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' REPLY MEMORANDUM OF LAW SUPPORTING THEIR 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 Reply Memorandum of Law in support of their motion for partial summary judgment.

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OVERVIEW

At issue in this case is the legality of race-conscious provisions in a settlement agreement, entered into as a remedy for prior discrimination, that grants permanent employment and retroactive seniority to the Arroyo Intervenors and other beneficiaries. The Arroyo Intervenors seek summary judgment on their request for entry of the Agreement as a consent judgment, and on their request for a declaratory judgment that the Agreement is lawful under both Title VII and the Equal Protection Clause of the Fourteenth Amendment.

The Arroyo Intervenors have demonstrated that the challenged provisions of the Agreement are lawful under Title VII, because the Agreement meets the Supreme Court's test for the lawfulness of race-conscious remedies in settlement of employment discrimination claims. The principal objection raised by the Brennan Intervenors is that retroactive seniority can only be awarded to identified victims of discrimination. In making this objection, however, the Brennan Intervenors misread and ignore the applicable law in this area, which clearly states that race-conscious remedies in a settlement are not limited to identified victims of discrimination. This Court may accordingly hold for the Arroyo Intervenors simply on the ground that the test for the lawfulness of race-conscious remedies in a Title VII settlement has been met, and that retroactive seniority need not be limited to actual victims of discrimination.

Even if this Court agrees with the Brennan Intervenors as to the necessity of limiting retroactive seniority to actual victims of discrimination, however, there is no genuine dispute of material fact as to the Arroyo Intervenors' showing that they would meet such a requirement: Each of the Arroyo Intervenors was a victim of the discriminatory exams. The Brennan Intervenors' central challenge in this regard is that the retroactive seniority awarded is in excess of proper make-whole relief. However, the law is plain that because of the impossibility of

reconstructing the employment decisions that would have taken place in the absence of a discriminatory system, this Court need only find that the retroactive seniority included in the Agreement is a reasonable proxy for the date on which the Arroyo Intervenors would have been hired absent discrimination in the challenged exams. Because the provisional employment system was a less discriminatory employment system available to Defendants during the time period covered by this lawsuit, it constitutes just such a reasonable proxy.

The Arroyo Intervenors have further demonstrated that the Agreement is lawful under the Equal Protection Clause of the Fourteenth Amendment. The parties entered the Agreement in order to remedy prior discrimination in the challenged exams, and the remedies provided by the Agreement are narrowly tailored to achieve that compelling interest. The central contested issue is how much evidence of prior discrimination must be shown to establish that there is a strong basis in evidence to support the parties' conclusion that remedial action was necessary. In order for summary judgment to be proper here, this Court need only find that a strong basis can be met on the basis of a prima facie case of disparate impact discrimination, a holding that comports with the Supreme Court's articulation of the strong basis test and with the decisions of numerous other courts to consider this issue. Morever, even if evidence in addition to a prima facie case is needed to meet the strong basis test, such additional evidence is present here – the record includes evidence of the non-job-relatedness of the challenged exams, intentional discrimination, and less discriminatory alternatives (namely, the provisional hiring system).

The Arroyo Intervenors have presented the facts necessary to support summary judgment on both the statutory and constitutional claims here. The Brennan Intervenors contest those facts not with a contrary factual showing of their own, but rather with speculation, conjecture, and hypotheticals. In spite of the nearly four years that have passed since this case was remanded to

this Court by the Second Circuit (and the thousands of pages of documents produced, and dozens of depositions taken, in that period), the Brennan Intervenors have failed to demonstrate or quantify sufficient harms to render the Agreement unlawful. The Agreement undoubtedly had some minimal impact on the Brennan Intervenors, as often occurs when longstanding and egregious employment discrimination is finally redressed. But it is a cornerstone of constitutional and statutory law in the employment discrimination area that this minimal impact may not stand in the way of a proper remedy. For the reasons articulated in detail below and in the Arroyo Intervenors' initial memorandum, this Court should grant summary judgment to the Arroyo Intervenors, and should enter the Agreement as a consent judgment resolving all claims.

ARGUMENT

I. Summary Judgment is Proper on the Question Whether the Challenged Paragraphs of the Agreement Can Be Entered as a Consent Judgment

Summary judgment is proper on the Arroyo Intervenors' prayer that this Court enter the Agreement as a consent judgment in final resolution of the United States's discrimination claims. The Agreement was knowingly and voluntarily made, and therefore is a valid settlement of the United States's claims. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n.15 (1974); Agreement at 2 (Ex. 40). A party may not prevent entry of a settlement agreement by changing its mind and attempting to withdraw consent. *See* Arroyo Mem. at 18-19.[1]

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[1]All references to "Arroyo Mem." are to the initial memorandum of the Arroyo Intervenors supporting entry of the challenged provisions and supporting the Arroyo Intervenors' motion for summary judgment (served on January 10, 2005, and filed concomitantly with the instant motion). References to "Brennan Mem." are to the Brennan Intervenors' motion for partial summary judgment, served and filed on November 16, 2004 (docketed at Doc. No. 466). The Brennan Intervenors' reply memorandum, served on February 28, 2005, is referred to as

(continued...)

The Brennan Intervenors oppose summary judgment by arguing that the Agreement has expired, and that it thus cannot be entered as a consent judgment. However, the challenged provisions of the Agreement have not expired. *See* Defs.' Mem. at 7-15. And even if the Agreement has expired, it may still be entered as a consent judgment, given that the finality and protection from collateral attack that attend entry of a consent judgment will still benefit the parties even if entry is achieved after the expiration of the underlying agreement. *See* Arroyo Mem. at 20-24.

The Brennan Intervenors do not rebut any of these points, and instead respond only that this argument lacks an "outer limit." Brennan Reply Mem. at 8. Because it is plain that this principle should apply given the facts of the instant case, however, there is no basis to insist that an outer limit be articulated; and indeed, asking this Court to state an "outer limit" would be tantamount to asking for an improper advisory opinion. The United States and Defendants settled the United States's discrimination claims, and jointly moved for entry of a consent decree; since that joint motion, however, entry of the challenged provisions has been postponed because of the instant ongoing litigation regarding the Brennan Intervenors' challenges to the lawfulness of those provisions. If the Brennan Intervenors were correct that a settlement agreement could not be entered as a consent judgment simply because ongoing litigation regarding that agreement had extended beyond the agreement's expiration date, it would encourage sandbagging: Individual objectors (such as the Brennan Intervenors here) would have an incentive to intervene in the action for the purpose of delaying a determination of the legality

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[1](...continued)
"Brennan Reply Mem." The other parties' initial memoranda are referred to as "Caldero Mem.," "Defs.' Mem.," and "U.S. Mem."

of the agreement until after the agreement's expiration date had passed, because by doing so they could effectively preclude the agreement from ultimately being protected by 42 U.S.C. § 2000e-2(n) or res judicata. Such an outcome would encourage interference with the orderly process of the judicial system, and would seriously undermine Congress's objectives in passing § 2000e-2(n). Even without intentional delay, the entry of intervenors can slow the process of approving a settlement agreement; courts should not have to choose between an intervenor's interest in full participation and the parties' interest in entry of judgment. Nor would it be equitable to allow the parties' interests in finality and protection from collateral attack to expire along with an agreement that is pending approval, simply because of delays that the original parties have no power to control.

It is thus proper for this Court to enter a *nunc pro tunc* order that enters the Agreement as a consent judgment, even if the Agreement has expired. Indeed, *nunc pro tunc* entry of a consent decree, as of the date it was signed or agreed to, is quite common. In a case presenting similar procedural issues to the instant case, the district court entered a consent decree that was then vacated and remanded by the Seventh Circuit, *see King v. Walters*, 190 F.3d 784, 790 (7th Cir. 1999), and on remand the district court re-entered the consent decree *nunc pro tunc* as of the date it was originally signed (before appellate review). *See King v. Bradley*, No. 92-C-1564 (N.D. Ill. Jan. 5, 2000) (order entering consent decree "nunc pro tunc March 30, 1998") (Ex. 105); *see also Eichman v. Fotomat Corp.*, 880 F.2d 149, 153 (9th Cir. 1989) (noting a state court's entry of a consent judgment *nunc pro tunc* as of one year previously); *Schmidt v. Zazzara*, 544 F.2d 412, 413 (9th Cir. 1976) (approving the district court's entry of a consent judgment *nunc pro tunc* as of the date it was signed by the parties).

Defendants and the Caldero Intervenors agree with the Arroyo Intervenors that the

challenged provisions of the Agreement may be entered as a consent judgment. *See* Defs.' Mem. at 5, 15; Caldero Mem. at 26-28 & nn.17-19. The United States disagrees in part, but argues only that the portions of the Agreement to which the Brennan Intervenors properly object – namely, those portions that award retroactive seniority to the Offerees – may not be entered as a consent judgment.[2] *See* U.S. Mem. at 9-10 & n.4. Because, as discussed *infra* pp. 31-36, the Brennan Intervenors' consent to the challenged provisions is not required in this case, the United States's argument is without merit.

