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

RESPONSE BRIEF OF INTERVENORS-APPELLEES PEDRO ARROYO ET AL.

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(Continuation of caption)

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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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SUMMARY OF THE ARGUMENT

I. *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009), announced a new Title VII standard for a particular factual context, but it did not displace all of the Supreme Court's well-established Title VII jurisprudence or undermine Congress's goal of promoting equal employment opportunity. Only a substantial and unwarranted expansion of *Ricci* could reach the New York City Board of Education's well-informed decision, after years of litigation and extensive expert discovery, to enter into a settlement to redress pervasive racial exclusion in the traditionally segregated custodial workforce. If, however, this Court concludes that *Ricci* does alter the applicable legal framework, there is overwhelming record evidence that supports affirmance of the district court's judgment.

II. Neither Title VII nor the Equal Protection Clause prohibits race-conscious settlement remedies that may exceed make-whole relief where those remedies do not unnecessarily trammel the interests of incumbent employees and are narrowly tailored to further a compelling interest in remedying the continuing effects of past discrimination. The United States argues that because twelve of the testing-claim beneficiaries (including the Arroyo Intervenors) received seniority primarily tied to their provisional hire dates, the Agreement exceeded the relief necessary to eliminate racial discrimination. But the award of retroactive seniority tied to the Arroyo Intervenors' provisional hire dates was necessary to effectuate

the Agreement's objectives, and Title VII's mandate, of breaking down established patterns of racial exclusion. The Board's continued use of the challenged exams, when the less-discriminatory alternative of the provisional hiring process was available, confined minority workers into a segregated, two-tiered labor force in which they performed the same responsibilities but without the benefits and job security that the predominantly white permanent custodial workforce enjoyed.

III. There is no merit to the United States's contention that the Brennan Intervenors are entitled to force a trial on the merits of the Board's defenses to the United States's original discrimination claims. The Brennan Intervenors have already received all the process they were due. They were entitled to—and did—have their challenges to the validity of the Agreement adjudicated on the merits under the proper legal standards, but they were not empowered to pursue defenses to the validity of the challenged exams that the Board expressly abandoned when it entered into the Agreement. The United States's position is contrary to congressional intent and would effectively preclude future litigants, including the federal government, from ever settling discrimination claims.

ARGUMENT

I. The district court's judgment is consistent with *Ricci v. DeStefano*.[1]

In *Ricci*, New Haven discarded the results of employment tests administered to determine firefighters' eligibility for promotion because, after reviewing the significant statistical disparities between the performance of white and minority test-takers, New Haven thought such action was necessary to avoid violating Title VII's disparate-impact provision. *Ricci*, 129 S. Ct. at 2664, 2673-74. Writing for a narrow majority of the Court, Justice Kennedy concluded that "the raw racial results" of the exams were "the predominant rationale" for New Haven's decision, *id.* at 2681, and, because this "race-based action" upset "legitimate expectations" of high-scoring test-takers, *id.* at 2674, 2676, Title VII required the City to demonstrate "a strong basis in evidence to believe it w[ould] be subject to disparate-impact liability [had] it fail[ed] to take the race-conscious, discriminatory action," *id.* at 2677. Applying this new standard, the Court held that New Haven failed to demonstrate the requisite strong basis in evidence and, thus, violated Title VII. *Id.* at 2677-81. Because New Haven did not meet its statutory burden, the Court did not evaluate the constitutionality of New Haven's actions. *Id.* at 2676.

[1] Pursuant to the parties' stipulation and with leave of the Court, this section addresses the effects of *Ricci* on this appeal and responds to the Brennan Intervenors' supplemental brief on this issue.

The Brennan Intervenors concede that *Ricci* does not directly control the outcome of this appeal, but they argue that this case warrants even *higher* scrutiny than that applied in *Ricci*. Brennan Supplemental Br. 3-8. This expansive reading ignores the care taken by the Supreme Court to limit its holding to the distinctive facts of that case. For the reasons explained below, *Ricci* does not alter the well-established standards under either Title VII or the Equal Protection Clause for evaluating race-conscious settlement remedies that redress pervasive racial exclusion in a traditionally segregated job category. In any event, even under *Ricci*'s new standard, the record supports affirmance of the district court's judgment with respect to the relief awarded to the Arroyo Intervenors.

A. *Ricci* does not alter the Title VII standard directly applicable to this case.

The district court correctly concluded that this case falls squarely within the category of cases governed by *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987), and *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). *See* SPA 42-59 (Order 42-59); Arroyo Br. 23-29, 36-42. The Supreme Court's decision in *Ricci*, which did not apply or even mention *Johnson* or *Weber*, developed a new standard to address an entirely distinct set of factual circumstances: an employer's prospective decision to avoid a potential one-time racial disparity by discarding the results of promotional exams that would otherwise have entitled particular candidates to particular promotions, based on

mere "[f]ear of litigation alone." *Ricci*, 129 S. Ct. at 2681. *Ricci*'s new legal standard has no application to a case like this one involving an employer's well-informed decision, after years of defending against employment discrimination claims, to enter into a settlement to redress ongoing and pervasive racial exclusion in a particular class of jobs.

In cases where the *Johnson* and *Weber* framework applies, the common thread is that the employers made well-informed decisions to adopt race-conscious actions that were plainly targeted at job categories in which "old patterns of racial segregation and hierarchy" persisted. *Weber*, 443 U.S. at 208. The Supreme Court has explained that Title VII permits employers to adopt affirmative action plans "structured to 'open employment opportunities for [African Americans] in occupations which have been traditionally closed to them.'" *Id*. at 208 (quoting 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey)); *see also Johnson*, 480 U.S. at 627-30. When an employer seeks to break down patterns of discrimination and exclusion in such "traditionally segregated job categories," the employer is not required to prove that it previously engaged in discriminatory practices itself or even point to an "'arguable violation' on its part." *Johnson*, 480 U.S. at 630. The employer need demonstrate only that its affirmative action plan is justified by a "manifest imbalance" in the traditionally segregated job category in question; is

intended to attain, not maintain, a balanced workforce; and does not unnecessarily trammel the interests of non-minority employees. *Id.* at 630-641.

