08-5171-cv

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

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee-Cross-Appellant,

and

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

Intervenors-Appellees-Cross-Appellants,

and

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

Intervenors-Appellees

-against-

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

Intervenors-Appellants-Cross-Appellees,

and

NEW YORK CITY DEPARTMENT OF EDUCATION,
CITY OF NEW YORK, MARTHA K. HIRST, Commissioner, New York City Department of City Administrative Services, NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE
SERVICES,
Defendants-Appellees,
Appeal No. 08-5149-cv (con)

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

Plaintiffs-Appellants,

v.

ATTORNEY GENERAL OF THE UNITED STATES, ASSISTANT ATTORNEY GENERAL OF THE UNITED STATES FOR CIVIL RIGHTS, U.S. DEPARTMENT OF JUSTICE, NEW YORK CITY DEPARTMENT OF EDUCATION, CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES, MARTHA K. HIRST,

Commissioner, New York City Department of City Administrative Services,
Defendants-Appellees,

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

Intervenors-Appellees

and

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

Appeal No. 08-4639-cv (con)

RUBEN MIRANDA,
Plaintiff-Appellant
v.
NEW YORK CITY DEPARTMENT OF EDUCATION,
Defendant-Appellee

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

BRIEF OF INTERVENORS-APPELLEES-CROSS-APPELLANTS JANET CALDERO, ET AL.

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Preliminary Statement

Judge Frederic Block rendered the judgment below. *See United States v. N.Y.C. Bd. of Educ.*, 448 F. Supp. 2d 397 (E.D.N.Y. 2006), 487 F. Supp. 2d 220 (E.D.N.Y. 2007), 556 F. Supp. 2d 202 (E.D.N.Y. 2008).

Jurisdictional Statement

The Caldero Intervenors incorporate by reference the Arroyo Intervenors' Jurisdictional Statement. The Caldero Intervenors filed a timely notice of cross-appeal in these consolidated cases on November 3, 2008.

Statement of Issues Presented for Review

1. Did the district court properly hold that awards of permanent appointment and retroactive seniority to female and minority beneficiaries constituted affirmative action remedying a manifest imbalance in a traditionally segregated workplace that did not unnecessarily trammel the rights of others?
2. Did the district court properly hold that the awards of permanent appointment and retroactive seniority to female beneficiaries constituted gender-conscious relief substantially related to an important state interest in remedying past gender discrimination?

3. Did the district court err in finding that evidence of City Defendants' recruitment discrimination did not provide the necessary basis for narrowly-tailored, race-conscious relief?
4. Did the district court err in concluding that awards to only a subset of African-American and Hispanic beneficiaries were narrowly tailored race-conscious relief intended to remedy the effects of City Defendants' hiring discrimination?
5. Do the Brennan Intervenors have standing to challenge the permanent appointments of the beneficiaries?
6. If any permanent appointment awarded by the agreement is found improper, does an appropriate remedy include stripping the beneficiary appointed of all seniority actually earned on the job and the ability to earn seniority in the future?
7. Did the district court abuse its discretion in certifying a class?

Statement of the Case

These consolidated appeals address the lawfulness of permanent appointment and competitive seniority benefits provided under a settlement agreement intended to resolve a Title VII lawsuit by the United States against the New York City Board of Education and other City Defendants alleging race and

sex discrimination in recruitment and race discrimination in hiring for school custodian positions. (JA 77-85, JA 103-174.) (Unless otherwise indicated, "Doc." refers to the docket of Case No. 96-0374 (E.D.N.Y.).)

The Caldero Intervenors incorporate by reference the Arroyo Intervenors' Statement of the Case setting out the history of this matter prior to summary judgment.

After cross-motions for summary judgment, the district court assessed the lawfulness of the challenged provisions of the agreement in light of the Brennan Intervenors' Title VII and Constitutional claims. Pertinent to the Caldero Intervenors' awards, the court held:

- The permanent appointments received by the female Caldero Intervenors were lawful under Title VII and the Fourteenth Amendment. The retroactive seniority received by the female Caldero Intervenors was lawful under Title VII and the Fourteenth Amendment to the extent that it affected eligibility for school transfers and temporary care assignments, but reliance on such seniority in the event of layoffs would violate Title VII.
- Both the awards of retroactive seniority and the calculation of earned seniority by reference to actual appointment date for the male Caldero Intervenors violate the Fourteenth Amendment when utilized for any competitive purpose.

The district court's final judgment was issued on August 22, 2008. (SPA 147-150.) This appeal followed.

Statement of Facts

Custodians and custodian engineers employed by the New York City Board of Education[1] oversee the maintenance, upkeep, and physical operation of each public school. The positions enjoy civil service protections, as well as significant autonomy and authority. Custodians and custodian engineers[2] hire and employ their own, sometimes sizeable, staff of cleaners, handypersons, and "firemen," or boiler operators. They manage their own budgets, with limited oversight by the Board. (JA 4350-4351 (Lonergan Decl. ¶ 3); JA 224 (Lonergan Decl. ¶ 26); JA 1267-1271 (Lonergan 2004 Dep.) & JA 810-822 (Ex. 5 thereto).)

Provisional custodians and custodian engineers perform the same work as permanent custodians and custodian engineers. Provisionals, however, lack civil service protections. Unlike permanent custodians and custodian engineers, provisionals can be fired at any time. They do not accrue seniority on the job and are not eligible to bid for transfers to different schools. Instead, they are placed

[1] The Board of Education has since been replaced by the Department of Education, but this brief uses the prior title, as is the practice in this case.
[2] The positions are today called Custodian Engineer Level I and Custodian Engineer Level II, but this brief uses the terms "custodian" and "custodian engineer," as is the practice in this case.

and moved at the discretion of the Board of Education. They also are not eligible for temporary care assignments (TCAs), in which a custodian or custodian engineer temporarily takes responsibility for overseeing a second school building and collects an increased salary for this extra duty. (JA 3545 (Cappoli Dep. at 50-51); JA 220, 222, 224 (Lonergan Decl. ¶¶ 6, 15-17, 24.)

In the early 1990s, when the United States Department of Justice began its investigation of possible discrimination in the recruitment and hiring of permanent custodians and custodian engineers in New York City public schools, the custodian workforce was overwhelmingly white and almost exclusively male. A 1993 demographic survey of custodians and custodian engineers employed in New York City public schools indicated that among the permanent workforce, more than 99 percent were men, and 92 percent were white. While African-Americans made up 20.1 percent of the qualified labor pool for these positions, and Hispanics made up 18.9 percent, they made up 3.9 percent and 3.2 percent respectively of the custodian workforce. Women were calculated to make up 8.4 percent of the qualified labor pool, but made up less than one percent of the workforce. (JA 1780-1794 (1993 Ethnic Survey); JA 1920 (Defs. Resp. to Requests for Admission); JA 2812 (Jacobsen Decl., Ex. 1 Table 4).) In 1996, when Defendants performed another demographic survey, the story was much the same. (JA 1759-1778 (1996 Ethnic Survey); JA 1920 (Defs.' Resp. to Requests for Admission).)

Permanent Hiring Methods

Individuals obtain jobs as permanent custodians and custodian engineers by passing a civil service examination and submitting an "experience paper" to the Department of Personnel that is reviewed to determine whether the applicant has the necessary qualifications for the job.[3] (JA 3175, 3182-3183 (Wachter Dep.); JA3203, JA3212 (Paul Dep.).) Exam 5040 was given in 1985 for the position of custodian. Exam 8206 was given in 1989 for the custodian engineer title. In 1993, Exam 1074 was given for the custodian position. (JA 1924-1926 (Defs. Resp. to Requests for Admission).) These exams were the subject of the United States' testing discrimination claims.

White test-takers passed Exams 5040, 8206, and 1074 at far higher rates than African-American and Hispanic test-takers. Moreover, statistical analysis demonstrated that these disparities were very unlikely to be the result of chance. (JA 3096-3100, 3105-3109 (Defs.' Resp. to Expert Req. for Admission).) Successful applicants were placed on the eligibility list in rank order based on their scores and any adjustments required by civil service law. The eligibility list for each of the challenged exams was set aside before the candidates on that list were exhausted. (JA 1914-1917 (Defs.' Resp. to Requests for Admission).) Because whites' scores tended to be higher, whites passing the exams were more likely to

[3] The New York City Department of Personnel is today known as the Department of Citywide Administrative Services.

actually be appointed from the eligibility list than African-Americans or Hispanics. (*See* JA 2168-2225 (Siskin & Cupingood Rep.).)

Provisional Hiring Methods

After the civil service eligibility list for Exam 5040 expired in 1990, Defendants began to hire provisional custodians to meet their workforce needs. They continued to do so until December 1996, when the eligibility list for Exam 1074 was established. When the eligibility list for Exam 8206 expired in 1994, they hired provisional custodian engineers. (JA 859-860 (Defs. Resp to Second Interrogs., Resp. 3, 5); JA 3543 (Cappoli Dep.); JA 95-101 (Stip. re. Provisional Hires).) The qualifications required for the provisional jobs are the same as for permanent jobs. However, rather than taking a civil service examination and submitting an experience paper that is reviewed for qualifications by the Department of Personnel, applicants for provisional positions submitted a resume to the Board of Education, which determined whether candidates had the necessary qualifications and made hiring decisions. (JA 3545-3546 (Cappoli Dep.); JA 220-221 (Lonergan Decl. ¶¶ 4-10).)