Accordingly, partial summary judgment is proper on the Arroyo Intervenors' argument that the Agreement can be entered as a consent judgment.

II. Summary Judgment Is Proper as to the Lawfulness of the Challenged Provisions of the Agreement

Whether or not this Court agrees that it may enter the Agreement as a consent judgment, partial summary judgment is proper on the Arroyo Intervenors' prayer for declaratory judgment that the challenged provisions of the Agreement are lawful under Title VII and the Equal Protection Clause of the Fourteenth Amendment.

A. Summary Judgment Is Proper on the Claim for Declaratory Judgment That the Challenged Provisions Do Not Violate Title VII

The Agreement is lawful under Title VII because it is justified by a manifest imbalance in a traditionally segregated job category; is intended to attain, not maintain, a balanced work force; and does not unnecessarily trammel the interests of white employees. *Johnson v. Transp.*

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[2]Because the United States identifies no other reason why the Agreement may not be entered as a consent judgment, apart from the Brennan Intervenors' lack of consent, the implicit conclusion is that those provisions to which the Brennan Intervenors do not have standing to object *may* be entered as a consent judgment. Indeed, the United States has elsewhere argued to this Court that the purported expiration and withdrawal of consent are immaterial to the question of entry of judgment. *See* Letter from Leggott to Judge Block of 5/19/04 (Ex. 106).

Agency, Santa Clara County, 480 U.S. 616, 631, 639 (1987); *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 197, 208 (1979); *see* Arroyo Mem. at 25-34.

The Brennan Intervenors initially respond that the *Johnson*/*Weber* framework applies only to future-hiring affirmative action programs, and not to programs that affect pre-existing seniority rights. *See* Brennan Reply Mem. at 24-25. The Brennan Intervenors are incorrect that *Weber* did not involve the diminution of pre-existing seniority rights. The race-conscious training program at issue in *Weber* replaced a prior system that had awarded all seats on the basis of seniority.[3] *See Weber*, 443 U.S. at 198-200. In addition, the Brennan Intervenors ignore the Supreme Court's subsequent application of *Weber* in *Local 93*, which expressly held that the *Weber* standard applied to race-conscious employment provisions in a consent decree, and further held that the decree at issue in that case was permissible under Title VII even though it modified seniority rights. *Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 510, 512-13, 517-24 (1986); *see also id.* at 535, 537 (Rehnquist, J., dissenting); Am. Consent Decree, *Vanguards of Cleveland v. City of Cleveland*, No. C80-1964 (N.D. Ohio Jan. 31, 1983), at ¶¶ 8-14 (Ex. 73).[4] Several appeals courts have also applied the *Weber* framework

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[3]As Justice Marshall has explained: "In *Steelworkers v. Weber*, we specifically addressed a departure from the seniority principle designed to alleviate racial disparity. In *Weber*, a private employer and a union negotiated a collective agreement that reserved for black employees one half of all openings in a plan training program, replacing the prior system of awarding all seats on the basis of seniority. This plan tampered with the expectations attendant to seniority, and redistributed opportunities to achieve an important qualification toward advancement in the company. We upheld the challenged plan under the Civil Rights Act of 1964 because it was designed to 'eliminate traditional patterns of racial segregation' in the industry and did not 'unnecessarily trammel the interests of the white employees.'" *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 308 (1986) (Marshall, J., dissenting) (internal citations omitted).

[4]The Brennan Intervenors object to the Arroyo Intervenors' citation to the underlying consent decree, arguing that it does not have precedential value. *See* Brennan Reply Mem. at 23

(continued...)

to race-conscious provisions in a consent decree or voluntary agreement that affect seniority rights, and have held such provisions permissible. *See Tangren v. Wackenhut Servs. Inc.*, 658 F.2d 705, 706 & n.1 (9th Cir. 1981), *cert. denied*, 456 U.S. 916 (1982); *EEOC v. McCall Printing Corp.*, 633 F.2d 1232, 1237 (6th Cir. 1980); *see also* Arroyo Mem. at 36.

The Brennan Intervenors further argue, citing two Second Circuit decisions dealing with limits on court-ordered relief, that retroactive seniority can only be awarded to identified victims of discrimination. *See* Brennan Reply Mem. at 22-24 (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)). This argument ignores the distinction between the permissible scope of court-ordered relief and employers' voluntary implementation of race-conscious remedies. The Supreme Court has held in *Weber* and *Local 93* 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."[5] *Local 93*, 478 U.S. at 516 (citing *Weber*, 443 U.S. at

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[4](...continued)
n.7. The *Local 93* consent decree is not cited for any precedential weight, but rather to disprove the Brennan Intervenors' contention that the decree did not affect seniority rights. From the face of the decree it is plain that it did, as recognized by then-Justice Rehnquist's dissent.

[5]The Brennan Intervenors claim that the Second Circuit has held, in *Association Against Discrimination in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256, 279 (2d Cir. 1981), that *Weber* had no effect on the holding in *Chance*. *See* Brennan Reply Mem. at 24-25. However, the passage from *AADE* that references *Chance* and *Weber* has nothing to do with the award of retroactive seniority to non-victims: The Second Circuit noted that "cases involving *hiring quotas* 'have been the occasion for some strong differences of opinion' among members of this Court," *AADE*, 647 F.2d at 279 (emphasis added) (citing cases, including the majority and dissenting opinions in *Chance*), and stated that "[t]he Supreme Court's recent opinions in [*Bakke* and *Weber*] provide no clear guidance as to how these differences should be resolved," *id.* The court went on to explain that one reason why *Weber* did not resolve debates over hiring quotas in court-ordered remedial decrees is that *Weber* "specifically excluded from the scope of its inquiry 'what Title VII requires or what a court might order to remedy a past proved violation'" of Title
(continued...)

204); *see also* Arroyo Mem. at 35-36; Caldero Mem. at 37-41.

1. Manifest Imbalance in a Traditionally Segregated Job Category

The Brennan Intervenors have not placed any material facts in issue as to whether there existed a manifest imbalance in a traditionally segregated job category, but instead rely on mere speculation and conjecture to attempt to undermine the Arroyo Intervenors' proof of manifest imbalance. Such speculation cannot defeat summary judgment here.

The Brennan Intervenors object that the 1993 Ethnic Survey, on which the Arroyo Intervenors rely in partial proof of the low representation of black and Hispanic Custodians and Custodian Engineers, inaccurately classified four individuals as white (and one inaccurately as black), and that the survey is therefore unreliable. *See* Brennan Resp. to Arroyo Statement of Facts ¶ 4. But five individuals mis-classified out of 831 total permanent employees only amounts to a difference of 0.6%, which is plainly insufficient to raise the representation of black and Hispanic employees in any meaningful way. The Brennan Intervenors also speculate that the ethnic surveys may not have included all Custodians and Custodian Engineers, but they offer no evidence that the surveys were incomplete. *See id.* To the contrary, the evidence in the record shows that the surveys were compiled by sending a list of all custodians to all of the plant

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VII. *Id.* (quoting *Weber*, 443 U.S. at 200). Thus, *AADE* does nothing to undermine the Arroyo Intervenors' argument that *Chance* is inapplicable here. And even if the Brennan Intervenors were able to reconcile *Chance* with *Weber* as regards the permissibility of retroactive seniority in a settlement agreement, they do not even attempt to reconcile their understanding of *Chance* with the holding of *Local 93*. Their attempt to expand *Chance* from the context of court-ordered remedies to the context of voluntary employer action or settlement is squarely foreclosed by the Supreme Court's holdings in *Weber* and *Local 93*, and should be rejected.

managers, who filled out the surveys for the employees in their districts.[6] *See* Lonergan Dep. Tr. of 6/24/97, at 45-47 (Ex. 109); Leacock Dep. Tr. at 18-20, 36 (Ex. 110).

The Brennan Intervenors also try to create an issue of fact as to the figures presented for the representation of blacks and Hispanics in the qualified labor pool, by arguing that the United States's expert, Dr. Ashenfelter, did not identify individuals in the labor market with the precise qualifications needed for the Custodian and Custodian Engineer positions. *See* Brennan Resp. to Arroyo Statement of Facts ¶ 6 (citing Carrington Decl. of 10/28/04 (Ex. 61)). This unsupported critique, with no effort to present contrary facts, is insufficient to create a genuine issue of material fact. *See Johnson*, 480 U.S. at 626-27; Arroyo Mem. at 27-28 & nn.20-21; *see also* Caldero Mem. at 9-14, 42. 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, establish a manifest imbalance. *See* Arroyo Mem. at 27-28.

