C. §§ 1331, 1343, and 42 U.S.C. § 2000e-5(f)(3).

The district court's final judgment in the consolidated actions was entered on August 26, 2008. SPA 147-50 (Judgment).[2] All parties to this action except the Arroyo Intervenors filed timely notices of appeal or cross-appeal.[3] This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

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[2] Citations to "A __" are to the deferred Joint Appendix filed pursuant to Fed. R. App. P. 30(c). Citations to "SPA __" are to the deferred Special Appendix.

[3] A 4221 (Brennan Notice of Appeal); A 4223-24 (U.S. Notice of Appeal); A 4225-26 (City Notice of Appeal); A 4227-29 (Caldero Notice of Cross-Appeal); A 4427 (Brennan Notice of Appeal); A 4445 (Miranda Notice of Appeal); Fed. R. App. P. 4(a)(1)(B). The City subsequently withdrew its cross-appeal. *See* 2d Cir. Docket No. 08-5171-cv (L). On January 23, 2009, the Court consolidated the appeals and cross-appeals. *See id.*

STATEMENT OF ISSUES PERTINENT TO THE ARROYO INTERVENORS

I. The district court properly held that race-conscious remedies provided to the Arroyo Intervenors through the City's settlement of the United States's employment discrimination lawsuit did not violate Title VII, because there is no genuine dispute of fact that **(1)** the challenged civil service exams produced gross racial disparities, and black and Hispanic employees are manifestly underrepresented as Custodians and Custodian Engineers, and **(2)** the limited remedies to the Arroyo Intervenors did not establish racial quotas or otherwise unnecessarily trammel the interests of incumbent employees.

II. The district court properly held that the race-conscious remedies provided to the Arroyo Intervenors did not violate the Fourteenth Amendment because **(1)** uncontested evidence of a prima facie Title VII disparate impact violation in the challenged civil service exams provides a strong basis in evidence for the City's conclusion that it had a compelling interest in remedying its prior discrimination, and **(2)** the relief is narrowly tailored to serve that compelling interest.

III. The district court properly upheld the remedies provided to three of the Arroyo Intervenors, whom the Brennan Intervenors contended were not Hispanic, because it recognized that there was uncontested evidence that each of the three had a parent or grandparent who was born in Mexico or Puerto Rico.

STATEMENT OF THE CASE

At issue in these consolidated appeals is the lawfulness of permanent appointments and competitive seniority benefits provided in four paragraphs of a 1999 settlement agreement that resolved the United States's Title VII lawsuit against the New York City Board of Education.[4]

The United States initiated this lawsuit against the Board in January 1996. A 77-85 (U.S. Compl.). The complaint alleged that the City's recruiting and hiring practices for Custodians and Custodian Engineers in New York City public schools amounted to unlawful race and sex discrimination against minorities and women in violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-2). *Id.*

The United States's Title VII claims were resolved in a negotiated settlement agreement (the "Agreement") that the parties filed in the district court in February 1999. A 103-74 (Agreement). As pertinent to these consolidated appeals, the Agreement granted permanent appointments and retroactive seniority to a group of fifty-nine black, Hispanic, and female individuals (the "Offerees") who had been employed as provisional Custodians and Custodian Engineers as of 1993. A 105-10, 124-26 (Agreement ¶¶ 4-6, 13-16 & app. A); SPA 5, 26 (Order 5, 26).

[4] The United States's 1996 complaint named other New York agencies and officials as defendants. A 77-85 (U.S. Compl.). This brief collectively refers to the defendants in the 1996 action as the Board or the City.

The district court approved the Agreement and entered it as a consent judgment in February 2000; at the same time, it denied a motion to intervene by several white male incumbent employees who objected to the Agreement. A 415-66 (Order). The objectors appealed, and this Court vacated the district court's order, permitted the objectors to intervene, and remanded for reconsideration. *Brennan v. N.Y. City Bd. of Educ.*, 260 F.3d 123, 128-33 (2d Cir. 2001).

On remand, the objectors intervened as the Brennan Intervenors. A 624-26 (Order 6-8). Along with two other white male incumbent employees, they also initiated a second action against officials and agencies of the United States and the City of New York, alleging that the settlement of the first action violated Title VII and the Equal Protection Clause of the Fourteenth Amendment. A 4321-32 (Brennan Compl.). Another incumbent employee initiated a third action raising similar challenges. A 4435-43 (Miranda Compl.). The district court consolidated all three actions. A 719 (Order); A 3995 (Order).

In March 2002, the parties consented to the district court's approval of all provisions of the Agreement except paragraphs 13 to 16, which deal with the permanent appointments and retroactive seniority provided to the Offerees. A 575 (Order); A 107-10 (Agreement ¶¶ 13-16).

During post-remand discovery, after the United States indicated that it would not defend all of the relief provided by the Agreement, the district court permitted

two groups of Offerees to intervene. A 715-17 (Order); A 779 (Minute Entry); A 783 (Order); A 4425-26 (Order). The Caldero Intervenors are twenty-five Offerees who (with one exception) did not take a challenged exam. The Arroyo Intervenors are ten Offerees who took one or more of the challenged exams.[5]

After cross-motions for summary judgment and two fact hearings, the district court assessed the lawfulness of the challenged provisions of the Agreement in light of the Brennan Intervenors' Title VII and Fourteenth Amendment claims. As relevant to the Arroyo Intervenors, the court held that:

- Each of the Arroyo Intervenors was a member of a racial or ethnic minority group, SPA 31-32, 41-42 (Order 31-32, 41-42);

- The permanent appointments received by the Arroyo Intervenors were lawful under Title VII and the Fourteenth Amendment, SPA 42-50, 52-59, 64-75, 88-90 (Order 42-50, 52-59, 64-75, 88-90); SPA 101-16, 121-22 (Order 5-20, 25-26);

- The retroactive seniority received by the Arroyo Intervenors was lawful under Title VII and the Fourteenth Amendment to the extent that it affected eligibility for school transfers and temporary care assignments, SPA 42-50, 52-59, 64-75, 88-90 (Order 42-50, 52-59, 64-75, 88-90); SPA 101-16 (Order 5-20); SPA 147-50 (Judgment); and

- The retroactive seniority received by the Arroyo Intervenors would be unlawful under Title VII and the Fourteenth Amendment if it affected the order of any employee layoffs in the future, unless it could be established that the seniority dates constituted make-whole relief to actual victims of

[5] The Arroyo Intervenors are Pedro Arroyo, Jose Casado, Celestino Fernandez, Kevin LaFaye, Steven Lopez, Anibal Maldonado, James Martinez, Wilbert McGraw, Silvia Ortega de Green, and Nicholas Pantelides. A 783 (Order); A 4425-26 (Order).

employment discrimination, SPA 59-64, 75-78 (Order 59-64, 75-78); SPA 147-50 (Judgment).

As to the fourth of these holdings, the district court ultimately did not adjudicate the Arroyo Intervenors' assertion that each received make-whole relief as an actual victim of discrimination, because all parties agreed to stipulated layoff-seniority dates for the Arroyo Intervenors, thereby resolving the lawfulness of their seniority relief for layoff purposes. A 4211-14 (Order).[6]

The district court issued a final judgment summarizing its rulings on August 18, 2008. SPA 147-50 (Judgment). Each party except the Arroyo Intervenors filed a notice of appeal or cross-appeal.

STATEMENT OF THE FACTS

1. The Custodian and Custodian Engineer workforce. The Board of Education employs School Custodians and Custodian Engineers to oversee the operation, maintenance, repair, and custodial upkeep of the City's public schools. A 4350 (Lonergan Decl. ¶ 3). Each Custodian and Custodian Engineer supervises a cleaning, repair, and mechanical staff to manage the daily physical operation of each school. *Id.*

Custodians and Custodian Engineers can be hired either as permanent or provisional employees. Permanent Custodians and Custodian Engineers are

[6] The district court did make determinations as to the layoff-seniority date for eight other Offerees. SPA 137-43 (Order 11-17).

selected based on their scores on a written civil service exam. SPA 9 (Order 9). Applicants who pass the exam and meet other eligibility requirements are ranked and placed on a civil service list (an "eligible list") for possible appointment to permanent positions. *Id.*; N.Y. Civ. Serv. Law §§ 56, 61(1) (McKinney 2008); N.Y. Comp. Codes R. & Regs. tit. 4, §§ 3.6, 4.1 (2009). Once appointed, permanent employees have civil service rights and accrue seniority, which is used to determine pension benefits and is a factor in other employment benefits. A 222 (Lonergan Decl. ¶ 17).

Provisional employees are hired when vacancies exist but there is no current civil service list from which the Board may make permanent appointments. *See* N.Y. Civ. Serv. Law § 65(1) (McKinney 2008). The qualifications needed to be selected as a provisional Custodians and Custodian Engineers are the same as for permanent hiring, and provisionals receive the same training and orientation as permanent employees. A 220-21 (Lonergan Decl. ¶¶ 6, 12). However, provisionals have no civil service rights; therefore they do not accrue seniority, can be moved between school assignments at the Board's discretion, and may be fired at any time regardless of performance. A 222 (Lonergan Decl. ¶¶ 15-16).

Blacks and Hispanics have traditionally been, and continue to be, dramatically underrepresented as permanent Custodians and Custodian Engineers. As of 1993, blacks and Hispanics held less than 8% of permanent positions,

SPA 4-5 (Order 4-5), but made up nearly 45% of the qualified labor force. A 563 (Ashenfelter Decl. tbl. 8).[7] There is considerable record evidence that Custodian and Custodian Engineer positions have historically been racially-closed jobs and that ongoing racial harassment persists. *See, e.g.*, A 3065-68 (Stein Report 28); A 3070-71 (Brooks Decl. ¶¶ 4, 6); A 3074-75 (Coleman Decl. ¶¶ 5-6); A 3386-87, 3389-90 (A. Pantelides Dep. Tr. 53-54, 81-83).

2. Litigation of the United States's employment discrimination claims.

After several years of investigating the Board's employment practices, the United States sued the Board in January 1996 for discrimination in recruitment and hiring for permanent Custodian and Custodian Engineer positions. A 77-85 (U.S. Compl.). The United States alleged violations of Title VII through a pattern or practice of intentional discrimination, as well as the use of civil service examinations and recruiting practices that had an unjustified disparate impact on the basis of race.[8] A 78-84 (U.S. Compl. ¶¶ 8-19).

[7] The Brennan Intervenors challenged this qualified-labor-force calculation below, A 3468 (Brennan Resp. to Arroyo Statement of Facts ¶ 6), but for the reasons explained *infra* Part II.A.2, their objection does not create a genuine dispute of material fact.

[8] In the litigation below, the parties and the district court referred to the United States's claim that the civil service exams had a discriminatory adverse impact on blacks and Hispanics as the "testing claim," and referred to the United States's claim that the City's recruitment practices unlawfully excluded minorities and women as the "recruiting claim." SPA 8-9 (Order 8-9). Because the Arroyo

Title VII prohibits both intentional discrimination ("disparate treatment") as well as employment practices that have a "disparate impact" on protected groups and are not otherwise justified. 42 U.S.C. §§ 2000e-2(a), (k); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-32 (1971). The disparate impact approach is premised on recognition that "some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988). Where a prima facie case of a disparate impact violation is established based on evidence that an employment practice causes a significant adverse impact, use of that employment practice violates Title VII unless (1) the practice is job-related and consistent with business necessity, *and* (2) there are no equally valid, less-discriminatory alternatives. 42 U.S.C. § 2000e-2(k)(1)(A).

