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, JOSE CASADO, CELESTINO FERNANDEZ, KEVIN LAFAYE, STEVEN LOPEZ, ANIBAL MALDONADO, JAMES MARTINEZ, SILVIA ORTEGA DE GREEN, and NICHOLAS PANTELIDES, Applicants for Intervention, vs. NEW YORK CITY BOARD OF EDUCATION, *et al.*, Defendants, and JOHN BRENNAN, *et al.*, Defendant-Intervenors.	Civ. No. 96-0374 (FB) (RML) **MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE**

Proposed plaintiff-intervenors Pedro Arroyo, Jose Casado, Celestino Fernandez, Kevin LaFaye, Steven Lopez, Anibal Maldonado, James Martinez, Silvia Ortega de Green, and Nicholas Pantelides (collectively, "Movants"), by their undersigned counsel, respectfully submit this memorandum of law in support of their motion to intervene as of right pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure, or alternatively, for permissive intervention pursuant to Rule 24(b)(2) of the Federal Rules of Civil Procedure.

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PROCEDURAL AND FACTUAL BACKGROUND

The United States filed this lawsuit on January 30, 1996, against the New York City Board of Education, the City of New York, the New York City Department of Citywide Administrative Services, and DCAS Commissioner William J. Diamond (collectively, the "City Defendants"). 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[1] in New York City public schools.

The focus of the litigation was on two of the United States' claims: (1) the claim that several written civil service exams for the positions of Custodian and Custodian Engineer had a disparate impact on black and Hispanic test-takers in violation of Title VII (what the parties have termed the "testing claim"); and (2) the claim that the City 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 (the "recruitment claim"). *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). The civil service exams challenged in the testing claim are Custodian Exam 5040, administered in 1985; Custodian Engineer Exam 8206/8609, administered in 1989; and Custodian Exam 1074, administered in 1993 (collectively, the "challenged exams").

The United States' claims against the City 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 granted permanent Custodian and Custodian Engineer positions, along with retroactive seniority, to a group of beneficiaries (the "Offerees").[2]

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[1]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.

[2]In addition, the United States and the City Defendants provided that the Agreement was to "resolve[] all issues that were or could have been raised by the United States in its complaint." Settlement Agreement at 2. 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

See Settlement Agreement ¶¶ 13-17. A group of white male Custodians and Custodian Engineers (the "Brennan Intervenors") 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, U.S. Const. amend. XIV, § 1; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2; and 42 U.S.C. §§ 1981, 1983, and 1985(3). *See* Brennan Intervenors' Second Am. Compl. in Intervention. 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 granted the Brennan Intervenors' motion to intervene. Then, 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.

In the course of ongoing discovery in this Court after remand, it became apparent that the United States had changed its position and would not seek enforcement of the Agreement insofar as it provided race-conscious and gender-conscious relief to those individuals included as Offerees under the Agreement to remedy the discrimination alleged in the United States'

Origin, or sex with respect to the positions of Custodian or Custodian Engineer occurring before the execution of the Release." *Id.* ¶ 39.

recruitment claim. On becoming aware of this change in posture, the affected Offerees (the "Caldero Intervenors") moved to intervene to protect their interests. This Court granted the Caldero Intervenors' motion for permissive intervention in February 2003.

Movants here are Hispanic Custodians and Custodian Engineers who were included as Offerees under the Agreement in order to remedy, inter alia, the discrimination alleged in the United States' testing claim. All received grants of retroactive seniority, and the seven (of nine) Movants who were then serving as provisional employees received permanent appointments. Movants recently learned that the United States, in the course of ongoing litigation, has further changed its position with regard to the legality of the remedy that Movants received under the Agreement. Specifically, the United States is no longer defending the retroactive seniority dates that Movants received under the Agreement, and instead wants Movants to receive later seniority dates. *See* Pl.'s Resp. to Contention Interrogs. (attached relief chart). The changes the United States seeks would result in a loss of seniority of between approximately two and nine years for each Movant. *See id.*

Movants seek to intervene to defend the legality of the Agreement as originally negotiated between the United States and the City Defendants. Should the Agreement be adjudged illegal in the course of this litigation, one possible remedy that this Court could order is the loss of all benefits Movants received under the Agreement. If Movants were to lose the permanent appointments they received under the Agreement, they would face the substantial risk of losing their jobs. *See* Lonergan Decl. in Opp. to Prelim. Inj. ¶¶ 43-45; *see also, e.g.*, Arroyo Decl. ¶¶ 9, 12. Even if they were able to retain their jobs as provisional employees, Movants would lose the job security and civil service benefits that accompany permanent status. *See, e.g.*, LaFaye Decl.