Although *Johnson* and *Weber* arose in the context of affirmative action plans, the framework established in those cases also applies where an employer agrees to race-conscious settlement remedies to resolve a legal challenge to employment practices that perpetuate discrimination in a traditionally segregated job category. *See Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 518 (1986); Arroyo Br. 24. Here, the Board agreed to race-conscious remedies only after "'years of highly contentious discovery, entailing the retention of numerous experts by both sides, the production of thousands of pages of documents, the taking of approximately thirty depositions, many applications to the court regarding discovery disputes, and over three months of arms-length settlement negotiations.'" SPA 15 (Order 15) (quoting *United States v. N.Y. City Bd. of Educ.*, 85 F. Supp. 2d 130, 135 (E.D.N.Y. 2000), *vacated sub nom. Brennan v. N.Y. City Bd. of Educ.*, 260 F.3d 123 (2d Cir. 2001)). As a result, the Board was well-informed about the risks of Title VII liability had it continued to defend against the United States's discrimination claims.[2]

[2] As the Board itself explained to the district court, "[t]he 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. Opp'n Objections 58).

Moreover, the Agreement was designed to, and did, redress employment practices by the Board that spanned more than a decade and that perpetuated discrimination in a racially exclusive job category. Arroyo Br. 9-10; Caldero Br. 41-45. The United States explained at the 1999 fairness hearing for approval of the Agreement that this was the purpose of the settlement: "[W]e were very careful in selecting the group of individuals we wanted to become offerees. We needed to consider the United States['s] objective of wanting to rectify the past discrimination in ensuring that there were more Hispanics, blacks, Asians and women on the work force . . . ." A 393 (Tr. of Fairness Hr'g 114). And indeed, the very first sentence of the district court's September 2006 opinion summarized the Board's 1993 demographic study, which "disclosed that . . . 92% [of its 831 permanent custodial employees] were white," SPA 4-5 (Order 4-5), whereas African Americans and Hispanics collectively made up nearly 45% of the qualified labor force, A 547-53, 563 (Ashenfelter Decl. ¶¶ 3-16, 22 & tbl. 8); *see also* U.S. Br. 7 (summarizing the Board's 1997 demographic study showing that 91% of permanent custodians were white men).

Because a pattern of ongoing discrimination was apparent from the broad array of—and extensive period covered by—the employment practices that the United States challenged, the district court saw no need to make an express finding that the Custodian and Custodian Engineer positions are traditionally segregated

job categories. Nevertheless, ample record evidence revealed that the high level of racial exclusion demonstrated by the 1993 demographic survey was only a marginal improvement from the late 1970s. *See* A 3070-71 (Brooks Decl. ¶ 6); A 3074-75 (Coleman Decl. ¶ 5); *see also* A 2953-55 (Villegas Dep. Tr. 15, 63-64) (noting that he started working as a cleaner in the school system in 1978, and explaining that he did not take any civil service exams for Custodian or Custodian Engineer until 1997 because "I see through all my years only white people in those jobs"); A 2957-65 (Punter Dep. Tr. 52-56, 59) (noting that as a Custodian Engineer starting in 1995 he worked in five or six different schools, and undertook Temporary Care assignments in four or five additional schools, and "every time I go to a school, that's all I he[ar]: You are the first black guy who's ever come here as a custodian."); A 2967 (Fernandez Dep. Tr. 57-58) (describing the racial makeup of the Custodian workforce, and noting that "[t]here just wasn't any minorities on the job").[3]

Thus, in this case, as in *Weber*, *Johnson*, and *Local No. 93*, an employer made a well-informed decision to adopt race-conscious employment actions that plainly furthered Title VII's objective to "break down old patterns of racial segregation and hierarchy." *Weber*, 443 U.S. at 208. It was precisely to avoid

[3] If this Court has any question whether the evidence here suffices to demonstrate a traditionally segregated job category, the Court should remand for the district court to evaluate the strong factual record on this point.

discouraging employers from acting voluntarily in such circumstances that the Supreme Court in *Johnson* concluded that evidence of a manifest imbalance "need not be such that it would support a prima facie case against the employer." *Johnson*, 480 U.S. at 632-33. Accordingly, the district court correctly upheld the race-conscious remedies here under Title VII because the record evidence exceeded what was required by *Johnson* in that it established a prima face case of a disparate-impact violation on the challenged exams. *See* SPA 42-59 (Order 42-59); Arroyo Br. 23-29.

Ricci, by contrast, created a new legal standard to evaluate race-conscious employment actions aimed solely at avoiding a potential one-time racial disparity in the results of a particular employment practice that would otherwise have entitled particular candidates to particular positions. *Ricci*, 129 S. Ct. at 2675-76, 2681.[4] Because New Haven officials' "predominant" concern was the "raw racial results" of the particular challenged exams and not whether these results might perpetuate a pattern of historical discrimination in the fire department, the Supreme Court perceived a greater need to confirm that the employer's goals were aligned with Title VII's objectives than would be necessary in cases governed by the

[4] Even the Brennan Intervenors recognize that the goal of the Agreement in this case was "remedying the present effects of past discrimination" and acknowledge that this goal can be easily distinguished from "avoiding a current Title VII disparate impact violation," New Haven's exclusive asserted objective in *Ricci*. Brennan Supplemental Br. 6.

Johnson/*Weber* framework. *Ricci*, 129 S. Ct. at 2681; *see also Ricci v. DeStefano*, 554 F. Supp. 2d 142, 162 (D. Conn. 2006) (providing an expansive list of concerns that may have motivated New Haven officials, none of which was breaking down patterns of segregation and exclusion in a traditionally segregated job category).[5] The Supreme Court's concerns about New Haven's motives were exacerbated because New Haven discarded the test results based on a potentially baseless "[f]ear of litigation alone" without even waiting to see whether anyone would take any action at all to follow up on the threats of litigation presented in testimony to the City's Civil Service Board. *Ricci*, 129 S. Ct. at 2681. It was for these distinctive factual circumstances that the Supreme Court determined that it could not rely on the *Johnson*/*Weber* framework and instead promulgated a new strong-basis-in-evidence standard.