As pertinent to the Arroyo Intervenors, the United States challenged three civil service exams that the Board administered to select Custodians and Custodian Engineers: Exam 5040, administered in 1985 for Custodian hiring; Exam 8206, administered in 1989 for Custodian Engineer hiring; and Exam 1074, administered in 1993 for Custodian hiring. SPA 10-11 (Order 10-11). Each of the three challenged exams was a written, multiple-choice exam with the passing score pre-

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Intervenors each took one or more of the challenged civil service exams, this brief focuses on the claims and evidence relating to discrimination in those exams.

set at 70%. SPA 9 (Order 9); A 801-04 (Notice of Exam No. 5040); A 864-66 (Notice of Exam No. 8206); A 888-94 (Notice of Exam 1074).

The challenged exams produced gross and statistically-significant disparities as to black and Hispanic test-takers. SPA 11-12, 32-33, 49-50 (Order 11-12, 32-33, 49-50); SPA 101-16 (Order 5-20). All parties conceded the fact of adverse impact on black test-takers in all three challenged exams, and on Hispanic test-takers in two of the challenged exams. SPA 11-12, 32, 49-50 (Order 11-12, 32, 49-50). The district court held that there was a dispute of fact precluding summary judgment regarding the adverse impact of the remaining exam on Hispanic test-takers (Exam 8206). SPA 11-12, 33, 49 (Order 11-12, 33, 49). After an evidentiary hearing, the district court held that Exam 8206 did have an adverse impact on Hispanic test-takers, and the Brennan Intervenors have not appealed that finding of fact. SPA 101-16 (Order 5-20); Brennan Br. 47.

During discovery regarding the United States's testing claims, substantial evidence emerged that the challenged exams were not job-related and that less discriminatory alternatives were available.[9] The United States's experts concluded that the challenged exams were not job-related because the Board's procedures for

[9] The Brennan Intervenors contested the evidence of non-job-relatedness and less discriminatory alternatives. A 3480 (Brennan Resp. to Arroyo Statement of Facts ¶¶ 126-27, 130). For the reasons explained *infra* Part III.A.2, their objection has no bearing on the relevant questions of law.

developing the exams fell short of professional standards, and the material tested on the challenged exams did not accurately measure the knowledge, skills, and abilities needed to predict successful performance on the job. A 1963-75 (Siskin & Cupingood, Review of Statistical Methodology 1-13); A 1996-2004, 2019, 2029, 2045-47 (Pulakos & Schmitt, Analysis of New York City's School Custodian and School Custodian Engineer Examinations 1-9, 24, 34, 50-52); A 2101-05, 2115-31 (Pulakos & Schmitt, Supplemental Report 1-5, 15-31).

The United States's experts further concluded that provisional hiring was a less discriminatory alternative to the Board's civil service exam process. Provisional hiring resulted in a greater hire rate for black and Hispanic applicants—only 5.5% of permanent Custodian hires from the challenged exams were black or Hispanic, compared to 20.4% of provisional Custodian hires during the comparable time period. Similarly, only 4.0% of permanent Custodian Engineer hires, compared to 11.5% of provisional Custodian Engineer hires, were black or Hispanic during the same time period. A 1973-74, 1990-91 (Siskin & Cupingood, Review of Statistical Methodology 11-12 & exs. 13A, 13B); A 2163-66 (Siskin & Cupingood, Provisional Hiring as an Alternative Selection Device 1-4); *see also* A 2131-32 (Pulakos & Schmitt, Supplemental Report 31-32). The United States's experts also found that the performance of provisional employees on the job was statistically indistinguishable from that of permanent employees.

A 2165-66 (Siskin & Cupingood, Provisional Hiring as an Alternative Selection Device 3-4).

3. The 1999 settlement agreement. After three years of vigorous litigation, the United States and the Board agreed to resolve the discrimination claims in a negotiated settlement agreement submitted to the district court in February 1999. SPA 15 (Order 15). As relevant to these consolidated appeals, the Agreement granted permanent appointments and retroactive seniority to a group of fifty-nine Offerees who had been performing successfully as provisional Custodians and Custodian Engineers.[10] *See* SPA 15-16 (Order 15-16); A 105-10 (Agreement ¶¶ 4-6, 12-16). The Agreement did not direct Defendants to create any new permanent positions, but rather required them to appoint the Offerees to fill existing vacancies. A 513 (U.S. Mem. Supp. Settlement 42).

For each Offeree, the Agreement included a specific determination as to his or her date of retroactive seniority based on whether or not that individual took one of the challenged exams. Each of the Arroyo Intervenors took a challenged exam and received retroactive seniority dates as follows:

[10] All of the Offerees began employment with the Board as provisional employees. SPA 16 (Order 16). Most were still provisional as of the date of the Agreement, but some had previously acquired permanent status. *Id.* Two of the ten Arroyo Intervenors—Anibal Maldonado and Nicholas Pantelides—had attained permanent status prior to the Agreement, and the other Arroyo Intervenors received permanent status pursuant to the Agreement. A 4159 (Joint Letter 3).

Six of the ten Arroyo Intervenors—Jose Casado, Celestino Fernandez, Anibal Maldonado, James Martinez, Silvia Ortega de Green, and Nicholas Pantelides—received retroactive seniority pursuant to ¶ 15(b) of the Agreement, which provides that Custodian employees would receive the earlier of the date he or she was hired provisionally as a Custodian, or the median hire date for the challenged Custodian exam that he or she took. A 108-09 (Agreement ¶ 15(b)). The earlier of those dates for the six Arroyo Intervenors in question was their provisional hire date, which accordingly became their retroactive seniority date under the Agreement. A 108-09, 124-26 (Agreement ¶ 15(b) & app. A).

Three of the Arroyo Intervenors—Pedro Arroyo, Kevin LaFaye, and Wilbert McGraw—received retroactive seniority pursuant to ¶ 16(b) of the Agreement, which provides that certain provisional Custodian Engineers would receive seniority to April 1990, which reflected the earliest date for provisional Custodian Engineer hiring in a sample of provisional hires that was produced during discovery. A 109-10, 124-26 (Agreement ¶ 16(b) & app. A); A 93 (Calendar Entry for Disc. Conf., Apr. 9, 1997).

The remaining Arroyo Intervenor, Steven Lopez, received retroactive seniority to his provisional hire date as a Custodian Engineer pursuant to ¶ 15(a) of the Agreement. Paragraph 15(a) provides that "[i]f the Offeree did not take any of the Challenged Examinations *that correspond to his or her Current Job Title*, then

his or her retroactive seniority date shall be the date he or she was hired provisionally in his or her Current Job Title." A 108 (Agreement ¶ 15(a)) (emphasis added). Although he took both of the Custodian exams (Exam 5040 and Exam 1074), Lopez was employed as a provisional Custodian Engineer at the time of the Agreement. A 124-26 (Agreement app. A).

4. The Brennan Intervenors' challenge to the Agreement. As noted in the Statement of the Case, *supra* p. 6, a group of objectors to the Agreement (the Brennan Intervenors) were permitted to intervene after an appeal to, and remand by, this Court. *Brennan*, 260 F.3d at 128-33. The Brennan Intervenors argued that the permanent status and retroactive seniority that the Offerees received in paragraphs 13 to 16 of the Agreement were improper race-conscious remedies in violation of Title VII and the Equal Protection Clause. SPA 16, 31-39 (Order 16, 31-39). The Brennan Intervenors contended that the permanent appointments and seniority awards affected three interests they held in their own relative seniority dates: the ability to obtain transfers to new schools; the ability to receive temporary care assignments; and the order of discharge in the event of possible layoffs. SPA 18-23 (Order 18-23).

5. School transfers. The Board periodically gives permanent Custodians and Custodian Engineers the opportunity to bid for transfer to open school

buildings. SPA 18 (Order 18). Such transfers may result in a salary increase because larger schools provide a higher salary. *Id.*

Under the Collective Bargaining Agreement between the Board and the custodians' union, transfers are determined based on a combination of performance ratings and seniority. SPA 19 (Order 19). Permanent employees are assigned a seniority band based on their years of experience, and may apply for schools of a certain size based on their seniority band. *Id.* If more than one employee within the same seniority band applies for transfer to an open school, the candidate with the highest average performance rating receives the transfer. *Id.* If two or more candidates have equivalent performance ratings (defined as within one-quarter of a point of each other, on a five-point rating scale), the candidate with more seniority receives the transfer unless the school's principal vetoes the candidate or the candidate has received a low performance rating from his or her regional manager. *Id.*

6. Temporary care assignments. When there is a shortage of personnel and the Board is unable to assign a Custodian or Custodian Engineer to every school that needs one, the Board staffs those vacancies using a system called temporary care assignments ("TCA"). SPA 20 (Order 20); A 4354 (Lonergan Decl. ¶ 15). Under the TCA program, a permanent Custodian or Custodian Engineer who is already assigned to one school takes on temporary responsibility for a second

school and earns a portion of the salary for that school, but is not required to work any additional weekly hours. SPA 20 (Order 20). The rules governing TCAs are not included in the Collective Bargaining Agreement, and placement on the TCA list is not a matter of contractual right. *Id.*

All permanent Custodians and Custodian Engineers who have completed their one-year probationary period are eligible for TCAs within the borough in which they currently work. *Id.* Eligible employees are placed on the appropriate borough list in the order that they complete their probationary period. *Id.* When a TCA becomes available, the Board offers it to the employee at the top of the applicable list. On completion of the assignment, the employee returns to the bottom of the applicable list. SPA 20-21 (Order 20-21).

The record is unclear regarding whether the award of retroactive seniority affected the Offerees' initial placement on the TCA lists after implementation of the Agreement. SPA 21 & n.22 (Order 21 & n.22). The district court treated the contradictory evidence on this point as falling short of a dispute of material fact, because the effect on the Brennan Intervenors was, at most, "nominal." SPA 21, 58-59, 75 (Order 21, 58-59, 75).

7. Seniority as a factor in the event of layoffs. Layoffs of custodial employees are to be made "in the inverse order of original appointment on a permanent basis." N.Y. Civ. Serv. Law § 80(1) (McKinney 2008). No layoffs

have occurred, and as noted in the Statement of the Case, *supra* p. 8, the effect of the Agreement on any possible future layoffs is not at issue in this appeal with regard to the Arroyo Intervenors, because the parties stipulated in the district court to layoff-seniority dates for the Arroyo Intervenors. A 4211-14 (Order).

8. Intervention by the Arroyo Intervenors and Caldero Intervenors. During the course of the post-remand litigation of the Brennan Intervenors' challenge, the United States modified its position several times with regard to the lawfulness of the Agreement's provisions. In April 2002, the attorneys for the United States who originally negotiated the Agreement and submitted it to the district court withdrew their appearances and were replaced with new counsel. A 581-82 (Notice of Withdrawal of Counsel); A 583-84 (Notice of Appearances of Counsel). Under new counsel, and based on no new evidence, the United States decided it would no longer defend the Agreement's remedies for Offerees who had not taken one of the challenged exams. A 578 (U.S. Mem. Opp. Mot. for Prelim. Inj. 2 & n.2). When they became aware of this change in position, a group of the affected Offerees—the Caldero Intervenors—intervened to protect their interests. A 715-17 (Order).