¶¶ 8-10. In addition, if the Agreement is held illegal, or if the remedy provided by the Agreement is revised to alter or eliminate the grant of retroactive seniority, Movants risk losing significant job benefits and options. School transfers are largely awarded based on the seniority of the applicants, and salary is based on the size of the school in which a Custodian or Custodian Engineer works; a reduction or elimination of the seniority provided by the Agreement would thus greatly hinder Movants' ability to seek the highest-paying jobs. *See, e.g.*, Casado Decl. ¶ 9. Further, movants have acted in reliance on the remedy they received under the challenged provisions of the Agreement, making pension contributions to enable them to retire, *see* Casado Decl. ¶ 7; Fernandez Decl. ¶ 8; Pantelides Decl. ¶ 8; buying homes and setting aside money to send their children to college, *see* Casado Decl. ¶ 10; Fernandez Decl. ¶ 12; Lopez ¶ 10; Martinez Decl. ¶ 10; providing financial support to their parents and families, *see* Ortega de Green Decl. ¶ 9; and turning down other job opportunities, *see* Lopez Decl. ¶¶ 12-13; Maldonado Decl. ¶ 10.

As discussed below, none of the existing parties represent Movants' interests in this action. Accordingly, Movants respectfully request that this Court grant their motion for intervention as of right pursuant to Rule 24(a)(2); and in the alternative Movants request that this Court exercise its discretion to grant permissive intervention pursuant to Rule 24(b)(2).

ARGUMENT

I. Movants Meet The Requirements For Intervention As Of Right Under Rule 24(a)(2)

Rule 24(a)(2) of the Federal Rules of Civil Procedure provides:

> Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the

> applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a)(2). To intervene as of right pursuant to Rule 24(a)(2), a movant must (1) show an interest in the action; (2) demonstrate that the interest may be impaired by the disposition of the action; (3) show that the interest is not protected adequately by the parties to the action; and (4) file a timely motion. *See N.Y. News, Inc. v. Kheel*, 972 F.2d 482, 485 (2d Cir. 1992). Movants meet all of the requirements for intervention of right.

A. Movants Have Substantial And Legally Protectable Interests In This Action

Rule 24(a)(2) requires intervenors of right to have a "significantly protectable interest." *Donaldson v. United States*, 400 U.S. 517, 531 (1971), *superseded by statute on other grounds as noted in Ip v. United States*, 205 F.3d 1168, 1171 (9th Cir. 2000). This interest must be "direct, substantial, and legally protectable." *Wash. Elec. Coop., Inc. v. Mass. Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97 (2d Cir. 1990). The standard to determine the sufficiency of an intervenor's interest is not stringent, however, and serves primarily to effectuate the policy behind the interest requirement, which is "to prevent a multiplicity of lawsuits where common questions of law or fact are involved." *Id.*; *accord Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967) ("[I]n the intervention area the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process."). Moreover, "[c]lose cases should be resolved in favor of recognizing an interest under Rule 24(a)." *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1247 (6th Cir. 1997).

Movants plainly have a direct, substantial, and legally protectable interest in the subject of the instant action. As the Second Circuit explicitly recognized, Movants have a cognizable interest in being "restore[d] . . . to positions they would have held but for" the unlawful disparate impact discrimination of the challenged exams. *Brennan*, 260 F.3d at 130. Movants thus have a protectable interest in the permanent appointments and retroactive seniority that they received under the Agreement. *See Cotter v. Mass. Ass'n of Minority Law Enforcement Officers*, 219 F.3d 31, 34-35 (1st Cir. 2000) (holding that minority police officers had a sufficient interest in their challenged promotions to intervene in a discrimination action brought by white police officers); *cf. United States v. City of Chicago*, 870 F.2d 1256, 1260 (7th Cir. 1989) (holding that the intervenors' test scores on a police department promotional exam created the expectation of promotions sufficient to be an interest under Rule 24(a)).