The *Johnson*/*Weber* framework also contains other safeguards that would have been inapplicable in *Ricci* but nonetheless address key concerns that the *Ricci* majority cited in adopting its strong-basis-in-evidence standard. *See Ricci*, 129 S. Ct. at 2675-76. The *Johnson*/*Weber* framework requires that race-conscious

[5] As Justice Ginsburg recognized in dissent, however, there was significant evidence that *could* have been introduced into the *Ricci* record to establish that the promotional ranks in the New Haven fire department were traditionally segregated job categories. *Ricci*, 129 S. Ct. at 2691 (Ginsburg, J., dissenting); *see also* Brief for NAACP Legal Defense & Educational Fund, Inc. as Amicus Curiae Supporting Respondents at 14-18, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (Nos. 07-1428 & 08-328), 2009 U.S. S. Ct. Briefs LEXIS 245, at *28-33.

employment action must be intended to attain, not maintain, a balanced workforce, and that it must not unnecessarily trammel the interests of other non-minority employees. *See Johnson*, 480 U.S. at 630-641. In cases involving affirmative action plans or race-conscious settlements that provide specific guidance on how race will be taken into account in employment actions, these requirements are well-designed to address the Court's concerns in *Ricci* that employees' "legitimate expectations" would be undermined, and that an overemphasis on mere racial statistics would result in "a *de facto* quota system." *Ricci*, 129 S. Ct. at 2675-76. But these requirements are ill-suited to the distinctive circumstances at issue in *Ricci—i.e.*, a decision to discard entirely the results of an employment procedure without any specific remedial action in place or contemplated.

The conclusion that *Ricci* does not alter the *Johnson*/*Weber* framework is further supported by the complete failure of the *Ricci* majority opinion and the separate concurrences by Justices Scalia and Alito to distinguish, or even mention, *Johnson* and *Weber*. *See Ricci*, 129 S. Ct. at 2664-81; *id.* at 2682-83 (Scalia, J. concurring); *id.* at 2683-89 (Alito, J. concurring); *cf. Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*."); *Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 633 (2d Cir. 2005) (refusing "to conclude that the Supreme Court would, without discussion and indeed totally *sub*

silentio, overrule" its prior precedents). This silence is particularly probative because the majority opinion and the separate concurrences declined to respond to the dissent's express statement that "[t]his litigation does not involve affirmative action." *Ricci*, 129 S. Ct. at 2700, 2701 n.6 (Ginsburg, J., dissenting).[6] Moreover, the Court repeatedly emphasized that its ruling was narrowly limited to the circumstances at hand, rejected sweeping restrictions on race-conscious employer actions urged by the petitioners, and clarified that it did not "question an employer's affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions will be made." *Id.* at 2673-74, 2677.[7]

Ricci therefore was solely addressed to a distinct category of cases involving sharply different factual circumstances from those here, and it provides no basis for this Court to alter the district court's application of the *Johnson*/*Weber* framework.

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[6] The *Ricci* majority approvingly quoted *Local No. 93*, 478 U.S. at 515, but only to reject the petitioners' "overly simplistic and too restrictive" arguments. *Ricci*, 129 S. Ct. at 2674.

[7] Even if this Court were to conclude that *Ricci* undercuts the reasoning in *Johnson*, *Weber*, and *Local No. 93*, "it is not within the purview of the Courts of Appeals 'to anticipate whether the Supreme Court may one day overrule its existing precedent.'" *United States v. Estrada*, 428 F.3d 387, 390 (2d Cir. 2005) (quoting *United States v. Santiago*, 268 F.3d 151, 155 & n.6 (2d Cir. 2001)); *see also Agostini v. Felton*, 521 U.S. 203, 237 (1997).

B. Even assuming *Ricci* controls the Title VII analysis, its strong-basis-in-evidence standard is satisfied by the record here.

If this Court concludes that *Ricci*'s strong-basis-in-evidence standard governs the Title VII analysis in this case, the record here contains sufficient evidence to support affirmance of the district court's judgment. *See Drax v. Reno*, 338 F.3d 98, 105-06 (2d Cir. 2003).

Ricci did not specify the exact quantum of evidence necessary to meet the strong-basis-in-evidence test, but the Court made two principles clear: first, an employer is not required to *prove* a Title VII disparate-impact violation against itself before taking race-conscious remedial measures. *Ricci*, 129 S. Ct. at 2674, 2676. Second, the Court held that in the circumstances at issue in *Ricci*:

> [A] prima facie case of disparate-impact liability—essentially, a threshold showing of a significant statistical disparity, and nothing more—is far from a strong basis in evidence . . . because the City could be liable for disparate-impact discrimination only if the examinations were not job related and consistent with business necessity, or if there existed an equally valid, less-discriminatory alternative that served the City's needs but that the City refused to adopt.

Id. at 2678 (citations omitted). Applying this principle, the Court concluded that there was "*no evidence* . . . that the tests were flawed because they were not job-related or because other, equally valid and less discriminatory tests were available to the City." *Id.* at 2681 (emphasis added).

Based on these two principles, meeting *Ricci*'s strong-basis-in-evidence standard requires a prima facie showing of a Title VII disparate-impact violation and *some* evidence, but not *proof*, of non-job-relatedness or less-discriminatory alternatives. This case does not require this Court to identify the minimum evidentiary showing necessary to satisfy the strong-basis-in-evidence test, because there is voluminous record evidence—developed through several years of extensive discovery—that the challenged exams were not job-related *and* that a less-discriminatory alternative was available. Arroyo Br. 12-14, 53-55.[8] The Board's assessment of this legal vulnerability factored into its decision to enter into the Agreement and settle the United States's employment discrimination claims. A 3812 (Defs.' Mem. Opp'n Objections 58).

1. In *Ricci*, the Court concluded that "[t]here is no genuine dispute that the examinations were job-related and consistent with business necessity," and that New Haven's assertions to the contrary were "'blatantly contradicted by the record.'" *Ricci*, 129 S. Ct. at 2678 (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007)). The record in this case could not be more different.

[8] The Arroyo Intervenors' Opening Brief described this evidence in the context of the Agreement's lawfulness under the Fourteenth Amendment, but, if the Court concludes that *Ricci*'s strong-basis-in-evidence standard now applies in the Title VII context, the same evidence would be relevant to the statutory analysis. In this response, we describe the record in more detail in order to highlight the sharp distinctions with the evidence that the Supreme Court reviewed in *Ricci*.