The United States changed its position a second time in a September 2003 response to a discovery request, and indicated that it would no longer defend the lawfulness of retroactive seniority provided to an additional group of Offerees, all of whom were previously included in the list of Offerees that the United States had

contended, in April 2002, *were* lawfully entitled to relief. A 1110-48, 3330-37 (U.S. Resps. to Pl.-Intervenors' 1st Contention Interrogs. No. 1, 3(a)-(d), & attached relief chart). Each of the Arroyo Intervenors is one of the group of Offerees whose remedies the United States indicated that it was no longer defending. The district court granted intervention to permit the Arroyo Intervenors to defend the lawfulness of their relief under the Agreement. A 779 (Minute Entry); A 4425-26 (Order).

9. The district court's judgment. After cross-motions for summary judgment and two fact hearings, the district court held in pertinent part that the Arroyo Intervenors' receipt of permanent appointments and retroactive seniority was lawful under both Title VII and the Fourteenth Amendment for all non-layoff purposes. SPA 1-91 (Order); SPA 97-125 (Order); SPA 127-46 (Order). The district court issued a final judgment summarizing its rulings on August 18, 2008. SPA 147-50 (Judgment). These consolidated appeals followed.

SUMMARY OF THE ARGUMENT

A public employer may lawfully adopt carefully circumscribed remedies in voluntary settlement of a Title VII lawsuit where, as here, that employer is confronted with strong evidence that its prior hiring decisions were tainted by racial discrimination.

On appeal, the Brennan Intervenors do not contest that the challenged civil service exams produced gross racial disparities sufficient to demonstrate a prima facie case of a Title VII disparate impact violation. Rather, they argue that such evidence provides inadequate support for race-conscious remedial measures under Title VII and the Fourteenth Amendment. Their argument is incorrect.

The race-conscious provisions of the Agreement are valid under Title VII because there is no dispute of fact that black and Hispanic employees were manifestly underrepresented in the Custodian and Custodian Engineer workforce and had long been so in the past. In addition, the Agreement did not unnecessarily trammel the interests of incumbent employees because it was a focused, one-time remedy that did not create an absolute bar to any employee's advancement. The Brennan Intervenors' contention that Title VII only permits a settlement agreement to include make-whole relief to actual victims of discrimination is groundless.

The race-conscious provisions of the Agreement are also valid under the Fourteenth Amendment because they are narrowly tailored to meet a compelling state interest. The uncontested evidence of a prima facie case of a Title VII disparate impact violation in the challenged civil service exams provides a strong basis in evidence that race-conscious relief was necessary to remedy past discrimination. Moreover, additional evidence supports the City's compelling remedial interest, including expert reports indicating that it would be difficult, if

not impossible, for the City to defend the challenged exams as valid means to select highly qualified Custodians and Custodian Engineers. The race-conscious relief was narrowly tailored to serve the City's compelling interest because it was a limited, one-time remedy for a small group of individuals who were already successfully performing the same job as provisional employees.

Finally, each of the Arroyo Intervenors was properly included in the settlement. The district court properly rejected the Brennan Intervenors' contention that three of the Arroyo Intervenors were not Hispanic. As the district court recognized, there was uncontested evidence that each of the three had a parent or grandparent who was born in Mexico or Puerto Rico, which is sufficient to establish ethnicity under settled authority and federal guidelines.

The Brennan Intervenors seek to prohibit public employers from ever taking voluntary steps to redress racial discrimination in their workforces unless the employer concedes past intentional discrimination. This principle would defeat Congress's intent to encourage employers to comply voluntarily with Title VII, and would contravene the Supreme Court's clear pronouncement that state actors are not required to convict themselves of discrimination before taking action to avoid or remedy a violation. Congress and the Supreme Court do not share the Brennan Intervenors' cramped view of the remedies available in settlement of a Title VII lawsuit, and this Court should decline to adopt it as well.

ARGUMENT

I. Standard of Review.

The standard of review of a district court's decision on cross-motions for summary judgment is de novo. *Nat'l Awareness Found. v. Abrams*, 50 F.3d 1159, 1164 (2d Cir. 1995).

II. The permanent appointments and retroactive seniority received by the Arroyo Intervenors are lawful under Title VII.

Applying the standard set forth by the Supreme Court in *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 631-39 (1987), and *United Steelworkers of America v. Weber*, 443 U.S. 193, 197, 208 (1979), the district court held that the Arroyo Intervenors' permanent appointments and retroactive seniority dates for the purposes of school transfers and temporary care assignments were lawful under Title VII because the Agreement (1) is justified by a manifest imbalance in a traditionally segregated job category; (2) is intended to attain, not maintain, a balanced work force; and (3) does not unnecessarily trammel the interests of white employees. SPA 42-50, 55-59 (Order 42-50, 55-59); SPA 116 (Order 20); SPA 145 (Order 19); SPA 147-50 (Judgment).

The Brennan Intervenors have only appealed the district court's holdings on the "manifest imbalance" and "unnecessary trammeling" factors. Brennan Br. 59-66. Because the Brennan Intervenors do not meet their burden to demonstrate a

genuine dispute of material fact regarding either factor, *see Johnson*, 480 U.S. at 626-27, the Court should affirm the district court's Title VII holdings.

The Brennan Intervenors argue in the alternative that it was improper for the district court to apply the Supreme Court's holdings in *Johnson* and *Weber* to the race-conscious provisions of the Agreement. Although *Johnson* and *Weber* arose in the context of an employer's voluntary affirmative action plan, the framework established in those cases applies to the race-conscious remedies contained in the Agreement. *See Local No. 93*, 478 U.S. at 518; *Kirkland v. N.Y. State Dep't of Corr. Servs.*, 711 F.2d 1117, 1129-30 (2d Cir. 1983). Accordingly, the district court also correctly held that Title VII does not prohibit an employer from providing race-conscious remedies pursuant to a settlement agreement that may extend beyond make-whole relief to actual victims of discrimination. SPA 52-55 (Order 52-55).

A. There is no dispute of material fact regarding the existence of a manifest racial imbalance in the Custodian and Custodian Engineer workforces.

The Brennan Intervenors argue that the district court erred in finding a manifest imbalance in the Custodian and Custodian Engineer workforces. *See* Brennan Br. 59-65. Their argument is without merit. Under *Johnson* and *Weber*, race-conscious remedies provided by the Agreement are "justified by the existence of a 'manifest imbalance' that reflect[s] underrepresentation" of black and

Hispanic employees in Custodian and Custodian Engineer positions. *Johnson*, 480 U.S. at 631 (quoting *Weber*, 443 U.S. at 197).

1. The district court properly relied on evidence of discrimination in the challenged exams.

The district court based its manifest imbalance ruling on evidence of a prima facie case of a Title VII disparate impact violation in the challenged exams. SPA 44-50 (Order 44-50); SPA 116, 124-25 (Order 20, 28-29). A prima facie case is established by statistical evidence that "reveals a disparity so great that it cannot be accounted for by chance." *Waisome v. Port Auth. of N.Y. & N.J.*, 948 F.2d 1370, 1375 (2d Cir. 1991). One method this Court uses to evaluate prima facie disparities is the "four-fifths" test, which provides that evidence of a selection rate for any minority group that is less than four-fifths of the selection rate for whites will be considered evidence of adverse impact. *Id.* at 1375-76; 29 C.F.R. § 1607.4(D); SPA 49 (Order 49). All three of the challenged exams produced large and statistically-significant disparities between black and Hispanic test-takers and white test-takers sufficient to establish a prima facie case. SPA 11-12, 33, 50 (Order 11-12, 33, 50); SPA 101-16 (Order 5-20).

On appeal, the Brennan Intervenors do not contest that each of the challenged exams produced gross disparities that establish a prima facie case of unlawful discrimination against black and Hispanic applicants. The Brennan Intervenors instead argue that this evidence of discrimination does not meet the

"manifest imbalance" requirement in *Johnson* and *Weber*; in their view, that requirement can only be met through a comparison of the representation of minorities on the job and in the relevant labor market. Brennan Br. 59-61. This argument is foreclosed by the Supreme Court's holding in *Johnson* and contrary to controlling Second Circuit precedent.

The Supreme Court held in *Johnson* that evidence of a manifest imbalance "need not be such that it would support a prima facie case against the employer," and noted that an employer was not required to meet the more demanding prima facie burden because "[a]pplication of the 'prima facie' standard in Title VII cases . . . could inappropriately create a significant disincentive for employers to adopt an affirmative action plan." *Johnson*, 480 U.S. at 632-33. Rather, *Johnson* permitted the employer to meet its burden through a comparison of the representation of minorities on the job and in the workforce. In so holding, however, the Court explicitly stated that race-conscious measures were *also* justified if the higher prima facie standard was met: "Of course, when there is sufficient evidence to meet the more stringent 'prima facie' standard, be it statistical, nonstatistical, or a combination of the two, the employer is free to adopt an affirmative action plan." *Id.* at 633-34 n.11. *Johnson* thus made clear that a comparison of the representation of minorities on the job and in the workforce is a

sufficient, but not necessary, basis for voluntary race-conscious measures under Title VII.

Pre-*Johnson*, this Court anticipated the Supreme Court's conclusion when it held that "a showing of a *prima facie* case of employment discrimination through a statistical demonstration of disproportionate racial impact constitutes a sufficiently serious claim of discrimination to serve as a predicate for a voluntary compromise containing race-conscious remedies." *Kirkland*, 711 F.2d at 1130; *accord Bushey v. N.Y. State Civil Serv. Comm'n*, 733 F.2d 220, 228 (2d Cir. 1984). The Brennan Intervenors ignore this controlling authority. They also ignore persuasive authority in other courts of appeals that have more recently relied on *Johnson* to hold, as did the district court below, that a prima facie case of a Title VII disparate impact violation provides the necessary predicate for race-conscious employment decisions. *See, e.g.*, *Davis v. City of San Francisco*, 890 F.2d 1438, 1443-44, 1448 (9th Cir. 1989); *see also* 3 Lex K. Larson, *Employment Discrimination* § 62.04[2], at 62-21 & n.27 (2d ed. 2008).

The Brennan Intervenors argue that *Johnson* referred only to a prima facie case of a Title VII disparate treatment violation, whereas the district court here relied on a prima facie case of a Title VII disparate impact violation. Brennan Br. 60-61. But nothing in *Johnson*'s language limits its holding to the disparate treatment context. *See Johnson*, 480 U.S. at 633-34 n.11. And even if *Johnson*'s

language were so limited, the distinction the Brennan Intervenors attempt to draw is a distinction without a difference: A statistical showing of racial disparities that is sufficient to establish a prima facie case of a Title VII disparate impact violation is generally also sufficient—as it is in this case—to establish a prima facie case of a Title VII pattern-and-practice disparate treatment violation. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977); *Segar v. Smith*, 738 F.2d 1249, 1266 (D.C. Cir. 1984) ("A pattern or practice disparate treatment case shares with a typical disparate impact suit the allegation that an employer's practices have had a systemic adverse effect on members of the plaintiff class."); *cf. Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 160 (2d Cir. 2001) ("As with the liability phase of a pattern-or-practice disparate treatment claim, statistical proof almost always occupies center stage in a prima facie showing of a disparate impact claim.").