In addition, like the Brennan Intervenors, Movants also have an interest in effectuating the principle of non-discrimination. *Brennan*, 260 F.3d at 129. The Brennan Intervenors argue that the race-conscious provisions of the Agreement violate constitutional and statutory non-discrimination principles; Movants have a parallel interest in arguing that the race-conscious provisions of the Agreement are legal as a way to *vindicate* constitutional and statutory non-discrimination principles.

B. Movants' Interests May Be Impaired By The Disposition Of This Action

Intervenors of right must demonstrate that their ability to protect their interest may be impaired by the disposition of the action. Fed. R. Civ. P. 24(a)(2). The central issue in this action is the legality of the race-conscious remedies in the Agreement, which included the permanent appointments and retroactive seniority described above. As noted, the majority of the

Movants (seven of nine) received permanent appointments through the Agreement, and they face the risk of losing their jobs entirely if their permanent status under the Agreement is taken away. *See* Lonergan Decl. in Opp. to Prelim. Inj. ¶¶ 43-45; *see also, e.g.*, Arroyo Decl. ¶¶ 9, 12. Even if they could remain as provisional employees, the removal of permanent status would entail the loss of significant civil service benefits and job protections. *See, e.g.*, LaFaye Decl. ¶¶ 8-10. In addition, Movants each received some amount of retroactive seniority through the Agreement; loss of this seniority would not only hinder their future ability to transfer to larger schools and undertake temporary care assignments, but would also jeopardize their current school assignments. *See, e.g.*, Casado Decl. ¶ 9.

The potential impact on Movants' permanent positions and seniority dates is sufficient for this Court to find that their interests may be impaired by the disposition of this action. *See Cotter*, 219 F.3d at 35 ("[E]ven a small threat that the intervention applicants' present promotions could be jeopardized would be ample reason for finding that their ability to protect their interest 'may' be adversely affected." (citing *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 984 (2d Cir. 1984))); *see also* 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1908 (2d ed. 1986 & Supp. 2004) [hereinafter Wright, Miller & Kane] ("[Rule 24(a)(2)] is satisfied whenever disposition of the present action would put the applicant at a practical disadvantage in protecting his interest.").

In addition, Movants meet the impairment requirement of Rule 24(a)(2) because of the possibility of a negative stare decisis effect that could result from the resolution of this case. "An intervenor's interest can be impaired or impeded as a practical matter if a pending action will cause a stare decisis impact that is harmful to the applicant." 6 *Moore's Federal Practice*

§ 24.03[3][b] (3d ed. 1997 & Supp. 2004). Stare decisis is a relevant concern only if the case involves the resolution of a new legal issue, *see id.*, which the instant case certainly does – neither the Second Circuit nor any district court within the Second Circuit has ever addressed the question whether a prima facie showing of disparate impact demonstrates the prior discrimination necessary to meet the "compelling interest" prong of strict scrutiny. If this Court were to hold in the instant case that a prima facie disparate impact showing is constitutionally insufficient to justify race-conscious remedies in a Title VII settlement agreement, such a holding would clearly have a stare decisis impact. If the Agreement were to be adjudged unconstitutional on this ground, and Movants were then to commence employment discrimination actions alleging disparate impact discrimination in the challenged exams, they would be unable – because of the possible precedent of this case – to reach a new negotiated resolution of their claims based on a prima facie showing of disparate impact. The potential for a stare decisis effect that could be harmful to Movants in this way is a sufficient showing to meet the impairment requirement. *See id.*; *cf. Wash. Elec. Coop.*, 922 F.2d at 98 (holding that the intervenor did not meet Rule 24(a)(2)'s impairment requirement in part because resolution of the case would not create a stare decisis effect that would control any future related actions by the intervenor).

C. The Existing Parties Do Not Adequately Protect Movants' Interests

Because Movants have protectable interests that may be impaired by the disposition of this litigation, they have the right to intervene so long as their interests are not "adequately represented by existing parties." Fed. R. Civ. P. 24(a)(2). Movants can easily show that their interests in this case are not adequately represented by the United States, the City Defendants, or the Caldero Intervenors.

