UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, JANET A. CALDERO, *et al.*, Plaintiff-Intervenors, and PEDRO ARROYO, *et al.*, Plaintiff-Intervenors, vs. NEW YORK CITY BOARD OF EDUCATION, *et al.*, Defendants, and JOHN BRENNAN, *et al.*, Objector-Intervenors.	Civ. No. 96-0374 (FB) (RML) **ARROYO INTERVENORS' MEMORANDUM OF LAW SUPPORTING ENTRY OF THE CHALLENGED PROVISIONS OF THE AGREEMENT, OPPOSING THE BRENNAN INTERVENORS' MOTION FOR PARTIAL SUMMARY JUDGMENT, AND SUPPORTING THE ARROYO INTERVENORS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiff-Intervenors Pedro Arroyo, Jose Casado, Celestino Fernandez, Kevin LaFaye, Steven Lopez, Anibal Maldonado, James Martinez, Wilbert McGraw, Silvia Ortega de Green, and Nicholas Pantelides (the "Arroyo Intervenors") submit this Memorandum of Law in support of their motion for entry of the challenged provisions of the Settlement Agreement, in opposition to the Brennan Intervenors' motion for partial summary judgment, and in support of their motion for partial summary judgment.

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FACTUAL AND PROCEDURAL BACKGROUND

This action began with a complaint filed by the United States on January 30, 1996, against the New York City Board of Education,[1] the City of New York, the New York City Department of Personnel (later renamed the Department of Citywide Administrative Services, or "DCAS"), and DCAS Commissioner William J. Diamond (collectively, "Defendants"). *See* U.S. Compl. (Ex. 1).[2] The United States alleged disparate impact and pattern-and-practice disparate treatment discrimination in the recruitment and hiring of blacks, Hispanics, Asians, and women for the positions of Custodian and Custodian Engineer[3] in New York City public schools. *Id.* at ¶¶ 8-19.

The Board of Education employs School Custodians and Custodian Engineers to oversee the physical operation, maintenance, repair, and custodial upkeep of the City's public schools. The Custodian and Custodian Engineer positions have historically had a reputation as being segregated, racially closed jobs. *See* Andrew Stein, Taking Back Our Schools II: A Report on the Board of Education's Custodial System (Jan. 12, 1988), at 28 (Ex. 2); Brooks Decl. ¶ 4 (Ex. 3); Coleman Decl. ¶¶ 5-6 (Ex. 4). Blacks and Hispanics have traditionally been, and continue to be, overwhelmingly underrepresented as permanent Custodians and Custodian Engineers compared to their representation in the qualified labor force. Available data show that in 1993,

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[1]The Board of Education has been renamed the Department of Education. This Memorandum will use the prior designation.

[2]All references in this memorandum to "(Ex. __)" are to the exhibits to the accompanying declaration of Matthew Colangelo, unless otherwise noted.

[3]During the pendency of this action, the Custodian and Custodian Engineer positions have been re-titled "Custodian Engineer Level I" and "Custodian Engineer Level II," respectively. This Memorandum will refer to the positions by their former titles.

blacks represented 3.9% of the permanent employees in both positions, while Hispanics represented 3.2% of the permanent employees in both positions. *See* 1993 Ethnic Survey (Ex. 5); Munger Decl. ¶¶ 5-7 (Ex. 6). By contrast, one of the United States's experts in this action calculated that in 1993, the representation of blacks with the appropriate background in the external labor pool was 21.4%, and the representation of Hispanics with the appropriate background was 23.1%. *See* Ashenfelter Decl. of 4/1/99 (Ex. 7), at tbl. 8.

Permanent Hiring Process

During the time period relevant to this action, Defendants administered three civil service exams to select individuals for permanent employment as Custodians and Custodian Engineers: Custodian Exam 5040, administered in 1985; Custodian Engineer Exam 8206,[4] administered in 1989; and Custodian Exam 1074, administered in 1993 (collectively, the "challenged exams").

Exam 5040

For the 1985 Custodian hiring process, Defendants first administered Exam 5040, a written, competitive multiple-choice exam, on December 13 and 14, 1985. *See* Defs.' Resp. to Pl.'s First Set of Reqs. for Admis. (Resp. No. 37) (Ex. 8). Defendants determined in advance of administering Exam 5040 that a score of 70% would constitute a passing score. *See* Examination No. 5040, Am. Notice of Examination, at 2 (Ex. 9). Applicants who did not achieve a passing score were eliminated from the selection process. *See id.* According to Defendants' expert, Dr. Philip Bobko, 58.1% of white applicants passed the exam, compared to

[4]Exam 8206 was administered simultaneously with Exam 8609, and both exams consisted of the same questions. *See* Defs.' Resp. to Pl.'s First Set of Reqs. for Admis. (Resp. No. 40) (Ex. 8). Exam 8609 was a promotional exam, administered to individuals currently employed as Custodians, and Exam 8206 was an open competitive exam. *See* Seluga Dep. Tr. of 6/24/97, at 39 (Ex. 10). The Board of Education exhausted the civil service list from Exam 8609 before using Exam 8206. *Id.*

14.1% of black applicants and 27.7% of Hispanic applicants. *See* Defs.' Resp. to Pl.'s First Expert Set of Reqs. for Admis. (Resps. No. 54-61, 78-81) (Ex. 11). The disparity between the pass rate for black test-takers and white test-takers is 13.85 standard deviations, and is statistically significant at the .05 level. *Id.* (Resps. No. 84-85). The disparity between the pass rate for Hispanic and white test-takers is 8.09 standard deviations, and is statistically significant at the .05 level. *Id.* (Resps. No. 86-87).

After Defendants administered and scored the multiple-choice exam, the Qualifications Review Division of the Department of Personnel (now DCAS) reviewed the qualifications of test-passers. *See* Carol Wachter Dep. Tr. at 43 (Ex. 12). If an individual was determined not to meet the minimum qualifications for employment, that individual was sent a notice of disqualification identifying the basis for the determination. *See* Paul Dep. Tr. of 10/23/03, at 90 (Ex. 13). A disqualified applicant could appeal the "not qualified" determination by (1) submitting a written appeal, with supporting materials, to the Department of Personnel's Committee on Manifest Errors, and (2) if unsuccessful before the Committee on Manifest Errors, by appearing in person before the New York City Civil Service Commission. *See* Carol Wachter Dep. Tr. at 51-53 (Ex. 12); Paul Dep. Tr. of 10/23/03, at 90-97 (Ex. 13). Of the 132 test-passers for Exam 5040 originally rated "not qualified," at least 28 successfully overturned that determination through the appeal process. *See* Pl.'s First Set of Reqs. for Admis. (Reqs. No. 35-36 & Ex. 15) (Ex. 14); Defs.' Resp. to Pl.'s First Set of Reqs. for Admis. (Resps. No. 35-36) (Ex. 8).

Applicants who passed the written multiple-choice exam and were found to meet the minimum requirements for the position were then given a "Qualifying Practical Oral Test." Paul Dep. Tr. of 1/27/04, at 314 (Ex. 15). The qualifying practical oral was used as a pass/fail

component of the selection process, and Defendants determined in advance of administering the practical oral that a score of 70% would constitute a passing score. *See* Juni Dep. Tr. at 98 (Ex. 16); Examination No. 5040, Qualifying Practical Oral Test, at 1 (Ex. 17). The examiners who administered the practical oral test presented a series of questions to each applicant, and scored the applicant's responses based on the examiner's subjective determination of the strength of each answer. *See* Examination No. 5040, Qualifying Practical Oral Test (Ex. 17); Cappoli Dep. Tr. at 117-20 (Ex. 18). There was no way for Defendants to ensure that the practical oral test was consistently administered in the same manner to each applicant. *See* Johnston Dep. Tr. of 1/30/97, at 173-75 (Ex. 19); Serpico Dep. Tr. of 2/5/97, at 91-92 (Ex. 20); Charles Wachter Dep. Tr. of 2/6/97, at 52-53 (Ex. 21); Job Analysis Report for School Custodian Exam No. 1074, at 5 (Ex. 22).

Successful applicants were placed on an eligibility list in rank order based on their scores on the competitive multiple-choice exam. *See* Seluga Dep. Tr. of 6/24/97, at 26 (Ex. 10). The Board of Education called candidates in rank order for vacant positions, interviewing three candidates for each position. *See id.* at 26-27. The Board ultimately appointed 158 individuals to permanent Custodian positions from the Exam 5040 eligibility list. *See* Defs.' Resp. to Pl.'s First Set of Reqs. for Admis. (Resp. No. 10) (Ex. 8).

After appointment, all permanent hires must complete a one-year probationary period, during which they accumulate seniority but are not eligible for voluntary transfers or temporary care assignments (described below). *See* Seluga Dep. Tr. of 10/6/04, at 10 (Ex. 23); Lonergan Dep. Tr. of 6/24/97, at 66-67 (Ex. 24).

Exam 8206

For the 1989 Custodian Engineer hiring process, Defendants administered Exam 8206, a

written, competitive multiple-choice exam, on May 12 and 13, 1989. *See* Defs.' Resp. to Pl.'s First Set of Reqs. for Admis. (Resp. No. 41) (Ex. 8). Defendants determined in advance of administering Exam 8206 that a score of 70% would constitute a passing score. *See* Examination No. 8206, Notice of Examination, at 2 (Ex. 25). According to Defendants' expert, Dr. Philip Bobko, 85.1% of white applicants passed the exam, compared to 50.0% of black applicants and 71.1% of Hispanic applicants. *See* Defs.' Resp. to Pl.'s First Expert Set of Reqs. for Admis. (Resps. No. 62-69, 88-91) (Ex. 11). The disparity between the pass rate for black test-takers and white test-takers is 5.14 standard deviations, and is statistically significant at the .05 level. *Id.* (Resps. No. 93-94). The disparity between the pass rate for Hispanic and white test-takers is 2.15 standard deviations, and is statistically significant at the .05 level.[5] *Id.* (Resps. No. 95-96).

After Defendants administered and scored the multiple-choice exam, the Qualifications Review Division of the Department of Personnel checked the qualifications of test-passers in the same manner as for Exam 5040. *See* Carol Wachter Dep. Tr. at 55-56 (Ex. 12). Applicants rated "not qualified" could appeal that determination by the same procedure as described for Exam 5040. *See* Carol Wachter Dep. Tr. at 59-61 (Ex. 12); Paul Dep. Tr. of 10/23/03, at 105 (Ex. 13). Of the 56 test-passers for Exam 8206 originally rated "not qualified," 23 successfully overturned that determination through the appeal process. *See* Exam No. 8206 Test Rating Sheet, at 2 (Ex. 26); Pl.'s First Set of Reqs. for Admis. (Req. No. 17 & Ex. 5) (Ex. 14); Defs.' Resp. to Pl.'s First

[5]The United States's experts found an even greater disparity between the pass rate for Hispanic and white test-takers, of 2.51 standard deviations (statistically significant at the .05 level). *See* Defs.' Resp. to Pl.'s First Expert Set of Req. for Admis. (Resps. No. 41-42) (Ex. 11).

Set of Reqs. for Admis. (Resp. No. 17) (Ex. 8); Seluga Dep. Tr. of 10/6/04, at 21-22 (Ex. 23).[6]

Unlike for Exam 5040, which had a qualifying practical oral test, there was no practical test component for Exam 8206. *See* Juni Dep. Tr. at 99 (Ex. 16). Successful applicants were placed on an eligibility list, interviewed, and appointed as Custodian Engineers in the same manner as described for Exam 5040. *See* Seluga Dep. Tr. of 6/24/97, at 39 (Ex. 10). The Board ultimately appointed 46 individuals to permanent Custodian Engineer positions from the Exam 8206 eligibility list. Defs.' Resp. to Pl.'s First Set of Reqs. for Admis. (Resp. No. 20) (Ex. 8).

Exam 1074

For the 1993 Custodian hiring process, Defendants administered Exam 1074, a written, competitive multiple-choice exam, on January 29 and 30, 1993. *See* Defs.' Resp. to Pl.'s First Set of Reqs. for Admis. (Resp. No. 45) (Ex. 8). Defendants determined in advance of administering Exam 1074 that a score of 70% would constitute a passing score. *See* Examination No. 1074, Am. Notice of Examination, at 2 (Ex. 27). According to Defendants' expert, Dr. Philip Bobko, 61.7% of white applicants passed the exam, compared to 14.4% of black applicants and 30.8% of Hispanic applicants. *See* Defs.' Resp. to Pl.'s First Expert Set of Reqs. for Admis. (Resps. No. 70-77, 97-100) (Ex. 11). The disparity between the pass rate for black test-takers and white test-takers is 12.51 standard deviations, and is statistically significant at the .05 level. *Id.* (Resps. No. 103-04). The disparity between the pass rate for Hispanic and

[6]The test rating sheet for Exam 8206 indicates that 56 test-passers were originally rated "not qualified," and 313 test-passers were rated "qualified." *See* Exam No. 8206 Test Rating Sheet, at 2 (Ex. 26). However, 336 test-passers were ultimately included on the eligible list for Exam 8206. *See* Pl.'s First Set of Reqs. for Admis. (Req. No. 17 & Ex. 5) (Ex. 14); Defs.' Resp. to Pl.'s First Set of Reqs. for Admis. (Resp. No. 17) (Ex. 8). Thus, the difference of 23 people between the 336 test-passers included on the eligible list and the 313 test-passers originally rated "qualified" reflects the number of test-passers who successfully appealed a "not qualified" determination. Seluga Dep. Tr. of 10/6/04, at 21-22 (Ex. 23).

white test-takers is 8.06 standard deviations, and is statistically significant at the .05 level. *Id.* (Resps. No. 105-06).

Applicants who passed the competitive multiple-choice exam were then given a qualifying practical test. Unlike for Exam 5040, which included an oral practical, the qualifying practical component of Exam 1074 was a written multiple-choice test. *See* Examination No. 1074, Am. Notice of Examination, at 1-2 (Ex. 27). Defendants switched the oral practical test to a written practical because of concern that the oral practical suffered from inconsistent and subjective administration, and that it was susceptible to unfair or biased evaluation. *See* Johnston Dep. Tr. of 1/30/97, at 173-75 (Ex. 19); Serpico Dep. Tr. of 2/5/97 at 91-92 (Ex. 20); Charles Wachter Dep. Tr. of 2/6/97, at 52-53 (Ex. 21); Job Analysis Report for School Custodian Exam No. 1074, at 5 (Ex. 22).

Applicants' qualifications were only reviewed if they passed *both* the competitive multiple-choice exam and the qualifying practical multiple-choice test. *See* Paul Dep. Tr. of 10/23/03, at 23-24 (Ex. 13). The Qualifications Review Division of the Department of Personnel had been phased out by this time, so instead of the Qualifications Review Division reviewing the qualifications of test-passers (as had taken place for Exam 5040 and Exam 8206), the unit within the Department of Personnel that was responsible for developing Exam 1074 reviewed the qualifications of Exam 1074 test-passers. *See* Carol Wachter Dep. Tr. at 44-45 (Ex. 12). Applicants rated "not qualified" could appeal that determination by the same procedure as described for Exam 5040 and Exam 8206. *See* Carol Wachter Dep. Tr. at 66 (Ex. 12); Paul Dep. Tr. of 10/23/03, at 104-05 (Ex. 13). Of the 87 test-passers for Exam 1074 originally rated "not qualified," 11 successfully overturned that determination through the appeal process. *See* Exam No. 1074 Test Rating Sheet (Ex. 28); Exam No. 1074 Eligible Listing of 2/3/98, at 15 (Ex. 29);

Seluga Dep. Tr. of 10/6/04, at 21-22 (Ex. 23).[7]

Successful applicants were placed on an eligibility list, interviewed, and appointed as permanent Custodians in the same manner as described for Exam 5040 and Exam 8206. *See* Seluga Dep. Tr. of 6/24/97, at 39 (Ex. 10). The Board ultimately appointed 46 individuals to permanent Custodian Engineer positions from the Exam 8206 eligibility list. Defs.' Resp. to Pl.'s First Set of Reqs. for Admis. (Resp. No. 20) (Ex. 8).

Provisional Hiring Process

When vacancies existed for the position of Custodian or Custodian Engineer, but there was no current civil service list from which the Board of Education could make permanent appointments to those positions, the Board hired individuals to serve as "provisional" Custodians and Custodian Engineers in those vacancies. *See* Charles Wachter Dep. Tr. of 6/12/97, at 25-27 (Ex. 30); Seluga Dep. Tr. of 6/24/97, at 40-43 (Ex. 10); *see also* N.Y. Civ. Serv. Law § 65(1) (McKinney 2004). As the first step in the provisional hiring process, the Board reviewed the qualifications of applicants for the available positions. *See* Lonergan Decl. of 5/20/99, at ¶ 5 (Ex. 31). The minimum qualifications required for provisional Custodians and Custodian Engineers were identical to the minimum qualifications required for permanent Custodians and Custodian Engineers, respectively. *See id.* at ¶ 6; Cappoli Dep. Tr. at 58 (Ex. 18); Seluga Dep. Tr. of 6/24/97, at 57 (Ex. 10). The Board then selected qualified candidates to be interviewed,

[7]The test rating sheet for Exam 1074 indicates that 87 applicants who passed both the competitive multiple-choice test and the written practical test were originally rated "not qualified," and 524 test-passers were rated "qualified." *See* Exam No. 1074 Test Rating Sheet (Ex. 28). However, 535 test-passers were ultimately included on the eligible list for Exam 1074. *See* Exam No. 1074 Eligible Listing of 2/3/98, at 15 (Ex. 29). Thus, the difference of 11 people between the 535 test-passers included on the eligible list and the 524 test-passers originally rated "qualified" reflects the number of test-passers who successfully appealed a "not qualified" determination. Seluga Dep. Tr. of 10/6/04, at 21-22 (Ex. 23).

and hired those who were most qualified for the available positions. *See* Lonergan Decl. of 5/20/99, at ¶¶ 7-10 (Ex. 31).

Once hired, provisional Custodians and Custodian Engineers receive the same orientation and training as permanent Custodians and Custodian Engineers, *see id.* at ¶ 12, have the exact same job responsibilities as permanent employees, *see* Lonergan Dep. Tr. of 6/24/97, at 56 (Ex. 24), and are reviewed on the same schedule and according to the same performance criteria as permanent employees,[8] *see* Lonergan Decl. of 5/20/99, at ¶¶ 13-14 (Ex. 31). Provisional employees do not, however, have any civil service rights, and can be terminated at any time for unsatisfactory performance. *See id.* at ¶ 15. Moreover, provisional employees are not eligible to bid for transfer to open buildings or for temporary care assignments, and may be replaced or transferred to another school at any time. *See id.* ¶¶ 16-19, 22-24.

The provisional hiring process resulted in a group of successful candidates that was more racially and ethnically representative than the permanent hiring process. Black and Hispanic individuals represented only 5.5% of all permanent hires made from the challenged Custodian exams, but represented 20.4% of provisional Custodian hires made during the same time period. Similarly, black and Hispanic individuals represented only 4.0% of all permanent Custodian Engineer hires from the challenged Custodian Engineer exam, but represented 11.5% of provisional Custodian Engineer hires during the same time period. *See* Siskin & Cupingood, Review of Statistical Methodology, at 11 & Exs. 13A, 13B (Ex. 33).

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[8]Permanent and provisional Custodians and Custodian Engineers are reviewed every six months by both the principal of the school in which they work, and by the plant manager in charge of their region (who serves as the immediate supervisor of the Custodian or Custodian Engineer). *See* Lonergan Decl. of 5/20/99, at ¶¶ 13-14 (Ex. 31). The review forms include twenty-one performance categories, in which each Custodian or Custodian Engineer is rated on a scale of one to five. *See, e.g.*, Arroyo Performance Review Forms, Spring 2004 (Ex. 32).

School Transfers

The Board of Education periodically gives permanent Custodians and Custodian Engineers the opportunity to bid for transfer to open school buildings. *See* Lonergan Decl. Opp'n Prelim. Inj. ¶ 21 (Ex. 34). The current collective bargaining agreement between the custodians' union (Local 891 of the International Union of Operating Engineers) and the Board of Education provides that permanent Custodians and Custodian Engineers are eligible to bid for schools of a certain square footage depending on their years of seniority. *See* Calderone Decl. ¶¶ 2-10 (Ex. 35); Collective Bargaining Agreement, Art. IV (Ex. 36). The annual salary, or "maximum permissible retainage" ("MPR"), that a Custodian or Custodian Engineer can earn is scaled to the size of the school in which he or she works; thus, the CBA provides that employees in higher seniority bands are eligible to work in larger schools. *See* Lonergan Decl. of 5/20/99, at ¶ 18 (Ex. 31); Lonergan Dep. Tr. of 2/5/04, at 78-80 (Ex. 37). There are three seniority bands for Custodians (one to five, five to ten, and ten or more years) and four seniority bands for Custodian Engineers (one to five, five to ten, ten to fifteen, and fifteen or more years). *See* Lonergan Decl. Opp'n Prelim. Inj. ¶ 25. (Ex. 34).