The district court's conclusion that race-conscious relief in a settlement agreement may permissibly be based on evidence of a prima facie case of a Title VII disparate impact violation also accords with the underlying premise of *Johnson* and *Weber*, which held that "taking race into account was consistent with Title VII's objective of 'break[ing] down old patterns of racial segregation and hierarchy.'" *Johnson*, 480 U.S. at 628 (quoting *Weber*, 443 U.S. at 208) (alteration in original). As the Supreme Court and Congress have long recognized, the Title

VII disparate impact standard is as critical in breaking down patterns of racial hierarchy as the statute's disparate treatment standard. *Griggs*, 401 U.S. at 431 ("[Title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."); *see also* 42 U.S.C. §§ 2000e-2(a), (k)(1)(A).

This Court should reject the Brennan Intervenors' overly-narrow reading of *Johnson*, and affirm the district court's finding that the evidence of gross racial disparities in the challenged exams warrants the race-conscious relief in the Agreement.

2. Overwhelming evidence of an imbalance of blacks and Hispanics employed as Custodians and Custodian Engineers compared to their representation in the applicable labor force supports the district court's holding.

Even if the Brennan Intervenors are correct that the manifest imbalance requirement may only be met using evidence of a disparity between the representation of minorities on the job and in the relevant labor market, the district court's holding should be affirmed. There is overwhelming record evidence of a wide imbalance of blacks and Hispanics employed by the Board as permanent Custodians and Custodian Engineers compared to their representation in the applicable labor force. Although the district court did not base its decision on this ground, this Court may affirm the lower court's judgment on a basis not relied

upon below if supported by the record. *Drax v. Reno*, 338 F.3d 98, 105-06 (2d Cir. 2003); *Arlinghaus v. Ritenour*, 622 F.2d 629, 638 (2d Cir. 1980).

In determining whether an imbalance exists under the job-market approach, the applicable comparison is between the percent of minorities employed in the pertinent positions and the percent of minorities in the area labor market with relevant experience or qualifications. *Johnson*, 480 U.S. at 631-32. In 1993, minorities represented only 8% of permanent Custodians and Custodian Engineers. SPA 4-5 (Order 4-5). By contrast, the United States's expert in this action, Dr. Orley Ashenfelter, calculated that in 1993 blacks and Hispanics with the appropriate background accounted for 21.4% and 23.1%, respectively, of the external labor pool—for a total of 44.5%. A 547-52, 563 (Ashenfelter Decl. 2-7 & tbl. 8). This disparity is certainly sufficient to show a manifest imbalance during the time period that the parties litigated the United States's race discrimination claims. *See Johnson*, 480 U.S. at 632-34; *Higgins v. City of Vallejo*, 823 F.2d 351, 356 (9th Cir. 1987) (holding that a manifest imbalance existed when approximately 30% of the applicable city work force were minorities, but minorities made up only 11.4% of municipal employees).

The Brennan Intervenors criticize Ashenfelter's analysis on the ground that it did not specifically identify individuals with the precise qualifications required for the positions (including a high-pressure boiler license for Custodian Engineers,

and supervisory experience in schools or similar buildings for Custodians). *See* Brennan Br. 61-64. But the Brennan Intervenors' expert simply posited this unsupported critique with no effort to present contrary facts or demonstrate that the proposed alternative analysis would undermine the striking imbalance demonstrated by Ashenfelter's study. A 3468 (Brennan Resp. to Arroyo Statement of Facts ¶ 6); A 1447-48 (Carrington Report of Findings ¶¶ 8-11). The mere assertion of an unsupported methodological disagreement by a proposed expert does not create a dispute of material fact precluding summary judgment. *See Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 310-11 (2d Cir. 2008) ("An expert's opinions that are without factual basis and are based on speculation or conjecture are . . . inappropriate material for consideration on a motion for summary judgment.").

Moreover, Ashenfelter's analysis was proper as a matter of law. He did not compare the custodian workforce to the general population, which would have been inappropriate, *see Teamsters*, 431 U.S. at 339 n.20 (noting that general population figures may not be probative when specific job qualifications are at issue); rather, he carefully screened the available census data to include only those occupational categories that matched the ones that applicants for the challenged exams most often reported among their prior job experiences. A 548-51 (Ashenfelter Decl. ¶¶ 5-13). This occupational screen is a reasonable proxy for

applicable experience. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 651 (1989) ("[I]n cases where . . . labor market statistics [accounting for actual qualifications] will be difficult if not impossible to ascertain, we have recognized that certain other statistics—such as measures indicating the racial composition of 'otherwise-qualified applicants' for at-issue jobs—are equally probative for this purpose."); *Peightal v. Metro. Dade County*, 26 F.3d 1545, 1555 (11th Cir. 1994) ("*Peightal II*").

The Brennan Intervenors also criticize Ashenfelter's analysis for failing to account for interest in the job. Brennan Br. 61-63. But the Brennan Intervenors presented no facts below, and cite none to this Court, to support their contention that black or Hispanic individuals were less interested in Custodian or Custodian Engineer positions than whites. *See id.* A party does not demonstrate a dispute of fact sufficient to defeat summary judgment simply by speculating that racial minorities may be less interested in a job than whites. *EEOC v. Joint Apprenticeship Comm.*, 186 F.3d 110, 120 (2d Cir. 1999) ("[The defendant] posits, without support, that the disparity between the characteristics of the potential applicants and the actual applicants can be attributed to a general lack of interest on the part of Blacks and women in becoming electricians. . . . [The defendant's] unsupported conjectures and assertions that these missing factors would explain

the disparities revealed by EEOC's statistical evidence cannot operate to debunk those statistics.").

B. The carefully circumscribed award of permanent appointments and retroactive seniority to the Arroyo Intervenors did not unnecessarily trammel the interests of incumbent employees.

The district court held that the award of permanent appointments and retroactive seniority to the Offerees, including the Arroyo Intervenors, did not unnecessarily trammel the interests of incumbent employees in terms of transfers and temporary care assignments.[11] SPA 55-59 (Order 55-59). The Brennan Intervenors argue that the district court's conclusion should be reversed because the Agreement modified their opportunity to receive transfers and temporary care assignments under the pre-existing Collective Bargaining Agreement. Brennan Br. 65-66.

As an initial matter, the extent to which the relief contained in the Agreement adversely affected the seniority interests of any particular Brennan Intervenor is exceedingly limited. The permanent appointments had at most a

[11] As noted *supra* pp. 7-8, the district court also held that the award of retroactive seniority to all Offerees, including the Arroyo Intervenors, *would* unnecessarily trammel the interests of white employees in terms of layoff protection if that seniority exceeded make-whole relief. SPA 59-64 (Order 59-64). Because the parties agreed on layoff-seniority dates for the Arroyo Intervenors in a consent judgment below, A 4211-14 (Order), the district court's holding on unnecessary trammeling as to layoff protection with respect to the Arroyo Intervenors is not at issue in this appeal.

"nominal effect" on the Brennan Intervenors, both because the number of appointments was small relative to the overall size of the workforce, and because the Agreement did not create new positions but rather filled vacancies that were required to be filled with permanent appointments anyway. SPA 21 (Order 21); N.Y. Civ. Serv. Law § 65(2) (McKinney 2008). In addition, it is undisputed that the temporary care system was not contracted-for as part of the collective bargaining agreement, and any effect of the retroactive seniority awards on the Brennan Intervenors' expectations in specific transfer opportunities is limited because "seniority is only one factor" in such determinations. SPA 18-20, 58 (Order 18-20, 58); *see supra* pp. 17-18.

In any event, the award of retroactive seniority to the Offerees as it affects transfers and temporary care assignments "passes muster under Title VII" because it has an extremely "limited effect." SPA 58 (Order 58). Race-conscious relief violates Title VII's prohibition against unnecessary trammeling only if it requires that incumbents be discharged and replaced with beneficiaries, creates an "absolute bar" to their advancement, or implements racial quotas. *Johnson*, 480 U.S. at 637-39; *Weber* 443 U.S. at 208; *Higgins*, 823 F.2d at 356-58. The district court properly found that none of these concerns applies here. SPA 58-59 (Order 58-59).

The Agreement did not require the displacement of any incumbent permanent Custodian or Custodian Engineer from his or her job or school

assignment to make room for the Arroyo Intervenors or any other Offeree. Nor did the Agreement create an absolute bar to the advancement of incumbent employees; all Custodians and Custodian Engineers, including the Brennan Intervenors and the Offerees, are eligible to compete for each and every school transfer. A 4355-58 (Lonergan Decl. ¶¶ 21-29).

The agreement is in fact far less restrictive of the advancement of other employees than other plans that the Supreme Court and courts of appeals have approved. *See, e.g., Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 479 (1986) (holding that an affirmative action plan does not unnecessarily trammel the interests of white employees, because "[w]hile whites seeking admission into the union may be denied benefits extended to their nonwhite counterparts, the [court-ordered plan] does not stand as an absolute bar to such individuals"); *Weber*, 443 U.S. at 208-09 (upholding an affirmative action plan that reserved half of the positions in a training program for black employees until the percentage of black craftworkers at the plant equaled the percentage of blacks in the local labor force); *see also* SPA 59 (Order 59) (collecting cases). Accordingly, the district court's holding with respect to the unnecessary trammeling prong of the Title VII analysis should be affirmed.

C. The district court properly held that remedies in a Title VII settlement are not limited to make-whole relief.

The Brennan Intervenors contend that the district court erred in relying on the *Johnson* and *Weber* framework because it applies only to future-hiring affirmative action plans and not to programs that affect seniority rights. Brennan Br. 47-53. In their view, Title VII requires that any award of retroactive seniority must be limited to make-whole relief. *Id.* This argument fails because, even if the Brennan Intervenors' seniority interests at issue here amount to legally-enforceable rights, the Supreme Court has authorized employers to implement voluntary race-conscious relief that affects pre-existing seniority rights.[12]

An employer's voluntary implementation of race-conscious remedies may permissibly be broader than the relief available by court order under Title VII. *See Local No. 93*, 478 U.S. at 516. In *Local No. 93*, the Supreme Court relied on *Weber* to conclude that "the voluntary action available to employers . . . seeking to

[12] The Brennan Intervenors assert that this Court's 2001 intervention ruling in this case constitutes an explicit or implicit holding that only make-whole relief is lawful in a settlement of race discrimination claims. Brennan Br. 36, 43-44, 49. But this Court confined its 2001 holding to the intervention question under Fed. R. Civ. P. 24(a)(2), and expressly refused to rule on the merits. *See Brennan*, 260 F.3d at 133 ("Appellants [the Brennan Intervenors] also ask us to exercise discretionary jurisdiction and rule on the merits of the Agreement, rather than remand the case to the district court. . . . We think such a course would be ill-advised."); *see also id.* at 129-30, 132-33. Nothing in the Court's 2001 decision holds that the Agreement's remedies were lawful only if they were limited to make-whole relief.

eradicate race discrimination may include reasonable race-conscious relief that benefits individuals who were not actual victims of discrimination." *Id.* (citing *Weber*, 443 U.S. at 193). Nor must relief in a settlement agreement be precisely calibrated to provide make-whole remedies to actual victims in order to be lawful under Title VII; a settlement agreement may provide for remedies that extend beyond the relief that may be ordered by a court after a finding of liability. *See id.* at 525; *Wilder v. Bernstein*, 49 F.3d 69, 73 (2d Cir. 1995).