1. Movants' Interests Are Not Adequately Represented By The United States

In a case such as this one, in which the United States is litigating in its role as *parens patriae*, the United States is presumed to represent its citizens adequately. *See Hooker Chems.*, 749 F.2d at 985-86. To rebut this presumption, "there must be . . . a strong affirmative showing that the sovereign is not fairly representing the interests of the applicant." *Id.* Although the United States may have commenced this lawsuit with Movants' interests in mind, it is now clear that the United States' current litigation position does not fairly or adequately represent Movants' interests. In light of the Brennan Intervenors' legal challenge, the United States has abandoned its obligation to defend the legality of all provisions of the Agreement, and specifically has made clear that it will not defend the seniority that Movants received under the Agreement. *See* Pl.'s Resp. to Contention Interrogs. (attached relief chart).

As noted above, Movants have a protectable interest in the grant of seniority they received under the Agreement. The United States' express repudiation of those seniority dates constitutes a strong affirmative showing that Movants' interests are not represented. *Cf. South Dakota ex rel. Barnett v. United States Dep't of Interior*, 317 F.3d 783, 785-87 (8th Cir. 2003) (holding that an Indian tribe seeking intervention did not prove that its interests were inadequately protected by the United States, because "the Tribe has not identified any specific Tribal interest implicated in this litigation that the United States cannot or will not adequately protect"). Because Movants have identified specific interests in this litigation that the United States has made clear it will not protect, Movants have made the necessary showing that the United States will not adequately represent their interests.

2. Movants' Interests Are Not Adequately Represented By The City Defendants

With regard to the remaining parties to the case, Movants' burden in establishing inadequate representation is minimal, and is satisfied merely by showing that the representation of their interests by the existing parties *may* be inadequate. *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972); *Wash. Elec. Coop.*, 922 F.2d at 98.

The City Defendants are not an adequate representative of Movants' interests. It is true that the City Defendants are currently pursuing the same ultimate objective that Movants seek to pursue – namely, enforcement of the original terms of the Agreement. "[W]here the putative intervenor and a named party have the same ultimate objective . . . the movant to intervene must rebut the presumption of adequate representation by the party already in the action." *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 179-80 (2d Cir. 2001). Among other evidence, "adversity of interest . . . may suffice to overcome the presumption of adequacy" where proposed intervenors have the same ultimate objective as an existing party. *Id.* at 180.

Movants are plainly able to demonstrate adversity of interest between themselves and the City Defendants sufficient to rebut the presumption of adequate representation. Although the City Defendants currently seek to enforce the Agreement as negotiated, they have expressly continued to deny that the challenged exams disproportionately excluded blacks and Hispanics from employment. *See* Settlement Agreement at 1-2. Defending the Agreement against the Brennan Intervenors' constitutional challenge, however, will likely place the City Defendants' prior history of discrimination in issue. As courts have recognized in analogous cases, it is highly unlikely that the City Defendants will present the evidence of past discrimination that

might be necessary to defend the constitutionality of the Agreement. *See, e.g.*, *Grutter v. Bollinger*, 188 F.3d 394, 400-01 (6th Cir. 1999) (allowing minority students to intervene in two cases challenging race-conscious provisions of the admissions policies at the University of Michigan undergraduate college and law school, and holding that the intervenors' interests were not adequately represented by the University because "the University is unlikely to present evidence of past discrimination by the University itself or of the disparate impact of some current admissions criteria, and . . . these may be important and relevant factors in determining the legality of a race-conscious admissions policy").

There are a number of reasons why the City Defendants will be disinclined to prove their own prior discrimination. First, doing so could subject the City Defendants to liability on additional claims of discrimination. As this Court previously noted, the group of individuals included as Offerees pursuant to the Agreement does not include all of the individuals who could conceivably have a discrimination claim based on the City Defendants' use of the challenged exams. *See N.Y. City Bd. of Educ.*, 85 F. Supp. 2d at 147. If the City Defendants were to prove that the challenged exams did in fact have a disparate impact on the basis of race, they could face discrimination lawsuits by other individuals affected by the disparate impact of the exams but not included as Offerees under the Agreement. *Cf. Cotter*, 219 F.3d at 35-36 (allowing minority police officers to intervene in an action challenging the use of racial criteria in the police department's promotion process, and holding that although the department and the minority officers both sought to defend the constitutionality of the promotion plan, the department did not adequately represent the officers' interests because "there is ample reason for [the department] to resist a defense premised on a showing that its tests are currently in violation of law"). Second,

proof of prior discrimination could damage the City Defendants' "integrity as an employer," *Jansen v. Cincinnati*, 904 F.2d 336, 343 (6th Cir. 1990), an outcome that the City Defendants might predictably like to avoid. Finally, the Board of Education in particular, as a public employer and as the agency of an elected administration, may be subject to political pressures that could prevent it from presenting evidence of its own prior discrimination. *Cf. Grutter*, 188 F.3d at 400 ("[T]he University is subject to internal and external institutional pressures that may prevent it from articulating some of the defenses of affirmative action that the proposed intervenors intend to present."). The City Defendants thus do not adequately represent Movants' interests.