For instance, the United States's experts demonstrated that the Board's procedures for developing the challenged exams fell far short of professional standards. A 1996-2004, 2019, 2029, 2045-47 (Pulakos & Schmitt, Analysis of New York City's School Custodian & School Custodian Engineer Examinations 1-9, 24, 34, 50-52). The experts established that the test-development procedures were insufficient because, *inter alia*, the test developers:

- interviewed only a handful of custodians to determine the relevant job tasks;
- described the necessary knowledge, skills, and abilities (KSAs) for the job in only the most general way;
- failed to analyze the relative importance of the job tasks or KSAs;
- did not undertake independent verification to ensure that test items actually measured the necessary KSAs;
- did not distinguish between KSAs that were typically acquired on the job and those that were required at entry to the job;
- provided no justification at all for the established passing score.

A 2002-04, 2019, 2029, 2045-47 (Pulakos & Schmitt, Analysis of New York City's School Custodian & School Custodian Engineer Examinations 7-9, 24, 34, 50-52). By contrast, the Supreme Court held that the firefighting exams at issue in *Ricci* were developed through "painstaking analyses of the captain and lieutenant positions" in the fire department. *Ricci*, 129 S. Ct. at 2678.

In addition, the United States's experts in this case demonstrated that the challenged exams did not test the KSAs required to complete critical job tasks and could not predict successful performance on the job. A 1963-75 (Siskin & Cupingood, Review of Statistical Methodology 1-13); A 2002-04, 2019, 2029, 2045-47 (Pulakos & Schmitt, Analysis of New York City's School Custodian & School Custodian Engineer Examinations 7-9, 24, 34, 50-52); A 2101-05, 2115-31 (Pulakos & Schmitt, Supplemental Report 1-5, 15-31). By contrast, the Supreme Court held in *Ricci* that the firefighter exams in that case *did* test the relevant KSAs, and further that New Haven intentionally "turned a blind eye to evidence that supported the exams' validity." *Ricci*, 129 S. Ct. at 2678-79. The Board here did not "turn a blind eye" to evidence of validity, but rather retained an exam-validation expert of its own and agreed to settle the litigation only after the United States's experts exposed fatal flaws in the efforts of the Board's own expert to validate the challenged exams.[9] A 1963-75 (Siskin & Cupingood, Review of Statistical Methodology 1-13); A 2101-05, 2115-31 (Pulakos & Schmitt, Supplemental Report 1-5, 15-31); A 3812 (Defs.' Mem. Opp'n Objections 58).

[9] Contrary to the United States's assertion, *see* U.S. Br. 29, the Brennan Intervenors did not present any additional evidence that the Board might have used to create a genuine dispute of material fact regarding job-relatedness. Rather, the Brennan Intervenors' expert, Dr. Sharf, merely opined that the Board's expert reports conformed with general practices of industrial psychology. *See* A 1414 (Sharf Statement ¶ 19). The United States's evidence discrediting the Board's expert reports therefore undermines Dr. Sharf's conclusions as well.

2. As with the evidence of non-job-relatedness, the evidence of a less-discriminatory alternative in this case stands in stark contrast to *Ricci*. In *Ricci*, the record contained only "a few stray (and contradictory) statements" that New Haven's suggested alternatives would be equally valid, and what limited evidence there was largely consisted of testimony by a competing test-developer who had not studied the exams in detail, and whose focus was marketing his services to the City in the future. *Ricci*, 129 S. Ct. at 2679-80. The abundant and undisputed evidence in this case bears no resemblance to the skeletal record in *Ricci*.

Testimony from Board officials, as well as reports submitted by the United States's experts, demonstrated that the provisional hiring process required the same qualifications as permanent appointment, resulted in a greater hire rate for African Americans and Hispanic applicants, and selected candidates who ultimately performed just as well on the job. *See* Arroyo Br. 9, 13-14, 55. The Board produced no evidence below to challenge the showing that the provisional hiring system was a less-discriminatory alternative. Indeed, the Board's extensive use of the provisional hiring process, *see* A 95-101 (Stipulation Regarding Provisional Hires), further supports the conclusion that the Board considered provisional hiring to be, and that it in fact was, an efficient means of fulfilling the Board's hiring needs. *See Bridgeport Guardians, Inc. v. City of Bridgeport*, 933 F.2d 1140, 1148 (2d Cir. 1991).

Thus, by the time it settled the United States's claims, the Board's grasp of the deficiencies in its employment practices far exceeded a strong basis in evidence under *Ricci*'s new standard. In addition to a prima facie case of a disparate-impact violation, some evidence *either* that the challenged custodian exams were not job-related, *or* that less-discriminatory alternatives existed, would suffice to meet the strong-basis-in-evidence test that *Ricci* sets out. *See Ricci*, 129 S. Ct. at 2678. The overwhelming record in this case amply demonstrates *both* non-job-relatedness *and* less-discriminatory alternatives. If this Court applies the *Ricci* standard, it should therefore affirm the district court's judgment that the Agreement's race-conscious remedies were lawful under Title VII.[10]

C. *Ricci* does not require reversal of the district court's conclusion that the Agreement is constitutionally sound.

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). It is uncontested that remedying the effects of prior discrimination is a compelling interest that

[10] In any event, this Court should not reverse on the basis of a new Supreme Court standard without providing an opportunity for the district court to consider in the first instance whether the record is sufficient to satisfy *Ricci*'s strong-basis-in-evidence test. *Cf. LaForest v. Honeywell Int'l, Inc.*, 569 F.3d 69, 76 (2d Cir. 2009); *Pinsky v. Duncan*, 79 F.3d 306, 313 (2d Cir. 1996).

supports the use of race-conscious employment decisions, and that a compelling interest is established where the employer has a "'strong basis in evidence for its conclusion that remedial action was necessary.'" *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion)). Notwithstanding the Brennan Intervenors' contention to the contrary, *Ricci* does not undermine the district court's judgment that the relief awarded to the Arroyo Intervenors is constitutional. Brennan Supplemental Br. 5-8.