Local No. 93 resolved the question previously left open in *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 583 (1984), as to whether an employer can voluntarily adopt race-conscious remedies of retroactive seniority for non-victims of discrimination without violating Title VII. The Supreme Court made clear in *Local No. 93* that a consent judgment *may* permissibly modify seniority rights, even where the relief provided is not purely remedial relief to identifiable victims of discrimination. The consent decree at issue in *Local No. 93* contained minority promotion goals and procedures that modified the use of seniority points as a factor in promotions. A 3360-62 (Am. Consent Decree ¶¶ 8-14, *Vanguards of Cleveland v. City of Cleveland*, No. C80-1964 (N.D. Ohio Jan. 31, 1983)); A 3374 (Petition for Writ of Certiorari 5, *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, No. 84-1999 (filed June 19, 1985)); *see also Local No. 93*, 478 U.S. at 535, 537 (Rehnquist, J., dissenting) (noting that the relief provided in the consent

decree was "at the expense of nonminority firefighters who would have been promoted under the City's existing seniority system"). The Court nonetheless approved the consent decree as a permissible voluntary remedial plan, notwithstanding its plain impact on the existing seniority system. *See Local No. 93*, 478 U.S. at 510, 512-13.

The Brennan Intervenors appear to acknowledge that *Local No. 93* undermines their argument. *See* Brennan Br. 55-56. Nevertheless, they rely on two Second Circuit cases that pre-date *Local No. 93*, *Johnson*, and *Weber* for the proposition that a settlement agreement may only modify seniority rights in order to provide victim-specific relief.[13] *See* Brennan Br. 49-53 (citing *Chance v. Bd. of Exam'rs*, 534 F.2d 993 (2d Cir. 1976), and *Acha v. Beame*, 531 F.2d 648 (2d Cir. 1976)). To the extent that they remain good law, *Chance* and *Acha* are inapplicable to the Agreement at issue here because those cases addressed only the limits that Title VII places on use of retroactive seniority as a component of court-

[13] The Brennan Intervenors also quote the Title VII legislative history to support this argument. Brennan Br. 49 (citing 110 Cong. Rec. 7213 (1964)). But the quoted passage simply described Congress's intent—ultimately codified at § 703(h) of Title VII—that employers should not be liable under Title VII for the effects of pre-existing bona fide seniority systems. *See* 110 Cong. Rec. 7213 (1964) ("Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective."); 42 U.S.C. § 2000e-2(h); *see also Teamsters*, 431 U.S. at 350-52. That Congress in enacting Title VII wished to limit employer liability for pre-existing seniority systems says nothing about employers' ability to enter into settlements granting relief that may affect such seniority systems.

ordered remedial relief; they did not discuss limits on an employer's voluntary implementation of race-conscious remedies. *Compare Chance*, 534 F.2d at 998-99, *and Acha*, 531 F.2d at 651-54, *with Weber*, 443 U.S. at 206-07, *and Local No. 93*, 478 U.S. at 516.

Relying on *Association Against Discrimination in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256 (2d Cir. 1981), the Brennan Intervenors claim that this Court has held that *Weber* did not affect the holding in *Chance*. Brennan Br. 52-53. The Brennan Intervenors take this Court's language out of context. This Court held that "cases involving *hiring quotas* 'have been the occasion for some strong differences of opinion' among members of this Court," 647 F.2d at 279 (emphasis added) (quoting *Ass'n Against Discrimination in Employment v. City of Bridgeport*, 594 F.2d 306, 310 (2d Cir. 1979)), and recognized that because the Supreme Court's decision in *Weber* addressed voluntary race-conscious measures, it "provide[s] no clear guidance as to how these differences should be resolved." *Id.* (noting that *Weber* "specifically excluded from the scope of its inquiry 'what Title VII requires or . . . what a court might order to remedy a past proven violation'" of Title VII (quoting *Weber*, 443 U.S. at 200)). Because *Association Against Discrimination* had nothing to do with the award of retroactive seniority pursuant to a settlement agreement, that case does not support the Brennan Intervenors' argument that *Chance* and *Acha* apply here.

Even if the Brennan Intervenors were able to reconcile *Chance* and *Acha* with *Weber*, they do not attempt to reconcile their understanding of *Chance* and *Acha* with the Supreme Court's subsequent holding in *Local No. 93*. The Brennan Intervenors' effort to expand *Chance* and *Acha* from the context of court-ordered remedies to the context of a settlement or other voluntary employer action is squarely foreclosed by the holdings in *Weber* and *Local No. 93*.

In light of this controlling Supreme Court authority, the Brennan Intervenors provide no valid reason why this Court should not follow the several other courts of appeals that have applied the *Johnson* and *Weber* framework and concluded that race-conscious provisions in a settlement agreement or consent decree are lawful even when those provisions affect seniority rights. *See Paradise v. Prescott*, 767 F.2d 1514, 1529 (11th Cir. 1985) (holding that Title VII does not "prevent[] a court from approving a consent decree that provides relief which is consistent with, but goes beyond, that authorized in the underlying statute"); *Tangren v. Wackenhut Servs., Inc.*, 658 F.2d 705, 706 & n.1 (9th Cir. 1981) (holding that a voluntary agreement that adjusted seniority rights in order to reduce adverse impact on minorities and women was a permissible voluntary agreement under Title VII, and noting that while Title VII protects bona fide seniority systems from challenge in

certain circumstances, Title VII "d[oes] not . . . prohibit the employer from agreeing of his own accord to modify the seniority system").[14]

Even assuming that Title VII did require a showing of identifiable victims to support remedial relief in a settlement agreement, a remand would be necessary because the district court declined to reach the argument pressed at length below that the Arroyo Intervenors *are* identifiable victims who received only victim-

[14] The Brennan Intervenors also argue that because they objected to the effect the Agreement would have on their "pre-existing contractual rights," the race-conscious relief at issue here cannot be upheld unless it is make-whole relief substantiated by "[p]roof at trial" of the United States's discrimination claims against the City. Brennan Br. 54 (quoting *United States v. City of Hialeah*, 140 F.3d 968 (11th Cir. 1998)). Yet, because the district court declined to enter the settlement agreement as a consent judgment, SPA 82-84 (Order 82-84), the Brennan Intervenors' reference to *City of Hialeah* is inapt. There are significant differences between a consent decree and a settlement, thereby requiring more vigilance by a court in approving the former. A consent decree requires the "imprimatur" of the court before it can take effect, *id.*, is often approved only after a fairness hearing, *see* 42 U.S.C. § 2000e-2(n), and is enforceable like any other court judgment, *see City of Hialeah*, 140 F.3d at 983; *Donaghy v. City of Omaha*, 933 F.2d 1448, 1459 (8th Cir. 1991) (distinguishing between "the heightened judicial oversight inherent in a properly entered decree," on the one hand, and a voluntary affirmative action plan on the other). By contrast, a settlement is a private contract, and its enforcement mechanisms are limited to those provided in the agreement. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381-82 (1994). Moreover, Title VII provides significant protection for employees from challenges to the lawfulness of employment actions taken to implement a consent judgment, but not a settlement. *See* 42 U.S.C. § 2000e-2(n)(1)(A). Accordingly, even assuming the Brennan Intervenors had legally enforceable rights affected by the Agreement that precluded its entry as a consent decree absent a full trial on the merits, there is no similar bar to upholding the lawfulness of the Agreement as a settlement of Title VII claims. *Kirkland*, 711 F.2d at 1126-28.

specific make-whole relief under the Agreement.[15] As the district court noted, SPA 52 (Order 52), the Brennan Intervenors do not question that retroactive seniority is appropriate for beneficiaries who were actual victims of discrimination; nor could they in light of clearly established precedent. *See Franks v. Bowman Transp. Co.*, 424 U.S. 747, 762-70, 776-79 (1976); *see also Teamsters*, 431 U.S. at 347-48.

III. The permanent appointments and retroactive seniority received by the Arroyo Intervenors are lawful under the Fourteenth Amendment.

If this Court finds that the challenged provisions of the Agreement are lawful under Title VII, it must next evaluate whether the district court correctly concluded that those provisions also comply with the Equal Protection Clause of the Fourteenth Amendment. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (plurality opinion); *id.* at 520 (Scalia, J., concurring in the judgment). Under the Equal Protection Clause, a public employer's race-conscious employment actions are lawful where they meet strict scrutiny—that is, they must be narrowly tailored measures that further a compelling government interest. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). As the party challenging race-conscious remedial relief, the Brennan Intervenors bear the

[15] *See* A 2878-91 (Arroyo Mem. Supp. Mot. for Summ. J. 37, 41-53); A 3004-07 (Arroyo Reply Mem. 14-17); A 4163-66 (Joint Letter 7-10); A 4170-77 (Arroyo Post-Trial Letter Br. 2-9).

ultimate burden of proving that the relief is unconstitutional. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277-78 (1986) (plurality opinion); *id.* at 293 (O'Connor, J., concurring).

A. Race-conscious relief is supported by a compelling interest in remedying the effects of prior discrimination.

It is well-established that remedying the effects of prior discrimination is a compelling interest that supports the use of race-conscious employment decisions. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 327-28 (2003); *Crumpton v. Bridgeport Educ. Ass'n*, 993 F.2d 1023, 1030 (2d Cir. 1993). A compelling interest is established where the employer has a "strong basis in evidence for its conclusion that remedial action was necessary." *Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277 (plurality opinion)); *Crumpton*, 993 F.2d at 1030.

The central dispute here is over the scope and nature of the evidence needed to meet the strong basis standard. As noted above, the Brennan Intervenors do not contest on appeal that the three challenged exams had an adverse impact on African Americans and Hispanics of sufficient magnitude to establish a prima facie case of a Title VII violation. Rather, they challenge the district court's conclusion that such evidence suffices to meet the strong basis test. SPA 65-72 (Order 65-72). The Brennan Intervenors' arguments, however, are inconsistent with Congress's objectives in enacting Title VII, conflict with controlling authority, and undermine the strong congressional goal of encouraging voluntary compliance with Title VII.

1. A prima facie Title VII disparate impact violation provides a compelling interest in race-conscious remedial action.

The Brennan Intervenors contend that "only pervasive and egregious" evidence of intentional discrimination "justifies the use of race-based decision-making," and thus, presumably, the Equal Protection Clause *never* permits a public employer to take race-conscious actions to remedy a Title VII disparate impact violation. Brennan Br. 68-69. No decision of the Supreme Court or this Court compels such a cramped view of the Equal Protection Clause.