In addition, the record clearly shows that the Custodian and Custodian Engineer positions were a "traditionally segregated job category." *See, e.g.*, Villegas Dep. Tr. at 15, 64 (noting that he started working as a cleaner in the school system in 1978, and explaining that he did not take any civil service exams for Custodian or Custodian Engineer until 1997 because "I see through all my years only white people in those jobs") (Ex. 111); Punter Dep. Tr. at 52-56, 59 (noting that as a Custodian Engineer starting in 1995 he worked in five or six different schools, and undertook Temporary Care assignments in four or five additional schools, and "every time I go to a school, that's all I he[ar]: You are the first black guy who's ever come here as a custodian.")

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[6] Moreover, the 831 employees identified in the 1993 Ethnic Survey is in line with other evidence of the total Custodian and Custodian Engineer workforce that shows a total of 801, 809, and 790 in the years 1998, 2000, and 2002 respectively. *See* Defs.' EEO-5 Reports (Ex. 107); Feld Decl. ¶¶ 1-4 (Ex. 108).

(Ex. 112); Fernandez Dep. Tr. at 57-58 (describing the racial makeup of the Custodian workforce, and noting that "[t]here just wasn't any minorities on the job") (Ex. 113); 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, 6 (Ex. 3); Coleman Decl. ¶¶ 5-6 (Ex. 4). The Brennan Intervenors again respond without any contrary facts, and instead only raise various objections to the admissibility of part of the Arroyo Intervenors' proof. *See* Brennan Resp. to Arroyo Statement of Facts ¶¶ 3, 7. All of these evidentiary objections are invalid,[7] and the Brennan Intervenors' response is insufficient to create a genuine dispute of material fact. *See* Fed. R. Civ. P. 56(e) (requiring that a party opposing summary judgment set forth specific facts showing a need for trial); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-51 (1986); *Knight v. United States Fire Ins. Co.*, 804 F.2d 9, 11-12 (2d Cir. 1986) (holding that a nonmoving party may not defeat summary judgment without submitting specific facts showing that a trial is required).

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[7]The Brennan Intervenors incorrectly argue that the Stein Report is inadmissible because it is hearsay and unsworn. *See* Brennan Resp. to Arroyo Statement of Facts ¶ 3. The Stein Report is a publication of the New York City Council setting forth matters observed pursuant to its duty to oversee city agencies (including the Board of Education), and thus falls within the "public records and reports" exception to the rule against hearsay. *See* Fed. R. Evid. 803(8). The Stein Report is properly before this Court as an exhibit to the Colangelo Declaration of Jan. 10, 2005.

The Brennan Intervenors contest the Brooks and Coleman Declarations on the grounds that they do not show "a reputation of any discrimination by Defendants," and that they are without foundation. *See* Brennan Resp. to Arroyo Statement of Facts ¶¶ 3, 7. The first objection is immaterial: The only required showing is of a manifest imbalance in a traditionally segregated job category. *See Weber*, 443 U.S. at 209; *id.* at 212-13 (Blackmun, J., concurring). The second objection is incorrect: Both Brooks and Coleman explain that they were involved in forming a group of black engineers that actively contacted and coordinated with black colleagues for the purpose of "address[ing] the imbalance in the number of blacks working as School Custodians or Custodian Engineers in the Board of Education," and that as a result they knew that there were very few black Custodians and Custodian Engineers at the time. Coleman Decl. ¶ 7 (Ex. 4); *see also* Brooks Decl. ¶¶ 5-6 (Ex. 3).

2. Limited Temporal Scope

The Arroyo Intervenors' initial memorandum demonstrates that the challenged provisions of the Agreement are limited in temporal scope and not designed to maintain a balanced workforce. *See* Arroyo Mem. at 29-30. No party has contested this showing.

3. Unnecessary Trammeling

Finally, the Arroyo Intervenors demonstrated in their initial memorandum that the Agreement does not unnecessarily trammel the interests of the Brennan Intervenors. *See* Arroyo Mem. at 30-34. The Brennan Intervenors have not presented any facts to show that the Agreement either requires non-minority incumbents to be discharged and replaced with beneficiaries, creates an absolute bar to their advancement, or implements racial quotas. *See Johnson*, 480 U.S. at 637-39; *Weber*, 443 U.S. at 208; *Higgins v. City of Vallejo*, 823 F.2d 351, 356-58 (9th Cir. 1987).

The Brennan Intervenors instead argue that the "potential 'domino effect' of retroactive seniority to the Offerees on the Brennan Intervenors" raises the possibility that they will lose a desired transfer. Brennan Resp. to Arroyo Statement of Facts ¶ 106. But even assuming this risk to exist, the admittedly hypothetical "potential domino effect" – which would result, at most, in the loss of a preferred transfer – is wholly insufficient to establish unnecessary trammeling. Denial of a promotion pursuant to a race-conscious plan does not render that plan invalid under Title VII, unless the plan creates an absolute bar to advancement. *See Johnson*, 480 U.S. at 638. The Agreement here does not constitute such a bar to advancement, and no party contends that it does. Even if a preferred transfer is unavailable, an individual is still eligible for future transfers.

The Brennan Intervenors also assert that Temporary Care ("TC") lists are maintained in

order of seniority.[8] *See* Brennan Resp. to Arroyo Statement of Facts ¶ 80; Brennan Reply Mem. at 21-22. This conclusory assertion does not create an issue of fact. The Brennan Intervenors have long claimed that the Agreement interferes with their eligibility for TC assignments, but after a lengthy post-remand discovery period they have failed to present any facts whatsoever that this alleged interference rises to the level of unnecessary trammeling. The only party to have presented any facts as to the effect of the Agreement on the TC system is the Arroyo Intervenors, who have made an unrefuted factual showing that any interference with the TC system is truly *de minimis*.[9] *See* Arroyo Mem. at 33 n.24.

The Brennan Intervenors have neither presented any facts showing that the Agreement

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[8]To support this assertion, the Brennan Intervenors cite only to a letter from the Brennan Intervenors' counsel to the United States's counsel, and the Arroyo Intervenors' declarations in support of intervention. The letter from counsel merely asserts that the Brennan Intervenors believe that when more than one Custodian or Custodian Engineer finishes a TC assignment on the same date, they are replaced on the bottom of the TC list in seniority order; but the letter cites to absolutely no evidence in the record to support this assertion. *See* Rosman Reply Decl. Ex. 61. As for the Arroyo Intervenors' intervention declarations (which state their belief that TC lists were maintained in seniority order), those declarations were submitted before the Arroyo Intervenors had undertaken any discovery or were even parties to the case. While they thought at the time, based on experience and belief, that TC lists were maintained in seniority order, the facts as they learned in discovery after they intervened prove otherwise. *See* Arroyo Decl. of Apr. 6, 2005, at ¶ 2 (Ex. 114); Casado Decl. of Apr. 6, 2005, at ¶ 2 (Ex. 115); Fernandez Decl. of Apr. 6, 2005, at ¶ 2 (Ex. 116; LaFaye Decl. of Apr. 6, 2005, at ¶ 2 (Ex. 117); Lopez Decl. of Apr. 6, 2005, at ¶ 2 (Ex. 118); Maldonado Decl. of Apr. 6, 2005, at ¶ 2 (Ex. 119); Martinez Decl. of Apr. 6, 2005, at ¶ 2 (Ex. 120); McGraw Decl. of Apr. 6, 2005, at ¶ 2 (Ex. 121); Ortega de Green Decl. of Apr. 6, 2005, at ¶ 2 (Ex. 121); Pantelides Decl. of Apr. 6, 2005, at ¶ 2 (Ex. 123).

[9]In response to the Arroyo Intervenors' factual showing, the Brennan Intervenors raise only an invalid evidentiary objection on the ground of hearsay. *See* Brennan Resp. to Arroyo Statement of Facts ¶¶ 109-11. The cited records were produced by Defendants in response to a discovery request from the Arroyo Intervenors, *see* Colangelo Decl. of Jan. 10, 2005, at ¶ 71; Letter from Cote to Colangelo dated Oct. 25, 2004 (Ex. 124), and are admissible pursuant to the business records exception. *See* Fed. R. Evid. 803(6); Scally Decl. of Apr. 29, 2005, at ¶¶ 1-7 (Ex. 136); *Potamkin Cadillac Corp. v. B.R.I. Coverage Corp.*, 38 F.3d 627, 632-33 (2d Cir. 1994).

unnecessarily trammels their rights, nor have they refuted any of the Arroyo Intervenors' factual showings. The Brennan Intervenors have thus failed to meet their burden of proving the invalidity of the Agreement under Title VII. *See Johnson*, 480 U.S. at 626-27.