1. The district court concluded that the compelling interest requirement was satisfied by the prima facie showing of a Title VII disparate-impact violation against African Americans and Hispanics with respect to each of the challenged exams. SPA 65-72 (Order 65-72); SPA 101-16, 124-25 (Order 5-20, 28-29). This conclusion is consistent with controlling authority of this Court. *See* Arroyo Br. 43-51. As the Brennan Intervenors acknowledge, Brennan Supplemental Br. 5, *Ricci*'s holding was limited to the applicable Title VII standard in that case; the Supreme Court did not discuss what standard might apply under the Fourteenth Amendment. *Ricci*, 129 S. Ct. at 2675-76.

The Arroyo Intervenors recognize that *Ricci* concluded that a prima facie case of disparate-impact liability alone was "far from a strong basis in evidence" to justify, under the Supreme Court's new Title VII standard in that case, New

Haven's decision to discard the results of its promotional exams. *Id.* at 2678. But "[c]ontext matters" in the application of constitutional strict scrutiny, *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003), and *Ricci* did not expressly reject prior Supreme Court authority upon which the district court relied to conclude that evidence approaching a prima facie case of a Title VII disparate-impact violation is sufficient to justify a compelling interest that race-conscious remedies are necessary. SPA 65 (Order 65) (quoting *Croson*, 488 U.S. at 500). For the reasons discussed in Part I.A, *supra*, a settlement agreement to redress pervasive exclusion of African Americans and Hispanics from positions as permanent Custodians and Custodian Engineers does not warrant the exact same evidentiary showing to satisfy the strong-basis-in-evidence standard as the one applied in *Ricci*, where New Haven's asserted motivation was exclusively the avoidance of a possible future violation of Title VII's disparate-impact provision.

2. Even assuming that, in light of the Supreme Court's reasoning in *Ricci*, a prima facie case of a Title VII disparate-impact violation can never satisfy the strong-basis-in-evidence standard either in the statutory or constitutional context, the record here contains ample evidence to uphold the district court's judgment that the Agreement's race-conscious remedies are constitutionally sound. As described in Part I.B, *supra*, the record demonstrates not only an unrebutted prima facie case of a Title VII disparate-impact violation, but also additional evidence

that, at the very least, creates substantial doubt that the challenged exams are job-related and that equally valid, less-discriminatory alternatives are available.

Such evidence would suffice to meet the *Ricci* strong-basis-in-evidence standard, *see* Part I.B, *supra*, and has been deemed sufficient to meet the compelling interest requirement by three other courts of appeals that have addressed the question under *Croson*. *See Edwards v. City of Houston*, 37 F.3d 1097, 1113 (5th Cir. 1994) (holding that the *Croson* 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"), *vacated and superseded on other grounds by* 78 F.3d 983 (5th Cir. 1996) (en banc); *accord 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).

There is no basis for the Brennan Intervenors' assertion that the constitutional strong-basis-in-evidence standard should be *more* stringent than *Ricci*'s statutory standard. Brennan Supplemental Br. 7-8. Even assuming that the Fourteenth Amendment standard is "more demanding" *as a whole* than the Title VII inquiry, Brennan Supplemental Br. 7, the adoption of an identical strong-basis-in-evidence standard will still result in a "more demanding" constitutional framework than the test adopted in *Ricci*. That is because, in addition to the

compelling interest prong, strict scrutiny also requires that public employers demonstrate that race-conscious measures are narrowly tailored to further the remedial goal. *Adarand*, 515 U.S. at 227. *Ricci* did not import a narrow tailoring requirement into the Title VII context; rather, the Court made clear that, if New Haven had been able to satisfy the strong-basis-in-evidence standard, it could have pursued precisely the course of action that it did without violating Title VII. *See Ricci*, 129 S. Ct. at 2664, 2673-77.

Accordingly, *Ricci* does not undermine the district court's judgment that the race-conscious remedies awarded to the Arroyo Intervenors survive strict scrutiny.[11]

II. Retroactive seniority awards in a settlement agreement are not limited to make-whole relief.

The United States argues that the retroactive seniority dates received by twelve of the testing-claim beneficiaries, including all ten of the Arroyo Intervenors, are unlawful to the extent that those dates exceed make-whole relief. *See* U.S. Br. 64-71. The United States's position is that, in this particular case, retroactive seniority awards that exceed make-whole relief violate Title VII because they unnecessarily trammel the rights of incumbent employees, and are

[11] In any event, for the reasons explained *supra* p. 18 n.10, if this Court disagrees that the current record satisfies *Ricci*'s new standard, it should remand rather than reverse outright the district court's judgment.

not narrowly tailored as required by Fourteenth Amendment strict scrutiny because they are not necessary to eliminate racial imbalance in the custodial workforce. U.S. Br. 64-65, 67-68, 70. The United States's contentions should be rejected.

Neither Title VII nor the Fourteenth Amendment limits race-conscious settlement provisions to victim-specific, make-whole relief. In any event, the retroactive seniority dates awarded to the Arroyo Intervenors are necessary to achieve precisely the objectives that the United States originally intended the Agreement and its underlying employment discrimination action to accomplish: The Agreement grants the Arroyo Intervenors seniority primarily tied to the commencement of their employment through the provisional hiring process, which the United States long contended, and ample record evidence confirms, was an equally-valid, less-discriminatory alternative to the discriminatory civil service exams.

A. The retroactive seniority dates awarded to the Arroyo Intervenors need not be limited to make-whole relief to comply with Title VII or the Equal Protection Clause.

As the district court held, neither Title VII nor the Equal Protection Clause limits race-conscious remedies in a settlement to make-whole relief where, as here, those remedies do not unnecessarily trammel the interests of incumbent employees and are narrowly tailored to further a compelling interest in remedying the effects

of past discrimination.[12] SPA 42-46, 52-58, 64-66, 72-78 (Order 42-46, 52-58, 64-66, 72-78).