3. Movants' Interests Are Not Adequately Represented By The Caldero Intervenors

Finally, the Caldero Intervenors do not adequately represent Movants' interests in this litigation. As with the City Defendants, the Caldero Intervenors and Movants currently seek the same resolution – the enforcement of the Agreement as written. In spite of this shared objective, however, Movants and the Caldero Intervenors have divergent interests. None of the Caldero Intervenors suffered disparate impact discrimination from the challenged exams, but rather were included as Offerees under the Agreement to remedy the discrimination alleged in the United States' recruitment claim. *See* Caldero Intervenors' Compl. in Intervention ¶ 41. The Caldero Intervenors accordingly are not in a position to articulate, and presumably would not even have standing to assert, the argument that the race-conscious provisions of the Agreement are a constitutional remedy for the disparate impact of the challenged exams. *See, e.g.*, *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990) (holding that a party must have personally suffered a

direct injury that will be redressed by the requested relief). Because a showing of disparate impact from the challenged exams may be necessary to justify the race-conscious remedies that Movants received under the Agreement, the Caldero Intervenors cannot adequately represent Movants' interests. *See Butler, Fitzgerald & Potter*, 250 F.3d at 179-80 (explaining that the presumption of adequate representation when an existing party has the same ultimate objective as the proposed intervenor can be overcome by showing, inter alia, conflicting or divergent interests); *cf. Grutter*, 188 F.3d at 400 ("[I]t may be enough to show that the existing party who purports to seek the same outcome will not make all of the prospective intervenor's arguments." (quoting *Miller*, 103 F.3d at 1247) (internal quotation marks omitted)); *Chiles v. Thornburgh*, 865 F.2d 1197, 1214 (11th Cir. 1989) (allowing intervention on the ground that the existing party with similar interests may not make the same arguments as the intervenors).

D. Movants' Application For Intervention Is Timely

Finally, Movants' application for intervention is timely. The Second Circuit has explained the timeliness requirement as follows:

> Whether a motion to intervene is timely is determined within the sound discretion of the trial court from all the circumstances. . . . Among the circumstances generally considered are: (1) how long the applicant had notice of the interest before it made the motion to intervene; (2) prejudice to existing parties resulting from any delay; (3) prejudice to the applicant if the motion is denied; and (4) any unusual circumstances militating for or against a finding of timeliness.

United States v. Pitney Bowes, Inc., 25 F.3d 66, 70 (2d Cir. 1994) (internal citations omitted). Consideration of all the circumstances plainly shows that Movants' application is timely.

1. Movants Have Been On Notice For Only A Few Weeks That Their Interests In This Case Are Unrepresented

Although timeliness "certainly is not confined strictly to chronology," *id.*, the amount of time that Movants were on notice of their interest in the case is one element to be considered in the exercise of the court's discretion. Many of the Movants were of course generally aware of the litigation in the instant case after it was filed by the United States in 1996, and all had certainly become aware of their interest in the case once this Court approved the Agreement in 2000. However, the Agreement requires the parties to defend the Agreement against any legal challenge. *See* Agreement ¶ 9 ("If any provision of this Settlement Agreement is challenged, the United States and Defendants shall take all reasonable steps to defend fully the lawfulness of any such provision."). Movants thus reasonably expected the United States to fulfill this obligation and, in doing so, to continue to represent Movants' interest in the permanent appointments and seniority awarded by the Agreement. Although most of the Movants understood that the United States was not representing them individually, *see, e.g.*, Casado Decl. ¶ 13; they reasonably expected that the United States would continue to represent their interests by defending the remedies they received under the Agreement.