4. There Is No Dispute of Fact That the Arroyo Intervenors Are Victims of Defendants' Discrimination

The Brennan Intervenors contest the Arroyo Intervenors' motion for summary judgment as to the lawfulness of the Agreement under Title VII on the ground that remedies in a settlement agreement are limited to victim-specific relief, and that the remedies the Arroyo Intervenors received are not make-whole relief. *See* Brennan Reply Mem. at 22-25, 67-77. The Arroyo Intervenors have already demonstrated, and both Defendants and the Caldero Intervenors agree, that remedies provided in a settlement are not limited to victim-specific remedial relief. *See* Arroyo Mem. at 35-36; Defs.' Mem. at 42-47; Caldero Mem. at 37-41. Even were this Court to disagree, however, the Arroyo Intervenors have further demonstrated that they are identifiable victims of discrimination, and that the remedies they received are proper make-whole relief. *See id.* at 37-53. The Brennan Intervenors' reply does not present sufficient evidence to create a triable issue of fact on this point.

The Brennan Intervenors first argue that the Arroyo Intervenors should not have received retroactive seniority to their provisional start dates, because there is no proof that Defendants would have used the provisional hiring system had they not used the discriminatory exams.[10] *See* Brennan Reply Mem. at 75-76. But there is no requirement that the Arroyo Intervenors prove that Defendants would have used the provisional hiring system in order to demonstrate

[10]The Brennan Intervenors also argue that the provisional hiring system was not a less discriminatory alternative. This argument is rebutted *infra* pp. 25-27.

that seniority to their provisional start dates constitutes proper make-whole relief. Given the impossibility of reconstructing what would have happened absent unlawful discrimination, courts have universally recognized that the determination of proper make-whole relief "necessarily involve[s] a degree of approximation and imprecision." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 372 (1977); *see also Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 260-61 (5th Cir. 1974). The Arroyo Intervenors have shown that at the time Defendants were using the discriminatory civil service exams, they had available to them a less discriminatory alternative in the provisional hire system, and therefore that the provisional start date is a reasonable proxy for the date the Arroyo Intervenors would have been hired absent unlawful discrimination. *See* Arroyo Mem. at 42-46.

The Brennan Intervenors also argue that the Arroyo Intervenors ignore the importance of "relative" seniority as part of make-whole relief, which the Brennan Intervenors seem to argue means that if the Arroyo Intervenors are to get adjusted seniority dates, so should all incumbent Custodians and Custodian Engineers, including themselves. *See* Brennan Reply Mem. at 76-77. The Brennan Intervenors support this proposition solely with reference to the Second Circuit's intervention holding in this case, which noted that the loss of relative seniority as a result of the Agreement was sufficiently direct to meet the interest requirement for intervention under Rule 24(a)(2). *See Brennan v. N.Y. City Bd. of Educ.*, 260 F.3d 123, 132 (2d Cir. 2001). The Second Circuit's language had nothing to do with make-whole relief under Title VII, and the finding of an interest sufficient to intervene says nothing about whether the Brennan Intervenors' rights were unnecessarily trammeled in violation of Title VII. The Rule 24(a)(2) interest standard is not stringent and is not an assessment of the merits of the intervenor's claims, but rather serves "primarily [as] a practical guide to disposing of lawsuits by involving as many apparently

concerned persons as is compatible with efficiency and due process." *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967).

The Brennan Intervenors further argue that summary judgment is not proper as to the lawfulness of certain of the individual Arroyo Intervenors' relief, namely Steven Lopez and Nicholas Pantelides. The Arroyo Intervenors have already demonstrated that, even if victim-specific remedial relief is required, the remedies to Steven Lopez and Nicholas Pantelides were proper. *See* Arroyo Mem. at 46-48. The Brennan Intervenors add the additional argument that the exams Lopez took "had nothing to do with the job that he received," because he was affected by disparate impact in the Custodian exams, but received an appointment as a Custodian Engineer. Brennan Reply Mem. at 70. However, the Board of Education's "broadbanding" program allowed any permanent Custodian with a stationary engineer's license to become a permanent Custodian Engineer, without taking a separate Custodian Engineer exam. It is thus plainly incorrect to argue that the Custodian exams Lopez took have nothing to do with the Custodian Engineer position he received.[11]

Because the Arroyo Intervenors have put forth sufficient facts to prove that all three elements of the *Johnson*/*Weber* framework are met, and the Brennan Intervenors have not put forth facts to place the Arroyo Intervenors' showing in dispute – much less to meet their admitted burden of establishing the invalidity of the Agreement under Title VII – summary

[11]Indeed, the Brennan Intervenors are in a curious position to allege that the Custodian exam has nothing to do with the Custodian Engineer position, as the three Brennan Intervenors who are currently Custodian Engineers – James Ahearn, John Brennan, and Dennis Mortensen – all received that position not by taking a Custodian Engineer exam, but instead by taking a Custodian exam and broadbanding to the Custodian Engineer position. *See* Ahearn Dep. Tr. at 105-06 (Ex. 125); Brennan Dep. Tr. at 73-76, 281 (Ex. 126); Mortensen Dep. Tr. of 5/7/03, at 90-98 (Ex. 127).

judgment for the Arroyo Intervenors is proper on their claim for declaratory relief that the challenged provisions of the Agreement do not violate Title VII.

B. Summary Judgment Is Proper on the Claim for Declaratory Judgment That the Challenged Provisions Do Not Violate the Fourteenth Amendment

1. Equal Protection Legal Standard

a. Strong Basis In Evidence Requirement

The central contested issue as regards the constitutional analysis in the instant case is how much evidence of prior discrimination must be presented before a "strong basis in evidence" has been shown to support the conclusion that remedial action was necessary. It is quite clear that the requisite showing is something less than *proof* of prior discrimination. *See Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989), *Wygant*, 476 U.S. at 277-78 (plurality opinion); *Wygant*, 476 U.S. at 290-92 (O'Connor, J., concurring); *Barhold v. Rodriguez*, 863 F.2d 233, 236 (2d Cir. 1988); *accord Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1565 (11th Cir. 1994) ("[T]he Supreme Court has never required that, before implementing affirmative action, the employer must already have proved that it has discriminated.").

The Brennan Intervenors argue that the strong basis test can never be met with evidence of disparate impact discrimination, and can only be met with evidence of "pervasive and egregious" intentional discrimination. *See* Brennan Reply Mem. at 28; Brennan Mem. at 45. The Brennan Intervenors' argument is counter to the Supreme Court's holding in *Croson*. *See Croson*, 488 U.S. at 500 (holding that the "strong basis" requirement is satisfied by evidence "approaching a prima facie case of a constitutional or statutory violation"); *see also Stuart v. Roache*, 951 F.2d 446, 450-52 (1st Cir. 1991); *Donaghy v. City of Omaha*, 933 F.2d 1448, 1458-60 (8th Cir. 1991); *Davis v. City & County of San Francisco*, 890 F.2d 1438, 1442-44, 1446-47

(9th Cir. 1989); *Howard v. McLucas*, 871 F.2d 1000, 1007-08 (11th Cir. 1989) (holding that statistical evidence establishing a prima facie case of Title VII disparate impact provided a strong basis in evidence of prior discrimination); *United States v. New Jersey*, 75 Fair Empl. Prac. Cas. (BNA) 1602 (D.N.J. 1995); Arroyo Mem. at 53-61. Indeed, the intervenors in *Howard* raised the same objection that the Brennan Intervenors raise here, and the Eleventh Circuit rejected it. *Howard*, 871 F.2d at 1007-08 ("The intervenors argue that there was an insufficient predicate for relief in this case because the consent decree contained a denial of liability and because [a prior Eleventh Circuit decision] forecloses the *prima facie* statistical showing from operating as a judicial finding of discrimination. We find their argument unpersuasive.").

Citing *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548 (11th Cir. 1994), the Brennan Intervenors argue that "the *en banc* Eleventh Circuit has rejected the argument that a *prima facie* case of disparate impact is sufficient to establish the compelling governmental interest required by strict scrutiny." Brennan Reply Mem. at 30. This is a complete misstatement of the Eleventh Circuit's holding in *Ensley Branch*.[12] The district court in *Ensley Branch* had partially modified a prior consent decree that remedied employment discrimination in various city agencies. *Ensley Branch*, 31 F.3d at 1560-63. On appeal, the Eleventh Circuit expressly upheld the race-conscious remedies with regard to two of the municipal departments, the police and fire departments, holding that "[a]t the time the City and the Board accepted the present consent decrees, they already had a 'strong basis in evidence' for concluding that race-based relief was

[12]The Brennan Intervenors are also mistaken that *Ensley Branch* was an *en banc* decision; the opinion was published on panel rehearing. *Id.* at 1552; *see also Ensley Branch, NAACP v. Seibels*, 60 F.3d 717 (11th Cir. 1994) (denying the petition for rehearing *en banc*).

needed to correct discrimination in the police and fire departments." *Id.* at 1566-67 (holding that statistically significant adverse impact resulting from certain promotions exams, along with findings of discrimination in entry-level tests, provided "good reason [for the City and the Board] to believe that they had discriminated in those two departments"). With regard to race-conscious remedies in other municipal departments, the Eleventh Circuit held that the district court erred by refusing at all to consider whether there was any evidence of discrimination, and remanded for the purpose of ascertaining whether a strong basis in evidence existed to support race-conscious relief. *Id.* at 1567-68 (holding that "Croson's first requirement is satisfied with respect to the police and fire departments, and may on remand be satisfied with respect to the other departments"). While the facts with regard to the police and fire departments presented evidence of discrimination in addition to a prima facie case, the Eleventh Circuit never held that a lesser showing would be inadequate; to the contrary, the court cited with approval its earlier decisions holding that a prima facie case of disparate impact meets the strong basis test.[13] *Id.* at 1565 (citing *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir. 1990); *Howard*, 871 F.2d at 1007).