If more than one employee within the eligible seniority band bids for transfer to an open school, the candidate with the highest average performance rating is awarded the transfer.[9] *Id.* ¶ 29. A candidate's performance rating is frequently the deciding factor in a transfer. *See* Calderone Dep. Tr. of 10/1/03 (vol. 2), at 12 (Ex. 39). If two or more candidates have equivalent performance ratings – within one-quarter of a point of each other, on the five-point rating scale –

[9]The applicable performance rating is the average of the principal's rating over the preceding two years (or four rating periods). *See* Lonergan Decl. Opp'n Prelim. Inj. ¶ 29 (Ex. 34); Calderone Dep. Tr. of 10/1/03 (vol. 1), at 52 (Ex. 38).

seniority is used as a tie-breaker, and the candidate with the earliest seniority date will generally be awarded the transfer. Lonergan Decl. Opp'n Prelim. Inj. ¶ 30 (Ex. 34). Even if a candidate in a tie-breaker has the most seniority, however, that candidate will not necessarily receive the transfer if the school's principal vetoes the candidate, *id.* ¶ 31, or if the candidate has received a plant manager rating of less than three, *see* Calderone Dep. Tr. of 10/1/03 (vol. 1), at 52-53 (Ex. 38).

Custodians and Custodian Engineers who are otherwise eligible to transfer may not bid on any vacancies if they have transferred to a new school in the past two years, or if they are currently in disciplinary proceedings. *See* Lonergan Decl. Opp'n Prelim. Inj. ¶ 23 (Ex. 34).

Temporary Care Assignments

When there is a shortage of qualified custodial personnel such that the Board is unable to assign a Custodian or Custodian Engineer to every school that needs one, or when a Custodian or Custodian Engineer is out of work due to illness, vacation, or leave, the Board staffs those vacancies using a system of temporary care ("TC") assignments. Lonergan Decl. Opp'n Prelim. Inj. ¶ 15 (Ex. 34). Under the TC program, a Custodian or Custodian Engineer who is already assigned permanently to one school takes on temporary responsibility for a second school, generally for a period of eight weeks, and earns a portion of the salary for that second school (but is not required to work any additional weekly hours). *Id.* Only permanent Custodians and Custodian Engineers may undertake TC assignments; provisional employees are not eligible. *See id.* ¶ 18.

All permanent Custodians and Custodian Engineers who have completed their probationary period are eligible for TC assignments within the borough in which they currently work. *See* Calderone Dep. Tr. of 10/1/03 (vol. 1), at 88-89 (Ex. 38). Each borough office within

the Board of Education's Building Services Division maintains lists of permanent Custodians and Custodian Engineers assigned to schools within its borough, and offers TC assignments to those at the top of the list as schools become available. *See* Lonergan Decl. Opp'n Prelim. Inj. ¶¶ 15-16 (Ex. 34). TC assignments are not affected by seniority date; rather, each individual's position on the TC list is determined by the date on which he or she completed the probationary period after becoming a permanent employee. *Id.* ¶¶ 15, 17.

The rules governing the TC system are not included in the Collective Bargaining Agreement, and placement on the TC list is not a matter of contractual right for a Custodian or Custodian Engineer. *See* Lonergan Decl. of 5/20/99, at ¶ 25 (Ex. 31); Calderone Dep. Tr. of 10/1/03 (vol. 1), at 117 (Ex. 38); Calderone Dep. Tr. of 10/1/03 (vol. 2), at 15-16 (Ex. 39).

The Current Lawsuit

The United States brought this lawsuit on January 30, 1996, alleging disparate impact and pattern-and-practice disparate treatment discrimination in the recruitment and hiring of blacks, Hispanics, Asians, and women as Custodians and Custodian Engineers. *See* U.S. Compl. ¶¶ 8-19 (Ex. 1). Specifically, the United States alleged, inter alia, (1) that the challenged exams had a disparate impact on black and Hispanic test-takers in violation of Title VII; and (2) that Defendants' recruitment practices for the positions of Custodian and Custodian Engineer had a disparate impact on blacks, Hispanics, Asians, and women in violation of Title VII. *See United States v. N.Y. City Bd. of Educ.*, 85 F. Supp. 2d 130, 133-34 (E.D.N.Y. 2000), *vacated sub nom. Brennan v. N.Y. City Bd. of Educ.*, 260 F.3d 123, 133 (2d Cir. 2001).

In 1997, during the litigation of (and as part of its defense for) the United States's claims, Defendants conducted a post-hoc review of the qualifications of individuals who failed Exam 5040, Exam 8206, and Exam 1074. The post-hoc review procedure was conducted by a different

division within the Department of Personnel than the division that conducted the contemporaneous review of test-passers for Exam 5040 and Exam 8206. *See* Carol Wachter Dep. Tr. at 44-45 (Ex. 12); Paul Dep. Tr. of 10/23/03, at 27-31 (Ex. 13). In contrast to the contemporaneous review of the qualifications of test-passers, Defendants' post-hoc review of the qualifications of test-failers did not include any administrative or judicial process by which a finding of "not qualified" could be overturned. *See* Paul Dep. Tr. of 10/23/03, at 90-97 (Ex. 13); Defs.' Resp. to Pl.'s First Expert Set of Req. for Admis. (Resps. No. 171-84) (Ex. 11). Defendants have subsequently stated that their post-hoc determinations of the qualifications of test-failers were not always correct. *See, e.g.*, Paul Dep. Tr. of 10/23/03 at 53-54 & Ex. 5 (conceding that Defendants' post-hoc conclusion that Pedro Arroyo would not have been qualified for the Custodian position at the time he took Exam 5040 was incorrect) (Ex. 13); Paul Dep. Tr. of 1/27/04 at 368-73 (same) (Ex. 15).

After three years of vigorous litigation and extensive discovery, the United States's disparate impact and disparate treatment discrimination claims against Defendants were resolved in a negotiated settlement agreement (the "Agreement") that the parties submitted to this Court in February 1999. The Agreement included provisions that, in relevant part, granted permanent Custodian and Custodian Engineer appointments, along with retroactive seniority, to a group of beneficiaries (the "Offerees"). *See* Agreement ¶¶ 4-6, 12-16 & App. A (Ex. 40). The term "Offerees" was defined to include (a) all black, Hispanic, Asian, and female Custodians and Custodian Engineers listed on the Stipulation Regarding Provisional Hires[10] and still employed

[10]The Stipulation Regarding Provisional Hires resulted from a discovery ruling made by Magistrate Judge Levy that Defendants were not required to produce a complete list of all provisional Custodians and Custodian Engineers hired during the relevant time period, and that a (continued...)

(provisionally or permanently) as Custodians or Custodian Engineers as of the date of approval of the Agreement, and (b) all black, Hispanic, Asian, and female Custodians and Custodian Engineers who were not listed on the Stipulation Regarding Provisional Hires but who were employed as provisionals as of the date of the approval of the Agreement, and who took at least one of the challenged exams. *See id* ¶ 4.

The original list of Offerees, attached as Appendix A to the Agreement, was a tentative list of those individuals that the United States and Defendants believed met the definition of "Offeree" in paragraph 4 of the Agreement. *See id.* ¶ 4 & App. A; Cote Decl. of 11/15/04, at ¶ 7 (Ex. 42). The parties subsequently revised the list of Offerees to include individuals who fell within the definition of "Offeree" in paragraph 4 of the Agreement, but who were excluded from the original list by reason of oversight or mistake regarding their ethnic identity.[11] *See* Defs.' Mem. Supp. Settlement at 21-25 (Ex. 43); Letter from Cote to Judge Levy of 6/25/99 (Ex. 44); Tr. of Fairness Hr'g before Judge Levy, 5/27/99, at 39 (Ex. 45); U.S. Resps. to Intervenor-Objectors' Contention Interrogs. (Resp. No. 10) (Ex. 46). Ultimately, 59 individuals were included as beneficiaries of the Agreement (43 Custodians and 16 Custodian Engineers). *See* Lonergan Decl. Opp'n Prelim. Inj. ¶¶ 7, 10-12 (Ex. 34).

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[10](...continued)
stipulated list including provisionals whose names appeared on available personnel forms from 1993, 1996, and 1997 would constitute a statistically valid sample for the purposes of this action. *See* Calendar Entry for Disc. Conf. Held before Judge Levy, Apr. 9, 1997 (entered in the docket of this action at Doc. No. 16) (Ex. 41).

[11]Among the beneficiaries who were added to the revised list of Offerees are two of the Arroyo Intervenors, Kevin LaFaye and Nicholas Pantelides. Both were added after they submitted documentation to Defendants to prove that they were erroneously excluded from the list of beneficiaries. *See* Defs.' Mem. Supp. Settlement at 21-25 (Ex. 43); Letter from Cote to Judge Levy of 6/25/99 (Ex. 44).

The Agreement did not require Defendants to create any new permanent positions, but rather required Defendants to appoint the Offerees to fill existing vacancies (which were required by law to be filled with permanent appointments anyway). *See* N.Y. Civ. Serv. Law § 65(2) (McKinney 2004); U.S. Mem. Supp. Settlement at 42 (Ex. 47).

The United States and Defendants provided that the Agreement was to "resolve[] all issues that were or could have been raised by the United States in its complaint." *See* Agreement ¶ 2 (Ex. 40). In order to receive the remedies provided by the Agreement, each of the identified Offerees was required to sign and return a release agreeing to "discharge Defendants from all claims arising out of any discrimination on the basis of Race, National Origin, or sex with respect to the positions of Custodian or Custodian Engineer occurring before the execution of the Release." *Id.* ¶ 39 & App. G.

Several incumbent employees (the "Brennan Intervenors")[12] sought to intervene in the case, challenging the Agreement's grant of permanent status and retroactive seniority as a violation of the Fourteenth Amendment Equal Protection Clause and Title VII. In February 2000, this Court approved the Agreement in its entirety and denied the Brennan Intervenors' motion to intervene. *N.Y. City Bd. of Educ.*, 85 F. Supp. 2d at 157.

On appeal, the United States Court of Appeals for the Second Circuit vacated this Court's order denying the motion to intervene, and also vacated the approval of the Agreement (without discussing the merits of the Brennan Intervenors' constitutional and statutory objections). *Brennan*, 260 F.3d at 133. On remand, this Court permitted the Brennan Intervenors to

[12]The Brennan Intervenors are currently four permanent employees – three are permanent Custodian Engineers (James Ahearn, John Brennan, and Dennis Mortensen), and one is a permanent Custodian (Scott Spring).

intervene. In February 2002, with the consent of the original parties and the Brennan Intervenors, this Court approved all provisions of the Agreement with the exception of paragraphs 13-16, dealing with the permanent appointments and retroactive seniority dates to be awarded to the Offerees under the Agreement. *See* Order of Judge Levy, 2/28/02 (entered in the docket of this action at Doc. No. 245).

In the course of ongoing litigation in this Court after remand, the United States changed its position several times with regard to the lawfulness of the remedies provided by the Agreement. First, in April 2002, the United States declined to defend the Agreement's remedies for all but twenty-seven of the Offerees, those twenty-seven being individuals who had taken and failed one of the challenged exams. *See* U.S. Mem. in Partial Opp'n to Mot. for Prelim. Inj. at 2 & n.2 (Ex. 48). On becoming aware of this first change in posture, a group of the affected Offerees (the "Caldero Intervenors") moved to intervene to protect their interests. The Caldero Intervenors' motion for permissive intervention was granted by Stipulation and Order in February 2003. *See* Stipulation and Order of Judge Levy, filed 2/13/03 (entered in the docket of this action at Doc. No. 335).

The United States indicated a second change in position in a September 2003 response to the Caldero Intervenors' contention interrogatories. In this response, the United States indicated that it would no longer defend the lawfulness of part of the remedy (namely, the grant of competitive-status retroactive seniority) provided to an additional group of Offerees (all of whom were previously included in the list of twenty-seven Offerees that the United States had contended, in April 2002, *were* lawfully entitled to relief). *See* U.S. Resps. to Pl.-Intervenors' First Contention Interrogs. (Resps. No. 1, 3(a)-(d), & attached relief chart) (Ex. 49). Each of the Arroyo Intervenors is one of the new group of Offerees whose remedies the United States

indicated in its response to contention interrogatories that it was no longer defending. The Arroyo Intervenors moved to intervene in this action on July 6, 2004, and this Court granted the motion for intervention on July 9, 2004. *See* Minute Entry for Pre-Motion Conf. before Judge Block, 7/9/04 (entered in the docket of this action at Doc. No. 440).

On July 20, 2004, based upon the parties' stipulation, this Court ordered that the following four issues be briefed:

> 1) Can paragraphs 13-16 of the settlement agreement be entered as a consent judgment?
> 2) If so, what legal standard then governs judicial approval or disapproval of paragraphs 13-16 of the agreement?
> 3) If not, what legal standard governs review of the legality of the benefits awarded pursuant to paragraphs 13-16 of the agreement?
> 4) Does the evidence meet the applicable standard?

Order of July 20, 2004, at 2 (entered in the docket of this action as Doc. No. 441).

ARGUMENT

I. The Challenged Paragraphs of the Agreement Can Be Entered as a Consent Judgment

This Court may enter paragraphs 13 to 16 of the Agreement as a consent judgment.[13]

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[13]The Brennan Intervenors challenge the legality of all of the relief provided in ¶¶ 13-16 of the Agreement. Not all of this relief affects their interests, however. Each of the Brennan Intervenors is currently a permanent Custodian or Custodian Engineer, *see* Brennan Mem. at 32, so the permanent positions that certain Offerees received pursuant to ¶ 13 of the Agreement cannot be said to have hindered the Brennan Intervenors' ability to obtain permanent positions. Nor are the Brennan Intervenors' interests affected in any way by the grant of retroactive seniority in ¶¶ 14-16 insofar as seniority affects noncompetitive employment benefits, such as purchasing pension credits. *See Franks v. Bowman Transp. Co.*, 424 U.S. 747, 766 (1976) (distinguishing between "benefits" seniority and "competitive status" seniority in terms of the effects on third parties). Accordingly, this Court should view the Brennan Intervenors' challenge to the lawfulness of the Agreement as limited only to those provisions of ¶¶ 14-16 that arguably affect their interests – namely, the award of "competitive status" seniority. *See, e.g.*, *Hispanic Soc'y v. N.Y. City Police Dep't*, 806 F.2d 1147, 1152 (2d Cir. 1986) (holding that white officers could not contest the validity of a settlement agreement because, even if it were

(continued...)

The United States's partial withdrawal of consent from the challenged provisions of the Agreement does not preclude entry of those provisions of the Agreement as a consent judgment. In addition, the Agreement can be entered as a consent judgment even if the contract term has expired.

A. The Agreement Can Be Entered As A Consent Judgment Even If The United States No Longer Consents To All Of The Agreement's Provisions

The Second Circuit has held that where a settlement agreement is voluntarily reached and announced to the trial court on the record, the court may enter that agreement as a consent judgment even if one party attempts to withdraw consent prior to the moment of entry of judgment. *See Janus Films v. Miller*, 801 F.2d 578, 583-84 & n.1 (2nd Cir. 1986) ("[The defendant] contends that he was entitled to preclude the entry of judgment by reneging on the settlement agreement reached during the trial. [The district court] correctly determined that no basis had been shown for refusing to enforce the settlement by entry of judgment. Plainly [the defendant] could not walk away from the settlement simply because he changed his mind."); *see also King v. Walters*, 190 F.3d 784, 790 (7th Cir. 1999) (holding that consent to a valid agreement did not need to continue to the moment of judgment in order for a court to enter the consent judgment, and noting that so long as the agreement was validly made, the defendants' "eleventh hour" attempt to repudiate the agreement would not preclude the district court from entering judgment); *Dillard v. Crenshaw County*, 748 F. Supp. 819, 823, 828-31 (M.D. Ala. 1990) (holding that where the plaintiffs and the defendant reached an agreement to settle the plaintiffs' claims, but where the defendant later sought to withdraw its consent from the

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[13](...continued)
invalidated, they would not be entitled to promotion).

agreement, entry of the agreement as a consent decree was proper because both parties voluntarily agreed to the settlement); *In re Property Seized*, 501 N.W. 2d 482, 485 (Iowa 1993) ("To the extent that our [prior] decision . . . suggests that consent to judgment may be withdrawn as of right at any time prior to actual entry of judgment, that view is now specifically disapproved." (internal citation omitted)); *cf. Daly v. Darby Twp. Sch. Dist.*, 252 A.2d 638, 640 (Pa. 1969) ("Appellant of course cannot agree to a judicial settlement and then claim that because she has new counsel, she may take an appeal from that very agreement.")

There can be no dispute that the Agreement here is a valid settlement of the United States's discrimination claims against Defendants. Settlement of a Title VII claim is valid so long as it is knowing and voluntary at the time it is made. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n.15 (1974). Looking to the plain language of the document, as this Court must do to determine whether the parties knowingly and voluntarily consented to the Agreement, *see Janneh v. GAF Corp.*, 887 F.2d 432, 436 (2d Cir. 1989), it is clear that the Agreement conveys the intention of both parties to settle. *See* Agreement at 2 ("[T]he United States and Defendants, desiring to avoid protracted, expensive and unnecessary litigation, agree to the entry of this Settlement Agreement, which resolves all issues that were or could have been raised by the United States in its complaint.") (Ex. 40). Indeed, neither the United States nor the City has ever argued that the Agreement was anything but voluntarily made.

Accordingly, the Agreement can be entered as a consent judgment notwithstanding the United States's subsequent change of position regarding the propriety of certain provisions.[14]

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[14]Even if continuing consent were necessary for entry of judgment, the United States has consistently supported all of the remedies contained in ¶¶ 13-16 of the Agreement except the award of "competitive status" seniority to certain Offerees. *See* U.S. Resps. to Pl.-Intervenors' (continued...)

B. The Agreement Can Be Entered As A Consent Judgment Even If It Has Expired

In addition, the Agreement can be entered as a consent judgment even if the contract term has already expired. The Agreement provides that it "shall remain in force for a period of four years from the last date of execution of the Settlement Agreement by the parties." Agreement ¶ 11 (Ex. 40). Assuming (without conceding) that the Agreement has expired,[15] expiration of the contract term does not preclude entry of the Agreement as a consent judgment.

Two features of negotiated consent judgments warrant the entry of an expired settlement agreement as a consent judgment. First, Title VII provides that an employment practice that implements a consent judgment:

> may not be challenged in a claim under the Constitution or Federal civil rights laws (i) by a person who, prior to the entry of the judgment . . . had (I) actual notice of the proposed judgment . . . and (II) a reasonable opportunity to present objections to such judgment or order; or (ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation . . . .

42 U.S.C. § 2000e-2(n)(1). This provision of Title VII provides significant protection for employers from challenges to the lawfulness of employment actions taken to implement a consent judgment. *See* 42 U.S.C. § 2000e-2(n)(1)(A). Congress enacted this provision as part of

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[14](...continued)
First Contention Interrogs. (Resps. No. 1, 3(a)-(d), & attached relief chart) (Ex. 49). The parties to the Agreement have thus continued in their consent to the grant of permanent positions and the award of "benefits" seniority to the Offerees.

[15]Because the parties executed the Agreement and filed it with this Court on February 11, 1999, the Brennan Intervenors argue that the Agreement expired by its terms on February 11, 2003. The Arroyo Intervenors reserve argument on whether the Agreement has expired, and will address this question in their brief in response to Defendants' Motion to Enforce Paragraph 9 of the Agreement.

the Civil Rights Act of 1991, with the express goal of furthering Title VII's objective of encouraging voluntary settlement of discrimination claims, and of guaranteeing that employers were not "left vulnerable to subsequent lawsuits by persons or groups claiming that the employer's compliance with [a] consent decree constituted discrimination against them." H.R. Rep. No. 102-40, pt. 1, at 49-50 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 590-91; *see also EEOC v. Fed. Express Corp.*, 268 F. Supp. 2d 192, 200 (E.D.N.Y. 2003). In light of these objectives, it is of no import that a settlement agreement sought to be entered as a consent judgment has expired, because the protections of § 2000e-2(n) can still attach to employment actions taken to implement that consent judgment. *See EEOC v. Local 40, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 76 F.3d 76, 81 (2d Cir. 1996) (noting that employment actions that implement a consent judgment can have prospective effect that continues even after the judgment has expired). A contrary rule would not only severely undermine the Congressional goals that motivated the enactment of § 2000e-2(n), but would also deprive the parties to a settlement of the benefit of their bargain.

In the instant case, the United States and Defendants undertook to have the Agreement entered as a consent judgment in part to secure the protection from subsequent challenge that § 2000e-2(n) provides. *See N.Y. City Bd. of Educ.*, 85 F. Supp. 2d at 134 ("Pursuant to 42 U.S.C. § 2000e-2(n), the parties provided notice to those persons whose interests may be affected by the Agreement."). Moreover, the permanent appointments and awards of retroactive seniority that Defendants implemented pursuant to ¶¶ 13-16 of the Agreement were plainly designed to be prospective remedies with continuing effect after the Agreement expired. *See* Brennan Mem. at 35 n.13 (conceding that "the benefits to the Offerees" do not "somehow all reverse themselves automatically" when the Agreement expires). The expiration of the Agreement, then, would not

diminish the value to Defendants of the protection from challenge provided by § 2000e-2(n)(1) – a benefit that Defendants clearly bargained for in negotiating the Agreement.

The second feature of consent judgments that warrants the entry of an expired settlement agreement is that consent judgments generally have res judicata effect, which a contract alone cannot provide. *See Amalgamated Sugar Co. v. NL Indus., Inc.*, 825 F.2d 634, 639 (2d Cir. 1987); *accord Bayou Fleet, Inc. v. Alexander*, 234 F.3d 852, 858 (5th Cir. 2000). Indeed, a primary reason why parties choose to settle a dispute by consent judgment rather than by contract alone is to protect themselves from further litigation. *See, e.g.*, 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4443, at 255-56 & n.10 (2d ed. 2002 & Supp. 2004). Thus, entry of a consent judgment to record a settlement agreement serves to protect the parties as fully as possible from further litigation on the claim. *See, e.g.*, *Hoffenberg v. Hoffman & Pollok*, 288 F. Supp. 2d 527, 537-39 (S.D.N.Y. 2003) (holding that the plaintiff's claims against the defendant were barred by, inter alia, the doctrine of res judicata in connection with a consent judgment between the two parties). Given the claim preclusive function of consent judgments, there is no reason why a consent judgment cannot be entered after the expiration of the contract by which the dispute was settled – the parties will still benefit from the preclusive effect of the consent judgment in the event of a subsequent challenge.