Recruitment Methods for the Challenged Exams

Defendants did not advertise Exams 5040, 8206, or 1074 in newspapers of general readership, or in ethnic newspapers or publications, or in newspapers or

publications aimed at a female or minority audience. (JA 3509-3510, 3514 (Morris Dep.); JA 3566-3567 (Defs.' Resp. to Interrogs.), JA 3589-90 (Seluga Dep.).) They did not post the notices of these examinations in public schools, where they would likely be seen by the firepersons, handypersons, and cleaners employed by custodians and custodian engineers, nor did they otherwise distribute notices to these custodial employees. (JA 3499-3503 (Rosenfeld Dep.).) They did not attend job fairs or do outreach to unions, colleges with engineering programs, or other organizations where qualified custodian or custodian engineer candidates might be expected to be found, though they undertook such efforts for other, entry-level civil service jobs. (JA 3522 (Morris Decl.).) They did not engage in any activities to encourage or assist potential candidates in becoming qualified for their position, preparing for the civil service examinations, or otherwise bettering their application chances, other than informal word-of-mouth encouragement. (JA 3523-3534 (Cote Letter 11/10/04); JA 3540-3541 (Cappoli Dep. at 12-14); JA 3584-3585 (Cote Letter 11/19/04).)

Instead, the notice of an upcoming examination was posted in four Board of Education administrative offices, at least as to Exam 1074. (JA 3499-3503 (Rosenfeld Dep.).) The Chief, a local civil service newspaper, listed each of the exams among other upcoming exams for city positions. These lists set out only the job title and salary range for each position, providing no further description of the

job or the qualifications required. (JA 940-967 (Chief Excerpts); JA 1004-1005 (Cote Letter 9/27/04).) Organizations such as public libraries, community agencies, and community colleges that had affirmatively asked to receive information regarding civil service opportunities received booklets of announcements for all upcoming examinations, including custodian and custodian engineer examinations. (JA 3507-3508 (Morris Dep.); JA 3517-3518 (Boswell Dep.).) Collective bargaining agreements in force between Defendants and Local 891, the union representing custodians and custodian engineers, required the union and Defendants to work together to establish a training program that would provide ethnic minority groups with opportunities to prepare for custodian and custodian engineer exams. Defendants, however, never implemented these provisions. (JA 3548-3549 (Cappolli Dep. at 86-87, 89, 91-92); JA 3551-3555 (Ex. 3 thereto); JA 3556-3559 (Ex. 4); JA 3560-3562 (Ex. 5); JA3593-3594 (Lonergan Dep.); JA 3604-3620 (Ex. 4 thereto); JA 3623 (Rothman Dep.).) Other than the internal posting described above, the only effort Defendants made to specifically identify and target potential applicants with the relevant qualifications was to informally encourage their employees to advertise the relevant exams by word-of-mouth. (JA 3524-3534 (Cote Letter 11/10/04); JA 3540-3541 (Cappolli Dep. at 12-14); JA 3584-3585 (Cote Letter 11/19/04).) This word-of-mouth recruitment was a primary method by which candidates learned how to become custodians. (JA 3627

(McGraw Dep. at 85); JA 3633-3634 (Kachadourian Dep.); JA 3640 (Tatum Dep. at 50-51); JA 3647 (Fernandez Dep. at 58-59); JA 3651-3652 (Smith Dep. at 36-41); JA 3660 (Mortensen Dep.at 198-99).)

Applicant Pools for the Challenged Exams

The numbers of women, African-Americans, Hispanics, and Asians who applied for Exams 5040, 8206, and 1074 were in every instance significantly lower than one would expect based on the representation of these groups in the qualified workforce, as the analysis of the United States' expert, Dr. Orley Ashenfelter, demonstrated. (JA 553-554 (Ashenfelter Decl. ¶ 23).) Dr. Ashenfelter compared the actual number of qualified female and minority applicants for each of the three exams with the number that would be expected based on the representation of women and minorities in the available labor pool. (JA 553-554 (*id.* ¶¶ 22-23).)

Acknowledging that these positions required specific qualifications, Dr. Ashenfelter controlled for the possibility that lack of qualification was the reason for low numbers of applications from women and minorities and defined the available labor pool as those individuals able and willing to perform the job in question. (JA 547-548 (*id.* ¶ 4).) To determine the demographics of those individuals in the metropolitan area qualified for the job of custodian or custodian engineer, Dr. Ashenfelter necessarily relied upon a somewhat indirect method of measurement, as no data source exists detailing the particular educational history,

job history, and employment aspirations of all individuals in the local workforce. (JA 2735-2736 (Ashenfelter Reply).)

The richest data available to a researcher attempting to determine the demographics of a particular labor pool are typically Census data. (JA 2738 (*id.*); JA 2801 (Jacobsen Decl., Ex. 1); JA 1951 (Henderson Rep.).) These data, which reveal the demographics of workers in various occupations, allow a researcher to make conclusions about the demographics of the potential applicant pool with the relevant experience for a position. (JA 550 (Ashenfelter Decl. ¶ 10).) In this case, actual qualified applicants for each relevant exam were categorized according to the occupational group in which each was employed at the time of his or her application. The distribution of qualified *actual* applicants across occupational groups created a model that was used to construct the pool of qualified *potential* applicants: if a large percentage of *actual* applicants came from a particular occupational category, the assumption was made that a large percentage of *potential* applicants would come from that occupational category too. (JA 551-553 (Ashenfelter Decl. ¶¶ 13, 15, 18).) The analysis did not assume that every individual within a particular occupational group was equally able and willing to take a job as custodian or custodian engineer. Rather, it assumed that the demographics of those who were able and willing reflected the demographics of the overall occupational group: if 8 percent of the "Manager and Professional"

occupational group was Hispanic, the analysis assumed that Hispanics would also make up 8 percent of the smaller subgroup within the "Manager and Professional" category able and willing to perform the custodian job. (*Id.*; JA 1953 (Henderson Rep.).)

Indeed, Dr. Ashenfelter's analysis in this case tended to *understate* the representation of women and minorities in the qualified potential applicant pool and thus the disparities between expected and actual female and minority applicants. For instance, in constructing the potential applicant pool, he weighted lightly occupations from which many of the actual female and minority applicants originated, so as to reflect accurately the occupational distribution of the entire actual applicant pool. Thus, he did not weight the data to account for the possibility that occupations in which women and minorities are better represented, but from which few exam applicants actually originated, in fact had a deeper pool of qualified candidates that simply were not tapped through the methods of recruitment relied on for those examinations. (JA 2798-2799 (Jacobsen Decl., Ex. 1).) In addition, while the percentage of women and minorities in the overall labor force and in most occupational groups rose through the eighties and nineties, Dr. Ashenfelter's analysis tended to downplay this trend, thus making it less likely that he would find an underrepresentation of women and minorities in the actual applicant pool. (JA 2807 (*id.*).)

Nevertheless, Dr. Ashenfelter found gross disparities between the actual and expected number of female and minority applicants for each exam. In every instance the difference between the actual and expected number of applicants was statistically significant—equal to at least two standard deviations—and thus unlikely to be the result of chance.[4] (JA 553-554 (Ashenfelter Decl. ¶¶ 21, 23).)

For Exam 5040, the difference ranged from more than four to more than twelve standard deviations. There were more than four standard deviations between the actual and expected number of qualified Asian applicants, meaning that it was 99.9991804 percent likely that the disparity was not the result of chance. The significance of the disparities for qualified African-American, Hispanic, and female candidates was even greater. Respectively, there was a more than 99.9999999 percent likelihood, a 99.9999980 percent likelihood, and a more than 99.9999999 percent likelihood that these disparities were not the result of chance. (JA 561 (*id.* at Table 6); JA 2790-2792 (Jacobsen Decl. ¶¶ 7, 9).)

For Exam 8206, the differences ranged from more than two to more than six standard deviations. There was a 99.4394371 percent chance that the disparity between the actual and expected number of qualified Asian applicants for this

[4] "Standard deviation analysis measures the probability that a result is a random deviation of a predicted result—the more standard deviations, the lower the probability the result is a random one." *Waisome v. Port Auth. of N.Y. & N.J.*, 948 F.2d 1370 (2d Cir. 1991) (internal citations omitted). A disparity of two standard deviations is about 95 percent likely not to be the result of chance.

exam was not the result of chance. The significance of the disparities for qualified African-American, Hispanic, and female candidates was even greater. Respectively, there was a 99.9999983 percent likelihood, a 99.9936658 percent likelihood, and a 99.9999912 percent likelihood that these disparities were not the result of chance. (JA 546-563 (Ashenfelter Decl.); JA 2790-2792 (Jacobsen Decl. ¶¶ 7, 9).)

For Exam 1074, the difference ranged from more than five to more than ten standard deviations. There was a 99.9999968 percent chance that the disparity between the actual and expected number of qualified Asian applicants for this exam was not the result of chance. The significance of the disparities for qualified African-American, Hispanic, and female candidates was even greater. Respectively, there was a more than 99.9999999 percent likelihood, a 99.9999998 percent likelihood, and a more than 99.9999999 percent likelihood that these disparities were not the result of chance. (JA 563 (Ashenfelter Decl. Table 8); JA2790-2792 (Jacobsen Decl. ¶¶ 7, 9).)

Recruitment and Applicant Pool for Exam 7004

In 1997, Exam 7004 was offered for both the custodian and custodian engineer positions. Defendants undertook some additional recruitment efforts for this exam. Defendants sponsored a training program for Exam 7004, which it encouraged incumbent custodians and custodian engineers to publicize to their

staff. In addition, Defendants advertised this training program in various newspapers, including the New York Times, the New York Daily News, the Chinese Journal, and the Amsterdam News, in an attempt to reach potential qualified candidates outside the school system. These advertisements noted that the training program was being offered specifically to encourage women, minorities, and other qualified individuals to apply for the exam. Finally, Defendants instructed the current provisional custodian and custodian engineer workforce, which included several recently hired women and minorities, to take the exam and provided them with the opportunity to receive exam preparation. (JA 2775-2776 (Caldero 56.1 Statement ¶¶ 74-75, 77).[5])

Following these recruitment efforts, the disparity between the actual and expected number of qualified Hispanic applicants for Exam 7004 shrunk to a statistically insignificant difference. Similarly, the disparity between the actual and expected number of all Asian applicants (including both qualified and unqualified applicants) shrunk to a statistically insignificant difference. Disparities persisted, however, between the actual and expected number of qualified African-American and female applicants for Exam 7004. (JA 2801-2802 (Jacobsen Decl., Ex. 1).)