Movants have been on notice for only a matter of weeks that their interests in this action are, in fact, unrepresented. Eight of the nine Movants first became aware that the United States was not defending their retroactive seniority dates in late March 2004 when they were alerted to this change by the NAACP Legal Defense Fund, *see* Arroyo Decl. ¶ 16; Casado Decl. ¶ 14; Fernandez Decl. ¶ 15; Lopez Decl. ¶ 15; Maldonado Decl. ¶ 12; Martinez Decl. ¶ 14; Ortega de Green Decl. ¶ 14; Pantelides Decl. ¶ 14; while one Movant had heard rumors of the United States' change in position a month or so earlier, *see* LaFaye Decl. ¶ 12. It was not until Movants

became aware that the United States was no longer seeking to defend the Agreement in full that they knew or could have known that their interests were not being represented by the existing parties to the case.

Movants accordingly had notice of their unprotected stake in this lawsuit not from the time they became aware of the litigation, but rather from the time they learned that the United States was no longer defending in full the benefits they received under the Agreement – a mere six weeks (or in the case of Mr. LaFaye, approximately three months). *See United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 (1977) (holding that a motion to intervene was timely when made "as soon as it became clear to the respondent that the interests of the unnamed class members would no longer be represented by the named class representatives"); *accord Edwards v. City of Houston*, 78 F.3d 983, 1000 (5th Cir. 1996) ("The timeliness clock runs either from the time the applicant knew or should have known of his interest, or from the time he became aware that his interest would no longer be protected by the existing parties to the lawsuit." (internal citation omitted)); *Legal Aid Soc'y v. Dunlop*, 618 F.2d 48, 50 (9th Cir. 1980) ("The date on which the party seeking intervention became aware of the litigation is by itself not always relevant. In particular, the relevant circumstance here for determining timeliness is when the intervenor became aware that its interest would no longer be protected adequately by the parties . . . ." (internal citations omitted)); *cf. Werbungs Und Commerz Union Austalt v. Collectors' Guild, Ltd.*, 782 F. Supp. 870 (S.D.N.Y. 1991) (holding that a motion for intervention was timely even though it was filed almost two years after the movant became aware of its interest in the case, because the motion was made shortly after developments in the case made the movant's interest direct).

Nor could Movants reasonably be expected to have known of their unrepresented stake in this case any sooner. The United States never informed Movants that it had changed its position and would not fully defend their benefits under the Agreement, *see* Arroyo Decl. ¶¶ 15-16; even though the United States had decided by at least September 2, 2003 (the date it filed its Response to Contention Interrogatories) not to defend in full the remedies that Movants received under the Agreement. To the contrary, at least one of the Movants contacted counsel for the United States during the winter of 2004, and was told that the Agreement was not being changed. *See* Ortega de Green Decl. ¶ 13. Several other Movants asked counsel for the United States whether they should retain their own lawyers, and were told that they did not need to do so. *See* Casado Decl. ¶ 13; Martinez Decl. ¶ 13. It was not until Movants were informed of the United States' change in position, in late March 2004, that Movants knew or reasonably should have known that their interests were not being represented in this case.

2. The Existing Parties Are Not Prejudiced By The Minimal Delay Between Notice And The Instant Application For Intervention

The second factor that courts may consider in determining timeliness is whether the delay between notice and filing for intervention causes any prejudice to the existing parties. *Pitney Bowes*, 25 F.3d at 70. "It is firmly established that the most significant criterion in determining timeliness is whether the delay in moving for intervention has prejudiced any of the existing parties." *United States v. Int'l Bus. Machs. Corp.*, 62 F.R.D. 530, 541-42 (S.D.N.Y. 1974); *see also* 7C Wright, Miller & Kane § 1916 & n.12. The existing parties to this lawsuit are not prejudiced by the very brief delay between the time Movants learned that the United States was no longer defending their interests and the filing of this motion to intervene.