The Agreement in the instant case clearly evidences the intent of the United States and Defendants that res judicata apply. As noted above, the parties agreed that the Agreement would "resolve[] all issues that were or could have been raised by the United States in its complaint." Agreement at 2 (Ex. 40). The parties to the Agreement therefore bargained for the preclusive effect that entry of a consent judgment would provide.

The Brennan Intervenors argue that the expiration of the Agreement renders it unenforceable. *See* Brennan Mem. at 35. Even assuming, arguendo, that expiration of the Agreement term precludes *enforcement* of the Agreement's provisions, enforcement of the Agreement is different from *entry* of the Agreement as a consent judgment. *See, e.g.*, *Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 519-25 (1986) (distinguishing between entry of a consent judgment and enforcement of a consent judgment); *see also Frew v. Hawkins*, 124 S. Ct. 899, 904 (2004) ("The [respondents] challenge only the enforcement of the [consent] decree, not its entry."). Entry of a consent judgment is the process by which a court first reviews a contractual settlement agreement to determine whether the agreement is lawful, reasonable, and equitable, and then enters the terms of that agreement as a judgment of the court. *See, e.g.*, *Martin v. Wilks*, 490 U.S. 755, 788 n.27 (1989), *superseded on other grounds by statute at* 42 U.S.C. § 2000e-2(n)(1); *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 378 (1992). Enforcement of a consent judgment is the process by which one of the parties may seek to have the court compel compliance with the terms of that judgment. *See, e.g.*, *Wilks*, 490 U.S. at 788 n.27; *Local 93*, 478 U.S. at 523-24 & n.13. It is the question of *entry* of a consent judgment, not enforcement, that is presently before this Court. *See* Order of July 20, 2004, at 2 (ordering the parties to brief the question: "Can paragraphs 13-16 of the settlement agreement be *entered* as a consent judgment?" (emphasis added)).

In order to effectuate the goals of Title VII, and to provide the parties with the benefit of their bargain – including that the Agreement be protected by both § 2000e-2(n) and the doctrine of res judicata – this Court should conclude that it can enter the Agreement as a consent

judgment.[16]

II. The Challenged Provisions Should Be Judicially Approved Because They Are Lawful, Reasonable, and Consistent with Public Policy

If this Court concludes that it may enter the Agreement as a consent judgment, the standard for doing so is to determine whether the Agreement is lawful, fair, reasonable, and consistent with public policy. *See Kirkland v. N.Y. State Dep't of Corr. Servs.*, 711 F.2d 1117, 1128-29 (2d Cir. 1983); *see also EEOC v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir. 1985); *Williams v. Vukovich*, 720 F.2d 909, 921 (6th Cir. 1983); *United States v. City of Alexandria*, 614 F.2d 1358, 1361-62 (5th Cir. 1980). Because of Congress's strong preference for voluntary compliance with Title VII, *see Local 93*, 478 U.S. at 515 ("Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII."), settlements in Title VII cases enjoy a presumption of validity and therefore should be approved unless unlawful or unreasonable. *Kirkland*, 711 F.2d at 1129. As the Second Circuit has explained:

> Title VII settlements are afforded a presumption of validity because they "may produce more favorable results for protected groups than would more sweeping judicial orders that could engender opposition and resistance," and because they also reduce the cost of litigation, promote judicial economy, and vindicate an important societal interest by promoting equal opportunity.

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[16]In addition to the parties to the Agreement, the Arroyo Intervenors here have an interest in the finality and protection from collateral attack that entry of judgment would provide. Each has relied and continues to rely on the remedies included in the Agreement in making financial and personal decisions about their jobs, retirement, and families. *See, e.g.*, Arroyo Decl. ¶ 11 (Ex. 50); Casado Decl. ¶¶ 7, 10 (Ex. 51); Fernandez Decl. ¶¶ 8, 12 (Ex. 52); LaFaye Decl. ¶¶ 10-11 (Ex. 53); Lopez Decl. ¶¶ 10, 12-13 (Ex. 54); Maldonado Decl. ¶ 10 (Ex. 55); Martinez Decl. ¶ 10 (Ex. 56); McGraw Decl. ¶ 12 (Ex. 57); Ortega de Green Decl. ¶ 9 (Ex. 58); Pantelides Decl. ¶ 8 (Ex. 59). The protections that attend entry of the Agreement as a consent judgment thus allow the Arroyo Intervenors to make these financial and personal decisions without the risk of future disruption of those decisions.

Id. at 1129 n.14 (quoting *Vulcan Soc'y of Westchester County, Inc. v. Fire Dep't of City of White Plains*, 505 F. Supp. 955, 961 (S.D.N.Y. 1981)) (internal citations omitted). Because of this presumption of validity, the burden of showing invalidity falls on objectors to a settlement – here, the Brennan Intervenors. *See Brennan*, 260 F.3d at 129; *Williams*, 720 F.2d at 921.

A. The Challenged Provisions Are Lawful Under Title VII

The first step in determining the lawfulness of the challenged provisions of the Agreement is to assess whether they are permissible under Title VII. *See Kirkland*, 711 F.2d at 1128-29 (applying Title VII standards to evaluate the lawfulness of a proposed consent decree resolving employment discrimination claims).

1. Title VII Legal Standard

The standard for evaluating the lawfulness under Title VII of race-conscious employment benefits in a consent decree is certainly no more stringent than the standard that must be met by an employer's voluntary affirmative action plan. *See Local 93*, 478 U.S. at 501 ("[T]here is no reason to think that voluntary, race-conscious affirmative action such as was held permissible in *Weber* is rendered impermissible by Title VII simply because it was incorporated into a consent decree."). Accordingly, the Agreement should be deemed lawful under Title VII if it meets the three-part test that courts have used to evaluate the validity of an employer's race-conscious affirmative action plan.[17] *See Johnson v. Transp. Agency, Santa Clara County*, 480 U.S. 616 (1987); *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979). First, consideration of race

[17]Because, as described below, the evidence in the record plainly meets the *Johnson* and *Weber* test, this Court need not decide whether the general presumption in favor of validity of settlement agreements would weigh in favor of a less stringent standard than is applied in reviewing other forms of voluntary affirmative action. *See Kirkland*, 711 F.2d at 1128; *see also Carson v. Am. Brands*, 450 U.S. 79, 88 n.14 (1981) (noting that courts reviewing a settlement agreement "do not decide the merits of the case or resolve unsettled legal questions").

must be justified by the existence of a "manifest imbalance" reflecting under-representation of minorities in "traditionally segregated job categories."[18] *Weber*, 443 U.S. at 197; *see also Johnson*, 480 U.S. at 631. Second, the affirmative action plan must be "intended to *attain* a balanced work force, not to maintain one." *Johnson*, 480 U.S. at 639. Third, the plan must not "unnecessarily trammel the interests of white employees." *Weber*, 443 U.S. at 208.

While the parties defending the challenged provisions of the Agreement may of course present evidence in support of its lawfulness, the ultimate burden of persuasion remains on the Brennan Intervenors to prove its invalidity under Title VII. *See Johnson*, 480 U.S. at 626-27 ("As a practical matter, of course, an employer will generally seek to avoid a charge of pretext by presenting evidence in support of its plan. That does not mean, however, . . . that reliance on an affirmative action plan is to be treated as an affirmative defense requiring the employer to carry the burden of proving the validity of the plan. The burden of proving its invalidity remains on the plaintiff.").

2. The Facts Meet the Title VII Standard

Applying the *Johnson* and *Weber* standards, the permanent appointments and retroactive seniority that Defendants awarded to the Arroyo Intervenors are permissible race-conscious employment actions under Title VII. The challenged provisions plainly meet the *Johnson* and *Weber* test, and the Brennan Intervenors have not met their burden of proving invalidity.

a. The Challenged Provisions of the Agreement Constitute a Valid Race-Conscious Plan Under Title VII

[18]The evidence of a manifest imbalance required to justify a voluntary affirmative action plan under Title VII "need not be such that it would support a prima facie case against the employer." *Johnson*, 480 U.S. at 632 (emphasis added).

(1) The Challenged Provisions Are Justified by a Manifest Imbalance in a Traditionally Segregated Job Category

First, the challenged remedies are justified by a "manifest imbalance" in "traditionally segregated job categories." *Weber*, 443 U.S. at 197. In determining whether an imbalance exists, the applicable comparison is between the percent of minorities employed in the positions and the percent of minorities in the area labor market with relevant experience or qualifications. *Johnson*, 480 U.S. at 631-32.

There is overwhelming evidence of an imbalance between the number of blacks and Hispanics employed as permanent Custodians and Custodian Engineers and the representation of blacks and Hispanics in the applicable labor force. Available data show that in 1993, blacks represented 3.9% of the permanent employees in both positions, while Hispanics represented 3.2% of the permanent employees in both positions.[19] *See* 1993 Ethnic Survey (Ex. 5); Munger Decl. ¶¶ 5-7 (Ex. 6). By contrast, the United States's expert in this action calculated that in 1993, the representation of blacks with the appropriate background in the external labor pool was 21.4%, and the representation of Hispanics with the appropriate background was 23.1%.[20] *See*

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[19]Data for 1996 show that in that year, blacks represented 3.8% of permanent employees for both positions, while Hispanics represented 3.8% of permanent employees in both positions. *See* 1996 Ethnic Survey (Ex. 60); Munger Decl. ¶¶ 5, 8-9 (Ex. 6).

[20]Dr. Carrington, the Brennan Intervenors' expert, disputes this analysis primarily on the ground that Dr. Ashenfelter's calculations regarding the qualified labor pool do 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 school or similar buildings for Custodians). *See* Carrington Decl. of 10/28/04, at ¶¶ 4-5 (Ex. 61); Carrington Report of Findings, 4/3/03, at ¶¶ 8-11 (Ex. 62).

This criticism is unfounded. Dr. Ashenfelter did not conduct comparisons to the general population, *see Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (noting that comparison to general population figures may not be probative when specific job qualifications are at issue), but rather carefully screened the available census data to include only those

(continued...)

Ashenfelter Decl. of 4/1/99 (Ex. 7), at tbl. 8. The disparities between a 21.4% availability rate and a 3.9% employment rate for blacks, and a 23.1% availability rate and a 3.3% employment rate for Hispanics, are certainly sufficient to show a manifest imbalance. *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).[21]

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[20](...continued)
occupational categories that matched the ones most often reported as experience by applicants for the challenged exams, *see* Ashenfelter Decl. of 4/1/99, at ¶¶ 5-13 (Ex. 7). In the absence of more specific data, this occupational screen is a reasonable proxy for the applicable experience. *See* Ashenfelter Reply Report, 5/16/03, at ¶¶ 5-6 (Ex. 63); Henderson Report, 5/14/03, at 3-5 (Ex. 64); Jacobsen Report, 5/23/03, at 8-9 (Ex. 65) ("[I]f one took Dr. Carrington's point seriously, it would be impossible ever to show disparities in recruitment and hiring in any case, because no comparison group could be constructed from broader statistical samples that could exactly match the actual applicant pool for a position."); *see also Peightal v. Metro. Dade County*, 26 F.3d 1545, 1554-55 (11th Cir. 1994) (holding that where "labor market figures that precisely identify the racial composition of the qualified applicant pool" are "difficult[] if not impossib[le]" to obtain, a reasonable proxy using available data may properly be used to show disparity between minority employment rates and representation in the applicable labor market (quoting *Peightal v. Metro. Dade County*, 940 F.2d 1394, 1412 (11th Cir. 1991) (Tjoflat, J., concurring and dissenting)) (internal quotation marks omitted)).

Moreover, neither Dr. Carrington nor the Brennan Intervenors are able to demonstrate that an alternative analysis along the lines they describe, even were the data available, would reduce or eliminate the overwhelming disparity between blacks and Hispanics employed by the Board of Education and blacks and Hispanics in the applicable labor market. *See* Ashenfelter Reply Report, 5/16/03, at ¶ 6 (Ex. 63); Jacobsen Report, 5/23/03, at 8-9 (Ex. 65). An unsupported critique such as this is insufficient for the Brennan Intervenors to create a genuine issue of material fact as to the invalidity of the challenged employment actions. *Johnson*, 480 U.S. at 626-27.

[21]In addition, as demonstrated in detail in the discussion of the constitutional standard below, the statistical evidence of racial disparity in pass rates for the challenged exams is more than sufficient to demonstrate a prima facie case of disparate impact discrimination against blacks and Hispanics. *See infra* pp. 64-65. This prima facie showing can in turn establish that there was a manifest imbalance in the permanent Custodian and Custodian Engineer positions. *See Johnson*, 480 U.S. at 631-33 & n.11; *Davis v. City & County of San Francisco*, 890 F.2d 1438, 1443-44, 1448 (9th Cir. 1989).

Moreover, there can be no dispute that the positions of Custodian and Custodian Engineer are traditionally segregated job categories. The positions historically had a reputation as being segregated, racially closed jobs. *See* Andrew Stein, Taking Back Our Schools II: A Report on the Board of Education's Custodial System (Jan. 12, 1988), at 28 (Ex. 2); Brooks Decl. ¶ 4 (Ex. 3); Coleman Decl. ¶¶ 5-6 (Ex. 4). Indeed, as of 1969, there were no more than ten black Custodians and Custodian Engineers working for the Board of Education, and by the early 1970s there were still no more than twenty black employees in those positions compared to more than 950 white employees, for a black representation of barely 2%.[22] *See* Brooks Decl. ¶ 6; Coleman Decl. ¶ 5. The exclusion of blacks and Hispanics from positions on custodial staffs – positions that were key in providing the opportunity to develop skills needed to qualify for the Custodian and Custodian Engineer jobs – helped to perpetuate this occupational segregation. *See* Brooks Decl. ¶ 4.

Based on this evidence, there plainly existed a manifest imbalance in traditionally segregated job categories that was sufficient to satisfy Title VII.

(2) The Challenged Provisions Are Limited In Temporal Scope

Second, the challenged provisions of the Agreement are of appropriately limited temporal scope, and are not designed to maintain a balanced work force. The challenged provisions provide only for one-time relief to a small group of Offerees, and establish neither hiring quotas nor an indefinite future program. *See* Agreement ¶¶ 4, 13-16 (Ex. 40). Nor is the relief granted by the challenged provisions meant to maintain a racially balanced workforce –

[22]As noted above, little progress had been made two decades later in 1993, when blacks still held only 3.9% of permanent positions.

rather, the relief was complete once the fifty-nine Offerees received the applicable permanent appointment and retroactive seniority. *See Johnson*, 480 U.S. at 639-40; *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 477-78 (1986); *Weber*, 443 U.S. at 208-09 (approving as sufficiently limited in temporal scope a race-conscious hiring plan that terminated when a specific representation of minority employees was achieved).

(3) The Remedies Do Not Unnecessarily Trammel The Brennan Intervenors' Interests

The challenged provisions of the Agreement do not unnecessarily trammel the interests of the Brennan Intervenors or other incumbent employees. Race-conscious relief violates Title VII's prohibition against unnecessary trammeling if it requires that non-minority 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. None of these concerns apply here.

The Agreement did not require the displacement of any incumbent permanent Custodian or Custodian Engineer from his or her job or school assignment in order to make room for the Offerees. Equally as important, the Agreement did not create an absolute bar to the advancement of non-minority employees. The Brennan Intervenors are not barred from competing for transfers to any schools; all Custodians and Custodian Engineers, including the Brennan Intervenors and the Offerees, are eligible to compete for any particular school transfer. *See* Lonergan Decl. Opp'n Prelim. Inj. ¶¶ 21-29 (Ex. 34). In fact, the Agreement is far less restrictive of non-minority advancement than other plans that the Supreme Court has approved. *See e.g.*, *Sheet Metal Workers*, 478 U.S. at 479 (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 (upholding an affirmative action plan that reserved half of the positions in a training program for minorities).

Moreover, because transfer requests are determined on the basis not just of seniority but also of performance ratings and other factors, *see infra* pp. 84-86, Custodians and Custodian Engineers do not have a "legitimate firmly rooted expectation" in any particular transfer simply by virtue of their seniority. *Johnson*, 480 U.S. at 638; *see also Honadle v. Univ. of Vt. & State Agric. Coll.*, 56 F. Supp. 2d 419, 425 (D. Vt. 1999) (finding that an affirmative action plan did not violate the unnecessary trammeling prohibition because, inter alia, it "did not unsettle firmly rooted expectations"). And even if one of the Brennan Intervenors is unsuccessful in a transfer request as a result of the Agreement, that individual is still eligible for future transfers. *See Johnson*, 480 U.S. at 638 ("[W]hile the petitioner in this case was denied a promotion, he retained his employment with the Agency, at the same salary and with the same seniority, and remained eligible for other promotions."); *see also Barhold v. Rodriguez*, 863 F.2d 233, 238 (2d Cir. 1988) (concluding that the interests of non-minorities were not unnecessarily trammeled by a plan under which they continued to obtain the vast majority of reassignments). Indeed, the practical effects of the Agreement upon incumbents' overall eligibility for transfers have been, and likely will continue to be, quite limited and diffuse: The number of Offerees is small compared to the total permanent workforce, and the number of vacancies at a given time is small compared to the total number of schools.[23] *See* Lonergan Decl. Opp'n Prelim. Inj. ¶¶ 24, 28, 32,

[23]For all of these reasons, it is unsurprising that not one of the Brennan Intervenors has (continued...)

42 (Ex. 34). Moreover, an employee's personal preferences strongly influence whether they actually bid for any particular transfer for which they are eligible. *See, e.g.*, Ahearn Dep. Tr. at 135-36, 142-43 (Ex. 66); Brennan Dep. Tr. at 83-84, 88, 90, 116-17 (Ex. 67); Mortensen Dep. Tr. of 5/7/03, at 110-11 (Ex. 68); Spring Dep. Tr. at 104-05 (Ex. 69). As a result, according to the United States's experts, "current permanent custodians will not, on average, suffer any loss of earnings as a result of granting retroactive seniority" to the Offerees, and the economic effects of any limitation in the ability to obtain a preferred transfer on current Custodians and Custodian Engineers will be limited. *See* Siskin Decl. of 5/24/1999, at ¶ 11-13 (Ex. 70).

Nor does the Agreement impose on any interests the Brennan Intervenors may have in temporary care assignments. First, the Brennan Intervenors have no contractual or other interest in TC assignments. *See* Lonergan Decl. of 5/20/99, at ¶ 25 ("The guidelines for temporary care assignments are not negotiated and are modified in terms of the need of the Board of Education.") (Ex. 31); Calderone Dep. Tr. of 10/1/03 (vol. 1), at 117 (Ex. 38). Even if they did have contract rights to TC assignments, the Agreement did not impair those rights. The Agreement did not affect the frequency with which the Brennan Intervenors may receive TC assignments because it did not create any new permanent positions, but rather appointed the Offerees to fill existing vacancies that were required by law to be filled with permanent appointments anyway. *See* N.Y. Civ. Serv. Law § 65(2) (McKinney 2004); U.S. Mem. Supp. Settlement at 42 (Ex. 47). In addition, the grant of seniority in the Agreement did not affect the

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[23](...continued)
lost a transfer to an Offeree since Defendants implemented the Agreement. *See* Brennan Intervenors' Resp. to Arroyo Intervenors' Interrogs. (Resp. No. 1) (Ex. 72); Ahearn Dep. Tr. at 150-76 (Ex. 66); Brennan Dep. Tr. at 95-156, 161-63 (Ex. 67); Mortensen Dep. Tr. of 5/7/03, at 117-19, 161-77 (Ex. 68).

Brennan Intervenors' ability to receive TC assignments, because an employee's location on the TC list is determined not by seniority but by the date on which that employee finished his or her probationary period.[24] *See* Lonergan Decl. Opp'n Prelim. Inj. ¶¶ 15-17 (Ex. 34).

Finally, the challenged provisions of the Agreement do not establish inflexible hiring quotas or impose any requirements for future hiring; rather, they provide a one-time remedy for the discriminatory selection process created by the challenged exams by awarding retroactive

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[24]It is true that the Offerees did receive a one-time advantage in terms of TC assignments, in that they were placed at the top of the TC list, rather than the bottom, upon completing their probationary period (or, for those Offerees who were already permanent, upon the date of implementation of the Agreement). *See* Calderone Dep. Tr. of 10/1/03 (vol. 1), at 142-44 (Ex. 38). However, the effect of this one-time jump on the Brennan Intervenors must be considered truly *de minimis*, and wholly insufficient to affect the unnecessary trammeling inquiry. As noted, different TC lists are maintained by borough and position; the Brennan Intervenors thus could only be affected by those Offerees in the same borough and position as them. Two of the Brennan Intervenors, James Ahearn and Dennis Mortensen, were employed as Custodian Engineers in the Bronx as of the date of implementation of the Agreement; only four Offerees (Pedro Arroyo, Salih Chioke, Kevin LaFaye, and Wilbert McGraw) were added to the Bronx Custodian Engineer TC list as a result of the Agreement. *See* List of TC Assignments for Bronx and Manhattan (Ex. 71). Given that approximately 447 TC assignments were made from the Bronx Custodian Engineer TC list from January 2000 to August 2004, *see id.*, a one-time jump of four individuals to the top of the list constitutes only a minimal injury, if any at all.