The Brennan Intervenors also cite *Biondo v. City of Chicago*, 382 F.3d 680 (7th Cir. 2004), to support their argument that evidence of disparate impact discrimination can never meet the strong basis test. *See* Brennan Reply Mem. at 28. However, *Biondo* is not on point, and the

[13]Indeed, district courts in the Eleventh Circuit have continued to hold, post-*Ensley Branch*, that a prima facie case of discrimination can meet the strong basis test: "In determining whether there has been prior discrimination by a public employer that justifies remedial action, courts have looked to whether the evidence supports a prima-facie case of employment discrimination under Title VII. . . . The governmental body must have a 'strong basis in evidence for its conclusion that remedial action was necessary.' The test can also be formulated as requiring 'a prima facie case of a constitutional or statutory violation.'" *Allen v. Ala. State Bd. of Educ.*, 976 F. Supp. 1410, 1429 (M.D. Ala. 1997) (quoting *Croson*, 488 U.S. at 500).

Brennan Intervenors take its language and holding out of context. In *Biondo*, white applicants challenged the Chicago Fire Department's race-conscious promotions policy. *Biondo*, 382 F.3d at 682-83. In response to the applicants' equal protection challenge, the Department claimed only that it had a compelling interest in "comply[ing] with federal regulations that frown on using tests to make promotions in strict sequence," *id.* at 683; the Department did *not* claim that its policy was justified by prior discrimination. *Id.* Thus, the question of how much evidence of prior discrimination must be shown to meet *Croson*'s "strong basis" test was never in issue, and the Seventh Circuit's holding – that complying with federal regulations does not necessarily create a compelling interest for making race-conscious decisions – has nothing at all to do with the strong basis analysis at issue in the instant case. *See id.* at 692 (Williams, J., concurring) (noting that "we have recognized on numerous occasions that a governmental agency has a compelling interest in remedying its past unlawful discrimination," but that "[b]ecause the City made no argument that past discrimination was a factor in any decision related to the scoring of the 1986 examination, we are precluded from analyzing the case on this basis").

Because a prima facie case of Title VII disparate impact provides a strong basis in evidence of prior discrimination sufficient to meet the compelling interest element of strict scrutiny, summary judgment is indisputably proper as to the race-conscious provisions of the Agreement that remedy disparate impact in the challenged exams. It is undisputed that a prima facie case of disparate impact has been established with regard to Exam 5040 for blacks and Hispanics, Exam 8206 for blacks, and Exam 1074 for blacks and Hispanics. *See* Brennan Mem. at 51; Defs.' Mem. at 57-58; U.S. Mem. at 20.

While the Brennan Intervenors do argue that Exam 8206 did not have disparate impact against Hispanics, their argument presents a dispute of law, not fact. No party disputes that the

pass rate between white and Hispanic test-takers for Exam 8206 resulted in a statistically significant disparity of at least 2.15 standard deviations.[14] The Brennan Intervenors argue only that this disparity is not meaningful because the pass rate met the four-fifths rule. *See* Brennan Reply Mem. at 43. The Brennan Intervenors are incorrect as a matter of law: The Supreme Court has preferred statistical disparity analysis as more probative of disparate impact than the four-fifths rule. *See Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 & n.14 (1977) (citing *Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977)); *see also Waisome v. Port Auth. of N.Y. & N.J.*, 948 F.2d 1370, 1376 (2d Cir. 1991). The four-fifths rule, while it can be instructive in some cases, is "no more than 'a rule of thumb' to aid in determining whether an employment practice has a disparate impact." *Waisome*, 948 F.2d at 1375-76. The very text of the regulation establishing the four-fifths rule makes clear that an adverse impact may still exist even if the difference in selection rates is greater than 80%. *See* 29 C.F.R. § 1607.4(D) (providing that while a selection rate greater than four-fifths that of the group with the highest rate "will generally not be regarded by Federal enforcement agencies as evidence of adverse impact," "[s]maller differences in selection rate *may nevertheless constitute adverse impact*, where they are significant in both statistical and practical terms or where a user's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group" (emphasis added)). This Court may thus conclude as a matter of law, even if the Brennan Intervenors are correct that the

[14]Defendants' expert found the disparity to be 2.15 standard deviations and statistically significant; the United States's experts found the disparity to be 2.51 standard deviations and statistically significant. *See* Defs.' Resp. to Pl.'s First Expert Set of Reqs. for Admis. (Resps. No. 62-69, 88-91) (Ex. 11). The Brennan Intervenors neither presented their disparity analysis, nor contested the disparity shown by Defendants' expert or the United States's expert. *See* Brennan Mem. at 51; Brennan Reply Mem. at 42-43; Sharf Statement ¶¶ 7-9 & n.1; Brennan Resp. to Arroyo Statement of Facts ¶¶ 30-31.

four-fifths rule has been met, that a statistically significant disparity of 2.15 standard deviations is sufficient to establish a prima facie case of disparate impact.[15] *See Isabel v. City of Memphis*, No. 01-02533, slip op. at 4-5 (6th Cir. Apr. 11, 2005) ("[N]otwithstanding a test's compliance with the four-fifths rule, other analyses may still reveal an adverse impact.") (Ex. 134); 29 C.F.R. § 1607.4(D); *see also Hazelwood*, 433 U.S. at 307-08 & n.14.

This Court need go no further in order to conclude that the compelling interest requirement of strict scrutiny has been met. The questions of job-relatedness or less discriminatory alternatives, addressed in the following paragraphs, need not even be reached unless this Court believes that a prima facie case of disparate impact is insufficient on its own to establish a strong basis in evidence.[16]

Even if this Court concludes that a prima facie case of Title VII disparate impact is insufficient to meet the strong basis test, the Arroyo Intervenors have presented sufficient evidence for summary judgment on the constitutional question. An unrebutted prima facie case combined with additional evidence of discrimination, such as evidence calling into question the job-relatedness of the challenged exams, can establish a strong basis for remedial efforts. The

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[15]While all parties agree that the disparity was *at least* 2.15 standard deviations, the Arroyo Intervenors and the United States have asserted both that the disparity is greater and that it failed the four-fifths rule. *See* Arroyo Mem. at 64 n.44; U.S. Mem. at 20; Siskin & Cupingood, Adverse Impact on Minorities of Written Examinations for Custodian and Custodian Engineer Positions in New York City, 1985-1993, at tbl. 8206-4 & 8206-5 (Ex. 128). Thus, if this Court concludes that the evidence on which all parties agree is not sufficient to establish a prima facie case of disparate impact of Exam 8206 on Hispanics, an evidentiary hearing should be held for the limited purpose of assessing the dispute of fact as to whether the evidence shows an even greater disparity between the pass rates of white and Hispanic applicants.

[16]The Court could of course hold that it need not decide whether a prima facie case is, on its own, sufficient to establish a strong basis in evidence, because far more evidence of disparate impact discrimination is presented here.

Fifth Circuit has held that the strong basis test may be met with evidence establishing disparate impact combined with "other evidence [that] create[s] substantial doubt as to the job-relatedness of the challenged tests." *Edwards v. City of Houston*, 37 F.3d 1097, 1113 (5th Cir. 1994), *vacated and superseded on other grounds by* 78 F.3d 983 (5th Cir. 1996) (en banc). As the Fifth Circuit panel explained in *Edwards*:

> [T]he plaintiffs provided detailed statistics on the promotion rates of nonminorities, blacks and hispanics. The plaintiffs also identified numerous questions on the examinations which they alleged were extremely difficult to defend as job-related and consistent with business necessity. Clearly, the district court had ample evidence from which to conclude that the plaintiffs had proven disparate impact and that the City of Houston had justifiably concluded that it would be difficult to defend the job-relatedness of the questions on the promotion exams. More importantly, the City of Houston had a strong basis in evidence to conclude that remedial action was necessary.