[5] The Caldero Rule 56.1 Statement is cited only when the relevant paragraph was not disputed. (*See* JA 3445-3465 (Brennan Resp. to Caldero Rule 56.1 Statement).)

Provisional Custodian Recruitment and Applicant Pool

When Defendants began to hire provisional candidates in the early 1990s upon the expiration of the Exam 5040 eligibility list, the United States had begun its investigation of Defendants' hiring and recruitment practices. One of Defendants' goals was thus to increase the representation of women and minorities in the custodian workforce. Defendants advertised for the provisional positions in several newspapers, including newspapers with a large ethnic or minority audience. They encouraged word-of-mouth recruiting for the position targeted at the custodians' own staffs, a relatively demographically diverse group, by sending a circular to all incumbent custodians and custodian engineers suggesting they tell their employees about the provisional custodian positions and by making the same suggestion to the unions that represented custodians' employees. The word-of-mouth recruiting for the provisional positions was unique, however, in that it communicated Defendants' particular interest in hiring women and minorities. (JA 2773-2774 (Caldero 56.1 Statement ¶¶ 65-68).)

Defendants retained few records regarding their provisional hiring. (JA 2774 (*id.* ¶ 69).) They did, however, produce records indicating the race and gender of candidates interviewed for provisional custodian and custodian engineer positions between March 1995 and March 1996. Of the 219 interviews reflected

on these sheets, 193 indicated a male applicant and 24 indicated a female applicant, while two did not indicate gender. If the two with no gender indicated were men, women made up 11 percent of the interviewed applicants during this time period. In addition, 17.4 percent of those interviewed were African-American, 12.3 percent were Hispanic, and 4.1 percent were Asian. If those interviewed were demographically representative of those who applied, Defendants attracted a more diverse applicant pool through newspaper advertising and word-of-mouth recruiting specifically targeting female and minority applicants than through the recruitment strategies relied on for the exams. Compared to the actual applicant pool for the 7004 custodian and custodian engineer exam, a higher percentage of provisional interviewees were female, and that increase was statistically significant. The percentage of African-American and Asian provisional interviewees was also higher than the representation of these groups in the applicant pool for Exam 7004, though this difference was not statistically significant, and thus may have been the result of chance. (JA 2803-2804 (Jacobsen Decl., Ex. 1.); JA 2165-2166 (Leggot Declaration, Ex. 23).)

Exam 7004 is used as a comparator because that exam was taken by applicants seeking both custodian and custodian engineer positions, just as the provisional applicant flow data from 1995 to 1996 reflected candidates seeking both positions. However, as described above, because the Defendants also

conducted additional minority recruitment efforts for Exam 7004, the comparison to Exam 7004 presumably understates the success of the outreach to these groups through the provisional custodian hiring process as compared to the recruiting methods used for Exams 5040, 8206, and 1074.

United States v. New York City Board of Education

In 1996, the United States initiated the present case, alleging that Defendants had engaged in a pattern and practice of discrimination against women, African-Americans, Hispanics, and Asians in recruiting and a pattern and practice of discrimination against African-Americans and Hispanics in hiring. (JA 77-85.) In 1999, after extensive discovery but before the United States moved for summary judgment, went to trial, or otherwise affirmatively put forward its theory and proof, the United States and Defendants entered into a settlement agreement. (JA 103-174.) The agreement required both parties to defend its provisions against any challenge. (JA 106-107 (Settlement ¶ 9).) It required Defendants to undertake specified recruitment efforts. (JA 110-114 (*id.* ¶¶ 18-24).) In addition, paragraph 13 of the agreement provided permanent employment status to those female, African-American, Hispanic, and Asian custodians and custodian engineers who had been recruited through the provisional hiring process and were successfully working in provisional positions. Paragraphs 14 through 16 provided retroactive seniority to these individuals, as well as to female and minority custodians and

custodian engineers who had previously been employed provisionally, but who had obtained permanent status pursuant to civil service exam prior to the entry of the agreement. A single system was used to calculate retroactive seniority for the universe of beneficiaries. With a few minor exceptions, any beneficiary who had taken Exam 5040, Exam 8206, or Exam 1074, regardless of his or her race or gender, received a seniority award retroactive either to the individual's provisional hire date or to the specified "median hire date" for the first such exam he or she had taken, whichever was earlier. For individuals who had not taken a challenged exam, seniority was retroactive to provisional hire date. (JA 107-110 (*id.* ¶¶ 13-16).)

The United States and Defendants moved for judicial approval of the settlement agreement, setting forth the substantial statistical evidence of discrimination upon which the agreement rested, including the analysis of Dr. Ashenfelter, described above. In moving for approval, Defendants explicitly stated, "The Agreement does not seek to identify potential victims of discrimination from among minority and female takers of the challenged examinations or from other sources for the purposes of granting relief." (JA 203 (Defs. Mem. in Supp. of Entry).) The United States and Defendants both described the agreement as providing race- and gender-conscious relief to remedy the effects of past discrimination. (*E.g.*, JA 480 (U.S. Mem. in Support of Entry)(setting out

standard of review "where, as here, a settlement agreement implements race-conscious remedies"); JA 484 (setting out court's duty to eliminate discriminatory effects of the past and prevent like discrimination in the future); JA 193 (Defs. Mem. in Support of Entry)(setting out standard of review "for the creation of a race-conscious remedy"); JA 195 (agreement consistent with goal of ensuring "equality of opportunity and the elimination of discriminatory barriers to professional employment").)

The district court, per Magistrate Judge Levy, heard objections to entry of the settlement agreement at a fairness hearing and on the basis of the above-described evidence, approved entry of the agreement as a consent decree. The court also denied the motion to intervene of a group including some of those individuals today known as the Brennan Intervenors. *See United States v. New York City Bd. of Educ.*, 85 F. Supp. 2d 130 (E.D.N.Y. 2000). Defendants implemented the agreement immediately thereafter. (JA 4351-4352 (Lonergan Decl. ¶ 7).)

The beneficiaries were offered permanent appointment and retroactive seniority in the spring of 2000. As consideration for these awards, beneficiaries were required to release any and all discrimination claims against Defendants. All but one did so, and thus 59 individuals received permanent status, retroactive seniority, or both. (JA 2782 (Caldero 56.1 Statement ¶¶ 104-106).)

In the nine years since these agreements were executed, the beneficiaries have made numerous decisions in reliance on the awards, such as turning down other offers of permanent employment and entering into financial commitments based on the expectation arising out of their seniority. (*E.g.*, JA 643, 667, 678 (Decls. in Supp. of Motion to Intervene); JA 3839, 3841, 3843 (Decl. in Support of Motion to Enforce, Ex. 5 at 46, Ex. 6 at 25, Ex. 7 at 28-29).) For instance, several of the Caldero Intervenors who received permanent status under the agreement later received offers of permanent appointment when they were called off the eligibility list from Exam 7004. Because they had already received permanent status, they declined these appointments. (*See, e.g.*, JA 3845, 3847 (Decl. in Support of Motion to Enforce, Ex. 9 at 63, Ex. 8 at 65).)

Effects of the Permanent Employment Awards

The awards of permanent employment began to diversify the custodian and custodian engineer workforce and remedy the effects of Defendants' prior discriminatory practices. Seventeen women received permanent status under the agreement, bringing women's representation in the permanent custodian workforce up to approximately 4 percent, half of what would be expected based on the percentage of female qualified potential applicants in the 1997 external labor pool. (JA 103-174 (Settlement); JA 3742-3750 (Defs. Resp. to Arroyo Interrogs.); JA3752 (EEO Data); JA 2810 (Jacobsen Decl., Ex. 1 at Table 2).) A total of

sixteen African-Americans received permanent status, bringing their representation in the permanent workforce up to approximately 5 percent, a quarter of what would be expected based on the percentage of African-American qualified potential applicants in the 1997 external labor pool. A total of sixteen Hispanics received permanent status under the agreement, which also brought their representation in the permanent custodian and custodian engineer workforce to approximately 5 percent, slightly less than a third of what would be expected based on the percentage of Hispanic qualified potential applicants in the 1997 external labor market. (*Id.*) The permanent appointments also rendered the beneficiaries eligible for TCAs and so increased their visibility by making it likely that they would work in multiple schools, overseeing multiple custodial staffs. (JA 4354-4355 (Lonergan Decl. ¶¶ 15-18).) No incumbent permanent custodians or custodian engineers lost their employment or school assignments to make room for the beneficiaries. (JA 2785 (Caldero 56.1 Statement ¶ 115).)

Effects of the Retroactive Seniority Awards

Transfers. The retroactive seniority awards are relevant primarily because of their potential impact on school transfers. The awards make the beneficiaries eligible to bid for larger schools. Larger schools provide custodians with higher salaries, as well as larger staffs and thus more supervisory and hiring authority. (JA 2783-2784 (*id.* ¶¶ 112, 114).)

For purposes of transfer applications, a custodian or custodian engineer is assigned to an experience band associated with schools of a certain square footage, based on the applicant's years of satisfactory ratings in his or her current title. (Thus, a custodian engineer's seniority does not include any years employed as a custodian.) If an individual does not receive a satisfactory rating in a given year, that year is not included in calculating experience. Custodians and custodian engineers are divided into separate experience bands. Custodian engineer bands are associated with larger schools than custodian bands at the same level of experience. (JA 4356-4358 (Lonergan Decl. ¶¶ 23-31); JA 3759 (Calderone Dep. at 133-134); JA 3763-3766 (CBA).)