Another of the Brennan Intervenors, John Brennan, was employed as a Custodian Engineer in Manhattan when the Agreement was implemented; only four Offerees (Joseph Lin, Joseph Marcelin, Vernon Marshall, and Margaret McMahon) were added to the Manhattan Custodian Engineer TC list as a result of the Agreement. *See id.* Again, because approximately 545 TC assignments were made from the Manhattan Custodian Engineer TC list from January 2000 to August 2004, *see id.*, the one-time jump of four individuals must be considered marginal.

The remaining Brennan Intervenor, Scott Spring, was employed as a Custodian in Manhattan; only five Offerees (Thomas Fields, Edwin Howell, Belfield Lashly, Gil Rivera, and Peter Robertin) were added to the Manhattan Custodian TC list as a result of the Agreement. *See id.* Approximately 219 TC assignments were made from the Manhattan Custodian TC list from January 2000 to August 2004. *See id.* Thus, the one-time effect of the Agreement is again, clearly, *de minimis*. Moreover, Spring has conceded that he was not affected at all by the Agreement in terms of the number of TC assignments he received or the amount of income he earned from TC assignments. *See* Brennan Intervenors' Resp. to Arroyo Intervenors' Interrogs. (Resps. No. 2-3) (Ex. 72).

seniority and permanent positions to a small group of Offerees who previously demonstrated their qualifications for the jobs through their satisfactory service as provisionals. *Compare In re Birmingham Reverse Discrimination Employment Litig. v. Arrington*, 20 F.3d 1525, 1542-43 (11th Cir. 1994) (holding that "the indefinitely-lasting, arbitrarily-selected 50% figure for annual black promotions to fire lieutenant unnecessarily trammels the rights of non-black firefighters by unduly restricting their promotional opportunities through establishment of an arbitrary fixed quota").

For the foregoing reasons, the minimal burdens that the retroactive seniority awards impose do not unnecessarily trammel the interests of third parties.

b. The Brennan Intervenors Have Not Raised a Genuine Issue of Material Fact as to the Lawfulness of the Challenged Provisions of the Agreement Under Title VII

The Brennan Intervenors can meet their burden of proving a Title VII violation only by establishing that the challenged provisions of the Agreement are invalid, or by proving that Defendants' reliance on the Agreement is a pretext for unlawful discrimination. *Johnson*, 480 U.S. 626-27. But the Brennan Intervenors have not countered or even addressed any of the *Johnson* and *Weber* factors, discussed above, that establish the validity of a race-conscious plan. Nor have the Brennan Intervenors made any attempt at presenting evidence to suggest that Defendants' reliance on the Agreement is a pretext for Defendants' unlawful discrimination against white male Custodians and Custodian Engineers.

Instead, the Brennan Intervenors attempt to argue that the Agreement is an invalid race-conscious plan on the grounds that some of the Arroyo Intervenors are not victims of prior discrimination, and that the Arroyo Intervenors received benefits in excess of make-whole relief. These arguments are unavailing, and this Court should find that the Brennan Intervenors have

not met their burden of establishing the invalidity of the challenged provisions of the Agreement.

(1) Remedies Provided in a Settlement Agreement Are Not Limited to Victim-Specific Remedial Relief

The Brennan Intervenors first argue that the award of retroactive seniority to the Arroyo Intervenors violates Title VII because the statute requires that any award of retroactive seniority must "be limited to victim-specific remedial relief." *See* Brennan Mem. at 39. This assertion is simply incorrect in the context of race-conscious remedies undertaken pursuant to settlement agreement or other voluntary means: The Supreme Court has explicitly stated that "the voluntary action available to employers and unions seeking to eradicate race discrimination may include reasonable race-conscious relief that benefits individuals who were not actual victims of discrimination." *Local 93*, 478 U.S. at 516 (citing *Weber*, 443 U.S. at 193). Nor must relief in a settlement agreement be precisely calibrated with make-whole remedies in order to be lawful under Title VII – a consent judgment may provide for remedies that extend beyond those that may be ordered by a court after a finding of liability. *See Local 93*, 478 U.S. at 525; *Wilder v. Bernstein*, 49 F.3d 69, 73 (2d Cir. 1995).

Ignoring this controlling precedent, the Brennan Intervenors instead rely entirely upon two Second Circuit cases that pre-date both *Local 93* and *Weber* for the proposition that seniority rights may only be modified in the pursuit of victim-specific remedial relief. *See* Brennan Mem. at 39-41 (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 are still good law, *Chance* and *Acha* are wholly inapplicable to the instant Agreement, because those cases addressed only the limits that Title VII places on court-ordered remedial relief, and 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.

Indeed, the Supreme Court made clear in *Local 93* that a consent judgment *may* permissibly modify seniority rights, even where the relief that the consent judgment provides is not purely remedial relief to identifiable victims of discrimination. The consent decree at issue in *Local 93* contained minority promotion goals and procedures that modified the use of seniority points as a factor in promotions. *See* Am. Consent Decree, *Vanguards of Cleveland v. City of Cleveland*, No. C80-1964 (N.D. Ohio Jan. 31, 1983), at ¶¶ 8-14 (Ex. 73); Petition for Writ of Certiorari, *Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland*, No. 84-1999 (filed June 19, 1985), at 5 (Ex. 74); *see also Local 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 decree as a permissible voluntary remedial plan, notwithstanding its plain impact on the existing seniority system. *See Local 93*, 478 U.S. at 510, 512-513; *see also Tangren v. Wackenhut Servs. Inc.*, 658 F.2d 705, 706 & n.1 (9th Cir. 1981) (holding that a voluntary agreement that adjusted incumbent seniority rights to protect minority workers from layoffs 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, however, prohibit the employer from agreeing of his own accord to modify the seniority system"), *cert. denied*, 456 U.S. 916 (1982); *EEOC v. McCall Printing Corp.*, 633 F.2d 1232, 1237 (6th Cir. 1980) ("[R]etroactive seniority is an appropriate remedy [for claims of prior discrimination] and thus could properly be used as a term in the conciliation agreement and consent decree." (citing *Franks*, 424 U.S. at 773-79) (internal citations omitted)).

(2) Even If Title VII Did Require Victim-Specific Relief in a Voluntary Settlement Agreement, the Arroyo Intervenors Would Meet this Requirement

Each of the Arroyo Intervenors is black or Hispanic and took one or more of the challenged exams. *See* Arroyo Decl. ¶¶ 2, 5-7 (Ex. 50); Casado Decl. ¶¶ 2, 5 (Ex. 51); Fernandez Decl. ¶¶ 2, 5 (Ex. 52); LaFaye Decl. ¶¶ 2, 5-6 (Ex. 53); Lopez Decl. ¶¶ 2, 5-6 (Ex. 54); Maldonado Decl. ¶¶ 2, 5 (Ex. 55); Martinez Decl. ¶¶ 2, 5 (Ex. 56); McGraw Decl. ¶¶ 2, 4-6 (Ex. 57); Ortega de Green Decl. ¶¶ 2, 5 (Ex. 58); Pantelides Decl. ¶¶ 2, 5-6 (Ex. 59). Accordingly, even assuming that Title VII did require a showing of identifiable victims to support remedial relief in a settlement agreement, the Arroyo Intervenors are identifiable victims of the demonstrated discrimination.

The Brennan Intervenors argue that certain of the Arroyo Intervenors cannot be victims of discrimination against Hispanics because they are not, in fact, Hispanic. *See* Brennan Mem. at 63-64. This argument – which specifically targets Kevin LaFaye, Steven Lopez, Anthony Pantelides,[25] and Nicholas Pantelides – is based on misrepresentations of the factual record and a misunderstanding of the applicable law.

The Brennan Intervenors argue that LaFaye, Lopez, and the Pantelideses are not Hispanic because they each have only one Hispanic parent (or in the case of Lopez, a Mexican grandparent). Brennan Mem. at 63. The Uniform Guidelines on Employee Selection Procedures define the category of "Hispanic" as "including persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish origin or culture regardless of race." 29 C.F.R.

[25]Although Anthony Pantelides is not one of the Arroyo Intervenors, we address the Brennan Intervenors' argument that he is not Hispanic because his brother, Nicholas Pantelides, is one of the Arroyo Intervenors. As brothers, the evidence regarding one's national origin will obviously apply to the other.

§ 1607.4B. The EEOC's Guidelines on Discrimination Because of National Origin clarify that this definition reaches the place of origin of one's ancestors, and not just oneself: "The [EEOC] defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, *or his or her ancestor's*, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group." 29 C.F.R. § 1606.1 (emphasis added); *see also Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 & n.2 (1973) ("The 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."). Because Kevin LaFaye's father is Puerto Rican, Steven Lopez's father is Mexican, and Anthony and Nicholas Pantelides' mother is Puerto Rican, all four plainly meet the EEOC's definition for Hispanic ethnicity.[26] *See* LaFaye Dep. Tr. at 45 (Ex. 78); LaFaye Objection Letter, 4/19/99 (attachments) (Ex. 79); Lopez Dep. Tr. at 21-22 (Ex. 80); A. Pantelides Dep. Tr. at 76 (Ex. 75); N. Pantelides Dep. Tr. at 35 (Ex. 76); N. Pantelides Objection Letter, 4/6/99 (attachments) (Ex. 77).

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[26]The risks inherent in attempting to parse an individual's membership in an ethnic group based upon percentages of lineage are obvious. *See Plessy v. Ferguson*, 163 U.S. 537, 541-44 (1896) ("The petition . . . averred that petitioner was seven eighths Caucasian and one eighth African blood; that the mixture of colored blood was not discernible in him, and that he was entitled to every right, privilege and immunity secured to citizens of the United States of the white race; and that, upon such a theory, he took possession of a vacant seat in a coach where passengers of the white race were accommodated, and was ordered by the conductor to vacate said coach and take a seat in another assigned to persons of the colored race, and having refused to comply with such demand he was forcibly ejected with the aid of a police officer, and imprisoned in the parish jail . . . ."). Indeed, in his 2000 Memorandum and Order approving the Agreement, Magistrate Judge Levy approved the addition of several beneficiaries to the original list of Offerees on the basis of corrected information regarding their ethnicity, and declined to second-guess Defendants' determination in this regard: "[I]t is unnecessary, and would be extremely unwise, for this court to second-guess defendants' determinations or attempt to engage in the dubious task of defining or categorizing any person's race or national origin." *N.Y. City Bd. of Educ.*, 85 F. Supp. 2d at 153. For this reason alone, the Court should reject the Brennan Intervenors' argument that Kevin LaFaye, Anthony Pantelides, and Nicholas Pantelides are only "one-half" Hispanic, and that Steven Lopez is only "one-quarter" Hispanic.

The Brennan Intervenors' argument that none of the four presents a cultural or linguistic tie with Hispanic culture, other than an Hispanic parent, is also unavailing. First, there is no authority for the proposition that such a showing, in addition to a showing of the national origin of oneself or one's ancestors, is necessary to be considered Hispanic. While Spanish-language ability can be an indicator of Hispanic ethnicity, it is plainly not a necessary factor in the EEOC guidelines, *see* 29 C.F.R. § 1606.1, and has consistently been rejected by courts and commentators 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, at 29 (1991) (estimating, based on 1980 census data, that "at least 20% of Hispanics speak only English"). Indeed, the case that the Brennan Intervenors cite in support of their argument expressly upheld the EEOC's definition of "Hispanic." *Peightal v. Metro. Dade County*, 26 F.3d 1545, 1559-60 (11th Cir. 1994) ("*Peightal II*") (noting that "no court has invalidated the EEOC definition," and upholding the defendant employer's reliance on the EEOC definition).

Second, even if such an additional showing is necessary to be considered Hispanic, all four individuals testified that they grew up in a Hispanic household and do have a strong connection with Hispanic culture. *See* LaFaye Dep. Tr. at 57 (testifying that Spanish was spoken in his home when he was growing up) (Ex. 78); Lopez Dep. Tr. at 21-22 (testifying that he identifies himself ethnically as "Mexican, Latvian, and Italian," and that he considers himself to be of Mexican origin because his father's family is from Mexico) (Ex. 80); A. Pantelides Dep. Tr. at 76 (Ex. 75); N. Pantelides Dep. Tr. at 10-11 (testifying that his mother spoke predominantly Spanish to their maternal grandmother at home, and that "[m]y heritage, bringing

up was in a Hispanic household") (Ex. 76).

The Brennan Intervenors further argue that Anthony and Nicholas Pantelides "consistently identified themselves as 'white'" until the mid-1990s on personnel forms submitted to the Board of Education, and that the Pantelideses only changed their self-identification when "it became well known that the Justice Department was investigating" the Board of Education's discriminatory hiring practices. Brennan Mem. at 63. These assertions misrepresent the factual record. First, the personnel documents in the record demonstrate that both Nicholas and Anthony Pantelides alternately self-identified as white and Hispanic in forms filed between 1985 and 1997 (and that Nicholas Pantelides refused on one occasion to self-identify), rather than showing that the Pantelides brothers "consistently" self-identified as white until learning of the United States's lawsuit.[27] Second, both Anthony and Nicholas Pantelides first self-identified as Hispanic several years *before* the United States even filed this lawsuit in 1996, *see* A. Pantelides Personnel Forms (Ex. 81); N. Pantelides Personnel Forms (Ex. 82), and there is no evidence whatsoever that either was aware of any pre-filing investigation, much less that they chose to self-identify as Hispanic in an attempt to benefit from the United States's investigation or subsequent lawsuit.[28] In fact, Anthony Pantelides testified at length that the reasons for his self-

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[27]Anthony Pantelides self-identified, in chronological order, as: white (Dec. 14, 1985); white (Dec. 4, 1991); Hispanic (Jan. 30, 1993); Hispanic (Apr. 16, 1994); white (uncertain month, 1996); Hispanic (June 20, 1997); and Hispanic (Dec. 20, 1997). *See* A. Pantelides Personnel Forms (Ex. 81). Nicholas Pantelides self-identified, in chronological order, as: white (Dec. 14, 1985); white (Dec. 4, 1991); nothing (Jan. 30, 1993); Hispanic (Apr. 16, 1994); white (Aug. 28, 1995); Hispanic (June 17, 1997); and Hispanic (Dec. 20, 1997). *See* N. Pantelides Personnel Forms (Ex. 82).

[28]To the contrary, Anthony Pantelides expressly testified at his deposition that he did *not* hear of the investigation by the United States into the Board of Education's discriminatory hiring practices, and that the earliest he could recall hearing of the lawsuit was in 1999, when he

(continued...)

identification had nothing to do with the timing of the United States's lawsuit, but rather that he self-identified as white on some forms because there was an atmosphere of racial and ethnic discrimination among white Custodians and custodial workers, and that he was afraid of being harassed.[29]

For the reasons stated, this Court should reject the Brennan Intervenors' argument that Kevin LaFaye, Steven Lopez, Anthony Pantelides, and Nicholas Pantelides are not Hispanic.

(3) The Arroyo Intervenors Received Make-Whole Remedial Relief

In addition, if this Court finds that the remedies in the Agreement are limited by Title VII to make-whole relief, the permanent positions and grants of retroactive seniority that the Arroyo Intervenors received do constitute permissible make-whole relief.

The purpose of make-whole relief is to restore victims of discrimination, as near as is practicable, to the position they would have enjoyed but for the unlawful discrimination. *Franks*, 424 U.S. at 763-64; *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-19 (1975). An

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[28](...continued)
learned that white members of the custodians' union were planning on challenging the Agreement. A. Pantelides Dep. Tr. at 10, 13-15 (Ex. 75). There is no evidence in the record as to when Nicholas Pantelides first learned of the United States's discrimination lawsuit, and he was not asked about this subject at his deposition, so there is no basis for the Brennan Intervenors' argument.

[29]During his deposition, when asked by counsel for the Brennan Intervenors why he self-identified as white on certain forms, Anthony Pantelides explained: "[T]o be honest, I put white down because if I would have put Hispanic down at that time, I – there was a lot of prejudice in the system and . . . I just felt that if I did, that it was going to be something against me." A. Pantelides Dep. Tr. at 53 (Ex. 75); *see also id.* at 81-83 ("[A]ll the time they talked about Puerto Ricans and stuff, I would always just kind of not get involved and lay low. And I just couldn't believe some of the things that I would hear . . . [such as] Oh you dumb spics, they're useless. . . . [Y]ou know, just things that would make you feel uncomfortable to say, hey, I'm one of them. . . . I thought they were going to hold it against me because of all the things that I was hearing about, different things.").

award of retroactive seniority is ordinarily necessary to make victims whole and to meet Title VII's goal of eradicating present and future discrimination. *Franks*, 424 U.S. at 763-68 & nn.21, 28. The determination of proper make-whole relief "will necessarily involve a degree of approximation and imprecision." *Teamsters*, 431 U.S. at 372; *see also Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 260-61 (5th Cir. 1974) (holding, on review of a back-pay computation, that "unrealistic exactitude is not required"). Further, review of make-whole relief contained in a settlement agreement must take into account that the touchstone of any settlement is compromise. *See United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 624 (9th Cir. 1982) (noting that "the very essence of settlement is compromise"). In light of these guiding principles, this Court should find that the permanent positions and grants of seniority that the Arroyo Intervenors received under the Agreement are consistent with make-whole relief.

(a) Individuals Whose Seniority Dates Precede the Median Hire Date for Exam 1074

Paragraph 15 of the Agreement provides that Offerees whose names were included on the Stipulation Regarding Provisional Hires, and who took a challenged Custodian exam, would receive retroactive seniority calculated as follows:

> (b) If the Offeree took one or both of the Challenged Examinations for the position of Custodian and has a Current Job Title of Custodian, his or her retroactive seniority date shall be the earlier of:
>
> (i) the date he or she was hired provisionally as a Custodian, or
> (ii) the Median Date for the Challenged Examination for Custodian that he or she took . . . .

Agreement ¶ 15(b) (Ex. 40). Five of the Arroyo Intervenors – Jose Casado, Celestino Fernandez, Anibal Maldonado, James Martinez, and Silvia Ortega de Green – received an award

of retroactive seniority pursuant to ¶ 15(b)(i) of the Agreement. Because each of these individuals was adversely affected by Custodian Exam 1074, and because each had been hired as a provisional Custodian earlier than the median hire date for Exam 1074, they each received a retroactive seniority date under the Agreement that was tied to their date of hire as a provisional Custodian.[30] *See id* ¶ 5 & App. A; U.S. Resps. to Pl.-Intervenors' First Contention Interrogs. (attached relief chart) (Ex. 49). The Brennan Intervenors argue that a grant of retroactive seniority to these individuals that precedes the median hire date for Exam 1074 exceeds permissible make-whole relief. *See* Brennan Mem. at 75-76 & n.22.

In making this argument, the Brennan Intervenors appear to assert that the only reasonable approximation of where the Arroyo Intervenors would have been hired but for the unlawful discrimination is dependent on the challenged civil service exam system. However, as demonstrated *infra* pp. 65-70, the provisional hiring system that Defendants employed to fill some Custodian and Custodian Engineer positions had a significantly less discriminatory impact on black and Hispanic applicants than did the challenged exams. Because Defendants used the system of provisional hires as a less discriminatory alternative to the civil service exam system,

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[30]Two of these individuals – Celestino Fernandez and James Martinez – have since become Custodian Engineers through the Board of Education's "broadbanding" program (implemented in January 2001), which permitted permanent Custodians with a stationary engineer's license to be appointed as permanent Custodian Engineers. Accordingly, they no longer retain the retroactive seniority awards that they received under the Agreement, because they received a new seniority date as of the date of their broadbanding to the Custodian Engineer position. *See* Calderone Dep. Tr. of 10/1/03 (vol. 1), at 57-60 (Ex. 38). However, both continue to have an interest in the lawfulness of the seniority dates awarded under the Agreement. First, their seniority for layoff purposes would be the combined seniority in both positions. *See* N.Y. Civ. Serv. Law §§ 80(1), 80(2) (McKinney 2004); Gladstein Dep. Tr. at 31-32 (Ex. 83). Second, if they are affected by layoffs of Custodian Engineers, they could exercise the right to be returned to their prior civil service title as Custodians. *See* Procedures and Guidelines to be Followed in the Event of Layoffs: A Manual for Agencies, at 21 (Ex. 84).

provisional hire date is a reasonable approximation of the position that the Arroyo Intervenors would have been in but for unlawful discrimination. That is, because the Arroyo Intervenors *were* hired on their provisional start dates, it is reasonable to estimate that they *would have been* hired on their provisional start dates if the provisional employment system had been used instead of the discriminatory exams to fill permanent positions. *See generally Franks*, 424 U.S. at 767-73 (explaining that Title VII's rightful-place remedial doctrine aims to restore individuals to the positions they would presumptively have occupied absent the employer's reliance upon discriminatory practices); *cf. Albemarle*, 422 U.S. at 425 (holding that an employer's refusal to adopt less discriminatory alternative employment practices constitutes evidence that its current policies are merely pretext for discrimination).