Id. at 1113; *see also id.* (quoting with approval the district court's finding that "[i]t is not necessary for the Court to resolve the question whether the challenged examinations were job-related," and that evidence creating "substantial doubt as to the job-relatedness of the challenged tests [established] a sufficiently firm basis for the relief provided" (internal quotation marks omitted)). This principle must, of course, be correct. Requiring non-job-relatedness to be proved or admitted before meeting the strong basis test would contravene the Supreme Court's express holdings that prior discrimination need not be proved or admitted before employers may undertake voluntary affirmative action programs. *See Croson*, 488 U.S. at 500; *Wygant*, 476 U.S. at 277-78 (plurality opinion); *Wygant*, 476 U.S. at 290-92 (O'Connor, J., concurring).

Here, as in *Edwards*, there was evidence creating substantial doubt as to the job-relatedness of the challenged exams. *See* Arroyo Mem. at 65-70 (presenting evidence to show that the United States's experts established that neither the procedures originally used by the

City Defendants to develop the challenged exams, nor the validation studies that they commissioned as part of their effort to defend against the United States's discrimination lawsuit prior to settlement, established that those assessment instruments were predictive of applicants' future job performance)[17]; U.S. Statement of Facts ¶¶ 21-25. Defendants thus had a strong basis in evidence to conclude that remedial action was necessary, as they themselves acknowledge. *See* Defs.' Mem. at 58-59.

The Brennan Intervenors and the United States are thus incorrect in arguing that there is a dispute of fact on job-relatedness that precludes summary judgment. *See* Brennan Reply Mem. at 44-45; U.S. Mem. at 20-21. A dispute of fact is not a "genuine dispute" precluding summary judgment unless it requires a trial or evidentiary hearing to resolve competing reasonable factual contentions. *See Anderson*, 477 U.S. at 249-50. No evidentiary hearing is required here, because this Court need not find as a matter of fact that the challenged exams were not job-related in order for a strong basis in evidence to exist; at most, it is only necessary for this Court to believe that there was sufficient evidence of non-job-relatedness for Defendants to have a strong basis for believing that discrimination occurred.

If this Court agrees that a prima facie case of disparate impact – or a prima facie case combined with substantial evidence of non-job-relatedness – meets the strong basis test, the compelling interest prong has been met, and the Court's analysis on compelling interest may

[17]The Brennan Intervenors contest the cited evidence as "unsworn expert reports." Brennan Reply Mem. at 38-40, 45 & n.12. This objection is without merit. The authors of all of the cited reports were deposed under oath, attested to having written the reports in question, and further attested to the substance of the reports in their testimony. *See* Schmitt Dep. Tr. at 1-3, 84-86, 164-66 (Ex. 129); Siskin Dep. Tr. at 1-4, 82-83, 129-38, 154-55 (Ex. 130).

stop here.[18] However, even if this Court disagrees that substantial doubt as to job-relatedness can meet the strong basis test, it is nonetheless unnecessary for this Court to resolve any dispute regarding job-relatedness, because the evidence of less discriminatory alternatives provides a strong basis for believing that prior discrimination had occurred. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); 42 U.S.C. § 2000e-2(k)(1)(A)(ii); *see also Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 161 (2d Cir. 2001) (holding that "[i]f the employer succeeds in establishing a business justification . . . the burden of persuasion shifts back to the plaintiffs to 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").

The Arroyo Intervenors demonstrated in their initial memorandum, and the United States has agreed, that the provisional hiring system was a less discriminatory alternative that met Defendants' business needs. *See* Arroyo Mem. at 68-70; U.S. Mem. at 20-21. The Brennan

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[18]The Arroyo Intervenors also argued in their initial memorandum that there is evidence of intentional discrimination that further supports a finding that there was a strong basis in evidence for remedial action. *See* Arroyo Mem. at 70. The Brennan Intervenors argue that such evidence is outside the scope of the issues litigated in this case, and amounts to the assertion of new claims. *See* Brennan Reply Mem. at 60-61, 82. But even assuming, arguendo, that intentional discrimination was not alleged in the United States's complaint (which the Arroyo Intervenors do not concede), the Arroyo Intervenors are not asserting new claims, but rather are directing the Court's attention to evidence in the record that further supports a finding that Defendants had a strong basis in evidence to agree to remedial action. Intentional discrimination need not have been pled in the United States's complaint, or proven in litigation, in order for this Court to find that evidence of intentional discrimination helps establish the strong basis in evidence. *See, e.g.*, *Cotter v. City of Boston*, 323 F.3d 160, 169-71 (1st Cir. 2003) (holding that a strong basis in evidence existed on the basis of a prima facie case of adverse impact combined with (a) evidence of prior intentional discrimination that was "well-documented by past litigation and records," and (b) additional evidence of "racial tensions within the department").

The Arroyo Intervenors note, moreover, that this Court need not even reach the unrefuted factual evidence of intentional discrimination if the Court agrees that either a prima facie case of disparate impact, or a prima facie case combined with evidence creating substantial doubt as to job-relatedness, is sufficient to establish a strong basis in evidence for taking remedial action.

Intervenors concede that a more representative proportion of minorities were hired as provisionals than through the exam process, *see* Brennan Reply Mem. at 46, but imply that the provisional hiring process was itself discriminatory against whites, *see id.* at 5-7. But the Brennan Intervenors cite absolutely no statistical or anecdotal evidence of unfair treatment of white applicants, and instead point only to deposition testimony that Defendants undertook part of their provisional hiring with an eye toward increasing the diversity of the custodial ranks. *Id.* (quoting Cappoli Dep. Tr. at 47-48, 67-68). The cited testimony does not establish even the possibility of racial discrimination against white applicants – to the contrary, Cappoli testified that he was aware of his legal obligations and took care not to discriminate, and that only qualified applicants were hired.[19] *See* Cappoli Dep. Tr. at 47-48, 67-68 (Ex. 131). Moreover, consideration of race as one among many hiring factors is not impermissible in the pursuit of a state actor's compelling need for diversity in its workforce. *See Grutter v. Bollinger*, 539 U.S. 306, 327-33, 343 (2003); *Petit v. City of Chicago*, 352 F.3d 1111, 1114-18 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 2426 (2004).

The Brennan Intervenors also argue that the provisional hiring process did not meet Defendants' legitimate interests in complying with New York civil service law, in that it did not constitute an effective examination of an applicant's ability to perform the job. *See* Brennan Reply Mem. at 46. This is plainly disproven by the fact that the performance of provisional

[19]In any event, Cappoli testified that he retired in December 1994. *See* Cappoli Dep. Tr. at 84 (Ex. 131). Over half of all provisional Custodians listed on the Stipulation Regarding Provisional Hires, and over 85% of all provisional Custodian Engineers, were hired *after* Cappoli retired. *See* Stipulation Regarding Provisional Hires (Ex. 132). The Brennan Intervenors have thus presented no evidence at all to support their implication of discrimination against whites as regards the vast majority of provisional hires, which occurred after 1994.

employees was at least as strong as that of permanent employees.[20] *See* Siskin & Cupingood, Review of Statistical Methodology, at 12 & Ex. 15 (Ex. 33); Pulakos & Schmitt, Supplemental Report, at 31-32 (Ex. 93); *see also* Cappoli Dep. Tr. at 129 ("[W]e have had people come off the list that turned out to be poor custodians, but provisionals, I don't recall one provisional that ever turned out to be unsatisfactory.") (Ex. 131); Defs.' Mem. at 59, 61.

Because there is no material dispute of fact that a prima facie case of a Title VII violation has been established, this Court may conclude that Defendants had a strong basis in evidence for believing that the race-conscious provisions in the Agreement were necessary to remedy prior discrimination. If this Court concludes that evidence in addition to a prima facie case is necessary, it may nonetheless conclude that the strong basis test is met, because there is no material dispute of fact that the substantial evidence of non-job-relatedness, or of a less discriminatory alternative, created the requisite strong basis in evidence.

b. Narrow Tailoring Requirement

As the Arroyo Intervenors argued in their initial memorandum, *see* Arroyo Mem. at 72-79, the race-conscious provisions of the Agreement are narrowly tailored to further the remedial goal. The Arroyo Intervenors' analysis shows that the Agreement meets all of the narrow tailoring factors identified by the Supreme Court, which include: "(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

[20]Nor is it correct that the provisional process did not test the knowledge, skills, and abilities ("KSAs") of the applicants: Before 1995, the provisional interview was designed to satisfy the interviewer that the applicant could perform the job safely, *see* Cappoli Dep. Tr. at 63-65, 123 (Ex. 131); and after 1995, the provisional interview was conducted using a structured interview guide that was expressly designed to test the KSAs needed for the job. *See* Lonergan Dep. Tr. of 6/24/97, at 27-35 & Ex. 32 (Ex. 109).