The vast majority of available schools receive no bids or only one. (JA 4357 (Lonergan Decl. ¶ 28).) When multiple applicants within the same experience band bid for a school, the applicant with the higher performance rating will generally be awarded the transfer, even if this applicant has less seniority. If the candidates have equivalent ratings (within .25 of a point), seniority is used as a tie-breaker. (JA 4356-4358 (*id.* ¶¶ 23-31); JA 3759 (Calderone Dep. at 133-34).) Custodian engineers are *always* preferred over custodians in awarding transfers to schools over 76,000 square feet, even if the custodian has twenty years' seniority and the custodian engineer has one. (JA 3764 (CBA).) Also, a custodian without a

refrigeration license can *never* be awarded a school over 100,000 square feet, regardless of how much seniority he or she amasses. (JA 3764-3765 (CBA).)

Even when a bidder becomes a top candidate, before any transfer is recommended, the union and the Community Board must be given an opportunity to review the transfer and submit objections. (JA 3763 (CBA); JA 3759 (Calderone Dep. at 134-35); JA 3002 (Calderone Decl. at ¶¶ 3-5).) He or she may still be vetoed by the school's principal, regardless of ratings or seniority. (JA 4358 (Lonergan Decl. ¶ 31).)

Because there are today fewer than 59 beneficiaries in a system of over 1000 school buildings, there is no competition for most available schools, and multiple factors other than seniority determine whether a candidate will be successful in any particular bid, the effects of the retroactive seniority awards on transfers have been and will be limited. (JA 3658 (Mortensen Dep. at 117-119); JA 4355-4358 (Lonergan Decl. ¶¶ 21-34); JA 3772-3778 (Ahearn Dep. 150, 154-176); JA 3782-3803 (List of schools by square footage).)

TCAs. The record is contradictory as to whether the retroactive seniority awards had any effect on TCAs. One declaration indicates that the beneficiaries went to the bottom of the TCA lists and the retroactive seniority dates had no effect on this placement. (JA 591-592 (Lonergan Decl. ¶ 13).) Another states that the beneficiaries' retroactive seniority dates caused them to go to the top of their lists

right away. (JA 3819 (Calderone Decl. ¶ 9).) Even assuming the latter were true, at most the retroactive seniority "may have had a small and non-recurring effect" on the TCAs of those on the applicable lists at the time the beneficiaries were became permanent–a one-time delay of a few weeks in receiving a TCA. (*Id.*)

Layoffs. While the retroactive seniority awards could theoretically have affected the order of layoffs among custodians, no layoffs occurred. (JA 2785-2786 (Caldero 56.1 Statement ¶ 118).) The Caldero Intervenors do not appeal the district court's conclusion that reliance on the retroactive seniority awards should layoffs occur in future would unnecessarily trammel the rights of incumbent employees. Retroactive seniority for purposes of layoffs is not at issue here.

The Brennan Intervenors' Challenge

In 2001, this Court reversed the district court's denial of intervention by John Brennan, James Ahearn, and Kurt Brunkhorst and remanded. *See Brennan v. New York City Bd. of Educ.*, 260 F.3d 123, 133 (2d Cir. 2001). This Court considered the potential impact of the permanent appointments and the potential impact of the retroactive seniority awards separately in determining whether the three white male custodians had an interest sufficient to intervene. It explained that the awards of permanent status potentially affected the Brennan Intervenors' interests as provisional custodian engineers, because "[a]ccording permanent status as Custodian Engineer to an Offeree may result in the Offeree's displacing a

provisional Custodian Engineer." *Id.* at 127. Unbeknownst to this Court, however, the two Brennan Intervenors who remain in the case today—John Brennan and James Ahearn—had recently become permanent custodian engineers, thus mooting the interest described. (JA 593 (Lonergan Decl. ¶ 17).) After remand, Dennis Mortenson and Scott Spring were permitted to intervene; neither is a provisional employee and thus neither has the interest in avoiding displacement that this Court hypothesized. (JA 3657 (Mortensen Dep. at 92); JA 3662 (Ex. 3 thereto); JA 3807 (Spring Dep. at 60).)

This Court also held that the retroactive seniority awards affected the interests of the Brennan Intervenors because they "will have less seniority relative to Offerees moved above them and may therefore fail to obtain a desired transfer to a larger building." 260 F.3d at 127. Based on these interests, this Court remanded with orders that the Brennan Intervenors be accorded discovery and other rights with regard to their claim that the awards constituted impermissible discrimination against them. *Id.* at 133. This Court expressly declined to rule on the merits of the agreement, concluding that "such a course would be 'ill-advised.'" *Id.*

The United States' Change of Position

In 2002, the United States changed its position in this case almost overnight. After remand, the Brennan Intervenors moved for a preliminary injunction that would have stripped the beneficiaries of permanent employment and retroactive

seniority. (JA 4347-4348.) Without warning to Defendants, with whom, pursuant to its obligations under the agreement's terms, it had previously been jointly defending the agreement, the United States filed papers in response to this motion declining to defend the awards received by 32 of the 59 beneficiaries, including the individuals who became the Caldero Intervenors. (JA 577-580; *see also* JA 4387-4388 (Cote Letter 4/17/02) (describing conduct as "egregious").) Simultaneously, the United States removed the attorneys who (under a previous presidential administration) had negotiated the settlement, substituted new counsel, and created a firewall to prevent communications between old and new counsel. (JA 581-582, JA 583-584.) From 2002 forward, the United States attacked the legality of the agreement that it had previously sought, negotiated, and signed. (*E.g.*, JA 1110-1148 (Relief Chart).) This change in position occurred more than six months before any post-remand discovery and thus was not motivated by newly discovered facts. As the result of the United States' abandonment of their interests, the Caldero Intervenors intervened as plaintiffs seeking a declaratory judgment that the awards they had received were lawful and appropriate. (JA 633-634, JA 715-717.)

Shortly thereafter, the United States' new counsel specifically disavowed being able to shed light on previous counsel's intent regarding the settlement, stating "for the record," that "having not been counsel on the case at the time, none of us here can represent . . . from the United States' point of view, . . . the thinking

behind any selection process [for beneficiaries] that might or might not have happened." (JA 706 (Feb. 3, 2003 Hr'g Tr.).)

In 2003, in response to contention interrogatories, the United States crafted a relief chart reflecting its then-current theories as to the lawfulness of the awards. The chart categorized African-American and Hispanic individuals who had taken a challenged exam as "testing beneficiaries."[6] All other beneficiaries were categorized as "recruitment beneficiaries." (JA 1110-1148.) These terms appeared nowhere in the agreement or in the United States' or Defendants' arguments supporting entry of the agreement in 1999. (JA 103-174; JA 181-231; JA 471-53.)

The chart indicated that only those awards calibrated to make whole proven individual victims were lawful. Even as to these beneficiaries, the chart indicated that to be lawful, a seniority award must be based on a median exam date, and any awards based on provisional appointment dates were improper. (JA 1110-1148.) The United States thus further disavowed the premises of the agreement. The Arroyo Intervenors, a group of beneficiaries whose interests were compromised by this disavowal, intervened seeking declaratory relief in 2004. (JA 723-724; JA 781-782.)

[6] The exception to this rule was Caldero Intervenor Andrew Clement, an African-American who had taken Exam 1074, and whom the chart classified as a "recruitment beneficiary."

The Summary Judgment Motions and the District Court Opinions

The Brennan Intervenors moved for partial summary judgment in November 2004, followed in January 2005 by cross-motions for partial summary judgment by the Caldero and Arroyo Intervenors and a motion by Defendants for judicial approval of the challenged paragraphs of the agreement. The district court resolved these motions in the September 11, 2006 Order (SPA 1-91), followed by additional orders addressing motions for reconsideration and clarification, and two evidentiary hearings, one in November 2006 on the question of Exam 8206's disparate impact on Hispanics, and one in August 2007 on the question of the parties' intent in entering the settlement *vis a vis* categorizing beneficiaries. The district court entered additional orders on April 25, 2007 (SPA 97-125), May 30, 2008 (JA 4111-4214), and August 19, 2008 (JA 4215-4219). The Judgment in this case was entered on August 22, 2008 (SPA 147-148).

The September 11, 2006 Memorandum and Order

In deference to constitutional avoidance, the district court began its analysis by considering whether the agreement complied with Title VII. (SPA 42.) Because the agreement constitutes voluntary employer action, the district court correctly applied the standards articulated under *Johnson v. Transp. Agency*, 480 U.S. 616 (1987), and *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979), for evaluating an affirmative action plan under Title VII. Those cases hold that an

employer seeking to justify affirmative action need not point to its own discriminatory practices, or even to an "arguable violation" on its part; rather it need only identify a "conspicuous imbalance…in traditionally segregated job categories" and ensure the plan does not "unnecessarily trammel" the interests of others. 480 U.S. at 630, 638. The court also noted that the conspicuous imbalance standard is necessarily less than a prima facie case, and the statistical evidence need not establish a causal relationship between the disparity and the employer's practices. (SPA 44-45.)

Applying this standard, the district court found that with respect to all exams other than Exam 8206, the statistical evidence presented by the United States in 1999, when it initially sought approval of the agreement, not only met the manifest imbalance standard, but was sufficient to show a *prima facie* case of disparate impact on African-Americans and Hispanics. (SPA 47.) The court also found that Dr. Ashenfelter's analysis demonstrated a manifest imbalance in the recruitment of custodians and custodian engineers sufficient to justify affirmative action, noting that "the Brennan intervenors have not presented any evidence to countermand Dr. Ashenfelter's statistical analysis or his basis for arriving at his comparators." (SPA 50.)