Moreover, seniority for these Arroyo Intervenors to their provisional start date is reasonable make-whole relief because it accurately reflects their actual experience on the job. Provisional employees receive the same training, perform the same job function, and are reviewed according to the same performance criteria as permanent employees. *See* Lonergan Decl. of 5/20/99 at ¶¶ 12-14 (Ex. 31); Lonergan Dep. Tr. of 6/24/97, at 56 (Ex. 24); *see also infra* pp. 75-77. Seniority to their provisional start dates for the Arroyo Intervenors adversely affected by Exam 1074 is the only way to capture adequately the experience they have in their positions, and thus to make them whole for the discriminatory denial of the opportunity to work as permanent employees.[31] *See Franks*, 424 U.S. at 767-68 (holding that without a grant of

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[31]The Brennan Intervenors additionally argue that for one of these individuals, Anibal Maldonado, no relief is necessary under the Agreement because he passed Exam 1074 and was hired from the eligibility list. *See* Brennan Mem. at 74-75. This claim does nothing to undermine the argument that had Defendants used the less discriminatory provisional hiring process to fill permanent positions, Maldonado would have been hired at his provisional start

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seniority to the date an individual victim of discrimination would have been hired absent unlawful practices, that individual "will never obtain his rightful place in the hierarchy of seniority according to which these various employment benefits are distributed. He will perpetually remain subordinate to persons who, but for the illegal discrimination, would have been in respect to entitlement to these benefits his inferiors.").

(b) Individuals Whose Seniority Dates Precede the Median Hire Date for Exam 8206

Paragraph 16(b) of the Agreement provides that for Offerees whose names were not included on the Stipulation Regarding Provisional Hires, and who were then working as provisional Custodian Engineers, "his or her retroactive seniority date shall be the earliest hire date listed on the Stipulation Regarding Provisional Hires for any provisional Custodian Engineer, i.e., 4/13/90." Agreement ¶ 16(b) (Ex. 40). Three of the Arroyo Intervenors – Pedro Arroyo, Kevin LaFaye, and Wilbert McGraw – received an award of retroactive seniority pursuant to this provision of the Agreement. Each of these individuals was also adversely affected by Custodian Engineer Exam 8206, which had a median hire date of February 14, 1992. *See* U.S. Resps. to Pl.-Intervenors' First Contention Interrogs. (attached relief chart) (Ex. 49).

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[31](...continued)
date, and that the seniority award is thus a reasonable approximation of his likely position but for the unlawful discrimination. Moreover, the Brennan Intervenors' argument ignores the fact that the disparate impact evidence in this case demonstrates an actionable disparity between Hispanic test-takers and white test-takers not only in pass rates for Exam 1074, but also in absolute scores for that exam. *See* Siskin & Cupingood, Adverse Impact on Minorities of Written Examinations for Custodian and Custodian Engineer Positions in New York City, 1985-1993, at 13 & tbl. 1074-2 (Ex. 85) (showing a statistical disparity in average test scores between Hispanic and white test-takers of 10.95 standard deviations). Accordingly, the fact that Maldonado was hired from the Exam 1074 eligibility list does not show that he was not the victim of discrimination, because his score and thus his place on the eligibility list were the result of an exam that had a discriminatory effect on Hispanic test-takers.

The Brennan Intervenors argue that proper make-whole relief for these individuals should have been the median hire date for Exam 8206, and that because the seniority date established by ¶ 16(b) pre-dates the median hire date for Exam 8206, the grant of seniority exceeds make-whole relief. *See* Brennan Mem. at 75-76 & n.22.

The seniority date provided to Arroyo, LaFaye, and McGraw is permissible make-whole relief for the same reason as that described above – each of these individuals was working as a provisional Custodian Engineer at least as of this date, and in fact had been provisionally employed for some time before the date awarded in the Agreement.[32] Seniority to April 13, 1990, is thus a more than reasonable approximation of the date by which Arroyo, LaFaye, and McGraw would have been employed absent a discriminatory hiring system. The fact that each could argue that an even *earlier* seniority date would have been proper make-whole relief, in order to account more fully for their actual experience on the job and their likely position absent unlawful discrimination, does not undermine the permissibility of the relief awarded. The essence of settlement is compromise, and parties balance multiple factors – including the time, expense, and risk of litigation – when they accept the terms of a settlement agreement. *Carson*, 450 U.S. at 86-87. Accordingly, it was reasonable for the United States, in negotiating for the seniority dates that Arroyo, LaFaye, and McGraw would receive, to accept something less than that which they might otherwise have received at a trial on the merits.

(c) Individuals Whose Seniority Dates Are Not Tied to a Challenged Exam

Paragraph 15(a) of the Agreement provides that for Offerees whose names appear on the

[32]Arroyo and LaFaye began working as provisional Custodian Engineers in January 1989, and McGraw began working as a provisional Custodian Engineer in January 1982. Arroyo Decl. ¶ 3 (Ex. 50); LaFaye Decl. ¶ 3 (Ex. 53); McGraw Decl. ¶ 3 (Ex. 57).

Stipulation Regarding Provisional Hires: "(a) If 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." Agreement ¶ 15(a) (Ex. 40). Steven Lopez, who was employed as a provisional Custodian Engineer at the time of the Agreement, and who did not take Custodian Engineer Exam 8206, received retroactive seniority to his provisional start date of November 6, 1995, pursuant to ¶ 15(a). *See id.* ¶ 15(a) & App. A. The Brennan Intervenors argue that this shows that Lopez's seniority date is not make-whole relief. *See* Brennan Mem. 68-69 & n.20. In characterizing Mr. Lopez as a "non-test taker," however, the Brennan Intervenors ignore that Mr. Lopez did take both Exam 5040 and Exam 1074, and was adversely affected by the disparate impact of those exams. As far as make-whole relief is concerned, calculating Lopez's seniority based on his actual experience as a Custodian Engineer is a reasonable approximation of the position he would have attained but for unlawful discrimination.[33] *See infra* pp. 42-46.

(d) Individuals Who Are Alleged to Have Lacked the Requisite Qualifications

Finally, the Brennan Intervenors argue that a number of the Arroyo Intervenors received remedies in excess of make-whole relief because they could not have been hired from the applicable exams for lack of qualifications.

The Brennan Intervenors first argue that Nicholas Pantelides received an unlawful

[33]The Brennan Intervenors also argue that Lopez would not have been hired from Exam 1074 because he did not take the written practical component of that exam. *See* Brennan Mem. at 70-71. As noted, Lopez received seniority based on ¶ 15(a) of the Agreement, tied to his provisional start date as a Custodian Engineer and not to the hire dates from Exam 1074; his performance on the practical component of the test thus does not undermine the lawfulness of the make-whole seniority relief he received.

retroactive seniority date. *See* Brennan Mem. at 70. Because Nicholas Pantelides was adversely affected by Exam 5040, and because the median hire date from Exam 5040 preceded his provisional start date, he received retroactive seniority to the median hire date for Exam 5040 pursuant to ¶ 15(b)(ii) of the Agreement. The Brennan Intervenors argue that Nicholas Pantelides would not have been hired from Exam 5040 because he did not pass the oral practical component of the exam, and that his seniority date therefore exceeds make-whole relief. However, Nicholas Pantelides has alleged racial discrimination in the administration of the oral practical component of Exam 5040. *See* N. Pantelides Decl. ¶ 5 (Ex. 59); N. Pantelides Dep. Tr. at 35-41 (Ex. 76). The evidence further establishes that the oral practical exam was administered in a subjective manner, *see* Cappoli Dep. Tr. at 117-20 (Ex. 18), and that Defendants in fact stopped using an oral practical after Exam 5040 because of concern that the oral practical suffered from inconsistent and subjective administration, and that it was susceptible to unfair or biased evaluation. *See* Johnston Dep. Tr. of 1/30/97, at 173-75 (Ex. 19); Serpico Dep. Tr. of 2/5/97, at 91-92 (Ex. 20); Charles Wachter Dep. Tr. of 2/6/97, at 52-53 (Ex. 21); Job Analysis Report for School Custodian Exam No. 1074, at 5 (Ex. 22). Combined with evidence of a work environment that was generally inhospitable to minority employees, *see, e.g.*, A. Pantelides Dep. Tr. at 53-54, 81-83 (Ex. 75), and specific evidence that other Custodians and plant managers referred to Pantelides with the racially derogatory nickname "Nick the Spic," *see* N. Pantelides Dep. Tr. at 39-41 (Ex. 76), this Court may plainly find that but for unlawful discrimination Nicholas Pantelides would have been hired from Exam 5040. Retroactive seniority tied to the median hire date for Exam 5040 thus constitutes reasonable make-whole relief.[34]

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[34]In the event that this Court finds that Nicholas Pantelides's seniority date under

(continued...)

The Brennan Intervenors argue that Pedro Arroyo did not meet the minimum qualifications required to be hired from Custodian Exam 5040. *See* Brennan Mem. at 72. This assertion is incorrect. As Defendants' own witness for the qualification process testified (twice) on review of Mr. Arroyo's experience papers, Mr. Arroyo did meet the minimum qualifications for the position.[35] *See* Paul Dep. Tr. of 10/23/03, at 53-54 & Ex. 5 (Ex. 13); Paul Dep. Tr. of 1/27/04, at 368-73 (Ex. 15). The Brennan Intervenors also argue that James Martinez did not meet the minimum qualifications for Custodian Exam 1074. *See* Brennan Mem. at 72. The Brennan Intervenors are again incorrect; James Martinez did meet the minimum qualifications for Exam 1074. The position required three years of experience as a "fireman who is in responsible charge of a building in the City School District of New York, in the absence of the School Custodian or School Custodian Engineer." *See* Examination No. 1074, Am. Notice of Examination, at 2 (Ex. 27). Minimum requirements had to be met by the last day of the application period; here, October 27, 1992. *See id.* at 1. The record shows that Martinez had sufficient experience as a fireman to meet this requirement.[36] *See* Martinez Dep. Tr. at 29-32 & Ex. 2 (Ex. 86); Paul Dep. Tr. of 10/23/03, at 18-23 (Ex. 13); Cappoli Dep. Tr. at 126 (Ex. 18);

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[34](...continued)
¶ 15(b)(ii) is not proper, he is still entitled to retroactive seniority to his provisional start date of November 5, 1995, based on ¶ 15(b)(i) of the Agreement. *See infra* pp. 42-45.

[35]In any event, Mr. Arroyo's qualifications for Custodian Exam 5040 are not at issue as regards the lawfulness of his retroactive seniority date, given that his seniority date under the Agreement was calculated as per his position and start date as a provisional Custodian Engineer. *See* Agreement ¶ 16(b) (Ex. 40).

[36]In addition, even assuming that Arroyo and Martinez did not meet the minimum qualifications listed on the Notices of Examination, the fact that each was performing more than satisfactorily as a provisional in the exact same position to which he was permanently appointed by the Agreement demonstrates that he was qualified for the position. *See infra* pp. 75-77.

Letter from Capua to Cappoli (Ex. 87).

Moreover, the Brennan Intervenors' argument that this purported lack of qualifications somehow undermines the lawfulness of the make-whole relief that Arroyo and Martinez received pursuant to the Agreement is based solely on the City's unreliable post-hoc review of the qualifications of individuals who failed the challenged exams. *See* Brennan Mem. at 72. The City's post-hoc review is flawed, however, because as a matter of practice, the City did not review the qualifications of an individual test-taker until *after* it was determined that the test-taker had passed the written multiple-choice portion of the exam, *see* Paul Dep. Tr. of 1/27/04, at 314 (Ex. 15), and those test-takers who were found not to be qualified then had the opportunity to appeal that rating, *see* Paul Dep. Tr. of 10/23/03, at 90-97 (Ex. 13). If the test-taker clarified the listed experience, or noted additional experience, an original rating of "not qualified" could be overturned. *Id.* Indeed, the rate of correction on review of a not-qualified determination was quite high: At least 28 of the 132 applicants who passed Exam 5040 and were originally rated "not qualified" challenged that rating and had it overturned on appeal. *See* Defs.' Resp. to Pl.'s First Set of Reqs. for Admis. (Resp. No. 36) (Ex. 8). Likewise, 23 of the 56 applicants who passed Exam 8206 and were originally rated "not qualified" challenged that rating and had it overturned on appeal. *See* Exam No. 8206 Test Rating Sheet, at 2 (Ex. 26); Pl.'s First Set of Reqs. for Admis. (Req. No. 17 & Ex. 5) (Ex. 14); Defs.' Resp. to Pl.'s First Set of Reqs. for Admis. (Resp. No. 17) (Ex. 8); Seluga Dep. Tr. of 10/6/04, at 21-22 (Ex. 23). And 11 of the 87 applicants who passed both parts of Exam 1074 and were originally rated "not qualified" challenged that rating and had it overturned on appeal. *See* Exam No. 1074 Test Rating Sheet (Ex. 28); Exam No. 1074 Eligible Listing of 2/3/98, at 15 (Ex. 29); Seluga Dep. Tr. of 10/6/04, at 21-22 (Ex. 23).

The City's post-hoc review of the qualifications of test-failers, by contrast, did *not* include any process by which individuals could contest or appeal the City's finding of not-qualified, as the Brennan Intervenors themselves concede.[37] *See* Defs.' Resp. to Pl.'s First Expert Set of Req. for Admis. (Resps. No. 171-84) (Ex. 11); *see also* Brennan Mem. at 71. Arroyo and Martinez accordingly had no opportunity to appeal the City's conclusion that it would have found them not qualified, and the post-hoc review is thus a wholly unreliable means of determining who among the Arroyo Intervenors would ultimately have been found to meet the minimum requirements for the positions (as strikingly evidenced by Defendants' admission that its post-hoc determination regarding Arroyo's qualifications was incorrect, *see* Paul Dep. Tr. of 10/23/03 at 53-54 & Ex. 5 (Ex. 13); Paul Dep. Tr. of 1/27/04 at 368-73 (Ex. 15)).

The Brennan Intervenors finally argue that because the written exams were only one part of a multi-part process, there is no guarantee that each of the Arroyo Intervenors would have been hired even had the exams been non-discriminatory. *See* Brennan Mem. at 64-68. This argument is disingenuous – by definition, each of the Offerees had already been hired as a provisional Custodian or Custodian Engineer, *see* Agreement ¶ 4 (Ex. 40), and each was performing satisfactorily or better in that job. *See* Arroyo Intervenors' Performance Ratings (Ex. 88); Lonergan Decl. of 6/30/99, at ¶¶ 4-5 & Ex. A (Ex. 89); *see also infra* pp. 75-77. The City's interest in conducting all steps in its multi-part process – namely, to identify and hire individuals

[37]Moreover, the division within the Department of Personnel that was responsible for reviewing the qualifications of test-passers for Exam 5040 and Exam 8206 – the Qualifications Review Division – was eliminated in the mid-1990s and no longer exists. *See* Carol Wachter Dep. Tr. at 44-45 (Ex. 12). Defendants' post-hoc determination of the qualifications of test-failers, then, was not even conducted by the same division responsible for the contemporaneous review of test-passers, further undermining any claim that the post-hoc review process is a reliable indicator of whether test-failers like the Arroyo Intervenors would have been found qualified at the time they took one of the challenged exams.

who would be able successfully to perform the job of Custodian or Custodian Engineer – had already been satisfied. Moreover, as is demonstrated, each of the Arroyo Intervenors was adversely affected by the discriminatory use of an exam that resulted in an overwhelming shortfall of blacks and Hispanics employed as permanent Custodians and Custodian Engineers. *See infra* pp. 64-65. Permanent appointments and retroactive seniority to the Arroyo Intervenors are thus reasonable make-whole remedies in the interest of making up the discriminatory shortfall of black and Hispanic permanent employees, *even if* the Arroyo Intervenors cannot be proven, with exactitude, to be among the individuals who would have been hired had the exams been used in a non-discriminatory manner. *See Ass'n Against Discrimination in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256, 284-89 (2d Cir. 1981); *Guardians Ass'n of N.Y. City Police Dep't v. Civil Serv. Comm'n*, 539 F. Supp. 627, 629 (S.D.N.Y. 1982) (noting that "unrealistic exactitude" in the calculation of back pay and retroactive seniority is not required, and holding that "[d]espite the lack of certainty that non-discriminatory use of [the challenged exam] would have resulted in the hiring of the same 140 minorities in November, 1979, as were accepted in September, 1980, the members of plaintiffs' first sub-class must be granted back pay and seniority as of November, 1979").

This Court should thus conclude that even assuming, arguendo, that an award of retroactive seniority in a settlement agreement must be calibrated with make-whole relief in order to be lawful under Title VII, the grants of seniority to the Arroyo Intervenors do meet this requirement. It bears repeating in this regard that determinations of proper make-whole relief are necessarily inexact, in light of the impossibility of reconstructing exactly what position an individual would have been in absent unlawful employment discrimination. *See Teamsters*, 431 U.S. at 372; *Pettway*, 494 F.2d at 261. The seniority awarded to the Arroyo Intervenors is thus a

reasonable approximation of the positions they would have occupied had Defendants employed a hiring system that did not discriminate against black and Hispanic applicants for permanent employment.

B. The Challenged Provisions 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 those provisions are lawful under the Equal Protection Clause of the Fourteenth Amendment.[38] *See Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (plurality opinion of O'Connor, J.) (holding that Fourteenth Amendment strict scrutiny analysis applies to race-conscious decisions of state and local governments); *id.* at 520 (Scalia, J., concurring in the judgment); *see also Crumpton v. Bridgeport Educ. Ass'n*, 993 F.2d 1023, 1030 (2d Cir. 1993) (requiring that modifications to a race-conscious hiring plan implemented by consent decree be subjected to Fourteenth Amendment strict scrutiny analysis).

1. Equal Protection Legal Standard

Race-conscious employment actions by a public employer are lawful under the Equal Protection Clause where they meet strict scrutiny, which is satisfied where the employment actions are narrowly tailored measures that further a compelling government interest. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

a. Strong Basis In Evidence Requirement

It is well-established that remedying prior discrimination by a government actor is a compelling government interest that can support the use of race-conscious employment

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[38]If, on the other hand, this Court finds that the remedies provided by the challenged provisions of the Agreement violate Title VII, it need not and should not reach the question of the Agreement's lawfulness under the Equal Protection Clause. *See, e.g.*, *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988).

decisions. *See Grutter v. Bollinger*, 539 U.S. 306, 327-28 (2003); *Croson*, 488 U.S. at 493; *Crumpton*, 993 F.2d at 1030 ("Rectifying past discrimination is unquestionably a compelling governmental interest."). In order for a court to find that a compelling interest in remedying prior discrimination exists in a given case, there must be a demonstration of a "strong basis in evidence" to support the conclusion that remedial action was necessary. *Croson*, 488 U.S. at 500-01(1989); *Crumpton*, 993 F.2d at 1030. The Supreme Court has held that the "strong basis" requirement is satisfied by evidence "approaching a prima facie case of a constitutional or statutory violation." *Croson*, 488 U.S. at 500.

Applying this standard, a number of courts have held that the demonstration of a prima facie case of Title VII disparate impact is sufficient to support the conclusion that race-conscious remedial measures are necessary. In *Howard v. McLucas*, 871 F.2d 1000 (11th Cir. 1989), for example, the Eleventh Circuit held that statistical evidence that establishes a prima facie case of Title VII disparate impact provides a strong basis in evidence of prior discrimination. *Id.* at 1007-08 (citing *Howard v. McLucas*, 671 F. Supp. 756, 760-61 (M.D. Ga. 1987)). Likewise, in *Stuart v. Roache*, 951 F.2d 446 (1st Cir. 1991), then-Judge Breyer concluded that a prima facie case of Title VII disparate impact, when unrebutted by the employer, provides a strong basis in evidence of prior discrimination that in turn demonstrates a compelling purpose for race-based relief. *See id.* at 450-52 (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988) (applying the Title VII disparate impact framework)); *see also Davis v. City & County of San Francisco*, 890 F.2d 1438, 1442-44, 1446-47 (9th Cir. 1989) (holding that the district court's finding of statistically significant disparities in pass rates on civil service exams by race established a prima facie case of Title VII disparate impact discrimination, which was sufficient to satisfy the "strong basis" test and to support race-conscious provisions in a consent decree);

United States v. New Jersey, 75 Fair Empl. Prac. Cas. (BNA) 1602 (D. N.J. 1995) (holding that a prima facie case of disparate impact discrimination satisfies the constitutional requirements for race-based consent decrees); *Paganucci v. City of New York*, 785 F. Supp. 467, 477 (S.D.N.Y. 1992) (noting that the strong basis requirement can be satisfied by a prima facie showing of disparate impact in a civil service exam), *aff'd*, 993 F.2d 310, 312 (2d Cir. 1993).[39]

The Brennan Intervenors argue, without any reference at all to the controlling "strong basis in evidence" test, that only a showing of disparate treatment can establish a compelling government interest in remedying prior discrimination. *See* Brennan Mem. at 45. While it is certainly true that a demonstration of a prima facie case of pattern-and-practice disparate treatment is *sufficient* to meet the strong basis test, *see Croson*, 488 U.S. at 500 (quoting *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977)); *see also Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 292 (1986) (O'Connor, J., concurring) (stating that evidence establishing a "prima facie Title VII pattern or practice claim . . . would lend a compelling basis for a competent authority . . . to conclude that implementation of a voluntary affirmative action plan is appropriate to remedy apparent prior employment discrimination"); *Cotter v. City of Boston*, 323 F.3d 160, 169 (1st Cir. 2003); *Aiken v. City of Memphis*, 37 F.3d 1155, 1163 (6th Cir. 1994), it is simply incorrect to argue that the Supreme Court has held that such a showing is

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[39] Other courts have concluded that the strong basis standard was satisfied by a prima facie showing of Title VII disparate impact discrimination combined with other evidence of discrimination. *See, e.g.*, *Cotter*, 323 F.3d at 169-71 (holding that a strong basis in evidence existed for race-conscious promotions on the basis of, inter alia, statistical evidence of a promotional exam's significantly adverse impact); *In re Birmingham*, 20 F.3d at 1540-41, 1544-45 (holding that a strong basis in evidence was established on the basis of previous district court findings that certain selection exams had adverse impact and were insufficiently job-related to be valid under Title VII, as well as evidence "attacking other employment tests and selection procedures"). Neither *Cotter* nor *In re Birmingham*, however, holds that a prima facie showing of disparate impact discrimination would not, by itself, satisfy the strong basis standard.

necessary to meet the strong basis test. To the contrary, as cited above, a strong basis for remedial measures can be established by presenting evidence "approaching a prima facie case of a constitutional or statutory violation." *Croson*, 488 U.S. at 500. Because disparate impact discrimination is, of course, a statutory violation of Title VII , *see* 42 U.S.C. § 2000e-2(k)(1)(A); *Griggs v. Duke Power Co.*, 401 U.S. 424, 426-31 (1971), 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 discriminatory impact alone may be sufficient to establish a firm basis in evidence for race-conscious decision-making).