Movants' entry into this case would not hinder or delay the process of litigation. Discovery in this action is still open, and has been effectively stayed pending the current mediation process. *See Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1250-51 (10th Cir. 2001) (rejecting the plaintiff's argument that intervention would delay a case otherwise ready for disposition, and holding instead that there was no prejudice because discovery had not closed, no scheduling order had been issued, no cut-off date for motions had been set, and no trial date had been set); *Cummings v. United States*, 704 F.2d 437, 440-41 (9th Cir. 1983) (holding that the existing parties were not prejudiced by any delay in the intervenor's motion to intervene, even though the cut-off date for interrogatories had passed and the closing date for discovery was near, because there was no showing that the process of litigation would be delayed or that the parties would be prejudiced thereby). Although Movants do not expect to conduct extensive discovery if this motion to intervene is granted, the inconvenience to the existing parties that may accompany limited additional discovery cannot be said to cause undue or prejudicial delay. *See John Doe #1 v. Glickman*, 256 F.3d 371, 378 (5th Cir. 2001) ("[C]ourts should ignore the likelihood that intervention may interfere with orderly judicial processes. 'Prejudice must be measured by the delay in seeking intervention, not the inconvenience to the existing parties of allowing the intervener to participate in the litigation.'" (quoting *Sierra Club v. Espy*, 18 F.3d 1202, 1206 (5th Cir. 1994)) (internal citations omitted)); *see also Cummings*, 704 F.2d at 441.

Moreover, Movants' intervention would not delay the mediation process currently underway. The parties agreed to mediation in December 2003 and a mediator was appointed in January 2004. Only one mediation session has taken place to date, in March 2004, and Movants understand that the focus of discussion at that mediation session was whether and how to proceed

with mediation in the absence of any representative defending Movants' otherwise unrepresented interests. Movants' entrance into the case would thus not prejudice the existing parties by unduly delaying the litigation or mediation process.

Nor would Movants' intervention prejudice the existing parties by undermining extensive or completed settlement negotiations; to the contrary, Movants seek to intervene solely to *defend* the product of the extensive negotiations between the United States and the City Defendants. *Cf. Pitney Bowes*, 25 F.3d at 72 (affirming the district court's denial of intervention in part on the ground that intervention would require the parties "to begin negotiations again from scratch," and that "jeopardizing a settlement agreement causes prejudice to the existing parties to a lawsuit").

In addition, Movants do not seek to relitigate issues that have already been decided, *cf. United States v. Yonkers Bd. of Educ.*, 801 F.2d 593, 596 (2d Cir. 1986) (denying intervention in part because the movants sought to "relitigate issues which have already been decided after lengthy proceedings"); nor do they seek to alter the scope of issues being litigated or inject new issues into the lawsuit, *cf. United States v. Tennessee*, 260 F.3d 587, 594 (6th Cir. 2001) (holding that the movant's delay in seeking intervention prejudiced the existing parties because the movant's late entry into the case could force the parties into collateral litigation); *Carey v. Klutznick*, 88 F.R.D. 249, 250 (S.D.N.Y. 1980) (denying intervention where the movant sought to introduce new issues after extensive discovery and immediately before trial on the merits).

3. Movants Face Significant Prejudice If They Are Unable To Intervene

While the existing parties would not be prejudiced if Movants' application for intervention is granted, Movants would suffer substantial prejudice if their motion to intervene is denied. The Brennan Intervenors assert both constitutional and statutory objections to the

Agreement's grant of permanent positions and retroactive seniority. Absent intervention in this litigation to enable Movants to defend the legality of all provisions of the Agreement as a remedy for disparate impact in the challenged exams, no party can be expected to articulate a full defense of the Agreement on this basis. The United States has made clear through its actions that it will not defend the legality of all provisions of the Agreement. The City Defendants have so far undertaken to defend the legality of the Agreement, but as noted above, it is no stretch to suggest that Movants would be prejudiced by entrusting the vigorous defense of their settlement benefits to the very party alleged to have discriminated against them in the first place. Nor is the risk of prejudice to Movants mitigated by the involvement of the Caldero Intervenors in this lawsuit, as the Caldero Intervenors cannot argue the Agreement is a constitutional remedy for the disparate impact that resulted from the challenged exams. Prejudice to Movants if they cannot intervene is thus clear.

4. Unusual Circumstances Militate For A Finding Of Timeliness

Finally, "unusual circumstances militat[e] for . . . a finding of timeliness" with regard to Movants' application for intervention. *Pitney Bowes*, 25 F.3d at 70. As mentioned above, Movants have been aware of this litigation at least since this Court approved the Agreement in 2000. When, however, the United States responded to the Brennan Intervenors' challenge to the Agreement by deciding not to defend the Agreement in full, the United States failed even to notify Movants that they were at risk of losing the remedy that the United States had originally secured for them. *See, e.g.*, Arroyo Decl. ¶¶ 15-16; Casado Decl. ¶¶ 13-14; Ortega de Green Decl. ¶¶ 13-14. The United States' change in position, and its accompanying failure to inform

Movants that their interests were no longer effectively represented, should be considered an unusual circumstance that militates in favor of a finding of timeliness.