To the contrary, the Supreme Court held in *Croson* that a strong basis for remedial measures can be established with evidence "approaching a prima facie case of a constitutional or statutory violation." *Croson*, 488 U.S. at 500. Because disparate impact discrimination is a statutory violation of Title VII, *see* 42 U.S.C. § 2000e-2(k)(1)(A); *Griggs*, 401 U.S. at 426-31, evidence demonstrating a prima facie case of disparate impact discrimination is plainly evidence "approaching a prima facie case of a . . . statutory violation." *Croson*, 488 U.S. at 500; *see also Barhold v. Rodriguez*, 863 F.2d 233, 237 (2d Cir. 1988) (noting that statistical evidence of a Title VII disparate impact violation alone may be sufficient to establish a strong basis in evidence for race-conscious decision-making). Moreover, Title VII is not just any statute; it was enacted to enforce the Equal Protection Clause of the Fourteenth Amendment, *see Guardians Ass'n of N.Y. City Police Dep't, Inc. v. Civil Serv. Comm'n*, 630 F.2d 79, 88 (2d Cir. 1980), and

manifests Congress's intent that the prohibition against employment discrimination "should have the 'highest priority.'" *Franks*, 424 U.S. at 763 (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974)).

The Brennan Intervenors assert that *Croson*'s reference to evidence "approaching a prima facie case of discrimination" was merely a characterization of evidentiary shortcomings in that case, and was not meant to equate the strong basis test with evidence approaching a prima facie case. Brennan Br. 70. This is incorrect. *Croson* repeatedly refers to gross statistical disparities—that is, evidence approaching a prima facie case of Title VII disparate impact discrimination—as evidence that would support remedial race-conscious measures. *Croson*, 488 U.S. at 500-04. Moreover, the Supreme Court has consistently assumed that state actors have a compelling interest to take race-conscious actions to avoid liability under federal civil rights statutes, including the "results test" of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973(a). *See, e.g.*, *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality opinion); *id.* at 990-94 (O'Connor, J., concurring); *id.* at 1033-34 (Stevens, J., dissenting); *id.* at 1065 (Souter, J., dissenting).[16] In the same context, the Supreme Court has held that a public actor

[16] Indeed, if avoiding liability under a federal civil rights statute did not constitute a compelling interest, "a State could be placed in the impossible position of having to choose between compliance with [the statute] and compliance with the Equal Protection Clause." *League of United Latin Am. Citizens (LULAC) v. Perry*,

may take race-conscious action provided it has a "'strong basis in evidence' for finding that the *threshold* conditions of [Section] 2 liability are present," *id.* at 978, even though proof of an actual Section 2 violation requires more, *see Johnson v. De Grandy*, 512 U.S. 997, 1011-12 (1994). *Vera* thus confirms the continuing validity of *Croson*'s holding that evidence "approaching a prima facie case" of a statutory violation satisfies the strong basis test. *Croson*, 488 U.S. at 500.

The Brennan Intervenors cite *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), in support of their argument that only "pervasive and egregious" evidence of intentional discrimination can establish a compelling interest in taking remedial measures. Brennan Br. 69. *Garrett* is irrelevant in this context; *Garrett* addressed whether Congress validly abrogated states' Eleventh Amendment immunity from suits for money damages under Title I of the Americans with Disabilities Act. *Garrett*, 531 U.S. at 373. That question does not arise in this case because a municipal employer enjoys no such sovereign immunity. *Monell v. N.Y. City Dep't of Soc. Servs.*, 436 U.S. 658, 690-91 & n.54 (1978). Moreover, *Garrett* had nothing to do with the evidence needed to support race-conscious remedial measures in employment; nor does its holding undermine the validity of disparate impact standards in Title VII or any other statute. *See*

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548 U.S. 399, 518 (2006) (Scalia, J., concurring in the judgment in part and dissenting in part).

Tennessee v. Lane, 541 U.S. 509, 520 (2004); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 723 (2003); *Guardians*, 630 F.2d at 88.[17]

A number of courts have recognized since *Croson* that significant statistical evidence of racial disparity resulting from an employment selection device—that is, evidence that could support a prima facie case of Title VII disparate impact discrimination—would be sufficient to support a public employer's conclusion that race-conscious remedial measures are necessary. *See, e.g.*, *Kohlbek v. City of Omaha*, 447 F.3d 552, 556-57 (8th Cir. 2006); *Stuart v. Roache*, 951 F.2d 446,

[17] The Brennan Intervenors cite several additional cases to support their argument that only intentional discrimination can serve as a compelling state interest for taking race-conscious remedial action. Brennan Br. 69-70. These cases are not on point. The cited passage from *Michigan Road Builders Association, Inc. v. Milliken*, 834 F.2d 583 (6th Cir. 1987), a contracting set-aside case, merely reiterates the established principle that a public agency cannot implement race-conscious provisions to remedy general societal discrimination. *Id.* at 592. *People Who Care v. Rockford Board of Education*, 111 F.3d 528 (7th Cir. 1997), is similarly inapposite—the Seventh Circuit held, in relevant part, only that "making it more difficult to identify particular schools as 'white' or 'black,'" "reducing the disciplinary problems of minority students," and "providing minority students with role models of their own race or ethnicity" were not compelling state interests. *Id.* at 535. Equally problematic for the Brennan Intervenors is their reference to the dissent in *Wessman v. Gittens*, 160 F.3d 790 (1st Cir. 1998), because the dissenting judge would have *upheld* the race-conscious student assignment plan at issue. *See id.* at 810 (Lipez, J., dissenting). Finally, like *Wessman*, *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738 (2007), involves race-conscious student assignment, and the majority's compelling interest analysis is expressly limited to that context. In any event, *Parents Involved* does not "attempt[] . . . to set forth all the interests a school district might assert. . . ." *Id.* at 2752 (plurality opinion); *id.* at 2793 (Kennedy, J., concurring in part).

450-52 (1st Cir. 1991); *Donaghy v. City of Omaha*, 933 F.2d 1448, 1458-60 (8th Cir. 1991); *Davis*, 890 F.2d at 1442-44, 1446-47; *Howard v. McLucas*, 871 F.2d 1000, 1007-08 (11th Cir. 1989) (citing *Howard v. McLucas*, 671 F. Supp. 756, 760-61 (M.D. Ga. 1987)); *United States v. New Jersey*, 75 Fair Empl. Prac. Cas. (BNA) 1602, 1614-15 (D.N.J. 1995).

Prior to *Croson*, the Second Circuit expressly held that a prima facie case of a Title VII disparate impact violation was constitutionally sufficient to justify remedial action in settlement of an employment discrimination lawsuit. *Kirkland*, 711 F.2d at 1130. This Court has not addressed the question directly since *Croson*, but has affirmatively suggested post-*Croson* that a prima facie case of a Title VII disparate impact violation satisfies the strong basis test. *See Paganucci v. City of New York*, 993 F.2d 310, 312 (2d Cir. 1993), *aff'g* 785 F. Supp. 467, 476-77 (S.D.N.Y. 1992) (noting that "[i]t is well settled that a statistical disparity sufficient to support a prima facie claim under Title VII provides a firm basis for the implementation of a race-conscious remedy"). The Brennan Intervenors correctly note that *Paganucci*'s discussion of the strong basis test was an alternate basis for its holding, *see* Brennan Br. 70-71; *Paganucci*, 785 F. Supp. at 476-77, but they make no suggestion that this Court has ever disavowed *Paganucci*'s reasoning or the Court's pre-*Croson* decision in *Kirkland*.

Moreover, a stronger showing is not required to protect the rights of non-minority employees. The plaintiff's burden in demonstrating a prima facie case is not easily met: A plaintiff must "isolat[e] and identify[] the specific employment practices that are allegedly responsible for any observed statistical disparities," and must then offer "statistical evidence of a kind and degree sufficient to show that the practice in question has *caused* the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Watson*, 487 U.S. at 994-95 (emphasis added). This significant hurdle, once met, creates a presumption of unlawful discrimination. 42 U.S.C. § 2000e-2(k)(1)(A); *Griggs*, 401 U.S. at 431; *see also* 29 C.F.R. §§ 1607.3(A), 1607.4(D). Under this standard, then, race-conscious measures are only permitted where plaintiffs have already met the high burden of demonstrating presumptive discrimination against minority employees.

Even were *Croson* unclear as to the adequacy of a prima facie showing of disparate impact to meet the strong basis test, the congressional purposes of Title VII should compel the conclusion that the strong basis test does not require a finding of "pervasive and egregious" intentional discrimination. Brennan Br. 69. One of the primary purposes of the disparate impact standard is to screen out subtle or surreptitious intentional discrimination. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). As Eleventh Circuit Judge Tjoflat has noted:

> [A] *prima facie* finding of disparate impact by the court means that the plaintiff has demonstrated that the challenged practice (and not something else) actually *causes* the discriminatory impact at issue. Though the plaintiff is never explicitly required to demonstrate discriminatory motive, a genuine finding of disparate impact can be highly probative of the employer's motive since a racial "imbalance is often a telltale sign of purposeful discrimination."

In re Employment Discrimination Litig. Against Ala., 198 F.3d 1305, 1321 (11th Cir. 1999) (quoting *Teamsters*, 431 U.S. at 339-40 n.20); *accord Okruhlik v. Univ. of Arkansas*, 255 F.3d 615, 626 (8th Cir. 2001). Another central purpose of the disparate impact standard, even where there is no surreptitious intentional discrimination, is to prevent current employment practices that are neutral on their face but nevertheless perpetuate workplace segregation, thereby effectively "freezing" in place the status quo created by prior racial discrimination. *Griggs*, 401 U.S. at 430. In such contexts, "the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." *Watson*, 487 U.S. at 987.

Accordingly, prima facie evidence of a Title VII disparate impact violation is tantamount to evidence of either surreptitious intentional discrimination or self-perpetuating racial hierarchy in the workplace. Prohibiting public employers from taking remedial action in such contexts would severely undermine Title VII's key

goals of "achiev[ing] equality of employment opportunities and remov[ing] barriers" to that equality. *Griggs*, 401 U.S. at 429-30.

Prohibiting employers from entering settlement agreements except on *proof* of *intentional* discrimination would also defeat Congress's intent to encourage voluntary compliance. *See Local No. 93*, 478 U.S. at 515 ("Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII."); *see also Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545 (1999) ("Dissuading employers from implementing programs or policies to prevent discrimination in the workplace is directly contrary to the purposes underlying Title VII."). Voluntary compliance by a public employer is of critical, intrinsic importance "both because of the example its voluntary assumption of responsibility sets and because the remediation of governmental discrimination is of unique importance" to ensure community confidence in the fairness of public employment practices, and as a consequence, the legitimacy of the government itself. *Wygant*, 476 U.S. at 290 (O'Connor, J., concurring).

Because it is not contested on appeal that the evidence establishes a prima facie showing of Title VII disparate impact discrimination against blacks and Hispanics with respect to each of the challenged exams, this Court should affirm the district court's conclusion that there was a compelling interest to support the race-conscious provisions of the Agreement.

2. The relief provided by the Agreement is justified by additional evidence that supports a compelling remedial interest in remedying prior discrimination.