Requiring more than a prima facie case of disparate impact discrimination would undermine Title VII's goal of encouraging voluntary compliance. *See Wygant*, 476 U.S. at 290 (O'Connor, J. concurring) ("The imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations."); *Local 93*, 478 U.S. at 515 ("Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII."). Indeed, the Second Circuit has expressly held that because such a requirement would reduce voluntary compliance, lack of job-relatedness need not be established before entering into a settlement. *See Bushey v. N.Y. State Civil Serv. Comm'n*, 733 F.2d 220, 224-28 (2d Cir. 1984) ("By requiring proof of not only a prima facie case of adverse impact, but also of the inability to rebut such a case, the district court in effect posited a rule, contrary to the stated policy of voluntary compliance, permitting an employer . . . to take remedial actions only where there could be a judicial determination of racial discrimination."); *Kirkland*, 711 F.2d at 1130 ("[I]f intervenors' position were adopted, no

Title VII 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.").

Even were the Supreme Court's language in *Croson* unclear as to the adequacy of a prima facie showing of disparate impact to meet the strong basis test, the very rationale behind – and historical development of – the Title VII disparate impact framework should compel the conclusion that the strong basis test is satisfied by a prima facie showing of disparate impact. One of the primary purposes of the disparate impact standard in employment discrimination law is to screen out the possibility of subtle or surreptitious intentional discrimination. *See In re Employment Discrimination Litig. Against Ala.*, 198 F.3d 1305, 1322 (11th Cir. 1999) ("[A]lthough the form of the disparate impact inquiry differs from that used in a case challenging state action directly under the Fourteenth Amendment, the core injury targeted by both methods of analysis remains the same: intentional discrimination.").[40] Another central purpose of the disparate impact standard, even where there is no surreptitious intentional discrimination, is to

[40]In articulating this theory of the rationale behind disparate impact law, the Eleventh Circuit explained: "[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.' If, after a prima facie demonstration of discriminatory impact, the employer cannot demonstrate that the challenged practice is a job related business necessity, what explanation can there be for the employer's continued use of the discriminatory practice other than that some invidious purpose is probably at work?" *In re Employment Discrimination Litig.*, 198 F.3d at 1321-22 (quoting *Teamsters*, 431 U.S. at 339-40 n.20) (internal citations omitted). In other words, the Title VII disparate impact framework provides a powerful evidentiary tool in cases where discrimination may otherwise be difficult to prove; it proceeds by effectively countering ordinary explanations other than discriminatory intent for an employment policy or practice with a demonstrably adverse impact.

prevent current employment practices that are neutral on their face from perpetuating workplace segregation and racial hierarchies, effectively "freezing" in place the status quo created by prior discriminatory practices. *Griggs*, 401 U.S. at 430; *see also Watson*, 487 U.S. at 987 ("[T]he 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."). Accordingly, a statistical showing of racial disparity in employment that is sufficient to make out a prima facie case of disparate impact 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 fundamental goals of "achiev[ing] equality of employment opportunities and remov[ing] barriers" to that equality. *Griggs*, 401 U.S. at 429-430; *see also Connecticut v. Teal*, 457 U.S. 440, 449 (1982).[41]

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[41]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 a showing of disparate treatment will suffice to establish a compelling interest in taking remedial measures. *See* Brennan Mem. at 45. *Garrett*'s relevance in this context is not entirely clear; *Garrett* held only that certain provisions of the Americans with Disabilities Act that prohibited public agencies from "utilizing standards, criteria, or methods of administration" that had a disparate impact on the disabled exceeded Congress's enforcement powers under § 5 of the Fourteenth Amendment. *See Garrett*, 531 U.S. at 373. If the Brennan Intervenors are somehow attempting to suggest that *Garrett*'s assessment of the ADA casts doubt on the applicability of Title VII to state agencies, they are clearly incorrect; such an argument is foreclosed by long-settled precedent. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 453 n.9 (1976) ("There is no dispute that in enacting the 1972 Amendments to Title VII to extend coverage to the States as employers, Congress exercised its power under § 5 of the Fourteenth Amendment."); *see also Teal*, 457 U.S. at 447 n.8 ("The legislative history of the 1972 amendments to Title VII . . . demonstrates that Congress recognized and endorsed the disparate-impact analysis employed by the Court in *Griggs*."); *Dothard v. Rawlinson*, 433 U.S. 321, 331 n.14 (1977) ("Congress expressly indicated [in the 1972 amendments to Title VII] the intent that the same Title VII principles be applied to governmental and private employers alike."); *Okruhlik v. Univ. of Ark.*, 255 F.3d 615, 626-27 (8th Cir. 2001) (holding that the Title VII disparate impact prohibition is a "prophylactic"

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Even assuming, arguendo, that the strong basis test is only satisfied by evidence showing a prima facie case of pattern-and-practice disparate treatment, this would in many cases be a distinction without a difference: A statistical showing of employment disparities by race that is sufficient to establish a prima facie case of disparate impact will nearly always also be sufficient to establish a prima facie case of pattern-and-practice disparate treatment. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) ("Either theory may, of course, be applied to a particular set of facts."); *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.*, 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."). To establish a prima facie showing of Title VII disparate impact discrimination, a plaintiff must demonstrate "that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Albemarle*, 422 U.S. at 425. In

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[41](...continued)
response to a pattern of unconstitutional state action); *In re Employment Discrimination Litig.*, 198 F.3d at 1324 (concluding that "in enacting the disparate impact provisions of Title VII, Congress has unequivocally expressed its intent to abrogate the states' Eleventh Amendment sovereign immunity, and that Congress has acted pursuant to a valid exercise of its Fourteenth Amendment enforcement power."); *Scott v. City of Anniston*, 597 F.2d 897, 900 (5th Cir. 1989) (holding that the Title VII disparate impact standard rests squarely within Congress's enforcement powers under § 5 of the Fourteenth Amendment).

Recently, the Supreme Court reconfirmed the constitutionality of Congressional civil rights legislation aimed at eliminating widespread constitutional violations by state employers, including the use of facially nondiscriminatory policies that are applied in discriminatory ways. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 723 (2003) (upholding the Family and Medical Leave Act).

comparison, a prima facie showing of pattern-and-practice disparate treatment under Title VII merely requires evidence of a gross disparity between the percentage of minorities in the workforce and in the relevant, qualified labor pool. *See Hazelwood*, 433 U.S. at 303. At the prima facie stage, then, the fundamental difference between the two frameworks is that the disparate impact standard requires identification of the specific source of the disparity; thus, any statistical showing that suffices to establish a prima facie case of disparate impact discrimination will also often establish a prima facie case of pattern-and-practice disparate treatment. In fact, due presumably to the functional equivalence of the prima facie showing between the two theories, courts holding that the strong basis test has been met with evidence of racially disparate employment statistics often omit reference to the specific theory of discrimination being pursued. *See, e.g.*, *Peightal II*, 26 F.3d at 1553, 1555-56, 1562 (holding that there was evidence of a statistical imbalance between minorities and non-minorities in the relevant work force and available labor pool, which "constituted the requisite 'strong basis in evidence' mandated by *Croson*"); *see also Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1566-67 (11th Cir. 1994) (holding that statistically significant adverse impact resulting from a promotions exam for police sergeant, along with findings of discrimination in entry-level tests, satisfied the strong basis standard).

Accordingly, the compelling interest element of strict scrutiny will be satisfied if this Court finds a "strong basis in evidence" to support the conclusion that the race-conscious provisions of the Agreement were necessary to remedy prior discrimination. Such a remedial justification can permissibly be based on evidence showing a prima facie case of disparate

impact discrimination.[42]

b. Narrow Tailoring Requirement

A race-conscious remedy for prior discrimination must also be narrowly tailored to further the remedial goal. *Adarand*, 515 U.S. at 227. A court's narrow-tailoring analysis includes consideration of "(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 Supreme Court reaffirmed in *Grutter*, 539 U.S. at 333-41, that narrowly-tailored measures are not limited to efforts to make whole identified victims of discrimination. Indeed, the very notion of affirmative action presumes that relief will be provided to individuals who are not proven victims of discrimination so long as they are members of the racial or ethnic group

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[42]In addition to the cases already discussed, the Brennan Intervenors cite three additional cases to support their argument that only intentional discrimination can serve as a compelling state interest for taking race-conscious remedial action. *See* Brennan Mem. at 45-46. These cases are not on point. The cited passage from *Michigan Road Builders Ass'n, 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. The Seventh Circuit's opinion in *People Who Care v. Rockford Board of Education*, 111 F.3d 528 (7th Cir. 1997), is similarly inapplicable to the instant case – the court there 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. (Moreover, the continued vitality of the Seventh Circuit's holding is unclear following *Grutter* and *Gratz*, which held that diversity is a compelling state interest. *See Grutter*, 539 U.S. at 327-33, 343; *Gratz v. Bollinger*, 539 U.S. 244, 268 (2003).) Equally problematic for the Brennan Intervenors is their reference to the dissenting opinion in *Wessman v. Gittens*, 160 F.3d 790 (1st Cir. 1998), a school assignment case, in which the dissenting judge would have *upheld* the race-conscious student assignment plan at issue. *See id.* at 810 (Lipez, J., dissenting).

that suffered discrimination. *See, e.g.*, *Associated Gen. Contractors v. Coalition for Econ. Equal.*, 950 F.2d 1501, 1418 (9th Cir. 1991).

c. Allocation of Burdens

In the constitutional inquiry, the parties defending the race-conscious remedies bear the burden of demonstrating a "strong basis in evidence" that remedial measures were necessary, and that such actions were narrowly tailored to achieve the remedial goal. *See Croson*, 488 U.S. 469 at 500-01; *Wygant,* 476 U.S. at 274 (plurality opinion). Once this burden of production is met, the party challenging the race-conscious remedial relief retains the "ultimate burden" of persuading the court of the unconstitutionality of that relief. *Wygant*, 476 U.S. at 277-78 (plurality opinion) ("The ultimate burden remains with the [challenging party] to demonstrate the unconstitutionality of an affirmative-action program."); *id.* at 293 (O'Connor, J., concurring) ("[The nonminority challengers] continue to bear the ultimate burden of persuading the court that [the state actor's] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently 'narrowly tailored.'").[43]

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[43]The Brennan Intervenors incorrectly argue that the proponents and beneficiaries of the challenged employment decisions bear the ultimate burden of proving the constitutionality of race-conscious remedial relief. *See* Brennan Mem. at 44. The cases they cite for this proposition merely emphasize that the state actor has the burden of coming forward with evidence to demonstrate that race-conscious programs are narrowly tailored to meet a compelling interest. *See Johnson v. Bd. of Regents of Univ. of Ga. Sys.*, 263 F.3d 1234, 1244 (11th Cir. 2001) (holding that the state university failed to introduce sufficient evidence to demonstrate that its consideration of race was narrowly tailored to serve a compelling governmental interest); *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 744-47 (2d Cir. 2000) (remanding for trial as to whether the defendant could meet its burden of demonstrating that it had a compelling interest for engaging in remedial action); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997) (striking down a minority subcontracting plan because the state university "offered no evidence whatsoever" that the plan met strict scrutiny). None of these cases question or in any (continued...)

2. The Remedies Provided By The Challenged Provisions Of The Agreement Meet The Strict Scrutiny Standard

The facts of the instant case demonstrate that the strict scrutiny standard is clearly met here. The application of strict scrutiny must take account of the specific factors involved in the race-conscious actions under review. As the Supreme Court recently explained, "[c]ontext matters when reviewing race-based governmental action under the *Equal Protection Clause*. . . . Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity" of the reasons that support the race-conscious decision at issue. *Grutter*, 539 U.S. at 326-27 ("Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it.").

In the context of an employer's efforts to remedy discrimination in its own workforce, it is particularly relevant to consider Congress's explicit goal that "voluntary compliance" should be "the preferred means of achieving the objectives of Title VII." *Local 93*, 478 U.S. at 515. Moreover, "[t]he value of voluntary compliance is doubly important when it is a public employer that acts, both because of the example its voluntary assumption of responsibility sets and because the remediation of governmental discrimination is of unique importance." *Wygant*, 476 U.S. at 290 (O'Connor, J., concurring).

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[43](...continued)
way undermine the proof allocation enunciated by a majority of the Supreme Court in *Wygant*, which requires the challenging party to bear the ultimate burden of proving unconstitutionality. *Wygant*, 476 U.S. at 277-78 (plurality opinion); *see also Cotter*, 323 F.3d at 168 n.6; *Concrete Works of Colo., Inc. v. City & County of Denver*, 321 F.3d 950, 959 (10th Cir.), *cert. denied*, 540 U.S. 1027 (2003); *Majeske v. City of Chicago*, 218 F.3d 816, 820 (7th Cir. 2000); *Eng'g Contractors Ass'n of S. Fla. Inc. v. Metro. Dade County,* 122 F.3d 895, 916 (11th Cir.1997); *Aiken*, 37 F.3d at 1162; *Contractors Ass'n of E. Pa., Inc. v. City of Philadelphia*, 6 F.3d 990, 1005-07 (3d Cir. 1993).

a. There Is a Strong Basis in Evidence for the Conclusion That Remedial Action Was Necessary

(1) The Evidence Establishes a Prima Facie Case of Disparate Impact Against Blacks and Hispanics in Each of the Challenged Exams

All parties concede that Exams 5040 and 1074 had a statistically significant disparate impact on blacks and Hispanics, and that Exam 8206 had a disparate impact against blacks. *See* Defs.' Resp. to Pl.'s First Expert Set of Req. for Admis. (Resps. No. 54-81, 84-91, 93-100, 103-06) (Ex. 11); Brennan Mem. at 51 (citing Sharf Statement of 10/18/04, at ¶ 2 (Ex. 90)). Because a statistical showing of adverse impact suffices to establish a prima facie case of disparate impact discrimination, *see Albemarle*, 422 U.S. at 425, there is no dispute of fact that a prima facie case has been established with regard to Exams 5040 and 1074 for blacks and Hispanics, and Exam 8206 for blacks.

In addition, the record plainly demonstrates that a prima facie case of disparate impact has been shown for Exam 8206 against Hispanics. Defendants' own expert found that the pass rate for white applicants to Exam 8206 was 85.1%, and the pass rate for Hispanic applicants was 71.1%, for a disparity of 2.15 standard deviations (statistically significant at the .05 level).[44] *See* Defs.' Resp. to Pl.'s First Expert Set of Req. for Admis. (Resps. No. 89, 91, 94-95) (Ex. 11). In originally approving the Agreement in 2000, Judge Levy concluded that this evidence was sufficient to establish a prima facie case of disparate impact.[45] *See N.Y. City Bd. of Educ.*, 85 F.

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[44]The level of disparate impact is even greater using the analysis of the United States's experts, which shows a disparity of 2.51 standard deviations (statistically significant at the .05 level). *See* Defs.' Resp. to Pl.'s First Expert Set of Req. for Admis. (Resps. No. 41-42) (Ex. 11).

[45]The Brennan Intervenors contest this showing of disparate impact on the ground that the disparities in pass rates do not appropriately take into account the possible lack of

(continued...)

Supp. 2d at 143. Because a prima facie showing of disparate impact is sufficient to provide the strong basis in evidence needed to justify race-conscious remedies, this Court should hold that the strong basis requirement is met on the prima facie evidence alone.

(2) Additional Evidence of Disparate Impact Supports the Finding of a Strong Basis in Evidence

Although the strong basis standard is clearly satisfied by a prima facie case of disparate impact, there is additional evidence here that bolsters the conclusion that the Agreement was necessary to remedy Defendants' prior discrimination. *See Cotter*, 323 F.3d at 169-71; *In re Birmingham*, 20 F.3d at 1540-41, 1544-45. In particular, the record demonstrates that if this case had gone to trial, there was ample evidence to support a finding of Title VII disparate impact

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[45](...continued)
qualifications of those who failed Exam 8206. *See* Sharf Statement of 10/18/04, at ¶¶ 2-12 (Ex. 90). Dr. Sharf's statement is totally lacking in probative value, both because he provides no evidence of his calculations that purport to show that alternative methods of accounting for the qualifications of test-failers would reduce the demonstrated disparity, *id.*, and because his speculations regarding possible qualification rates are not credible assumptions in any event. *See* Siskin & Cupingood, Comments on Dr. Sharf's Report, at 2-4 (Ex. 91).

Moreover, as a matter of law, statistical evidence supporting a prima facie case of discrimination disparity may not be discounted by claims that subsequent employment criteria would (or would not) have affected the ultimate hiring results. For example, in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), the Supreme Court held that "to establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern." *Id.* at 329. The facially neutral standards in question in that case were height and weight requirements, and the Supreme Court held that the plaintiff had made out a prima facie case of unlawful sex discrimination by showing the effect that the height and weight requirements *alone* had on female applicants, without adjusting the data to screen out those who would not have been otherwise qualified for the position on the basis of additional hiring criteria (which included an educational minimum and a valid driver's license). *Id.* at 327-30; *see also Albemarle*, 422 U.S. at 425; *cf. Teal*, 457 U.S. at 450-51 ("In considering claims of disparate impact under [Title VII] this Court has consistently focused on employment and promotion requirements that create a discriminatory bar to *opportunities*. . . . The suggestion that disparate impact should be measured only at the bottom line ignores the fact that Title VII guarantees [minority workers] the *opportunity* to compete equally with white workers on the basis of job-related criteria.").

liability for the challenged exams, not merely a prima facie case.

Under the Title VII disparate impact framework, once the plaintiff establishes a prima facie case of disparate impact, an employer can avoid liability by demonstrating that the challenged practice is "job related for the position in question and consistent with business necessity," unless the plaintiff can "establish the availability of an alternative policy or practice that would also satisfy the asserted business necessity, but would do so without producing the disparate effect." *Robinson*, 267 F.3d at 161.[46]

Here, there is substantial evidence in the record that the three challenged exams were not job-related or consistent with business necessity, especially in view of the gross disparities that they produced. *See Guardians Ass'n of N.Y. City Police Dept. v. Civil Service Comm'n of City*

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[46] Title VII, as amended by § 105 of the Civil Rights Act of 1991, provides for an allocation-of-proof framework that assigns to the complaining party the burden of establishing the prima facie case, and requires the respondent to "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A). The Brennan Intervenors, citing a decision of the Eighth Circuit, argue that § 105 of the 1991 Act is non-retroactive and that the proof framework that governs the disparate impact analysis of Exams 5040 and 8206 (which were administered before the passage of the 1991 Act) is the framework described in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989) (holding that the burden of persuasion on a disparate impact claim remains with the complaining party throughout). *See* Brennan Mem. at 52 & n.16 (citing *Davey v. City of Omaha*, 107 F.3d 587, 593 (8th Cir. 1997)). This argument is unavailing. Unlike the Eighth Circuit, the Second Circuit has never held that § 105 is non-retroactive; to the contrary, the Second Circuit has indicated that the proof framework established the 1991 Act should apply to claims of disparate impact discrimination that relate to conduct pre-dating the passage of the 1991 Act. *See Robinson*, 267 F.3d at 155, 160-61 (describing the applicability of the burden-shifting framework mandated by the 1991 Act to challenged conduct that pre-dated the passage of the Act); *see also Jackson v. Bankers Trust Co.*, 60 Fair Empl. Prac. Cas. (BNA) 280, 284 n.8 (S.D.N.Y. 1992) ("A decision to apply the 1991 Act retroactively unless manifest injustice would result is consistent with caselaw suggesting that retroactive effect should be applied where the purpose of the statute is not to amend, but merely to restore and clarify congressional intent."). In any event, even assuming that the *Wards Cove* allocation of proof does apply to the disparate impact analysis of Exams 5040 and 8206, that standard is easily met here – the evidence presented above as to the absence of business necessity and job relatedness, and as to less discriminatory alternatives, is more than sufficient to meet the burden of persuasion.

of N.Y., 630 F.2d 79, 98-99, 105-06 (2d Cir. 1980) (establishing standards for validating the job-relatedness of an employment assessment instrument that has an adverse impact, and requiring that the greater the adverse impact of the test, the higher the correlation required). The United States's experts concluded that neither the procedures originally used by Defendants to develop the challenged exams, nor the content-validation studies prepared by Defendants' experts as part of this lawsuit, met professional standards for content-related validation – that is, the evidence did not demonstrate that the material tested on any of the challenged exams was a representative sample of either the critical job tasks or the knowledge, skills, and abilities ("KSAs") required to complete those tasks. *See* Pulakos & Schmitt, Analysis of New York City's School Custodian & School Custodian Engineer Examinations, at 7-9 (Ex. 92); Pulakos & Schmitt, Supplemental Report, at 4 (Ex. 93). The United States's experts also thoroughly discredited Defendants' studies[47] purporting to show that Exams 5040 and 1074 could be validated by criterion-related evidence (*i.e.*, by showing a statistically significant correlation between test scores and performance on the job as measured by specific "criteria" selected to indicate job success).[48] *See*

[47]The Brennan Intervenors have not presented any additional evidence purporting to show job-relatedness; rather, the Brennan Intervenors' expert, Dr. Sharf, merely opined that Defendants' expert reports conformed with general practices of industrial psychology. *See* Sharf Statement of 10/18/04, at ¶ 19 (Ex. 90). Evidence discrediting Defendants' expert reports therefore undermines Dr. Sharf's conclusions as well.