The United States does not embrace the Brennan Intervenors' groundless contention that race-conscious settlement relief must always be limited to make-whole relief. *See* U.S. Br. 58 ("[T]he United States takes no position in this appeal on whether, in a different case involving different facts, the Equal Protection Clause or Title VII might permit the award of retroactive, competitive seniority to individuals other than discrimination victims."); *see also* Arroyo Br. 36-41 (refuting the Brennan Intervenors' arguments on this point). Nevertheless, the United States argues that, in this case, the award of retroactive, competitive seniority in excess of make-whole relief violates Title VII and the Equal Protection Clause because it is "unnecessary to accomplish the goal of eliminating the racial imbalance in the Board's custodial workforce." U.S. Br. 70.

[12] The district court held that the competitive retroactive seniority received by the Arroyo Intervenors was lawful under Title VII and the Fourteenth Amendment, without regard to whether it was make-whole relief, to the extent that it affected eligibility for school transfers and temporary care assignments; but it also held that competitive retroactive seniority would be unlawful under both Title VII and the Fourteenth Amendment if it affected employee layoffs in the future, unless it constituted make-whole relief. Arroyo Br. 7-8; SPA 42-50, 52-78, 88-90 (Order 42-50, 52-78, 88-90); SPA 101-16 (Order 5-20); SPA 147-50 (Judgment). All parties subsequently agreed to stipulated layoff-seniority dates for the Arroyo Intervenors, which mooted the question whether they received victim-specific, make-whole relief. A 4211-14 (Order).

This contention fundamentally ignores the underlying purposes of the United States's original employment discrimination lawsuit and of the Agreement. In evaluating the necessity of relief for purposes of determining whether a race-conscious remedy is sufficiently narrowly tailored, this Court "must examine the purposes the [relief] was intended to serve." *United States v. Paradise*, 480 U.S. 149, 171 (1987) (plurality opinion). The purposes of the United States in bringing its lawsuit and of the parties in negotiating the Agreement were to remedy the continuing effects of prior discrimination, redress the gross racial imbalance of the permanent custodial workforce, and ensure Defendants' compliance with non-discrimination laws. *Id.* at 171-72; *Howard v. McLucas*, 871 F.2d 1000, 1008 (11th Cir. 1989). The United States concedes that permanent appointments of minority Custodians and Custodian Engineers were essential to the Agreement's goals, U.S. Br. 62, but it refuses to acknowledge that retroactive competitive seniority was also critical to ensure an effective remedy.

First, as the Caldero Intervenors have explained, "[b]y ensuring that the custodian workforce included additional qualified women and people of color, the agreement began to reverse the exclusionary effects of Defendants' practices. The retroactive seniority awards strengthened these effects by enhancing beneficiaries' ability to transfer to larger schools, with more supervisory responsibility and greater visibility within the system." Caldero Br. 38; *see also id.* at 44-45 ("Their

greater visibility will also more effectively dispel stereotypes that women or minorities cannot succeed as custodians . . . .").

Second, retroactive seniority was necessary to eliminate the effects of a segregated, two-tiered labor force. Throughout the litigation in this action, "the United States consistently has taken the position that the provisional hiring system could be advanced as a viable alternative to the written examinations that were the subject of the lawsuit, especially given that many of the same minorities who failed the challenged examinations were subsequently hired into the *same* positions through the provisional hiring process, and had been serving ably in those positions for several years." A 528 (U.S. Mem. Supp. Settlement 57); U.S. Br. 7. In these circumstances, the Board's persistent reliance upon the challenged exams unnecessarily confined minority workers into provisional positions that entailed the same responsibilities but not the same benefits or job security to which the predominantly white permanent workforce was entitled. The Agreement's award of seniority tied to provisional hire dates was an essential tool to rectify the racially exclusionary results of these practices. *See* A 3333-37 (U.S. Resp. to Pl.-Intervenors' 1st Contention Interrog. No. 3(d)) ("[T]he United States continues to believe that the provisional hiring process may be used as an alternative selection device and that awards of seniority based on provisional hire dates thus could be appropriate.").

Moreover, in stark contrast to a general race-based quota system, the Agreement resulted in a limited, one-time remedial award to a small group of individuals who were fully qualified and already performing successfully as Custodians and Custodian Engineers; the Agreement was also far more respectful of the rights of incumbent employees because it retained the integrity of the existing procedures for school transfers and temporary care assignments. *Cf.* U.S. Br. 68-69.[13]

For these reasons, this Court should reject the United States's challenges and affirm the district court's conclusion that it did not need to decide whether the award of retroactive seniority to the Arroyo Intervenors for the purpose of transfers and temporary care assignments was make-whole relief or not, because even if these race-conscious remedies exceeded make-whole relief, they still met the requirements of Title VII and the Fourteenth Amendment.[14]

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[13] The district court faithfully applied all other aspects of the Title VII unnecessary trammeling standard and the Equal Protection Clause's narrow tailoring prong in upholding the Arroyo Intervenors' permanent positions and retroactive seniority for school transfers and temporary care assignments. *See* Arroyo Br. 33-35, 56-63.

[14] If this Court concludes that race-conscious settlement remedies *are* limited to make-whole relief, it should not determine in the first instance whether the seniority awards to the Arroyo Intervenors are properly characterized as make-whole relief. Because the district court concluded that it could approve the Arroyo Intevenors' retroactive seniority dates for school transfers and temporary care assignments without determining whether they were make-whole relief, the district court made no findings on whether those seniority dates were consistent with any

B. There is no support for the United States's argument that post-remand discovery undermines the retroactive seniority dates awarded to the Arroyo Intervenors.

The retroactive seniority dates that all of the Offerees received are precisely those that the United States negotiated as part of the 1999 Settlement Agreement, A 103-74 (Agreement), and that the United States originally defended in both written briefing and oral argument at the 1999 fairness hearing before the district court. A 496-99, 504-17 (U.S. Mem. Supp. Settlement 25-28, 33-46); A 289-90, 392-96 (Tr. of Fairness Hearing 9-10, 113-17). The United States argues that it changed positions between 1999, when it entered into the Agreement, and 2001, when the case returned to the district court after this Court's remand in *Brennan v. New York City Board of Education*, 260 F.3d 123 (2d Cir. 2001), because new post-remand facts were discovered that revealed that some Offerees were awarded retroactive seniority dates earlier than those they would have received absent discrimination. U.S. Br. 14, 64, 67 n.11.