Even if this Court concludes that a prima facie case of Title VII disparate impact is insufficient to meet the strong basis test, the Court should affirm the judgment below because the record in this case meets an even higher standard. A strong basis for remedying prior discrimination is surely present where, as here, there is an unrebutted prima facie case and the inference of discrimination is substantiated (though not necessarily proven) by evidence that calls into question the job-relatedness of the challenged exams or that suggests the availability of equally valid, less-discriminatory alternatives. *See Cotter v. City of Boston*, 323 F.3d 160, 169-71 (1st Cir. 2003); *In re Birmingham Reverse Discrimination Employment Litig.*, 20 F.3d 1525, 1540-41, 1544-45 (11th Cir. 1994).

The Fifth Circuit has held that the strong basis test may be met by evidence establishing a prima facie case of a Title VII disparate impact violation combined with "other evidence [that] create[s] substantial doubt as to the job-relatedness of the challenged tests." *Edwards v. City of Houston*, 37 F.3d 1097, 1113 (5th Cir. 1994), *vacated and superseded on other grounds by* 78 F.3d 983 (5th Cir. 1996) (en banc). This principle must be correct: Because Title VII prohibits use of any employment practice with a significant adverse impact if the employer cannot show that it is job-related, 42 U.S.C. § 2000e-2(k)(1)(A), requiring an admission or

proof of non-job-relatedness would contravene the Supreme Court's holdings that a public employer need not convict itself of a Title VII violation in order to take race-conscious remedial measures. *See Wygant*, 476 U.S. at 290-92 (O'Connor, J., concurring); *see also id.* at 277-78 (plurality opinion); *Croson*, 488 U.S. at 500; *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1565 (11th Cir. 1994) ("[T]he Supreme Court has never required that, before implementing affirmative action, the employer must already have proved that it has discriminated."); *Barhold*, 863 F.2d at 236.

Here, as in the circumstances addressed by the Fifth Circuit's decision in *Edwards*, 37 F.3d at 1113, there was ample reason for the City to doubt the job-relatedness of the challenged exams. The United States's experts demonstrated that neither the procedures originally used by the City to develop the challenged exams, nor the validation studies the City commissioned to defend against the United States's discrimination lawsuit prior to settlement, established that those exams tested the skills and abilities required to complete critical job tasks or were predictive of applicants' future job performance. *See supra* pp. 12-13; *see also Guardians*, 630 F.2d at 98-99, 105-06.

The challenged exams are particularly vulnerable with respect to the job-relatedness of the 70% passing score required for each of the exams, and for the City's rank-order hiring of test-passers. *See supra* pp. 9, 11-12. Arbitrary passing

scores alone can defeat an employer's claim that a test is job-related. *See, e.g.*, *Isabel v. City of Memphis*, 404 F.3d 404, 413 (6th Cir. 2005) (affirming rejection of a test where the district court found that "the cutoff score was nothing more than an arbitrary decision and did not measure minimal qualifications"); *Lanning v. Se. Pa. Transp. Auth.*, 181 F.3d 478, 489 (3d Cir. 1999); 29 C.F.R. § 1607.5(H). And rank-order hiring cannot be shown to be job-related unless the employer demonstrates that "one- or two-point differences in scores [will] reflect differences in job performance." *Guardians*, 630 F.2d at 100-01. The expert evidence developed below thus provides evidence beyond the uncontested prima facie case of a Title VII violation to support the district court's judgment that the strong basis requirement is satisfied here.[18]

It is immaterial that the Brennan Intervenors challenged some of this evidence in the district court because, as noted, the district court was not required to adjudicate the question of job-relatedness on its merits—to do so would be the equivalent of requiring a finding or concession of past discrimination. *See Kirkland*, 711 F.2d at 1130 ("[I]f intervenors' position were adopted, no Title VII

[18] Indeed, the Board argued below—in response to a claim from the Brennan Intervenors that the challenged exams "can be" validated—that "'[c]an be' . . . is a far cry from 'have admittedly been' validated. . . . The defendants had already litigated this case vigorously for three years when they agreed to settle. They were in a position to make an informed judgment about the risks of a trial, as well as its costs and intangible burdens." A 3812 (Defs.' Mem. 58).

testing case could be settled by agreement until a judicial determination on the test's job-validity was made. Such a result would seriously undermine Title VII's preference for voluntary compliance and is not warranted.").

The district court's judgment that the strong basis test was satisfied here may also be affirmed based on the unrebutted prima facie case of a Title VII disparate impact violation combined with evidence that there were less discriminatory alternatives to the challenged exams. *See Albemarle*, 422 U.S. at 425; 42 U.S.C. § 2000e-2(k)(1)(A)(ii). There is significant evidence to support the United States's claim that the provisional hiring system was a less discriminatory alternative to the challenged exams—provisional hiring required the same qualifications as permanent appointment, resulted in a greater hire rate for African American and Hispanic applicants, and selected candidates who ultimately performed just as well on the job. *See supra* pp. 13-14. The Board's extensive use of the provisional hiring process further supports the conclusion that the Board considered the provisional hiring process to be, and that it in fact was, an effective means of fulfilling the Board's business needs. *See Robinson*, 267 F.3d at 161.

Accordingly, there is ample additional evidence beyond a prima facie case of a Title VII disparate impact violation to support the district court's judgment that the City had a compelling interest to engage in race-conscious remedial action.

B. The grant of permanent appointments and retroactive seniority to the Arroyo Intervenors was a limited, one-time adjustment for qualified employees and was therefore narrowly tailored.

A race-conscious remedy for prior discrimination must also be narrowly tailored to further the remedial goal. *Adarand*, 515 U.S. at 227. Narrow-tailoring analysis requires consideration of several factors: "(1) the necessity for relief and the efficacy of alternative remedies, (2) the flexibility and duration of the relief, (3) the relationship of the numerical goals of the relief to the relevant labor market . . . , and (4) the impact of the relief on the rights of third parties." *United States v. Sec'y of HUD*, 239 F.3d 211, 219 (2d Cir. 2001) (citing *United States v. Paradise*, 480 U.S. 149, 171 (1987)). The district court properly concluded that "[t]he award of retroactive seniority to remedy the adverse impact of the exams is, for the purposes of transfers and TCAs, carefully circumscribed in its scope and effect, making a one-time adjustment for those entitled to such relief under testing claims without establishing quotas or creating an absolute bar to the non-minorities' abilities to obtain those perquisites." SPA 75 (Order 75).

The Brennan Intervenors argue that the district court improperly focused on only one of the narrow-tailoring factors: the effect of race-conscious remedies on third parties. Brennan Br. 72. The Brennan Intervenors do not disagree with the district court's holding as to the effect on third parties; they argue only that the district court should have considered other factors as well. *See id.* at 73-75. As an

initial matter, the district court *did* consider other narrow-tailoring factors; holding, for example, that the Agreement was a "one-time adjustment" that was "carefully circumscribed" to "remedy the adverse impact of the exams." SPA 75 (Order 75). Moreover, the effect on third parties is precisely the factor that is typically determinative in the narrow-tailoring analysis. *Compare Cotter*, 323 F.3d at 172, *and Peightal v. Metro. Dade County*, 940 F.2d 1394, 1408 (11th Cir. 1991) ("*Peightal I*"), *with United States v. Starrett City Assocs.*, 840 F.2d 1096, 1103 (2d Cir. 1988) (holding that a race-conscious housing integration plan was not narrowly tailored where it employed "rigid racial quotas of indefinite duration to maintain a fixed level of integration"). The district court's conclusion that the relief here did not establish quotas or create an absolute bar to non-minorities' advancement is ample support for its narrow tailoring holding. SPA 72-75 (Order 72-75); *see also Johnson*, 480 U.S. at 638.

Rather than challenge the district court's analysis of the Agreement's impact on third parties, the Brennan Intervenors contend, first, that the race-conscious remedies here are not limited in time because the Offerees may benefit from their retroactive seniority for transfers and temporary care assignments for the rest of their careers. Brennan Br. 73. The Brennan Intervenors misapprehend the narrow-tailoring requirement regarding flexibility and duration of the relief; this requirement is intended to prohibit race-conscious measures designed to ensure

racial balancing in perpetuity. *See Howard*, 871 F.2d at 1009 (noting as a factor for narrow tailoring consideration that "the relief is not meant to set employment percentage goals or ensure a racially balanced workforce, and it evaporates when the 240 promotions are made"). The remedy upheld by the district court was complete once the relatively small number of Offerees received their grant of a permanent appointment and retroactive seniority, and was not meant to ensure or maintain a racially balanced workforce. *See Cotter*, 323 F.3d at 172 (upholding race-conscious promotions where "there is nothing in the decision requiring affirmative action in future decisions"); *Peightal I*, 940 F.2d at 1408 (approving a race-conscious hiring plan that "does not endure *in perpetuity*").[19] Furthermore, each of the Offerees, including the Arroyo Intervenors, was qualified for the permanent appointment he or she received and none was unfairly advantaged by inclusion in the Agreement. *See Howard*, 871 F.2d at 1009 (holding that the "flexibility of relief" factor in the narrow-tailoring analysis was met where all of

[19] This Court's decision in *Barhold*, 863 F.2d at 238, is not to the contrary. *Cf.* Brennan Br. 73. In *Barhold*, this Court found relevant to its narrow-tailoring analysis that a race-conscious transfer and reassignment policy for state parole officers was a "temporary measure" that was "modified . . . after only four months because of its effectiveness." 863 F.2d at 238. Yet, in *Barhold*, the prior seniority system was altered such that transfers were awarded based on consideration of an employee's race. *Id.* at 235. Here, by contrast, employees have never been considered for transfers and TCAs based expressly their race; once the Offerees received retroactive seniority, their eligibility was evaluated under the pre-existing facially race-neutral policy, as was that of any other employee.

the beneficiaries of a race-conscious promotion plan met the requisite qualifications); *see also Paradise*, 480 U.S. at 177-78 (plurality opinion); *Cotter*, 323 F.3d at 171.

The Brennan Intervenors also allege that the Agreement is not narrowly tailored because effective alternate remedies were not considered. The Brennan Intervenors suggest that the parties could have awarded retroactive seniority to incumbent, rather than provisional, minority and female Custodians and Custodian Engineers. Brennan Br. 72-73. But the Brennan Intervenors make no demonstration that this proposal would have had a smaller effect on third parties than the Agreement, and do not quantify the number of incumbents implicated in their new proposal. Their speculation is insufficient to create a dispute of fact. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (holding that to demonstrate a dispute of material fact, a party "must do more than simply show that there is some metaphysical doubt as to the material facts").[20]

In addition, the Brennan Intervenors urge consideration of "the overinclusiveness or underinclusiveness of the racial classification." Brennan Br. 72-74 (citing *Rothe Dev. Corp. v. U.S. Dep't of Defense*, 262 F.3d 1306, 1331

[20] Also, a proposed seniority award to certain members of the Brennan class that would harm the relative seniority of white male members of the Brennan class raises serious adequacy-of-representation concerns. *See* Fed. R. Civ. P. 23(a)(4); *Lott v. Westinghouse Savannah River Co.*, 200 F.R.D. 539, 562 (D.S.C. 2000).