The court concluded that affirmative action awards of retroactive seniority need not be limited to individuals who have been proven victims of an employer's past discrimination, stating,

> [T]here is nothing in Title VII that vitiates an affirmative-action plan granting preferential seniority to non-victims of discrimination; to hold otherwise would be anathema to the broad reach of *Weber* and *Johnson*, and the Supreme Court's explicit holding, subsequent to *Stotts*, in *Local No. 93, Int'l Assoc. of Firefighters v. City of Cleveland*, that "whatever the extent of the limits § 706(g) places on the power of the federal courts to compel employers and unions to take certain actions that the employers or unions oppose[,]" it "by itself does not restrict the ability of employers or unions to enter into voluntary agreements providing for race-conscious remedial action." 478 U.S. 501, 521 (1986)[.]

(SPA 54-55 (additional citations omitted).) The court then found the retroactive seniority awards did not "unnecessarily trammel" the rights of the Brennan Intervenors as applied to transfers and TCAs, as the Brennan Intervenors did not have an absolute entitlement to either, and the awards in no way functioned as an absolute bar to their advancement, operating as a one-time benefit to a limited universe of employees. (SPA 58-59.) The district court found, however, that reliance on retroactive seniority by non-victims of discrimination in the event of layoffs would place too heavy a burden on incumbent employees and would constitute unnecessary trammeling. (SPA 59-60.)

Having determined that the awards pass muster under Title VII so long as they are not relied on by non-victims in the event of layoffs, the district court

considered their propriety under the Equal Protection Clause. The court applied strict scrutiny to the race-conscious awards, determining that the requisite strong basis in evidence showed that the tests created by Defendants were discriminatory and that Defendants' effort to remedy this discrimination qualified as a "compelling government interest." Rejecting the Brennan Intervenors' argument, it held that a public employer's interest in remedying disparate impact discrimination was sufficiently compelling to justify race-conscious affirmative action, stating:

> To forbid public employers from voluntarily complying with their obligations under Title VII is effectively to require them to challenge those obligations as inconsistent with their duties under the Fourteenth Amendment; such a result is fundamentally inconsistent with the goal of encouraging voluntary compliance and would, as Justice O'Connor noted in another context, "produce the anomalous result that what private employers may voluntarily do to correct apparent violations of Title VII, public employers are constitutionally forbidden to do to correct their statutory and constitutional transgressions." *Wygant,* 476 U.S. at 291, 106 S.Ct. 1842 (O'Connor, J., concurring) (citation omitted).

(SPA 71-72.) However, as to the claim of recruiting discrimination, the district court found the evidence did not indicate Defendants had caused the shortfalls in female and minority applicants and thus held this evidence insufficient to support race-conscious affirmative action to remedy past recruitment discrimination. (SPA 66-67.)

The court then considered whether the race-conscious awards to non-victim African-Americans and Hispanics were narrowly tailored to remedy the effects of

testing discrimination, applying the factors set out in *United States v. Paradise*, 480 U.S. 149 (1987). Again with a narrow exception in the context of layoffs, the court found such awards to non-victims were indeed narrowly tailored to remedy the effects of testing discrimination. (SPA 72-77.) Nevertheless, the court held that the agreement's retroactive seniority awards to seven African-American men and four Hispanic men (a group that includes five Caldero Intervenors) could not survive strict scrutiny because "[a]ccording to the United States' relief chart" those awards were "based on the recruiting claim," rather than the testing claim.[7] (SPA 67.)

The district court next applied intermediate scrutiny in reviewing the constitutionality of the gender-conscious awards, asking whether the affirmative action "serve[d] important governmental objectives and . . . [was] substantially related to achievement of those objectives." (SPA 78.) The court found that remedying past discrimination is unquestionably an important governmental objective, and that "unlike strict scrutiny, intermediate scrutiny does not require any showing of governmental involvement…in the discrimination it seeks to remedy." (SPA 80.) Rather, "a showing of societal discrimination in the relevant economic sector" suffices. (*Id.*) The district court concluded that the six standard

[7] The relevant beneficiaries are Salih Chioke, Andrew Clement, Edwin Howell, Jerry Dale Lewis, Joseph Marcelin, Percival Punter, Bernard Rowell, Harry Santana, Carl Smith, Frank Valdez, and Gerardo Villegas.

deviations between the actual and expected number of female applicants for each of the challenged exams provided a strong evidentiary showing that "women have, to a significant extent, been shut out of permanent custodial positions." (*Id*.) Because the awards of retroactive seniority for purposes of transfers and TCAs were narrowly tailored to the goal of remedying past race discrimination, the district court found that they necessarily satisfied the less restrictive standard for gender discrimination. (SPA 81-82.)

Finally, the court concluded that the challenged paragraphs of the agreement could not be entered as a consent decree because the agreement had expired by its terms in 2004, and because of the agreement's effect on the Brennan Intervenors' contract rights. Although noting that no party other than the Brennan Intervenors had briefed the issue, it then certified a class "comprising all custodial employees whose layoff-protection rights have been adversely affected by the grant of seniority benefits to beneficiaries who are non-victims of discrimination," and concluded that an evidentiary hearing was necessary to determine whether Exam 8206 had a disparate impact on Hispanics and which beneficiaries were in fact actual victims of testing or recruitment discrimination. (SPA 82-88.)

The April 2007 Order, May 2008 Order, and Final Judgment

The April 2007 Order addressed several motions for reconsideration and clarification, as well as the district court's conclusions following an evidentiary

hearing regarding Exam 8206. The court concluded that Exam 8206 had a disparate impact on Hispanics. (SPA 116.) The court also granted the Brennan Intervenors' motion for reconsideration and redefined the class to include "all custodial employees whose seniority for purposes of transfers, TCAs and layoff protection has been adversely affected by the grant of seniority benefits to the Offerees." (SPA 124.)

Finally, the district court addressed the Caldero Intervenors' motion for reconsideration and clarification. The Caldero Intervenors had asked the court to reconsider its reliance on the United States' relief chart in concluding that a subset of African-American and Hispanic beneficaries' relief should be measured only against the recruiting claim. The Caldero Intervenors argued that the agreement made no distinction between "recruitment beneficiaries" and "testing beneficiaries," and that the court had rejected the underlying premise of the United States' relief chart when it rejected the proposition that the awards are only lawful to the extent they constitute make-whole relief to victims. The Caldero Intervenors further requested clarification from the district court regarding the legality of the permanent appointments. (JA 3953-3957.)

With respect to the motion for reconsideration, the court held that the settlement agreement was ambiguous as to whether it distinguished between testing beneficiaries and recruiting beneficiaries and ordered an evidentiary hearing

to address the United States' and Defendants' intent in entering the agreement regarding the classification of beneficiaries. (SPA 117.)

With respect to the motion for clarification, the court made the startling decision that the court's prior holdings should apply equally to both retroactive seniority *and* to all seniority actually earned on the job by beneficiaries in the years since receiving permanent appointment in 2000. This decision had the effect of stripping all seniority actually earned on the job, as well as the ability to earn seniority in future, from any individual whom the court might ultimately find to be a male "recruiting beneficiary"—a remedy neither requested by the Brennan Intervenors, nor anticipated by any of the parties to the litigation. (SPA 121-123.)

The court refused to hear evidence on whether any beneficiaries were victims of recruitment discrimination, contrary to its previous opinion. (SPA 120.)

An evidentiary hearing was held in August 2007 to address the parties' original intent regarding the classification of beneficiaries. The court heard testimony from Norma Cote, prior counsel for Defendants and an original negotiator of the settlement, and, over the Caldero Intervenors' objection, from Katherine Baldwin, a former second-level supervisor representing the United States who had no personal knowledge of the settlement negotiations or the selection of the beneficiaries. (JA 3997, 4019 (Aug. 20, 2007 Hr'g Tr.).)

Although Cote testified that the parties never "pigeonholed" the beneficiaries into one claim or another, and that "the Federal Government never made any distinction between…which legal theory applied to any individual beneficiary," in its May 2008 order the court nonetheless credited Baldwin's hypotheses about how the attorneys representing the United States would have likely approached the negotiation, and held that the parties did in fact intend to categorize the beneficiaries as testing or recruiting beneficiaries. Based on this conclusion, the court found that eleven black and Hispanic men should be considered "recruitment beneficiaries" and concluded that they were not entitled to retain their retroactive seniority or the seniority actually earned in more than eight years on the job for any purpose.[8] (SPA 135-136.)

Summary of Argument

As the district court found, a strong evidentiary basis supported the conclusion that the permanent custodian and custodian engineer workforce was overwhelmingly white in part because of Defendants' reliance on civil service exams that had a disparate impact on African-Americans and Hispanics. (SPA 72.) As set out *infra*, strong evidence also shows that Defendants' recruitment methods

[8] Because Andrew Clement received permanent appointment pursuant to examination, the court's holding regarding seniority earned on the job did not apply to him.

tended to keep women and minorities from seeking the job. By ensuring that the custodian workforce included additional qualified women and people of color, the agreement began to reverse the exclusionary effects of Defendants' practices. The retroactive seniority awards strengthened these effects by enhancing beneficiaries' ability to transfer to larger schools, with more supervisory responsibility and greater visibility within the system. (JA 498 (U.S. Mem. in Supp.) (describing "United States' goal of significantly increasing the representation of blacks, Hispanics, Asians, and women in the positions of permanent Custodian and Custodian Engineer while impacting incumbents as minimally as possible"); JA 393 (Fairness Hrg, Tr.)(describing "United States' objective of wanting to rectify the past discrimination in ensuring that there were more Hispanics, blacks, Asians, and women on the work force"); JA 199 (Defs' Mem. in Supp.)(describing retroactive seniority dates as negotiated to "meet legitimate goal of achieving equality of employment opportunity" while avoiding unnecessary trammeling of incumbents' interests).)