In its appellate brief, the United States does not identify any allegedly new facts or discovery to support its assertion regarding the retroactive seniority dates awarded to the Arroyo Intervenors. *See* U.S. Br. 64-71. In any event, all of the information upon which the United States relied to explain its position shift to the

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make-whole limitation. Therefore, this Court should remand for the district court to adjudicate this factual issue in the first instance. *See* Arroyo Br. 41-42 & n.15.

district court was in the record and available to the United States *before* this Court's remand and, indeed, *before* the United States negotiated the Agreement. *See* A 3434-43 (Arroyo Mem. Supp. Mot. to Enforce 11-20). There is therefore no basis for the United States's contention that post-remand discovery undermined the lawfulness of the Agreement.

To the contrary, the Agreement accomplished exactly what the United States and the Board, as the settling parties, intended it to do and what was appropriate in light of the evidence of the Title VII violations. The retroactive seniority dates for all but one of the Arroyo Intervenors were calculated pursuant to paragraphs 15(a), 15(b)(i), and 16(b) of the Agreement, which specifically provide that individuals who were adversely affected by a challenged exam would receive a retroactive seniority date tied to their provisional hire date if that date preceded the median hire date for the applicable challenged exam.[15] A 108-10 (Agreement ¶¶ 15-16).

[15] The exception, Nicholas Pantelides, received retroactive seniority under paragraph 15(b)(ii) of the Agreement based on the median hire date of Exam 5040, the earlier of two Custodian exams that he took (he also sat for Custodian Exam 1074). A 108-09 (Agreement ¶ 15(b)(ii)). The United States argues that Pantelides was only entitled to retroactive seniority based on the later exam, not the earlier exam, but it has not identified any post-remand discovery supporting this position. U.S. Br. 68-69. To the contrary, the information on which the United States previously based its change of position (that Pantelides did not pass the oral practical for Exam 5040) was known to the United States *before* Pantelides was included in the Agreement. A 3439-42 (Arroyo Mem. Supp. Mot. to Enforce 16-19). In any event, this fact—even if it *were* new—does nothing to undermine the lawfulness of Pantelides's settlement relief. A 2885-87 (Arroyo Mem. Supp. Summ. J. 47-49). As noted *supra* pp. 27-28 n.14, however, if this Court believes

Thus, at the time it entered the Agreement, the United States was aware that certain Offerees would receive retroactive seniority dates that predated hiring pursuant to the challenged exam that they took, because that was the *express intent* of the remedial provisions at issue.

Moreover, as explained in Part II.A, *supra*, a key premise of both the original lawsuit and the Agreement was that the provisional hiring system provided a less discriminatory alternative to the challenged exams and, thus, provisional hire dates constituted a reasonable approximation of the positions that Offerees would have occupied absent discrimination. The United States defended precisely this outcome in urging the district court to approve the Agreement in 1999. A 498-99 (U.S. Mem. Supp. Settlement 27-28) ("[N]o Offeree has been granted a retroactive seniority date that is earlier than that Offeree's first date of service as a provisional or the median [hire] date established for one of the challenged exams that the Offeree took and that corresponds to the Offeree's current job title. . . ."). The United States's change in position thus can only be seen as a new legal interpretation of the same facts.[16]

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that the settlement remedies here are limited to make-whole relief for Pantelides or the other Offerees, it should remand for the district court to consider the Arroyo Intervenors' factual arguments in the first instance.

[16] The parties have debated at length *why* the United States changed its position, occasioning the intervention of the Caldero Intervenors and the Arroyo Intervenors to defend the interests of different sets of Offerees whose settlement relief the

For the reasons set forth in Part II.A, *supra*, the possibility that the retroactive seniority dates awarded to the Arroyo Intervenors may have exceeded make-whole relief does not render them unlawful under Title VII or the Equal Protection Clause.

III. The district court was not required to hold a trial to determine whether the challenged exams violated Title VII.

The United States argues, on the Brennan Intervenors' behalf, that the district court erred by failing to hold a trial in order to determine that the challenged exams in fact violated Title VII and that the Offerees were "actual victims" of discrimination before it concluded that the relief in the Agreement was lawful. U.S. Br. 26-27. Because the Agreement "affects contractual rights of incumbent employees," the United States asserts that "those incumbents should be allowed to step into the shoes of their employer to raise defenses that the employer, by settling the case, has abandoned." *Id.* at 27. The United States's position is flawed.

United States was no longer defending. The Board and the intervening Offerees have noted in prior submissions that the United States withdrew its previous counsel and substituted new counsel after a change in presidential administration. Arroyo Br. 6-7, 19-20; Caldero Br. 26-28. For purposes of this appeal, whether or not the United States's position shift was based on political factors or other reasons, the pertinent point is that the United States has never identified any post-remand discovery that undermines the relief the Arroyo Intervenors received. The United States simply changed its mind.

1. Relying on *United States v. City of Hialeah*, 140 F.3d 968 (11th Cir. 1998), the United States asserts that incumbent employees may block any consent decree that affects their contractual rights. But the district court did not enter the Agreement as a consent decree, and *Hialeah* therefore does not apply. SPA 82-84, 90 (Order 82-84, 90); Arroyo Br. 41 n.14.

2. The United States's claim that remand is required for the Brennan Intervenors to defend the validity of the challenged exams is also incorrect because, under applicable law, the Brennan Intervenors have already received all the process they are due. The Supreme Court's holding in *Local No. 93* establishes that intervening incumbent employees may object to a settlement and litigate affirmative claims as may any other party, but they are not entitled to super-rights that exceed the procedural requirements that bind all other litigants. *Local No. 93*, 478 U.S. at 528-30; *see also Johnson v. Lodge #93 of the Fraternal Order of Police*, 393 F.3d 1096, 1106-07 (10th Cir. 2004) (applying *Local No. 93*).