(Fed. Cir. 2001), and *Croson*, 488 U.S. at 506). The "overinclusiveness" concern in *Rothe* and *Croson*—both of which were minority contracting set-aside cases—was directed to whether the set-asides benefited racial or ethnic groups that never suffered from discrimination, and not to the different question whether the remedy applied to a particular minority *individual* who belonged to a minority group that *had* been subjected to discrimination. *See Croson*, 488 U.S. at 478; *Rothe*, 262 F.3d at 1314 n.4. When courts have used "inclusiveness" as a factor in employment discrimination cases involving race-conscious remedies, they have properly applied it to the group, not to the individual beneficiary. *See, e.g.*, *Donaghy*, 933 F.2d at 1460 ("Because the consent decree's interim and long-term goals applied only to blacks, the minority group identified as being underutilized, the plan was not overinclusive."). As to "underinclusiveness," this Court has rejected the argument that race-conscious remedies must be as broad as possible if they are to be constitutional. *Jana-Rock Constr., Inc. v. N.Y. State Dep't of Econ. Dev.*, 438 F.3d 195, 207 (2d Cir. 2006) ("Evaluating underinclusiveness as a prong of strict scrutiny would be incompatible with the Supreme Court's requirement that affirmative action programs be no broader than demonstrably necessary.").

In any event, there is no merit to the Brennan Intervenors' contention that relief to Offerees who passed the challenged exams rendered the settlement overbroad. Brennan Br. 74-75. In several findings of fact that the Brennan

Intervenors have not appealed, *see* Brennan Br. 47, the district court concluded that it was not necessary for an Offeree to *fail* a challenged exam to be a testing-claim beneficiary or to be affected by the exams' disparate impact on black and Hispanic test-takers. SPA 134-35 (Order 8-9) (finding as a matter of fact that the parties to the Agreement intended testing-claim beneficiaries to be blacks and Hispanics who *took* a challenged exam); SPA 112-13 (Order 16-17) (holding that disproportionate clustering of black and Hispanic test-takers at the low end of the grading scale supported a finding that Exam 8206 had an adverse impact). Even if the Brennan Intervenors had appealed these findings, they could not show that the district court's decision was clearly erroneous. Due to the Board's rank-order hiring system, SPA 9 (Order 9), those Offerees who *passed* a challenged exam were nonetheless affected by the adverse impact of the exams because their performance affected their rank among test-passers, and thus they were hired later than would have occurred but for discrimination (or were never hired at all). *See Waisome*, 948 F.2d at 1377-78; *Kirkland*, 711 F.2d at 1122, 1131-32 & n.17.

For this reason, the district court's narrow-tailoring holding is correct as to Steven Lopez, the only one of the Arroyo Intervenors that the Brennan Intervenors claim is even affected by their argument. *See* Brennan Br. 75. The Brennan Intervenors correctly note that Lopez passed Exam 1074, but the district court's misstatement as to Lopez, SPA 137 (Order 11), does not affect the lawfulness of

his relief. The district court's reference to Lopez in its May 2008 Order went not to whether Lopez's relief was narrowly tailored (a question that was decided in Lopez's favor on summary judgment nearly two years earlier) but to whether Lopez was a testing-claim beneficiary, a question that was resolved by the district court's finding of fact that black and Hispanic Offerees who took a challenged test were testing-claim beneficiaries. SPA 134-35 (Order 8-9); SPA 72-75 (Order 72-75). Also, Lopez falls within the category of test-passers whose score—and thus opportunity to be hired—was detrimentally affected by the adverse impact of the challenged exams, because Lopez passed Exam 5040 in 1985 but did not score high enough to be hired. A 759 (Lopez Decl. ¶ 5).[21]

Because the remedies that the Arroyo Intervenors received in the Agreement were limited, one-time remedies to a small group of individuals who were already performing successfully as Custodians and Custodian Engineers, this Court should

[21] The Brennan Intervenors take the district court's holding as to Andrew Clement, one of the Caldero Intervenors, entirely out of context. Brennan Br. 74-75. The district court held simply that because Clement passed Exam 1074 with one of the highest scores and was at the very top of the appointment list, he could not argue that his permanent appointment was delayed by the discriminatory exams, and therefore (unlike every other Offeree who took one of the challenged exams) was not a testing-claim beneficiary. SPA 136 (Order 10). This holding had nothing to do with the district court's separate conclusion that remedies to people who were affected by discrimination in the exams were narrowly tailored. SPA 72-75 (Order 72-75).

affirm the district court's conclusion that the relief in the Agreement was narrowly tailored to serve the compelling interest of redressing past discrimination.

IV. The Brennan Intervenors' challenge to the Hispanic ethnicity of three of the Arroyo Intervenors should be rejected.

The Brennan Intervenors argued below that three of the Arroyo Intervenors—Kevin LaFaye, Steven Lopez, and Nicholas Pantelides—are not actually Hispanic and therefore are not entitled to the race-conscious remedies each received under the Agreement.[22] The district court properly rejected the Brennan Intervenors' argument, SPA 41-42 (Order 41-42), and this Court should similarly reject the argument on appeal.

The Supreme Court has stated that "[t]he term 'national origin' on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came." *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973). Likewise, the EEOC has long defined "national origin" for Title VII purposes to encompass "an individual's, or his or her ancestor's, place of origin." 29 C.F.R. § 1606.1 (EEOC Guidelines on Discrimination Because of National Origin); *see also* 29 C.F.R. § 1607.4(B) (EEOC Uniform Guidelines on Employee Selection Procedures) (defining "Hispanic" for record-keeping purposes as

[22] The Brennan Intervenors make the same argument about Nicholas Pantelides' brother Anthony Pantelides, who is also an Offeree. Although Anthony is not one of the Arroyo Intervenors, the arguments in this section regarding whether Nicholas Pantelides is Hispanic obviously apply to his brother Anthony.

"including persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish origin or culture regardless of race"). As the district court correctly noted, each of the Arroyo Intervenors at issue (LaFaye, Lopez, and Pantelides) has a parent or grandparent that was born in Puerto Rico or Mexico and is properly considered Hispanic. SPA 42 (Order 42 n.34).

The Brennan Intervenors contend that the district court should not have relied on the definition contained in the EEOC Guidelines on Discrimination Because of National Origin, arguing that the use of the phrase "*because of*" in the title of those Guidelines limits their applicability to intentional discrimination. Brennan Br. 78-79. This argument is incorrect, because the regulations expressly indicate that they apply to disparate impact discrimination. 29 C.F.R. § 1606.1 ("In examining . . . charges for unlawful national origin discrimination, the Commission will apply general [T]itle VII principles, such as disparate treatment and adverse impact."). Even if this express reference did not completely foreclose the argument, the Brennan Intervenors' assertion about the meaning of the term "because of" in the Title VII context was rejected by the Supreme Court nearly forty years ago. *See Griggs*, 401 U.S. at 426 n.1, 429-32 (holding that Title VII's prohibition on discrimination "because of" race prohibited "not only overt discrimination but also practices that are fair in form, but discriminatory in operation").

The Brennan Intervenors also cite *Peightal II*, 26 F.3d at 1559, for the proposition that Hispanic identity requires "strong visible indication that the person culturally and linguistically identifies with the group he or she claims." Brennan Br. 79. But *Peightal II* was discussing alternative, not exclusive, means of identifying an individual's national origin. *See Peightal II*, 26 F.3d at 1559-60. And while Spanish-language ability can be an indicator of Hispanic ethnicity, it is plainly not a necessary factor in the EEOC regulations, *see* 29 C.F.R. §§ 1606.1, 1607.4(B), and has consistently been rejected by courts as necessary to Hispanic identity. *See, e.g.*, *Florida v. Alen*, 616 So. 2d 452, 455 (Fla. 1993) (holding that although "a person's native language and surname may be used" to determine Hispanic ethnicity, "those characteristics are not strictly dispositive"); *see also* Gerardo Marin & Barbara VanOss Marin, *Research with Hispanic Populations* 29 (1991) (estimating based on 1980 census data that "at least 20% of Hispanics speak only English").[23]

[23] If cultural and linguistic ties are required to demonstrate Hispanic identity, there is ample record evidence that LaFaye, Lopez, and Pantelides all grew up in Hispanic households and have strong connections with Hispanic culture. SPA 31-32 (Order 31-32); A 2934-35 (Arroyo Statement of Facts ¶¶ 115-18). The Brennan Intervenors did contest some of this record evidence below, but their protestations do not create a genuine dispute of material fact. A 3478-79 (Brennan Resp. to Arroyo Statement of Facts ¶¶ 116, 118). For example, the Brennan Intervenors contested the statement "Steven Lopez's father is Mexican" by responding that Lopez's father is "half-Mexican and half-Latvian," A 3478 (Brennan Resp. to Arroyo Statement of Facts ¶ 116), a distinction that has no bearing under *Espinoza*, 414 U.S. at 88, or EEOC regulations, 29 C.F.R. §§ 1606.1, 1607.4(B).

CONCLUSION

This Court should affirm the district court's conclusion that the permanent appointments and retroactive seniority received by the Arroyo Intervenors are lawful race-conscious remedies under both Title VII and the Fourteenth Amendment.

Dated: August 21, 2009

Respectfully submitted,

NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.

By: */s/ Matthew Colangelo*
John Payton, Director-Counsel
Debo P. Adegbile
Matthew Colangelo
Joy Milligan
99 Hudson Street, 16th Floor
New York, NY 10013
(tel) 212-965-2200
(fax) 212-226-7592
(e-mail) mcolangelo@naacpldf.org

Joshua Civin
1444 I Street, NW, 10th Floor
Washington, DC 20005

Nonetheless, if the Court believes that the Brennan Intervenors have adequately demonstrated a dispute of fact on this point, the Court should remand for consideration of this question by a fact-finder in the first instance.

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

Pursuant to Fed. R. App. P. 32(a)(7)(C)(i), I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), as enlarged by the order of this Court granting leave to file an oversized brief, because this brief contains 15,947 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in Times New Roman 14-point font.

Dated: August 21, 2009

/s/ Matthew Colangelo

Matthew Colangelo
NAACP Legal Defense &
Educational Fund, Inc.
99 Hudson Street, 16th Floor
New York, NY 10013
212-965-2200
mcolangelo@naacpldf.org

Attorney for Intervenors-Appellees Pedro Arroyo et al.

Certificate of Service

Pursuant to Fed. R. App. P. 25(d), Local Rule 31, and Interim Local Rule 25.1, I certify that on August 21, 2009, I filed the foregoing final *Brief of Intervenors-Appellees Pedro Arroyo et al.* with the Clerk of the Court by both email and first-class mail. I further certify that I served this Brief by email and first-class mail on counsel for all parties at the following addresses:

Drake A. Colley
Office of the Corporation Counsel
100 Church Street
New York, NY 10007

Emily Martin
ACLU Women's Rights Project
125 Broad Street, 18th Floor
New York, NY 10004

Gregory B. Friel
U.S Department of Justice, RFK 3714
P.O. Box 14403
Washington, DC 20044-4403

Michael E. Rosman
Center for Individual Rights
1233 20th Street, NW, Suite 300
Washington, DC 20036

Dated: August 21, 2009

/s/ Matthew Colangelo

Matthew Colangelo
NAACP Legal Defense &
Educational Fund, Inc.
99 Hudson Street, 16th Floor
New York, NY 10013
212-965-2200
mcolangelo@naacpldf.org

Attorney for Intervenors-Appellees Pedro Arroyo et al.