[48]The evidence is particularly weak with respect to the job-relatedness of the 70% passing score required for each of the exams, and for Defendants' rank-order hiring of test-passers. *See* Pulakos & Schmitt, Supplemental Report, at 15-16 (Ex. 93); Pulakos & Schmitt, Analysis at 24, 34, 50 (Ex. 92); *see also Lanning v. SEPTA*, 181 F.3d 478, 489 (3d Cir. 1999) ("[A] discriminatory cutoff score is impermissible unless shown to measure the minimum qualifications necessary for successful performance of the job in question."); *Guardians*, 630 F.2d at 101 ("Without some substantial demonstration of reliability it is wholly unwarranted to make hiring decisions, with a disparate racial impact, for thousands of applicants that turn on one-point distinctions among their passing grades.").

Siskin & Cupingood, Review of Statistical Methodology, at 3 (Ex. 33); *see also* Pulakos & Schmitt, Supplemental Report, at 17-31 (Ex. 93). The voluminous expert evidence in the record demonstrating that the challenged exams were neither job-related nor consistent with business necessity[49] thus provides additional proof of prior discrimination on which this Court could find that the strong basis requirement is met.[50] *See, e.g.*, *Edwards v. City of Houston*, 37 F.3d 1097, 1113 (5th Cir. 1994) (holding that the strong basis in evidence standard was met by evidence establishing disparate impact of challenged examinations, combined with "other evidence [that] created substantial doubt as to the job-relatedness of the challenged tests."), *vacated and superseded on other grounds*, 78 F.3d 983 (5th Cir. 1996) (en banc).

There is also significant evidence to support the United States's claim that Defendants' provisional hiring process is a less discriminatory alternative to the challenged exams.[51] *See*

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[49]The Brennan Intervenors assert that Defendants had a legitimate business interest in complying with civil service requirements respecting the use of competitive exams. *See* Brennan Mem. at 52-53. However, New York City agencies have for decades made widespread use of provisional hiring practices that circumvent civil service requirements. In the early 1990s, for example, approximately 50,000 of the 183,000 City employees who held non-pedagogical, non-uniformed positions did so through provisional appointments rather than through permanent appointments from a civil service list. *See* Croghan Decl. ¶¶ 5-6 (Ex. 94). In addition, the Board of Education routinely hired provisionals and employed them for long periods of time, knowing that doing so was in violation of civil service law limiting provisional appointments to nine months. *See* Juni Dep. Tr. at 89 (Ex. 16); Carol Wachter Dep. Tr. at 25-26 (Ex. 12); N.Y. Civ. Serv. Law § 65(2) (McKinney 2004). It would be inequitable to allow Defendants to rely on compliance with civil service law as a legitimate business interest in light of their persistent and widespread use of provisional hiring processes to staff Custodian and Custodian Engineer positions for periods far exceeding the nine-month statutory maximum.

[50]As noted *infra* pp. 56-57, it cannot be argued that non-job-relatedness must be *proved* to meet the strong basis test, given that the Second Circuit has expressly held that such a requirement would impermissibly undermine Title VII's goal of voluntary compliance. *See Bushey*, 733 F.2d at 226; *Kirkland*, 711 F.2d at 1130.

[51]Throughout the litigation in this action, "the United States consistently has taken the (continued...)

Robinson, 267 F.3d at 161. The provisional hiring process clearly had a less discriminatory impact than the challenged exams because it resulted in a greater hire rate for black and Hispanic applicants. According to the United States's experts, 5.5% of all permanent Custodians hired from the eligibility lists generated by the challenged exams were black or Hispanic, compared to 20.4% of provisional hires during the comparable time period. *See* Siskin & Cupingood, Review of Statistical Methodology, at 11 & Exs. 13A, 13B (Ex. 33). 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. *Id.*

The provisional hiring process also adequately satisfies Defendants' business need to select an effective school custodian workforce. In the aggregate, performance ratings for Custodians selected provisionally were as good as those selected via the challenged exams. *See id.* at 12 & Ex. 15 ("[T]here is no statistically significant difference in the job performance ratings of those hired provisionally versus those hired from the eligibility lists for Exams 1070 and 5040"); *see also* Pulakos & Schmitt, Supplemental Report, at 31-32 (Ex. 93). Moreover, Defendants' extensive use of the provisional hiring process further supports the conclusion that Defendants considered the provisional hiring process to be, and that it in fact was, an effective means of fulfilling their business needs. *See Robinson*, 267 F.3d at 161. In sum, there is

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[51](...continued)
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." U.S. Mem. Supp. Settlement at 57 (Ex. 47); *see also* U.S. Resps. to Pl.-Intervenors' First Contention Interrogs. (Resp. 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.") (Ex. 49).

substantial evidence that "the provisional hiring process has less impact than the written test process and the provisional hiring process demonstrates at least as much validity as the testing process," and therefore that disparate impact discrimination in violation of Title VII would have been established at trial. Siskin & Cupingood, Provisional Hiring as an Alternative Selection Device, at 4 (Ex. 95).

Finally, in addition to the evidence that Defendants could have been held liable for a Title VII disparate impact violation with respect to the United States's testing claims, the gross statistical disparity between black and Hispanic representation in the permanent workforce and in the relevant qualified labor pool would also be sufficient to establish a prima facie case of a pattern-and-practice disparate treatment violation. The statistical evidence of racial disparity, described above, is of more than sufficient magnitude to support an inference of intentional discrimination. *See Hazelwood*, 433 U.S. at 307-08; *Teamsters*, 431 U.S. at 336. And there is ample evidence, over and above the gross statistical disparity, that could establish an inference of discriminatory intent in this case. Defendants continued to use written examinations in the face of knowledge that the tests had a demonstrable adverse impact on blacks and Hispanics. *See* Serpico Dep. Tr. of 6/11/97, at 85-93 (Ex. 96); Carol Wachter Dep. Tr. at 30-33 (Ex. 12). Continued use of an employment selection device combined with an employer's awareness of its discriminatory impact can plainly support an inference of discriminatory intent. *See In re Employment Discrimination Litig.*, 198 F.3d at 1321-22.

(3) The Brennan Intervenors Have Not Met Their Burden of Proving the Unconstitutionality of the Agreement

Because the evidence in this case clearly satisfies the strong basis requirement, it is incumbent upon the Brennan Intervenors to meet their ultimate burden of proving the

unconstitutionality of the Agreement. *See Wygant*, 476 U.S. at 277-78 (plurality opinion); *id.* at 293 (O'Connor, J., concurring). Where the parties defending race-conscious employment decisions have demonstrated a strong basis in evidence that remedial measures are necessary, the challenging party cannot meet its ultimate burden of proving unconstitutionality through "conjecture and unsupported criticisms," but rather must introduce "credible, particularized evidence" to establish the unconstitutionality of race-conscious employment decisions. *Concrete Works*, 321 F.3d at 991 (quoting *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1175 (10th Cir. 2000)) (internal quotation marks omitted). Such evidence must prove that a "neutral explanation" accounts for the identified disparity; that the disparities identified were not "significant or actionable"; or that the evidence supporting the "strong basis" is methodologically flawed. *Id.* at 959 (quoting *Coral Constr. Co. v. King County*, 941 F.2d 910, 921 (9th Cir.1991)); *see also Eng'g Contractors Ass'n,* 122 F.3d at 916; *Contractors Ass'n of E. Pa.*, 6 F.3d at 1007.

The Brennan Intervenors have not introduced the "credible, particularized evidence" required to meet their burden. *Concrete Works*, 321 F.3d at 991. They have not created a genuine issue of material fact that the statistical evidence of disparate impact is methodologically flawed or otherwise not actionable. *See Aiken*, 37 F.3d at 1163 (holding that the plaintiffs failed to create a genuine issue of material fact as to whether the race-based promotions at issue were supported by a compelling interest, because the plaintiffs failed to offer any evidence to rebut the prima facie showing of a gross statistical disparity); *Peightal II*, 26 F.3d at 1556-57 (holding that the plaintiff failed to rebut the statistical analysis offered by the government agency in support of its affirmative action plan "either by demonstrating that it was flawed in its methodology or by introducing contrasting data that indicated that the significant

disparities were not present"); *Stuart*, 951 F.2d at 451-52 (rejecting the plaintiffs' attempts to discredit statistical evidence that established a prima facie showing of a Title VII violation).

Nor have the Brennan Intervenors met their burden by introducing evidence that a "neutral explanation" accounts for the identified disparity. *Compare, e.g.*, *Concrete Works*, 321 F.3d at 991-992 (holding that the plaintiff failed to meet its rebuttal burden because, inter alia, it failed to introduce evidence to prove that the disparities supporting a city affirmative action plan could be explained by factors other than racial discrimination), *with Brunet v. City of Columbus*, 1 F.3d 390, 407 (6th Cir. 1993) (holding that reverse discrimination plaintiffs were able to rebut a prima facie case of discrimination only because they were able to prove that other factors, unrelated to race, accounted for the gross statistical disparity in examination passage rates).

Finally, even if this Court finds that the Brennan Intervenors have established an issue of fact as to job-relatedness, such a showing is insufficient to rebut the strong basis and establish the unconstitutionality of the Agreement. First, as noted, the Second Circuit has held that non-job-relatedness need not be established before entering into a settlement. *See Bushey*, 733 F.2d at 226; *Kirkland*, 711 F.2d at 1130. Second, the Second Circuit has also held that "a defendant's entrance into a compromise without rebutting an established *prima facie* case amounts to an admission of unlawful discrimination for purposes of Title VII," denials of unlawful discrimination notwithstanding. *Kirkland*, 711 F.2d at 1131 & n.16; *see also Stuart*, 951 F.2d at 453. Third, even if the tests *were* job-related, the Brennan Intervenors have not rebutted the showing that the provisional hiring process is an equally effective and less discriminatory alternative.

b. The Challenged Provisions Are Narrowly Tailored to Remedy Prior Discrimination

After determining that there is a strong basis in evidence to support the conclusion that remedial action was necessary, this Court must also assess whether the remedies provided by the challenged provisions of the Agreement are narrowly tailored to remedy the prior discrimination that has been demonstrated. *See Sec'y of HUD*, 239 F.3d at 219. In conducting its analysis, the Court should bear in mind that the ultimate purpose of the narrow-tailoring inquiry is to ensure that the means chosen to accomplish the compelling interest fits closely enough to eliminate any possibility that the race-conscious employment actions are actually motivated by "illegitimate racial prejudice or stereotype." *Croson*, 488 U.S. at 493. It is plain that the race-conscious remedies here are not motivated by impermissible prejudice, but rather are narrowly tailored to the achievement of the remedial goal.

(1) Necessity of Relief

First, the remedial relief provided by the challenged provisions of the Agreement was necessary to remedy prior discrimination. In determining the necessity of remedial relief, this Court "must examine the purposes the [relief] was intended to serve." *Paradise*, 480 U.S. at 171. The purpose of the parties in negotiating the Agreement here was plainly to remedy the effects of prior discrimination, redress the gross racial imbalance of the permanent custodial workforce, and ensure Defendants' compliance with non-discrimination laws. *See Paradise*, 480 U.S. at 171-72; *Howard*, 871 F.2d at 1008.

Given the overwhelming statistical evidence of racial disparity in the challenged civil service exams, *see infra* pp. 64-65, the permanent appointments and grants of retroactive seniority were necessary to remedy the identified prior discrimination and prevent the perpetuation of past patterns of exclusion. *See Majeske*, 218 F.3d at 824 ("[T]he necessity for this affirmative action was firmly rooted in both the anecdotal and statistical evidence adduced at

trial."); *Howard*, 871 F.2d at 1009 (holding that promotional relief was necessary where "[t]he government's efforts to eliminate the effects of past discrimination would have been thwarted" absent the use of race-conscious promotions); *see also Franks*, 424 U.S. at 774 (noting that retroactive seniority is presumptively necessary to make victims whole for prior discrimination).

It cannot be argued that the remedial relief in the Agreement was unnecessary because of the availability of other remedial alternatives; to the contrary, Defendants did pursue alternative remedial efforts that failed to increase the representation of black and Hispanic employees. *See Fullilove v. Klutznick*, 448 U.S. 448, 463-67 (1980) (finding a minority contracting set-aside constitutional where Congress examined and rejected race-neutral alternatives before enacting the set-aside) (cited in *Croson*, 488 U.S. at 507). For example, Defendants developed and pursued an affirmative action and outreach plan to recruit and train minorities to increase their chances of becoming permanent Custodians and Custodian Engineers. *See* Cappoli Dep. Tr. at 35-38 (Ex. 18); Lonergan Dep. Tr. of 2/5/04, at 112-15, 123-24 (Ex. 37); Lonergan Dep. Tr. of 10/6/04, at 248 (Ex. 97); Collective Bargaining Agreement, Art. XV (Ex. 36). This effort was unsuccessful. *See* Lonergan Dep. Tr. of 2/5/04, at 42-43 (Ex. 37); Lonergan Dep. Tr. of 10/6/04, at 239-43 & Ex. 22 (Ex. 97); Rothman Dep. Tr. at 8-9 (Ex. 98). The inefficacy of alternative efforts supports a finding that the race-conscious provisions in the Agreement were narrowly tailored. *See Peightal v. Metro. Dade County*, 940 F.2d 1394, 1407 (11th Cir. 1991) ("*Peightal I*") (holding that an employer's minority preference program was narrowly tailored on the ground, in part, that alternative remedies including a minority recruitment program had not succeeded in increasing minority representation).

(2) Flexibility and Duration of Relief

The challenged provisions of the Agreement meet the second narrow tailoring

requirement because they provide only for one-time relief to a small group of Offerees, and do not establish inflexible hiring quotas or an indefinite future program. *Compare Cotter*, 323 F.3d at 172 (holding that among the factors indicating that race-conscious promotions were narrowly tailored was that the promotions were limited in scope and duration: "[T]here were no quotas or long-term guidelines established, and there is nothing in the [promotion] decision requiring affirmative action in future decisions."), *and Peightal I*, 940 F.2d at 1408 (holding that narrow tailoring was met where a race-conscious hiring plan "does not endure *in perpetuity*, and . . . does not impose rigid quotas"), *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").

Nor is the relief granted by the challenged provisions meant to ensure or maintain a racially balanced workforce – as noted above, *see infra* pp. 29-30, the relief was complete once the limited number of Offerees received their grant of permanent appointment and retroactive seniority. *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").

In addition, each of the Arroyo Intervenors was qualified for the permanent appointment he or she received.[52] *See Paradise*, 480 U.S. at 177-78 (plurality opinion) (holding that race-

[52]Two of the Arroyo Intervenors – Anibal Maldonado and Nicholas Pantelides – had already become permanent Custodians at the time the Agreement was implemented, and so are not beneficiaries of the Agreement's grant of permanent status. Each of the remaining eight Arroyo Intervenors was working as a provisional Custodian or Custodian Engineer, and received permanent status in that position as a result of the Agreement. *See* Agreement ¶ 13 (Ex. 40).

conscious relief was narrowly tailored where only qualified applicants were promoted, and the employer was not required to make unnecessary or gratuitous promotions); *Howard*, 871 F.2d at 1009 (holding that the "flexibility of relief" factor in the narrow tailoring analysis was met where all of the beneficiaries of a race-conscious promotions plan met the requisite qualifications criteria). By definition, all Offerees (including the Arroyo Intervenors) were either provisional employees as of the date of execution of the Agreement, or were permanent employees who had originally been hired provisionally. *See* Agreement ¶ 4 (Ex. 40). The minimum qualifications for provisional employment are identical to the minimum qualifications for permanent employment. *See* Lonergan Decl. of 5/20/99 at ¶ 6 (Ex. 31); Cappoli Dep. Tr. at 58 (Ex. 18); Seluga Dep. Tr. of 6/24/97, at 57 (Ex. 10). Once hired, provisional and permanent employees receive the exact same orientation and training, perform the exact same job duties, and receive the same performance evaluations on the same performance criteria. *See* Lonergan Decl. of 5/20/99 at ¶¶ 12-14 (Ex. 31); Lonergan Dep. Tr. of 6/24/97, at 56 (Ex. 24). Thus, satisfactory performance as a provisional Custodian or Custodian Engineer is not simply a strong indicator of, but is actually tantamount to, satisfactory performance as a permanent Custodian or Custodian Engineer. While employed as provisional employees, each of the Arroyo Intervenors received an average job performance rating of "satisfactory" or better during every rating period, with most in fact receiving average ratings of "good" or "excellent." *See* Arroyo Intervenors' Performance Ratings (Ex. 88); *see also* Lonergan Decl. of 6/30/99, at ¶¶ 4-5 & Ex. A (Ex. 89). Moreover, since being granted permanent status as a result of the Agreement, each of the Arroyo Intervenors has continued this high performance on the job, with none receiving any performance rating below "satisfactory," and most receiving average ratings of "good" or "excellent." *See* Arroyo Intervenors' Performance Ratings (Ex. 88). The Arroyo Intervenors

were thus plainly qualified for the permanent positions they received under the Agreement. Because only qualified individuals were able to receive permanent appointments, none were unfairly advantaged by their inclusion in the Agreement. *See Cotter*, 323 F.3d at 171 (holding that race-conscious promotional relief in a consent decree was narrowly tailored where the pool of beneficiaries included only those who were qualified for promotions).

(3) Numerical Goals

The "relationship of the numerical goals of the relief to the relevant labor market," *Sec'y of HUD*, 239 F.3d at 219, is not an applicable narrow tailoring consideration in this case – the challenged provisions of the Agreement do not contain any hiring goals, and the number of Offerees is not scaled to any assessment of the percentage of blacks and Hispanics in the labor force. *See Howard*, 871 F.2d at 1009 (noting that this factor is not relevant to the narrow tailoring inquiry where the race-conscious promotion plan is a one-time remedy that is not designed to achieve aggregate proportionality).

(4) Impact on Third Parties

Finally, the remedies are narrowly tailored because they have only a limited effect on incumbent white employees, and do not unduly frustrate the Brennan Intervenors' legitimate expectations. As noted above in the discussion on the appropriateness of the remedy in light of Title VII's "unnecessary trammeling" requirement, the remedies provided by the Agreement impose only a limited burden on the Brennan Intervenors' interests. *See infra* pp. 30-34. Applied in the narrow tailoring context, the same factors demonstrate that the Agreement was narrowly tailored to remedy prior discrimination. The Agreement did not displace a single incumbent Custodian or Custodian Engineer from his or her job. In addition, given that multiple qualified candidates may bid on the same school for transfer, no single candidate has an

expectancy in a specific transfer upon which the Agreement imposes unfairly. *See Johnson*, 480 U.S. at 638 (holding that where seven qualified applicants sought one promotion, the "denial of the promotion unsettled no legitimate, firmly rooted expectation on the part of" unsuccessful candidates); *Boston Police Superior Officers Fed'n v. City of Boston*, 147 F.3d 13, 24 (1st Cir. 1998) (holding that a race-conscious promotion was narrowly tailored because, inter alia, there were more candidates than available positions).

Moreover, even if one of the Brennan Intervenors is unsuccessful in a transfer request as a result of the Agreement, that individual is still eligible for future transfers, and so the harm can at most be considered a delay in transfer rather than a denial of transfer. *See Johnson*, 480 U.S. at 638; *Paradise*, 480 U.S. at 183 (holding that "plainly postponement imposes a lesser burden" than a layoff or the "denial of a future employment opportunity"); *Stuart*, 951 F.2d at 454 (holding that a race-conscious consent decree was narrowly tailored because, inter alia, "white officers passed over on one test may be considered for future appointments"); *Howard*, 871 F.2d at 1010 ("[T]he intervenors and other white employees who are delayed in possible promotions to the target positions are still eligible for other promotions.").

(5) The Brennan Intervenors Have Failed To Demonstrate That The Remedies Are Not Narrowly Tailored

The Brennan Intervenors do not address any of the narrow tailoring factors discussed above, and instead argue only that the Agreement is not narrowly tailored because it awards benefits to individuals who were not victims of identified discrimination. *See* Brennan Mem. at 76. The Brennan Intervenors effectively treat this argument as overlapping with their argument that the remedies were not make-whole relief (insofar as they allege that some of the Arroyo Intervenors would not have been hired even absent the unlawful discrimination, or that some of

the Arroyo Intervenors received excess retroactive seniority). *See* Brennan Mem. at 62-76.

The constitutional narrow-tailoring analysis expressly does *not* limit race-conscious employment decisions to make-whole relief, *see, e.g.*, *Grutter*, 539 U.S. at 333-41, and the Brennan Intervenors appear to concede as much. *See* Brennan Mem. at 46. Accordingly, their argument that the remedies in the Agreement exceed make-whole relief should not be viewed as an argument that the Agreement fails narrow tailoring. And even assuming, arguendo, that narrow tailoring does require that race-conscious remedies conform with make-whole relief, this Court should reject the Brennan Intervenors' arguments on the ground that the remedies to the Arroyo Intervenors do constitute make-whole relief, as established *infra* pp. 36-53.