The district court appropriately analyzed these awards as gender- and race-conscious affirmative action, recognizing that the lawfulness of affirmative action does not depend on whether its benefits are limited to calibrated make-whole remedies to proven individual victims of discrimination. *See generally Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 282 (1986) (O'Connor, J., concurring) ("[A]

plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently 'narrowly tailored' or 'substantially related' to the correction of prior discrimination by the state actor."). As the district court affirmed, the Constitution and Title VII permit public employers to institute remedial affirmative action when evidence strongly suggests past employment discrimination, without imposing the counterproductive requirement that the employer prove it has previously violated the law or that it identify victims of its own past discrimination.

While these principles appropriately guided the district court's analysis, the court erred in declaring that race-conscious awards to certain male minority beneficiaries, including the male Caldero Intervenors, violated the Constitution because they were not supported by evidence of past discrimination. In fact, these awards were based on substantial evidence of Defendants' race discrimination in both testing and recruitment. The court also committed gross error in crafting a remedy for this purported violation when it declared that these beneficiaries should not only lose their retroactive seniority, but also the seniority each has earned through satisfactory performance on the job over the past nine years and the ability to earn seniority in the future. The court thus barred these beneficiaries from advancing in their jobs and left them forever first in line for layoffs, placing an indefensible burden on innocent employees.

Argument

Standard of Review

With the exceptions discussed in Parts V and VIII *infra*, the issues addressed herein were determined on summary judgment. Summary judgment is reviewed *de novo*, "construing the evidence in the light most favorable to the non-moving party and drawing all reasonable inferences in its favor." *Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 113 (2d Cir. 2005). The Court "is not to resolve issues of fact but only to determine whether there is a genuine triable issue as to a material fact." *Howley v. Town of Stratford*, 217 F.3d 141, 150 (2d Cir. 2000).

I. THE DISTRICT COURT APPROPRIATELY ANALYZED THE CHALLENGED RACE- AND GENDER-CONSCIOUS AWARDS AS A FORM OF AFFIRMATIVE ACTION.

As the Supreme Court has repeatedly affirmed, Title VII, 42 U.S.C. § 2000e-2 *et seq.*, permits voluntary race- and gender-conscious affirmative action to address persistent segregation in the workforce. *Johnson*, 480 U.S. at 616; *Local Number 93 v. City of Cleveland*, 478 U.S. 501 (1986); *Weber*, 443 U.S. at 193. The Constitution similarly allows race-conscious affirmative action that is narrowly tailored to forward a compelling state interest and gender-conscious measures substantially related to an important state interest. *Grutter v. Bollinger*,

539 U.S. 306, 333-41 (2003); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Eng'g Contractors Ass'n, Inc. v. Metro. Dade County*, 122 F.3d 895, 908-09 (11th Cir. 1997). In affirming the majority of the challenged portions of the settlement agreement, the district court appropriately analyzed these awards as race- and gender-conscious affirmative action measures designed to remedy the effects of Defendants' past discrimination and prevent similar discrimination in the future.

The Brennan Intervenors challenge the district court's analysis of this relief as affirmative action, arguing that (1) affirmative action cannot include retroactive seniority awards; (2) the challenged awards cannot be affirmative action because they are different in form from plans previously approved by the Supreme Court and this Court; (3) the challenged awards were designed to make individual victims whole and must be measured against that standard; and (4) this Court has already ruled that the awards are unlawful if they are not make-whole relief. For the reasons set out below, each contention fails.

1. The Awards Partially Remedy the Effects of Defendants' Past Discrimination.

As set out elsewhere herein, substantial evidence demonstrated that Defendants discriminated in their testing and recruiting practices. The challenged awards brought qualified women and people of color into the custodian workforce, thus beginning to remedy the exclusionary effects of Defendants' testing and

recruitment. Moreover, this change in the permanent workforce sends a message to potential applicants, thus helping to remedy past recruitment problems. Had Defendants' recruitment practices not posed a barrier to women and minorities in the past, and had their hiring practices not posed an additional barrier to African-Americans and Hispanics, a far more diverse permanent workforce would have been in place, and that diversity would have itself encouraged applications from diverse candidates. As the Supreme Court has recognized, a message that minorities are not welcome to apply can be communicated "even by the racial or ethnic composition of that part of [an employer's] work force from which he has discriminatorily excluded members of minority groups." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 365 (1977). Similarly, "[a]n employer's reputation for discrimination may discourage minorities from seeking available employment." *Local 28 of Sheet Metal Workers Int'l Ass'n v. E.E.O.C.*, 478 U.S. 421, 449 (1986). Here, evidence indicated that the low rate of female and minority applications likely in part stemmed from women's and minorities' reasonable conclusion that they were unwanted in the custodian positions. (JA 2823-2824 (Phillips Decl., Ex 1); JA 2765-2766 (Caldero 56.1 Statement ¶¶ 32-35); JA 2455 (McMahon Dep. at 13).) The awards change this pattern. *See generally Weber*, 443 U.S. at 208 (approving affirmative action plan designed "to break down old patterns of racial segregation and hierarchy" and open opportunities).

Many courts, including this one, have recognized that reliance on word-of-mouth advertising in a mostly white, male workforce will tend to exclude women and minorities. *See generally Grant v. Bethlehem Steel Co.*, 635 F.2d 1007, 1016 (2d Cir. 1980) (word-of-mouth hiring has propensity to mask racial bias and an employer may overcome a prima facie disparate impact claim challenging practice only when it can show its necessity); *Thomas v. Washington County Sch. Bd.*, 915 F.2d 922, 925 (4th Cir. 1990) (reliance on word-of-mouth advertising and limited posting of openings in predominantly white workforce violates Title VII because "[these policies] serve to freeze the effects of past discrimination"); *E.E.O.C. v. Metal Serv. Co.*, 982 F.2d 341, 350 (3d Cir. 1990) (reliance on word-of-mouth recruiting "in conjunction with an all white workforce, is itself strong circumstantial evidence of discrimination"); *Lams v. Gen. Waterworks Corp.*, 766 F.2d 386, 392 (8th Cir. 1985) ("Reliance on such word-of-mouth recruitment, especially in a segregated work force, easily may result in discriminatory personnel decisions"); *Barnett v. W.T. Grant Co.*, 518 F.2d 543, 549 (4th Cir. 1975) (word-of-mouth hiring as primary method of recruiting is discriminatory "because of its tendency to perpetuate the all-white composition of a workforce"); *Kyriazi v. Western Elec. Co.*, 461 F. Supp. 894, 919 (D.N.J. 1978), *alternative holding vacated*, 473 F. Supp. 786 (D.N.J. 1979) (suggesting discriminatory effect of word-of-mouth recruitment on women); *see also Ass'n Against Discrimination in*

Employment, Inc. v. City of Bridgeport, 647 F.2d 256, 284 n. 28 (2d Cir. 1981) (noting deliberate failure to recruit minority candidates probative of discriminatory policy in context where minority employment is extremely low). As record evidence shows, individuals are more likely to know and identify with individuals like themselves (JA 2821-2823 (Phillips Decl., Ex. 1)); thus, the beneficiaries are more likely than white males to recruit women and minorities for the positions. By opening the custodian ranks to additional qualified women and minorities, the agreement makes it less likely that word-of-mouth recruitment will continue to exclude.

The retroactive seniority awards strengthened these remedial effects. Retroactive seniority makes beneficiaries eligible to compete to transfer to larger schools, where they will have larger staffs and greater visibility. Because individuals tend to network and associate with others like themselves (JA 2822-2823 (*id.*)), the beneficiaries are more likely to employ women and minorities, thus bringing greater diversity into the corps from which custodians often rise. The increased presence of women and minorities as employers of custodial staff also makes it more likely that female and minority staff members will have access to the information networks necessary for success on the custodian exam. As the beneficiaries' visibility within the system increases, their examples will be more effective recruitment tools for other women and minorities. *See Johnson*, 480 U.S.

at 637 n.14 (introducing even a single woman into a previously all-male job title encourages other women and minorities to consider the possibility of nontraditional jobs for themselves). Their greater visibility will also more effectively dispel stereotypes that women or minorities cannot succeed as custodians, and thus again reduce the likelihood of such stereotypes leading to discrimination in recruitment. *Cf. Grutter*, 539 U.S. at 333 ("critical mass" of minority students enrolled in law school helped break down racial stereotypes). The challenged awards thus function as affirmative action to undo the effects of past discrimination.

2. Affirmative Action that Affects Seniority Interests Is Not Held to a Different Standard than Other Forms of Affirmative Action.

The Brennan Intervenors argue that the awards are not affirmative action because affirmative action cannot affect seniority interests. They claim any effects on seniority must be limited to make-whole relief to demonstrated victims of discrimination. The Supreme Court, however, has explicitly rejected that proposition in the context of a voluntary affirmative action plan adopted pursuant to settlement.

In *Local No. 93 v. City of Cleveland*, 478 U.S. 501, 515 (1986), the Supreme Court upheld a settlement that modified seniority rights over an intervenor's claim that the agreement unlawfully provided benefits to individuals who were not the actual victims of the defendant's discriminatory practices. The agreement required

minority firefighters be promoted on a one-to-one basis with non-minority firefighters until a certain number of promotions had been made. *Id.* at 510. Prior to settlement, seniority had been a factor in promotion decisions; the agreement stated seniority would continue to be used "except where necessary to implement the specific requirements of the consent decree." *Id*. Thus, the settlement required "that minority firefighters . . . be promoted ahead of non-minority firefighters who would otherwise be entitled to promotion by virtue of their seniority and examination scores." *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479, 490 (6th Cir. 1985) (dissent), *aff'd sub nom. Local 93*, 478 U.S. at 515; *see also* 478 U.S. at 535 (Rehnquist, J., dissenting) (describing decree as ordering "preferential treatment . . . at the expense of nonminority firefighters who would have been promoted under the City's existing seniority system").