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 Brennan Intervenors do not contest any part of this showing, and instead argue only that the Agreement is not narrowly tailored because "remedies go to individuals who are unlikely to have been victims of the alleged discrimination." *Id.* at 31-33. But it is well-established that narrowly-tailored measures are not limited to efforts to make whole identified victims of discrimination.[21] *See, e.g.*, *Grutter*, 539 U.S. at 333-41; *Associated Gen. Contractors v. Coalition for Econ. Equal.*, 950 F.2d 1501, 1418 (9th Cir. 1991); *see also* Arroyo Mem. at 61-62, 78-79. And even if this Court were to conclude that narrow tailoring did include such a requirement, the Arroyo Intervenors would meet it, as they have shown that the remedies they received did constitute make-whole relief. *See* Arroyo Mem. at 36-53; *see also infra* pp. 14-17.

c. The Brennan Intervenors Have Not Met Their Burden of Proof

"The ultimate burden remains with the [challenging party] to demonstrate the unconstitutionality of an affirmative-action program." *Wygant,* 476 U.S. at 277-78 (plurality opinion); *id.* at 293 (O'Connor, J., concurring) (same); *see also* Arroyo Mem. at 62-63 & n.43

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[21]None of the cases the Brennan Intervenors cite are to the contrary. The narrow tailoring holding from *Croson* was that the preference plan at issue was a "quota [that] cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing." *Croson*, 488 U.S. at 507. It was in this context that the Court criticized the failure to inquire into the effects of prior discrimination. Some courts have cited *Croson* for the proposition that "[w]here plans establish quotas, the quotas must be tied to some injury by the minority to be benefitted," *Cone Corp.*, 908 F.2d at 913-14 (citing *Croson*, 488 U.S. at 498-99)), but the Agreement here does not establish any quota at all, much less a quota unconnected to prior discrimination. *See* Arroyo Mem. at 74-75. Counter to the Brennan Intervenors' position, courts have consistently approved race-conscious employment remedies that are not restricted to identified victims, so long as they meet the narrow tailoring criteria identified above. *See, e.g.*, *Paradise*, 480 U.S. at 177-78 (plurality opinion); *Cotter*, 323 F.3d at 171-72; *Stuart*, 951 F.2d at 453-54; *Peightal v. Metro. Dade County*, 940 F.2d 1394, 1408 (11th Cir. 1991); *Howard*, 871 F.2d at 1009.

(citing cases). As demonstrated above, the Brennan Intervenors have failed to meet their burden of proving the Agreement's unconstitutionality.

The Brennan Intervenors cite language from *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), stating that government actors must "justify any racial classification . . . under the strictest scrutiny," *id.* at 224, and assert that this language places the ultimate burden of proof on those defending race-conscious programs. *See* Brennan Reply Mem. at 26. But *Adarand* did not purport to articulate a burden of proof; the cited language merely refers to the propriety of applying strict scrutiny to all, including federal, racial classifications. *See id.* Nor did *Adarand* have occasion to apply a burden of proof in any event, because it did not assess the lawfulness of the challenged program in that case; rather, the Court vacated and remanded for reconsideration of the case in light of the strict scrutiny principle announced.[22] *Id.* at 239. Other litigants have attempted to rely on this passage from *Adarand* to assert that the Supreme Court has changed the burden of proof, but the courts have rejected those attempts. *See, e.g.*, *Rothe Dev. Corp. v. United States Dep't of Defense*, 262 F.3d 1306, 1317 (Fed. Cir. 2001).

There is no genuine dispute of material fact as to the constitutionality of the challenged provisions of the Agreement. Summary judgment is proper on the Arroyo Intervenors' request for a declaratory judgment that the Agreement does not violate the Fourteenth Amendment.

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

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[22]It bears noting that the district court in *Adarand*, considering the strict scrutiny issue post-remand, did not consider the Supreme Court to have altered the burden of proof: "The party defending remedial legislation bears the initial burden of production to show the program is supported by a 'strong basis in evidence.' However, the ultimate burden rests on the challenger to 'demonstrate unconstitutionality of an affirmative action program.'" *Adarand Constructors, Inc. v. Pena*, 965 F. Supp. 1556, 1577 (D. Colo. 1997) (quoting *Wygant*, 476 U.S. at 277-78).

To approve the challenged provisions of the Agreement as a consent decree, this Court must find that in addition to being lawful, the Agreement is reasonable, fair, and consistent with public policy. *Kirkland v. N.Y. State Dep't of Corr. Servs.*, 711 F.2d 1117, 1128-29 (2d Cir. 1983). (If the Court concludes that the Agreement may not be entered as a consent judgment, it need not consider these factors.) Settlements of Title VII claims enjoy a presumption of validity and should be approved unless unlawful or unreasonable. *Id.* at 1129. 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).

The Arroyo Intervenors have demonstrated that the Agreement is reasonable, fair, and consistent with public policy. *See* Arroyo Mem. at 79-82; *see also* Defs.' Mem at 71-74. The Brennan Intervenors reply that the Agreement is unfair because it places most of the burden of remedying prior discrimination on them. *See* Brennan Reply Mem. at 77. This argument ignores the fact that had Defendants proceeded to trial and lost, the resultant remedial order could (and most likely would) have imposed a far greater burden on the Brennan Intervenors than did the Agreement, as Magistrate Judge Levy recognized in his order approving the Agreement. *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); *see also Kirkland*, 711 F.2d at 1132 (holding that the reasonableness of a settlement agreement "must be measured against the . . . relief which might have been granted had the case gone to trial"). The Brennan Intervenors also argue that one of the Brennan Intervenors has lost a first-choice transfer as an indirect result of the Agreement. *See* Brennan Reply Mem. at 79. Even

were this correct, which it is not,[23] it is not unreasonable for non-minority employees to bear some of the burden of remedying an employer's prior discrimination. *See, e.g.*, *Local 93*, 478 U.S. at 512.

The Brennan Intervenors have failed to meet their "heavy burden" of proving the unreasonableness of the Agreement, and summary judgment for the Arroyo Intervenors is therefore proper.

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

The Brennan Intervenors also assert that the Arroyo Intervenors' motion for summary judgment should be denied on the ground that the Agreement cannot be approved without a full trial on the merits. The Brennan Intervenors are incorrect. Controlling Second Circuit precedent does not authorize the Brennan Intervenors to veto the Agreement or force a trial on the merits, because they have failed to put any material facts at issue to establish that the Agreement affected their legally enforceable rights to particular job benefits. *See Kirkland*, 711 F.2d at 1126-28; Arroyo Mem. at 83-84; Caldero Mem. at 31-37; Defs.' Mem. at 47-54.

The Arroyo Intervenors have never disputed that competitive seniority is an important

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[23]The Brennan Intervenors argue in their reply to the Arroyo Intervenors' initial memorandum that John Brennan has lost a transfer as an indirect result of the Agreement. *See* Brennan Reply Mem. at 79. Specifically, they argue that Brennan lost a December 2002 transfer to school X-167 to John Mitchell, who had lost a transfer to Pedro Arroyo the previous year; and that if Mitchell had not previously lost a transfer to Arroyo, Brennan would have received the transfer to X-167. *Id.* (citing Brennan Dep. Tr. at 142-147). This is incorrect. The transfer standings from December 2002 show that even if Mitchell had received the earlier transfer, and therefore was not competing for X-167, Brennan would still not have received the transfer to that school because he was also behind two other individuals (Timothy Harrison and Thomas Greene) in the ranking for that school, both of whom would have been offered the school before Brennan. *See* Transfer Standings, Circular No. 8 (dated Dec. 19, 2002) (Ex. 135). The Brennan Intervenors have therefore failed to present any evidence that they have ever lost a desired transfer, either directly or indirectly, as a result of the Agreement.

factor in the award of certain job benefits under the Collective Bargaining Agreement ("CBA"). *See* Arroyo Mem. at 10-12. Indeed, the Arroyo Intervenors' motion to intervene in this action was motivated in part by their concern that a loss of the retroactive seniority they received under the Agreement might harm their interests. *See* Arroyo Mem. Supp. Intervention, at 8-9 (Doc. No. 422). Simply because seniority plays an important role in a Custodian's eligibility for certain job benefits, however, does not mean that he or she possesses what the Second Circuit considers to be a legally enforceable right to those benefits sufficient to veto a settlement. The Brennan Intervenors improperly conflate these two issues.

Under *Kirkland*, an employee's seniority creates a legally enforceable interest in a job benefit only if the employee is eligible to obtain the benefit exclusively on the basis of seniority. *Kirkland*, 711 F.2d at 1126-28. The purported "seniority rights" asserted by the Brennan Intervenors do not flow automatically to the Custodian or Custodian Engineer with the longest tenure, but rather depend on a number of other factors, and are in large part subject to the exercise of the Board of Education's discretion. *See* Arroyo Mem. at 83-87. In *Kirkland*'s language, the employment benefits at issue are "mere expectancies" rather than legally enforceable interests, and are therefore insufficient to give the Brennan Intervenors a veto over the Agreement. *Kirkland*, 711 F.2d at 1127-28.