Accordingly, this Court should find that the remedies provided to the Arroyo Intervenors by the Agreement were narrowly tailored to remedy prior discrimination against the Arroyo Intervenors. As explained above, the benefits provided by the Agreement possess all of the necessary indicia of narrow tailoring. The Brennan Intervenors have thus failed to demonstrate a genuine issue of material fact as to whether the remedies provided by the challenged provisions of the Agreement are unconstitutional. *See Wygant*, 476 U.S. at 277-78 (plurality opinion) ("The ultimate burden remains with the [challenging party] to demonstrate the unconstitutionality of an affirmative-action program."); *id.* at 293 (O'Connor, J., concurring).

C. The Challenged Provisions Are Reasonable, Fair, and Consistent with Public Policy

The *Kirkland* standard for approval of a settlement agreement requires that the relief provided not only must be lawful, but also must be reasonable, fair, and consistent with public policy. *Kirkland*, 711 F.2d at 1128-29. The reasonableness and fairness of a settlement agreement are "measured against the allegations of the complaint and the relief which might

have been granted had the case gone to trial," *Kirkland*, 711 F.2d at 1132, but because a settlement reflects the agreement of the parties, it may provide for remedies that extend well beyond that which might be granted by a court after a finding of liability. *See Wilder v. Bernstein*, 49 F.3d 69, 73 (2d Cir. 1995); *see also Local 93*, 478 U.S. at 525 ("[A] federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial."). The reasonableness inquiry should also consider the extent to which the interests of third parties are affected. *See In re Masters Mates & Pilots Pension Plan & IRAP Litig.*, 957 F.2d 1020, 1026 (2d Cir. 1992). However, in deciding whether a settlement meets the fairness standard, courts should "refrain from resolving the merits of the controversy or making a precise determination of the parties' respective legal rights." *Hiram Walker & Sons*, 768 F.2d at 889; *see also Carson*, 450 U.S. at 88 n.14 (noting that courts reviewing settlements "do not decide the merits of the case or resolve unsettled legal questions").

Given Congress's strong preference for voluntary compliance with Title VII, an objector "has a heavy burden of demonstrating that [a] decree is unreasonable." *United States v. City of Miami*, 614 F.2d 1322, 1333-34 (5th Cir. 1980); *see also Local 93*, 478 U.S. at 515.

In the instant case, militating in favor of the reasonableness and fairness of the Agreement is that the United States and Defendants entered into settlement negotiations at an advanced stage of the litigation – following nearly three years of contentious and costly litigation, and after the completion of extensive fact and expert discovery in the testing claim. The parties negotiated the Agreement extensively for over three months prior to settlement and were well positioned, due to the extensive discovery, to evaluate the strengths and weaknesses of their respective cases. *See Hiram Walker & Sons*, 768 F.2d at 890 (noting that the filing of a

proposed settlement early in the litigation, before the completion of any significant discovery, would cause a consent decree to be viewed with skepticism).

In addition, had the United States proven the allegations of discrimination pleaded in its complaint, the provision of permanent positions and retroactive seniority to the victims of Defendants' discrimination would be well within the scope of remedial make-whole relief that the district court could have ordered. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 399-400 (1982); *Franks*, 424 U.S. at 763. The Agreement provided relief only to those who were qualified for positions of Custodian or Custodian Engineer, and it did not displace any incumbent employees.

The Brennan Intervenors complain that they, rather than the City, shouldered the cost of the Agreement. *See* Brennan Mem. at 76-77. Even assuming this assertion to be true, however, the challenged provisions of the Agreement are relatively modest in comparison to the relief that could have been ordered had the matter been fully adjudicated. *See N.Y. City Bd. of Educ.*, 85 F. Supp. 2d at 147 ("[T]he number of Offerees who will receive permanent positions is quite small in comparison with the number of individuals who may have been afforded relief had this matter proceeded to final adjudication."). Thus, if Defendants had proceeded to trial and lost, a far larger number of individuals may have been entitled to permanent positions and retroactive seniority, resulting in the imposition of a significantly greater burden on the Brennan Intervenors than the relatively slight effects of the Agreement. Accordingly, the relief provided by the Agreement is reasonable and fair in light of the allegations in the complaint.

Moreover, to the extent that the Brennan Intervenors do bear some of the burden of remedying Defendants' prior employment discrimination, this is a reasonable and often necessary circumstance that accompanies the redress of prior wrongs. *See, e.g.*, *Local 93*, 478

U.S. at 512 ("It is neither unreasonable nor unfair to require non-minority [employees] who, although they committed no wrong, benefited from the effects of the discrimination to bear some of the burden of the remedy." (quoting *Vanguards of Cleveland v. City of Cleveland*, No. C80-1964, at *5 (N.D. Ohio Jan. 31, 1983)) (internal quotation marks omitted)); *Wygant*, 476 U.S. at 281 (plurality opinion) ("As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy."); *Franks*, 424 U.S. at 775 ("If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed." (quoting *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 663 (2d Cir. 1971)) (internal quotation marks omitted)).

Finally, the Agreement is consistent with public policy in that it furthers Title VII's underlying goals of "eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination," *Albemarle*, 422 U.S. at 421, as well as of encouraging voluntary compliance, *EEOC v. Local 14, Int'l Union of Operating Eng'rs*, 553 F.2d 251, 255 (2d Cir. 1977). By avoiding the time and expense of complex litigation on the merits of the United States's discrimination claims, the Agreement also promotes the public's interest in judicial economy. *Kirkland*, 711 F.2d at 1129 n.14.

D. Consent of the Brennan Intervenors Is Not Required for the Remedies Provided in the Agreement to Be Lawful

Finally, the Brennan Intervenors argue that even if this Court finds that the remedies provided by the Agreement are lawful and reasonable, this Court is nonetheless precluded from approving the Agreement absent either the Brennan Intervenors' consent or a full trial to final judgment of the merits of the dispute. *See* Brennan Mem. at 36-39 (citing *United States v.*

Hialeah, 140 F.3d 968 (11th Cir. 1998)). This argument is unavailing – a full-blown trial on the merits is not required, because the Agreement does not infringe on any of the Brennan Intervenors' legally enforceable rights. *See Kirkland*, 711 F.2d at 1126-28.

In *Kirkland*, the Second Circuit held that objectors to a consent decree must possess legally enforceable rights in matters affected by the decree in order to have veto power over its entry. *Id.* The Second Circuit distinguished legally enforceable interests from "mere expectancies," the possession of which are *not* sufficient to allow nonconsenting objectors to veto a settlement. *Id.* at 1127-28. The primary factor distinguishing a legally enforceable interest from a "mere expectancy" is the degree of discretion that the employer retains over the affected employment benefit under state law and the applicable collective bargaining agreement. *Id.* (distinguishing *United States v. City of Miami*, 664 F.2d 435 (5th Cir. 1981) (en banc)). Regarding the promotion procedures that were altered by the consent decree in *Kirkland*, the court held that the collective bargaining agreement "le[ft] unimpaired" the state employer's discretion under civil service laws to "choose and modify the procedures it sees fit to determine merit and fitness" of candidates for promotion. *Id.* at 1128. Thus, the state employer's discretion to promote from among the top three scorers on the civil service list effectively defeated the objectors' claim that they had an enforceable right to rank-order promotion, and the objectors thus had no power to veto a settlement that modified the application of the top-three scorers rule and delayed their opportunities for promotion. *Id*. at 1123.

In the instant case, the Brennan Intervenors similarly lack any legally enforceable interests under state law or the collective bargaining agreement. The Brennan Intervenors do not specify the legally enforceable rights that they believe are affected by the grant of competitive seniority to the Offerees, instead referring obliquely to their "contractual rights to seniority" and

"contractual and statutory rights to certain preferences." Brennan Mem. at 38. The Arroyo Intervenors will assume that the Brennan Intervenors are referring to three purported benefits of seniority that they elsewhere identify: (1) it is a factor in awarding competitive transfer requests to new schools; (2) it allegedly affects temporary care assignments; and (3) it affects the order of discharge in the event of possible layoffs. *See* Brennan Mem. at 12-14. However, none of these asserted benefits of seniority can be considered legally enforceable rights under either the Collective Bargaining Agreement or state statute.

First, as a general matter, the same statutory authority on which the *Kirkland* court relied to find sufficient employer discretion to defeat any claim to legally enforceable interests – namely, the authority under civil service law to "choose and modify the procedures it sees fit to determine merit and fitness," *id.* at 1128 – applies in exactly the same manner to the City Defendants here. *See* N.Y. Civ. Serv. Law §§ 20, 25 (McKinney 2004). Thus, the Brennan Intervenors' asserted interests in seniority are not interests that guarantee them a particular ranking on any seniority list, but rather are interests in their own seniority date. In addition, a number of situations arise that can affect an employee's position on a seniority list, and as to which that employee has no veto power as a matter of state or federal law. For instance, New York civil service law provides for constructive seniority upon the reinstatement or reappointment of an employee within one year of his or her resignation, as well as the reinstatement or reappointment of an employee terminated because of a disability that resulted from occupational injury or disease. *See* N.Y. Civ. Serv. Law § 80(2) (McKinney 2004). This reinstatement happens without any input from, or veto authority of, incumbent employees affected by that constructive seniority. In addition, employees may be awarded constructive seniority under a number of federal laws, with or without administrative proceedings. *See, e.g.*,

38 U.S.C. § 4316 (providing constructive seniority to persons absent from employment by reason of service in the armed forces, for periods they are away from work for military service); *Gen. Tel. Co. of the Northwest v. EEOC*, 446 U.S. 318, 326 (1980) (acknowledging the authority of the EEOC to secure constructive seniority on behalf of victims of discrimination); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941) (ratifying the power of the NLRB to grant constructive seniority to persons denied hire because of union membership); *Beame v. DeLeon*, 662 N.E.2d 752, 756-57 (N.Y. 1995) (concluding that the New York City Human Rights Commission and its state counterpart, the Division of Human Rights, had authority under state law to grant retroactive seniority as a remedy for past discrimination). In all of these instances, the award of constructive seniority alters incumbent employees' ranking on a seniority list, but does not give those employees a veto over the agency's power to provide constructive seniority. And, in each of these instances, the grant of constructive seniority occurs with much less process than the Brennan Intervenors have already had here.

Second, following *Kirkland*, none of the Brennan Intervenors' asserted "seniority rights" are legally enforceable rights pursuant to either the collective bargaining agreement or state law. The "right to transfer" under the collective bargaining agreement here is as contingent as, or even more contingent than, the right to rank-order promotion under consideration in *Kirkland*. If more than one candidate within the eligible seniority band for a school applies to transfer, the candidate with the highest average performance rating – *not* the candidate with the most seniority – receives the transfer. *See* Lonergan Decl. Opp'n Prelim. Inj. ¶ 25 (Ex. 34); Lonergan Dep. Tr. of 6/24/97, at 40 (Ex. 24). Because of this procedure, an applicant's performance rating is frequently the deciding factor in transfers. *See* Calderone Dep. Tr. of 10/1/03 (vol. 2), at 12 (Ex. 39). It is only if two or more candidates have equivalent performance ratings (within one-

quarter of a point) that seniority is used as a tie-breaker, and even then the transfer will not be awarded if the school's principal vetoes the candidate or if the candidate has received an unsatisfactory plant manager rating. *See* Lonergan Decl. Opp'n Prelim. Inj. ¶ 30-31 (Ex. 34); Calderone Dep. Tr. of 10/1/03 (vol. 1), at 52-53 (Ex. 38). So, just as the highest-ranking candidates in *Kirkland* had no legally enforceable rights because they were not automatically selected for promotion, the most senior candidate for transfer here will not be selected if one of three contingencies occurs: he or she (1) does not have the highest performance rating; (2) is vetoed by the school principal; or (3) receives an unsatisfactory rating from the plant manager. Because seniority does not automatically determine transfer rights, the Agreement's grant of seniority does not affect any legally enforceable transfer right of the Brennan Intervenors under New York law. *See Kirkland*, 711 F.2d at 1126-28; *Welland v. Citicorp, Inc.*, 2003 U.S. Dist. LEXIS 22721, at *49-50 (S.D.N.Y. 2003) (applying New York law to conclude that "[w]here a bonus policy expressly reserves the right to the employer to pay or not pay bonuses, employees cannot claim a vested right or entitlement to payment of a bonus under that policy"); *cf. Cassidy v. Mun. Civ. Serv. Comm'n*, 337 N.E.2d 752, 754 (N.Y. 1975) (concluding that an employee who successfully passed a civil service test and appeared at the top of the civil service list did not have "any mandated right to appointment or any other legally protectible interest").

Nor do the Brennan Intervenors have any legally enforceable rights with regard to temporary care assignments that are affected by the Agreement's grant of seniority. The TC program is not covered by the collective bargaining agreement, and the Brennan Intervenors thus have no enforceable interest in receiving any particular TC assignment. *See* Lonergan Decl. of 5/20/99, at ¶ 25 (Ex. 31); Calderone Dep. Tr. of 10/1/03 (vol. 1), at 117 (Ex. 38); Calderone Dep. Tr. of 10/1/03 (vol. 2), at 15-16 (Ex. 39). There is no agreement between the Brennan

Intervenors and Defendants that would be violated if Defendants were to restructure the TC program altogether; to the contrary, Defendants may make whatever changes to the TC program that they may choose. *See* Lonergan Decl. of 5/20/99, at ¶ 25 ("The guidelines for temporary care assignments are not negotiated and are modified in terms of the need of the Board of Education.") (Ex. 31); *see also* Collective Bargaining Agreement, Art. XXVII ("With respect to matters not covered by this Agreement, such matters shall be treated and administered in the same manner as if this Agreement were not in existence between the parties.") (Ex. 36). Moreover, even if the Brennan Intervenors did have contract rights in the TC program, seniority is not a factor in TC assignments.[53] Lonergan Decl. Opp'n Prelim. Inj. ¶¶ 15-17 (Ex. 34); *see also infra* pp. 30-34.

Finally, even if the Brennan Intervenors did have contract rights that were affected by the Agreement, not every impairment of such a right is sufficient to preclude entry of a consent decree. *See Local 93*, 478 U.S. at 510, 512-13 (approving a consent decree over intervenors' objections, even though the decree contained minority promotion goals and procedures that affected the intervenors' interests by modifying the use of seniority points as a factor in promotions); *see also infra* pp. 35-36; *cf. Donovan v. Robbins*, 752 F.2d 1170, 1178 (7th Cir.

[53]In addition, any seniority interest the Brennan Intervenors have in protection from layoffs is wholly speculative. No layoff of custodians has occurred in the memory of any of the individuals deposed in this action, and there is no indication that layoffs are imminent. *See* Calderone Dep. Tr. of 10/1/03 (vol. 2), at 26 (Ex. 39). The remote possibility of layoffs at an unspecified point in the future does not entitle the Brennan Intervenors to veto the Agreement. *See Kirkland*, 711 F.2d at 1126-28, 1135; *see also Wygant*, 476 U.S. at 277 (explaining that relief affecting third parties' rights, even including race-conscious layoff provisions, may be upheld pursuant to "a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary"); *cf. Bridgeport Guardians, Inc. v. Delmonte*, 248 F.3d 66, 74 (2d Cir. 2001) (rights guaranteed to third parties by collective bargaining agreement or state law may be displaced in order "to effectuate Title VII remedies" provided for in a settlement agreement, stipulation, or court order).

1985) (noting that "an interest is not necessarily a legally protected right"); *Franks*, 424 U.S. at 774 n.34 (noting that under the National Labor Relations Act, standard practice is to grant retroactive seniority relief to persons discriminatorily discharged or refused employment despite the interests of incumbent employees). The relief afforded by the Agreement not only did not interfere with a legally protected right, but also was necessary to make the Arroyo Intervenors and other victims whole for prior discrimination. *See Franks*, 424 U.S. at 779 n.41 (holding that the starting point for relief is "the presumption in favor of rightful place seniority relief, . . . and that such relief may not be denied on the abstract basis of adverse impact upon interests of other employees but rather only on the basis of unusual adverse impact arising from facts and circumstances that would not be generally found in Title VII cases.").

The Tenth Circuit recently rejected the arguments that the Brennan Intervenors raise, in a case presenting circumstances very similar to the instant case. In *Johnson v. Lodge Number 93 of the Fraternal Order of Police*, No. 03-5086 (10th Cir. Dec. 27, 2004) (Ex. 99), the court upheld, over the objection of a nonconsenting intervenor, the lawfulness of a consent decree aimed at remedying prior race discrimination. The Tenth Circuit rejected the objecting intervenor's argument that it was entitled to veto the consent decree, holding that the objector had not demonstrated an impairment of any of its legal rights. *Id.*, slip op. at 22 ("As in *Local No. 93*, the consent decree here does not bind FOP to do or not to do anything, nor does it impose any legal obligations on FOP." (citing *Local 93*, 478 U.S. at 529-30)). The court also rejected the objector-intervenor's argument that it was entitled to force a full trial on the merits, holding that its participation as an intervening party afforded "all the process that [it] was due." *Id.*, slip op. at 26 (quoting *Local 93*, 478 U.S. at 529) (internal quotation marks omitted) (alteration in original).

On the basis of the foregoing authority, this Court should reject the Brennan Intervenors' argument that, as nonconsenting objectors, they are entitled to a trial on the merits of the United States's underlying discrimination claims. As Objector-Intervenors, they have had "the opportunity to develop a record that would . . . permit[] a full and appropriate ruling on the fairness and constitutionality of the Agreement." *Brennan*, 260 F.3d at 133. Because the Agreement did not affect any legally enforceable rights, this opportunity is all the process they are due. *See Local 93*, 478 U.S. at 529; *Johnson*, No. 03-5086 (10th Cir. Dec. 27, 2004), slip op. at 25-26 (Ex. 99); *Kirkland*, 711 F.2d at 1126-28.

For all of the reasons stated above, this Court should hold that the challenged provisions of the Agreement are lawful under both Title VII and the Equal Protection Clause, and should enter the challenged provisions as a consent judgment.

III. The Legal Standard That Governs Review of the Legality of the Remedies Provided Pursuant to the Challenged Provisions

In the event that, on consideration of the first question briefed by the parties pursuant to the July 20 Order, this Court concludes that the challenged provisions of the Agreement may not be entered as a consent judgment, the framework for evaluating the remedies provided pursuant to the Agreement will be similar, though not identical, to the standard for judicial approval of the Agreement (discussed *infra* Part II). The remedies undertaken by Defendants pursuant to the challenged provisions of the Agreement should be evaluated for their lawfulness under both Title VII and the Fourteenth Amendment Equal Protection Clause, but this Court need not undertake the same reasonableness and fairness inquiry required for approval and entry of a consent

judgment. *See Kirkland*, 711 F.2d at 1132.

The Title VII and Equal Protection Clause analyses that this Court will undertake to review the lawfulness of the challenged employment actions will be the same even if this Court holds that the Agreement cannot be entered as a consent judgment, given that employment actions taken pursuant to a settlement are analogous to, and their lawfulness is analyzed the same as, employment actions taken pursuant to a voluntary plan.[54] *See Local 93*, 478 U.S. at 501. For the reasons stated in Parts II.A and II.B, therefore, this Court should hold that the challenged employment actions do not violate Title VII or the Equal Protection Clause.[55]

CONCLUSION

For the foregoing reasons, the remedies provided by the Agreement are lawful under Title VII and the Equal Protection Clause of the Fourteenth Amendment. Accordingly, this Court should approve the Agreement and enter it as a consent judgment; deny the Brennan

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[54]As noted *infra* Part II, Title VII settlements enjoy a presumption of validity in light of Congress's goal of encouraging voluntary settlement of employment discrimination claims. *See Carson*, 450 U.S. at 88 n.14. The same deference should apply even if this Court analyzes the challenged employment actions as an employer's voluntary race-conscious plan, given Congress's related interest in encouraging voluntary compliance with Title VII's objective of breaking down patterns of racial segregation and hierarchy. *See Johnson*, 480 U.S. at 628-29.

[55]Even if the Court were ultimately to conclude that the Arroyo Intervenors received their positions as a result of racially discriminatory conduct by the City, the Arroyo Intervenors should not lose their current school assignments, permanent status, or use of their seniority dates for all purposes. Applicable law does not favor the removal from their positions of innocent beneficiaries of an employer's discriminatory conduct. *See United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 660-61 & n.15 (2d Cir. 1971); *cf. Walters v. City of Atlanta*, 803 F.2d 1135, 1148-49 (11th Cir. 1986) (noting that the displacement of an incumbent in favor of a victim of discrimination was permitted as a remedy only in unusual circumstances: "'Bumping' is an extraordinary remedy to be used sparingly and only when a careful balancing of the equities indicates that absent 'bumping,' plaintiff's relief will be unjustly inadequate.").

Intervenors' motion for partial summary judgment on the ground that they have not met their burden of proving the unlawfulness of the challenged provisions; and grant the Arroyo Intervenors' motion for partial summary judgment on their prayer for a declaratory judgment that the remedies provided by the Agreement are lawful under Title VII, 42 U.S.C. §§ 1981 and 1983, and the Equal Protection Clause of the Fourteenth Amendment.

Dated: January 10, 2005.

Respectfully submitted,

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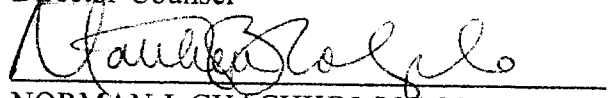

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