Noting that entrance into a consent decree is one form of preferred voluntary compliance with Title VII, the Court explained that "voluntary action available to employers . . . seeking to eradicate race discrimination may include reasonable race-conscious relief that benefits individuals who were not actual victims of discrimination." *Id.* at 516, 515-18. Indeed, the Court assigned no special weight to the fact that the affirmative action plan at issue affected a seniority system. *See also Weber*, 443 U.S. at 199 (approving training program based on seniority but

reserving half its spots for minorities, over challenge of a more senior white worker passed over in favor of less senior black workers).

As the Supreme Court has repeatedly emphasized in the affirmative action context, the law sharply distinguishes between court-ordered relief and voluntary employer action. Thus, in *Local 93*, the Court rejected arguments based on cases limiting *courts'* authority to modify seniority interests in the absence of proof that such modification constituted make-whole relief. 478 U.S. at 528; *cf. Firefighters Local Union No. 1734 v. Stotts*, 467 U.S. 561, 578 (1984) (reserving question of whether consent decrees might permissibly affect seniority systems). While Title VII limits the affirmative action remedies courts may impose on employers, it simultaneously protects employers' prerogative to undertake "temporary, voluntary, affirmative action measures . . . to eliminate manifest racial [and gender] imbalances in traditionally segregated job categories." *Weber*, 443 U.S. at 207 n.7. "[The] suggestion that employers should be able to do no more voluntarily than courts can order as remedies . . . ignores the fundamental difference between volitional private behavior and the exercise of coercion by the State." *Johnson*, 480 U.S. at 630 n.8; *see also Weber*, 443 U.S. at 200; *Ass'n Against Discrim. in Employment*, 647 F.2d at 279. Thus, "whether or not . . . [Title VII] precludes a court from imposing . . . [relief that benefits individuals who were

not the actual victims of discrimination], that provision does not apply to relief ordered in a consent decree." *Local 93*, 478 U.S. at 515.

The cases relied on by the Brennan Intervenors are thus inapposite to the question of whether voluntary affirmative action can affect seniority interests. In *Chance v. Bd. of Examiners*, 534 F.2d 993 (2d Cir. 1976), a case predating *Local 93*, this Court considered whether determining layoffs according to seniority itself constituted discrimination against recently hired minorities and thus justified a remedial order modifying the seniority system. 534 F.2d at 997 (describing question presented as whether "a facially neutral excessing plan, which operates on the concept of 'last hired-first fired,' discriminate[s] against minorities who are disproportionately affected"). This Court held the facially-neutral seniority system could not be so challenged, relying on § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), which limits the potential liability of employers by stating that providing terms and conditions of employment pursuant to a *bona fide* seniority system does not constitute an unlawful employment practice. 534 F.2d at 998. Accordingly, it found that the district court improperly fashioned a remedy for the seniority system's disparate impact in the context of "excessing"—that is, layoffs and demotions—stating, "Because there is no claim that defendants' excessing practices are or have been discriminatory, we see no justification for changing them." *Id.* *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), similarly

explored questions of liability and court-ordered remedy under Title VII, asking whether the statute *required* an employer to modify seniority rules in order to reasonably accommodate the religious needs of an employee. *Cf. also Acha v. Beame*, 531 F.2d 648 (2d Cir. 1976) (holding district court should have awarded make-whole retroactive seniority to identified victims of discrimination).

The present case, however, does not test the boundaries of court-ordered relief upon a finding of discrimination, or present the question of when a seniority system itself violates Title VII. *Chance* is utterly silent on the legal standard for reviewing a voluntarily adopted affirmative action plan that affects seniority, as is *Trans World Airlines*. Moreover, even if either case can be read to suggest that such affirmative action is *per se* impermissible, this suggestion cannot survive the Supreme Court's subsequent approval of voluntary affirmative action affecting seniority in *Local No. 93*. While an affirmative action plan may not violate the substantive antidiscrimination provisions of Title VII or the Constitution, the Brennan Intervenors cite no authority in support of their claim that affirmative action plans that modify seniority interests are *per se* unlawful, beyond *Chance*'s bare dictum that the adjustments to the seniority system in that case were "constitutionally forbidden reverse discrimination." 534 F.2d at 998. An intervening 33 years of jurisprudence addressing affirmative action and the constitutional limits placed on it are surely entitled to greater weight than this

statement, which was not even made in the context of reviewing a voluntary affirmative action plan. As set out *infra* Parts II-V, the challenged awards meet the applicable standards for lawful affirmative action under Title VII and the Constitution.

3. The Challenged Awards Are Unusual in That They Are Exceptionally Limited.

The Brennan Intervenors argue that the challenged awards cannot be affirmative action because they do not look like the most typical kind. The awards are unique because they are an exceptionally narrow intervention, perhaps because this plan represented a settlement and compromise.

Rather than imposing an open-ended, future-looking hiring preference, the United States and Defendants crafted a one-time hiring remedy and specified that its beneficiaries would be those women and minorities who for years had been successfully performing the job, thus ensuring that each was fully qualified. Rather than establishing a general race or gender preference for school transfers, the United States and Defendants retained the integrity of the transfer bidding process and crafted seniority dates for this universe of qualified individuals that represented a reasonable, though necessarily somewhat imprecise, reflection of individual circumstances: each beneficiary received seniority dating either to (1) his or her provisional employment date, thus measuring actual time doing custodian work or (2) a date keyed to a custodian exam previously taken by the

individual, thus roughly corresponding to efforts to obtain the job. Because seniority dates were tied to the beneficiaries' experience, they worked to ensure that individuals were qualified to manage the schools for which the dates rendered them eligible, and thus acted as a more precise intervention than a broad preference.

A consequence of this limited approach is, as the Brennan Intervenors note, that not all female and minority custodians became beneficiaries. But a complaint that the remedy implemented by Defendants was narrower than it might have been seems an odd one for the Brennan Intervenors to make; certainly they would not have been happier had the agreement created a broader set of preferences with a wider impact on the incumbent workforce. In any case, the Brennan Intervenors are incorrect when they assert that affirmative action must by definition privilege all members of a given group. *See generally Jana-Rock Constr., Inc. v. N.Y. State Dep't of Econ. Dev.*, 438 F.3d 195, 207 (2d Cir. 2006) (finding underinclusiveness of affirmative action does not compromise narrow tailoring and noting any other rule "would be incompatible with the Supreme Court's requirement that affirmative action programs be no broader than demonstrably necessary"); *id.* at 210 (accepting that any affirmative action racial classification will necessarily "always exclude persons who have individually suffered past discrimination and include those who have not"); *Stuart v. Roache*, 951 F.2d 446, 454 (1st Cir. 1991)

(approving hiring goal of 15 percent minority officers when qualified pool had 20 percent minority officers).

4. The Challenged Awards Were Intended to Be Race- and Gender-Conscious Relief.

The district court correctly found that affirmative action efforts need not be limited to demonstrated victims of discrimination, and thus evidence that each beneficiary was a victim is unnecessary to affirm the challenged awards. (SPA 54.) As Justice O'Connor explained in her pivotal concurrence in *Wygant*, the Supreme Court had "forged a degree of unanimity: it is agreed that a plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently 'narrowly tailored' or 'substantially related' to the correction of prior discrimination by the state actor." 476 U.S. at 282; *see also Croson*, 488 U.S. at 509 (listing relief to individual victims as one of multiple forms of relief, including racial preferences, that the Constitution permits).

Moreover, under Title VII, "an employer seeking to justify . . . a plan need not point to its own prior discriminatory practices, nor even to evidence of an 'arguable violation' on its part." *Johnson*, 480 U.S. at 630 (citing *Weber*, 443 U.S. at 212). Given that Title VII does not require an employer to put forward *any* evidence of its own discrimination before establishing an affirmative action plan, it certainly does not require employers to limit the benefits of that plan to specific identified victims. *See Weber*, 443 U.S. at 211 (Blackmun, J., concurring)

(explaining an employer may wish to adopt affirmative action to "avoid identifying victims of past discrimination"). "It is . . . clear that the voluntary action available to employers . . . seeking to eradicate race discrimination may include reasonable race-conscious relief that benefits individuals who were not actual victims of discrimination." *Local 93*, 478 U.S. at 516.

As the district court recognized, by definition race- or gender-conscious affirmative action is not make-whole relief to individual victims. (SPA at 54-55.) Such make-whole relief does not take into account an individual's race or g ender, but measures his or her injury. *See Croson*, 488 U.S. at 526 (Scalia, J., concurring) (victim-specific remediation is race-neutral); *Associated Gen. Contractors v. Coalition for Econ. Equity*, 950 F.2d 1401, 1417 n.12 (9th Cir. 1991) (same); *Acha*, 531 F.2d at 656 (same, in regard to sex). Thus, affirmative action, both in general and in this case, is properly considered an alternative or complement to make-whole relief. *See generally Ass'n Against Discrim. in Employment*, 647 F.2d at 278 (explaining that affirmative relief and make-whole relief may overlap, but have different purposes and functions).

While the settlement agreement benefited multiple individuals who were victims of Defendants' practices,[9] the awards were not intended to be limited to

[9] The district court refused to consider evidence that any beneficiary was an individual victim of recruitment discrimination based on its erroneous conclusion,

make-whole awards to compensate these injuries. Although they were crafted to settle a lawsuit, the challenged awards are appropriately considered voluntary employer action for purposes of reviewing their legality. *See Local 93*, 478 U.S. at 517-18; *Johnson*, 480 U.S. at 630. Therefore, as the employer, Defendants' motivation in crafting these awards is particularly relevant. In moving for approval of the settlement in 1999, Defendants were quite clear on this question, explicitly stating, "The Agreement does not seek to identify potential victims of discrimination from among minority and female takers of the challenged examinations or from other sources for the purposes of granting relief." (JA 203 (Defs. Mem. in Supp.).) In the years after, as the intent behind the awards was fiercely litigated, Defendants remained consistent in their assertion that the awards were not designed to be make-whole relief. (*E.g.*, JA 4026, 4027 (Aug. 20, 2007 Hr'g Tr.).)