For instance, it is clear that an individual's seniority rank does not create a legally enforceable right to a particular school transfer. School transfer awards are contingent upon other factors aside from seniority, including performance ratings and the discretionary decisions of various of Defendants' employees. The Brennan Intervenors argue that most transfers are determined by relative seniority, but they make no factual assertion to contest the Arroyo Intervenors' showing that among candidates within the same eligibility band, it is the candidate

with the highest average performance rating who receives the transfer.[24] *See* Lonergan Decl. Opp'n Prelim. Inj. ¶ 25 (Ex. 34); Lonergan Dep. Tr. of 6/24/97, at 40 (Ex. 24); *see also* CBA Art. IV § 1 ("Transfers of Custodian Engineers will be made on the basis of two main factors, viz. (1) ability and performance; and (2) seniority credit within the title.") (Ex. 36); Arroyo Mem. at 85-86. And even if performance ratings did not play a role in the transfer process, the significant amount of discretion that the Board of Education has retained over transfer assignments, including the ability of Board employees to veto proposed transfers, renders the Brennan Intervenors' interest in seniority for transfer purposes a "mere expectancy."[25] *See Kirkland*, 711 F.2d at 1127-28 (distinguishing *United States v. City of Miami*, 664 F.2d 435 (5th Cir. 1981) (en banc)). The Brennan Intervenors' analogy to home-run bonuses for baseball players, *see* Brennan Reply Mem. at 17, should not be viewed as a substitute for legal argument

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[24]The Brennan Intervenors correctly note that the Arroyo Intervenors expressed an interest in the retroactive seniority they received through the Agreement, and the effect of the retroactive seniority on their ability to transfer, as one factor supporting their motion to intervene. But as has been established and as should be plain, proof of an interest sufficient to justify intervention is a far cry from proof of a contract right sufficient to veto a settlement agreement. *See infra* pp. 15-16. Seniority plays a role in transfers sufficient to justify Rule 24(a)(2)'s non-stringent interest standard, but an interest justifying intervention is not tantamount to an enforceable right under *Kirkland*.

[25]The CBA reserved to the Community School Boards the right to review and object to the ranked list of candidates for each transfer before the transfer is recommended, *see* CBA Art. IV § 1 (Ex. 36); and a proper objection by a Community Board operated as a veto. *See* Calderone Decl. of 4/6/05, at ¶ 3 (Ex. 133). The public school system has been reorganized since the CBA was negotiated, and Community Boards no longer function in the same manner as before (as the Brennan Intervenors correctly point out, *see* Brennan Reply Mem. at 17 n.6), but the Brennan Intervenors are incorrect to assert that this review function no longer exists: In the new public school structure, the authority to review and object to transfers that was formerly conferred on the Community Boards has been delegated to the regional superintendents. *See* Calderone Decl. of 4/6/05, at ¶¶ 3-5 ("A proper objection by the regional superintendent acts as a veto to the transfer.") (Ex. 133). In addition to the veto power of the regional superintendent, there is evidence that school principals may veto a proposed transfer. *See* Lonergan Decl. Opp'n Prelim. Inj. ¶ 31 (Ex. 34).

applying controlling Second Circuit precedent. Even on its face, the analogy overstates the enforceability of contingent contract clauses. Applying the laws of New York and other states, courts have found that a promise to pay a bonus is not enforceable when the employer reserves the discretion to determine the amount of the benefit or withhold payment altogether. *See Welland v. Citicorp, Inc.*, 2003 U.S. Dist. LEXIS 22721, at *49-51 (S.D.N.Y. 2003); *Namad v. Salomon Inc.*, 543 N.E.2d 722, 723 (N.Y. 1989) (holding that an employee was not entitled to a bonus under New York law when management retained discretion concerning the amount of the bonus); *see also, e.g.*, *Amant v. Kidde, Inc.*, 756 F.2d 685, 686 (8th Cir. 1985); *Gronlund v. Church & Dwight Co.*, 514 F. Supp. 1304, 1312 (S.D.N.Y. 1981).

Nor does the TC system create legally enforceable rights. First, the Arroyo Intervenors have presented facts to show that TC assignments are not a matter of contractual right, and the Brennan Intervenors have not refuted this showing or presented any contrary facts. *See* Lonergan Decl. of 5/20/99, at ¶ 25; Arroyo Mem. at 32-33, 86-87. The Brennan Intervenors do correctly note that some TC procedures were set forth in a "side letter" between the Board of Education and the union, *see* Brennan Reply Mem. at 21, but this in itself is meaningless as to the existence of a contract or contractual rights – they present no evidence that the side letter constituted a contractual agreement, and they neglect to point out that the same witness whom they cite as to the existence of the side letter also expressly stated that placement on the TC list is *not* a matter of contractual right. *See* 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). Because the TC program is not covered by the CBA or any other contract between the Board of Education and the union, the Brennan Intervenors cannot be said to have anything more than a "mere expectancy" under *Kirkland*. *See* Arroyo Mem. at 87. And even if the Brennan Intervenors did have a contractual

right to TC assignments, they have failed to present any facts to show that seniority has any effect on the TC assignment process, or that their ability to receive TC assignments has been impaired by the Agreement in any non-speculative way. *See infra* pp. 12-13 & nn.8-9.

The Brennan Intervenors' misunderstanding of their contract rights is further illustrated by the fact that neither party to the CBA believed that the grant of retroactive seniority to the Offerees constituted a revision of incumbents' contract rights or a proper topic for "policy consultation" between the two sides. *See* Defs.' Mem. at 52-53 (noting that Defendants neither notified nor attempted to consult the union regarding the proposed settlement agreement; and that the union never grieved the settlement agreement as a violation of any contractual notification or consultation provisions); CBA Art. XVI (Ex. 36). The Brennan Intervenors attempt to dismiss Defendants' interpretation of the CBA by arguing that, were Defendants correct, "Custodians and CEs would be well advised to get a new union." Brennan Reply Mem. at 18. Although the relevant issue in this case is certainly not the union's skill in negotiating its contract, it is worth noting that expansive management rights provisions are not unusual.[26] *See, e.g.*, *Kirkland*, 711 F.2d at 1126-28; *see also Johnson v. Lodge Number 93 of the Fraternal Order of Police*, 393 F.3d 1096, 1100 (10th Cir. 2004).

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[26]For the same reason, due to Defendants' substantial rights under the CBA, the highly speculative issue of layoffs is also of little relevance in determining whether the Brennan Intervenors have legally enforceable rights sufficient to veto the Agreement. The CBA explicitly provides Defendants with the unilateral right to alter their method of custodial operations, up to and including the "unfettered right to privatize schools." CBA Art. XV, Art. XVI § 4 (Ex. 36). Even the mandated consultative process with the union is designed not to "prevent or delay unduly the taking of any action by the Board necessary for the proper conduct of the business of the Board." *Id.*

Again, the Brennan Intervenors note that the Arroyo Intervenors expressed concern about the possibility of layoffs in their declarations supporting intervention. *See* Brennan Reply Mem. at 19. As already stated, proof of an interest sufficient to intervene is not equivalent to proof of a contract right sufficient to veto a settlement agreement. *See infra* pp. 15-16, 33 n.24.

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* Arroyo Mem. at 88 (citing *Local 93*, 478 U.S. at 510, 512-13). For the foregoing reasons, the Brennan Intervenors may not defeat summary judgment on the ground that they have been denied a full trial on the merits. They have had all the process they are due. *See Local 93*, 478 U.S. at 529; *Lodge Number 93*, 393 F.3d at 1109.

CONCLUSION

No party has presented sufficient evidence to create an issue of fact as to the propriety of summary judgment on the Arroyo Intervenors' claims that the Agreement is lawful under Title VII and the Equal Protection Clause. Accordingly, the Arroyo Intervenors' motion for partial summary judgment should be granted, and this Court should approve the Agreement and enter it as a consent judgment.[27]

[27]As a procedural matter, the Brennan Intervenors raise the final argument that this Court should deny the Arroyo Intervenors' motion for summary judgment because it is not in compliance with this Court's procedures requiring a pre-motion conference. This argument must be (and has, in fact, already been) rejected. The Arroyo Intervenors sought leave to file their motion for summary judgment, expressly noting the Brennan Intervenors' objections, *see* Letter from Chernofsky to Judge Block dated Jan. 7, 2005 (Doc. No. 475), and the Court responded by granting leave to file, *see* E–Mail from Chernofsky to all Counsel dated Jan. 11, 2005 (Ex. 137).

Dated: April 29, 2005.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I served, by electronic means, a true and correct copy of the following to the attorneys of record for all of the parties in this action, as listed below.

- Arroyo Intervenors' Reply Memorandum of Law Supporting Their Motion for Partial Summary Judgment

- Declaration of Matthew Colangelo of April 29, 2005 (and all exhibits attached thereto)

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