Movants have submitted this application for intervention promptly upon learning that their interests were not being represented in this case. Absent prejudice to the existing parties, and in light of both the substantial prejudice that Movants would suffer and the unusual circumstances surrounding the United States' unannounced change in position, Movants' application for intervention should be considered timely.

Because Movants have met all of the requirements for intervention of right, Movants respectfully request that this Court grant their application for intervention as of right.

II. In The Alternative, Permissive Intervention Under Rule 24(b)(2) Is Appropriate

Permissive intervention is governed by Rule 24(b)(2) of the Federal Rules of Civil Procedure, which provides in relevant part: "Upon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b)(2). This Court has broad discretion to grant permissive intervention, and in exercising its discretion is to consider "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Id.*; *Pitney Bowes*, 25 F.3d at 73.

The standard for permissive intervention is more flexible than the standard for intervention as of right. Movants do not need to show an interest in the action, but rather need only show a question of law or fact in common with the action. Fed. R. Civ. P. 24(b)(2); *see also* 7C Wright, Miller & Kane § 1911. In addition, while adequacy of representation may be considered as one factor in the court's discretion, permissive intervention may be allowed even

for parties who are adequately represented. *See Arizona v. California*, 460 U.S. 605, 614-15 (1983); *Miller v. Silbermann*, 832 F. Supp. 663, 673-75 (S.D.N.Y. 1993) (denying the intervenors' motion for intervention as of right on the ground that the intervenors' interests were adequately represented by existing parties to the suit, but granting the intervenors' motion for permissive intervention); *see also Citizens for an Orderly Energy Policy v. County of Suffolk*, 101 F.R.D. 497, 502 (E.D.N.Y. 1984) (noting that adequacy of representation may be considered in the district court's discretionary review of an intervenor's motion for permissive intervention, but that "adequacy of representation . . . is 'a minor factor at most'" (quoting *United States v. Columbia Pictures Indus., Inc.*, 88 F.R.D. 186, 189 (S.D.N.Y. 1980))).

For the reasons described above, Movants' application for permissive intervention is timely. In addition, Movants' claims have questions of law and fact in common with the main action. Movants seek intervention to defend the legality and constitutionality of the remedies they received under the Agreement. *See* Movants' Compl. in Intervention ¶¶ 41-44. This legal question directly addresses the Brennan Intervenors' argument that race-conscious remedies in a Title VII settlement agreement can be based only on a finding of egregious disparate treatment. *See* Pl. Mem. Supp. Prelim. Inj. at 14-16. Moreover, the facts on which Movants' claims are based are identical to the facts present in the instant litigation, and include Movants' employment histories and the extent of disparate impact of the challenged exams. Movants' claims suffice to present questions of law and fact common to the original action. *See EEOC v. Int'l Ass'n of Bridge, Structural & Ornamental Ironworkers*, 139 F. Supp. 2d 512, 519 (S.D.N.Y. 2001). Finally, as described above, Movants' intervention would not unduly delay or prejudice the adjudication of the rights of the original parties.

An additional discretionary factor that courts may consider in deciding on a motion for permissive intervention is "whether the intervener's participation will contribute to the just and equitable adjudication of the issues." *Citizens for an Orderly Energy Policy*, 101 F.R.D. at 502 (citing *United States Postal Serv. v. Brennan*, 579 F.2d 188, 191-92 (2d Cir. 1978)). Movants are uniquely positioned to present to this Court the extent of their reliance on the remedies they received under the Agreement, as well as the potential harm they would suffer should the Agreement be altered or held to be illegal. Movants are also uniquely positioned to present the legal argument that the Agreement is a constitutional remedy for the prior disparate impact discrimination of the challenged exams, and that the specific benefits granted by the Agreement are narrowly tailored to redress that discrimination.

For these reasons, the district court should exercise its discretion to grant Movants' application for permissive intervention.

CONCLUSION

Movants meet all of the requirements for intervention as of right pursuant to Rule 24(a)(2), and Movants respectfully request that this Court grant their motion. In the alternative, Movants respectfully request that this Court grant their motion for permissive intervention pursuant to Rule 24(b)(2).

Dated: _____.

Respectfully submitted,

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