Here, the Brennan Intervenors' objections to the legality and reasonableness of the Agreement have been fully aired, and their claims that the relief provided by the Agreement adversely affected their rights under Title VII and the Constitution have been adjudicated on the merits under the appropriate legal standards. *See Johnson*, 393 F.3d at 1109 (intervening union received "'all the process that [it] was due'" where it was permitted to object to a consent decree and participate fully

in fairness hearings (quoting *Local No. 93*, 478 U.S. at 529)). The district court entered partial summary judgment in the Brennan Intervenors' favor and partial summary judgment against them on those claims.[17] *See* SPA 40-41, 90-91 (Order 40-41, 90-91); SPA 124-25 (Order 28-29); SPA 143-44 (Order 17-18); SPA 147-50 (Judgment). Nothing more is required under *Local No. 93*.[18]

The Brennan Intervenors have never pursued an affirmative contract claim that would entitle them to relief from the Board; rather, they have asserted only that the alleged effect of the Agreement on their contractual rights entitles them to special procedural rights in the case—that is, the right to require that the United States prove its original discrimination claims prior to court approval of the Agreement. *See, e.g.*, A 3927-37 (Brennan 3d Am. Compl. Intervention); A 4333-45 (Brennan Am. Compl.); A 4435-43 (Miranda Compl.); Caldero Br. 95-96.

There is no support for the United States's assertion that the Brennan Intervenors are somehow afforded procedural super-rights to force a full

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[17] Any suggestion that the Brennan Intervenors can force a *trial* is a red herring; summary judgment under the appropriate legal standard is a valid adjudication on the merits. *See Hialeah*, 140 F.3d at 977 ("[A] nonconsenting party's rights can[] be abrogated . . . only in a judgment entered following trial (*or summary judgment*)." (emphasis added)).

[18] The United States incorrectly argues that this Court's previous mandate required the district court to adjudicate whether the Board's use of the exams "actually discriminated" against the beneficiaries of the Agreement. *See* U.S. Br. 28. This Court expressly declined to consider the merits of any dispute other than whether the Brennan Intervenors had a right to intervene in the action. *See Brennan*, 260 F.3d at 129-30, 133.

adjudication not just of their own claims, but also of the Board's defense to the *original discrimination claims* brought by the United States—a defense that the Board expressly abandoned in settling the lawsuit after lengthy expert discovery. U.S. Br. 20-21, 26-31; *cf.* Brennan Br. 54. Intervention does not amplify an intervenor's substantive legal rights beyond the causes of action it already possesses. *See Local No. 93*, 478 U.S. at 528-30; *see also* Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 Mich. L. Rev. 321, 355 (1988) ("As a party, the intervenor can litigate the same claims that he could have litigated in a separate lawsuit, but only those claims.").

The effect of the United States's argument would be to heighten the legal standard for parties defending voluntary race-conscious remedies by requiring them to *prove* past discrimination over any defense that an intervening party chose to assert. The imposition of such a hurdle was explicitly rejected in *Ricci* because it is contrary to the strong congressional preference for voluntary compliance with federal fair-employment laws. *Ricci*, 129 S. Ct. at 2674.

The Brennan Intervenors' claims that the Agreement's race-conscious remedies violated their statutory and constitutional rights have been properly adjudicated. Under *Local No. 93*, they have received all the process they are due.

3. Even assuming that intervenors might be entitled to block approval of a settlement agreement in circumstances where the agreement violates their

contractual rights, such a principle would not apply here. In *Kirkland v. New York State Department of Correctional Services*, 711 F.2d 1117 (2d Cir. 1983), this Court distinguished legally enforceable interests from "mere expectation[s]," the possession of which is *not* sufficient to allow nonconsenting objectors to veto a settlement. *Id.* at 1126-28. Regarding the promotion procedures that were altered by a consent decree in *Kirkland*, the Court held that the collective bargaining agreement at issue in the case "le[ft] unimpaired the New York State [Civil Service Commission]'s authority over examinations and eligibility lists, which affords it wide discretion to choose and modify the procedures it sees fit to determine merit and fitness." *Id.* at 1128.

The same is true here: the collective bargaining agreement underlying the United States's concern for the "contractual rights of incumbent employees," U.S. Br. 27, leaves sufficient discretion to the Board and thus defeats any argument that the Brennan Intervenors have inviolable contract rights at stake. The same authority on which *Kirkland* relied—namely, the government's authority under civil service law to "choose and modify the procedures it sees fit to determine merit and fitness," 711 F.2d at 1128—applies in exactly the same manner here. *See* N.Y. Civ. Serv. Law §§ 20, 25. The role of seniority in school transfers is the sole seniority-based benefit at issue here that is included in the collective bargaining agreement. *See* Brennan Br. 9-13. As to those transfers, at best, the

collective bargaining agreement merely provides for the possibility of a nonbinding "policy consultation" regarding "[school] transfer plan revisions"—a consultation that can be requested by either the union or the Board, but that was never requested in this case. A 3306-07 (Collective Bargaining Agreement, art. XVI, §§ 1-3); A 3814-15 (Lonergan Decl. ¶¶ 5-6).

Thus, the Brennan Intervenors' interest does not rise to the level of a "specific contractual right[] under [the] collective bargaining agreement." *Kirkland*, 711 F.2d at 1127. As a result, *Kirkland* dictates that the Brennan Intervenors were only "entitle[d] . . . to be heard on the reasonableness and legality of the agreement" and may not force a full adjudication of the original claims underlying the agreement. *Id.* at 1128; *see also Johnson*, 393 F.3d at 1106-09; *Waisome v. Port Auth.*, 999 F.2d 711, 715 (2d Cir. 1993).

The Arroyo Intervenors have never disputed that competitive seniority is an important factor in the award of certain job benefits under the collective bargaining agreement; indeed, they intervened in this action partly out of concern that a loss of the retroactive seniority that they received under the Agreement might harm their interests. However, simply because seniority plays a role in a Custodian's or a

Custodian Engineer's eligibility for certain job benefits does not mean that he or she possesses a right to veto a settlement.[19]

CONCLUSION

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

Dated: August 21, 2009

Respectfully submitted,

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[19] Even if the Brennan Intervenors are entitled to litigate the Board's defenses to the United States's original discrimination claims, summary judgment can easily be upheld on the ground that the challenged exams violated Title VII's disparate-impact provision. *See* Arroyo Br. 53-55.

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), because this brief contains 8,843 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

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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 *Response 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 Response Brief by email and first-class mail on counsel for all parties at the following addresses:

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