Moreover, the Defendants and United States both acknowledged when they moved for judicial approval of the agreement that it provided race- and gender-conscious relief to remedy the effects of past discrimination. (*E.g.*, JA 193 (Defs. Mem. in Supp.) (setting out standard of review "for the creation of a race-conscious remedy"); JA 195 (agreement consistent with goal of "ensuring equality of opportunity and the elimination of discriminatory barriers to professional

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discussed *infra*, that there was no evidence Defendants had discriminated in recruitment. (SPA 120.)

employment"); JA 198 (explaining that seniority systems may be required to yield to voluntary affirmative action that is otherwise permissible); JA 480 (U.S. Mem. in Supp.)(setting out standard of review "where, as here, a settlement agreement implements race-conscious remedies"); JA 484 (describing district court's duty to eliminate the discriminatory effects of the past and prevent like discrimination in the future).) This is highly relevant, given that, as set out above, make-whole relief to victims of discrimination is not race- or gender-conscious.

Of course, the United States' alliances shifted after it executed the settlement agreement. In 2002, the United States changed its position in this case almost overnight. From 2002 forward it actively attacked the legality of the agreement that it had previously negotiated and signed, attempting to revise it through these legal proceedings to reflect the evolving preferences of its new counsel and, presumably, new political leadership within the Department of Justice. As set forth in greater detail at Part V, *infra*, however, the United States has put forward no competent evidence in support of its new arguments as to the intent motivating the challenged portions of the agreement.

5. This Court Has Not Previously Reached the Merits of this Dispute.

The Brennan Intervenors claim that this Court held that the challenged awards were unlawful if they were not make-whole relief when it permitted their intervention. Yet this Court explicitly declined to address the merits of the dispute.

260 F.3d at 133. Rather, it held that the Brennan Intervenors "should be accorded discovery and other rights with regard to *their* claim that any impairment by the Agreement of their interests in their positions as provisional Custodian Engineers and in their seniority rights as Custodians and Custodian Engineers would constitute impermissible discrimination rather than a proper restorative remedy based on past discrimination against the Offerees." *Id.* at 132 (emphasis added). This is indeed an accurate summary of the Brennan Intervenors' claim, and it is hardly remarkable that after finding they had an interest sufficient to support intervention, this Court held they were entitled to discovery with regard to it. An accurate paraphrase of the Brennan Intervenors' arguments cannot fairly be read as a decision on the merits of this legally intricate case.

II. THE DISTRICT COURT CORRECTLY FOUND THE CHALLENGED AWARDS TO BE LAWFUL AFFIRMATIVE ACTION UNDER TITLE VII.

Affirmative action complies with Title VII when it addresses a manifest imbalance in a traditionally segregated job category and does not unnecessarily trammel the rights of non-minority employees. *Johnson*, 480 U.S. at 630. The individual challenging an affirmative action program under Title VII bears the burden of proving that the program is invalid. *Id.* at 626. The district court correctly applied this standard.

1. The Settlement Agreement Addresses a Manifest Imbalance in a Traditionally Segregated Job Category.

When a job requires special qualifications, a manifest imbalance justifying affirmative action may be shown by comparing the representation of women or minorities in the employer's workforce with their representation in that portion of the area labor force possessing the qualifications. *Id.* at 632. Because an employer need not put forward evidence of its own discrimination to justify affirmative action under Title VII, *id.* at 630, evidence demonstrating a manifest imbalance is less than that required to establish a prima facie case of discrimination, as the district court explained. (SPA 45-46.) First, the magnitude of statistical disparity sufficient to justify affirmative action is less than that necessary to establish a prima facie case of a Title VII violation. *Johnson*, 480 U.S. at 632-33. Second, evidence sufficient to support affirmative action under Title VII need not demonstrate any causal connection between an employer's practice and the disparity. As the Supreme Court explained in *Johnson*, the affirmative action plan approved in *Weber* was created to remedy past discrimination by craft unions rather than discrimination by the employer. *Id.* at 633 n.10. If evidence of causation were required to support an affirmative action plan, the *Johnson* court reasoned, this would have resulted in invalidation of the very plan at issue in the case establishing the permissibility of affirmative action under Title VII. *Id.*

Very oddly, given this Supreme Court precedent clearly holding that evidence sufficient to justify affirmative action under Title VII is *less* than that required to establish a prima facie case, the Brennan Intervenors argue that *more* than a prima facie case is necessary. Specifically, they assert that *Weber* and *Johnson* held only that evidence sufficient to support affirmative action need not establish a prima facie case of disparate *treatment* and thus argue (without citation to authority) that a prima facie case of disparate *impact* is insufficient to show manifest imbalance. But nowhere does *Weber* or *Johnson* so limit its holding.

As the Court stated in *Johnson,* "application of the 'prima facie' standard in Title VII cases would be inconsistent with *Weber*'s focus on statistical imbalance, and could inappropriately create a significant disincentive for employers to adopt an affirmative action plan." *Id.* at 632-33. Employers are equally liable under Title VII for disparate treatment and disparate impact discrimination, and the Brennan Intervenors' proposed standard would pose just the sort of disincentive to voluntary remediation rejected by the Supreme Court. Requiring more than a prima facie case of disparate statistical impact as a basis for affirmative action would also be sharply "inconsistent with *Weber*'s focus on statistical imbalance." *Id.* at 632. *Johnson* thus holds that while evidence sufficient to establish a prima facie case is unnecessary, "[o]f course, when there is sufficient evidence to meet the more stringent 'prima facie' standard, be it statistical, nonstatistical, or a

combination of the two, the employer is free to adopt an affirmative action plan." *Id.* at 633 n.11.

This Court has also explicitly held that a prima facie case of disparate impact discrimination is sufficient (but not necessary) to justify affirmative action under Title VII, stating, "In short, we hold that . . . a showing of a prima facie case of employment discrimination through a statistical demonstration of disproportionate racial impact constitutes a sufficiently serious claim of discrimination to serve as a predicate for employer-initiated, race-conscious remedies." *Bushey v. N.Y. State Civil Serv. Comm'n*, 733 F.2d 220, 228 (2d Cir. 1984). *Bushey* further emphasizes this is "not meant to suggest that *only* a prima facie showing of adverse impact can serve as a sufficient predicate to voluntary remedial measures under Title VII." *Id.* at 226 n.7 (emphasis added). The Brennan Intervenors simply ignore this controlling precedent.

Ample evidence demonstrated a manifest imbalance between the percentage of women and minorities in the custodian workforce and the percentage of women and minorities in the qualified labor force. As set out *supra*, in the early nineties, African-Americans made up 3.9 percent of the custodian workforce and 21.4 percent of the qualified labor pool for these positions. Hispanics made up 3.2 percent of the workforce and 23.1 percent of the qualified labor pool. While women made up 14.7 percent of the qualified labor pool, they made up less than

one percent of the workforce. The statistical evidence is more than sufficient to justify affirmative action under Title VII.

Relying on cases that do not address what disparities justify affirmative action, but instead discuss what is necessary to prove a violation of Title VII, the Brennan Intervenors argue that no imbalance was shown between the representation of women and minorities in the custodian workforce and their representation in the qualified labor force because analysis of the representation of women and minorities in the qualified labor force necessarily rests on a somewhat indirect measure of qualifications. The analysis they propose Title VII requires bears no resemblance to that in *Johnson*. There, the Court approved an agency taking gender into account in hiring a road dispatcher pursuant to a voluntary affirmative action plan. The plan stated that while women made up 36.4 percent of the area labor force, no woman was employed in the Skilled Craft Worker job category at the agency, which included the dispatcher position. 480 U.S. at 621-22. The agency adopted a long-term goal of 36.4 percent female representation in the Skilled Craft Worker job category and planned to adopt short-term goals based in part on "data on the percentage of women and minorities in the local labor force that were actually working in the job classification[]." *Id.* at 635. The dispatcher position at issue was filled before this analysis was completed. *Id.* at 636. No analysis was planned as to the percentage of women in the area labor force with the

precise qualifications for the dispatcher job—namely, "at minimum four years of dispatch or road maintenance work experience for Santa Clara County." *Id.* at 623. Nevertheless, the Supreme Court found the gender-conscious hiring decision to be justified by a manifest imbalance in the Skilled Craft Worker classification, reasoning,

> [T]he Agency hardly needed to rely on a refined short-term goal to realize that it had a significant problem of underrepresentation that required attention. Given the obvious imbalance in the Skilled Craft category, and given the Agency's commitment to eliminating such imbalances, it was plainly not unreasonable for the Agency to determine that it was appropriate to consider as one factor the sex of Ms. Joyce in making its decision.

Id. at 637.

The statistical evidence of disparities between the custodian workforce and the qualified labor force is far more sophisticated than that approved in *Johnson.* Dr. Ashenfelter did not simply compare the demographics of the broad occupational category including custodian jobs to the demographics of the custodian workforce, as *Johnson* suggests would be appropriate. Rather, Dr. Ashenfelter used Census data to create a more complex and sensitive model of the demographics of potential qualified applicants, based on the demographics of the various occupational categories from which actual qualified applicants for the custodian positions came. If a large percentage of actual qualified applicants came from a particular occupational category, Dr. Ashenfelter reasonably assumed that a large percentage of potential qualified applicants would come from that

occupational category as well and would reflect the demographics of that job category.[10] (JA 551-553 (Ashenfelter Decl. at ¶¶ 13, 15, 18); *see* JA 2798 (Jacobsen Decl., Ex. 1) (Ashenfelter analysis used "best available data.").)

The Brennan Intervenors assert that this evidence does not show a manifest imbalance because it does not directly measure interest; they propose the disparities may simply stem from women's and minorities' lack of desire for custodian jobs. But the affirmative action plan approved in *Johnson* was expressly based on the recognition that the "underrepresentation of women in part reflected the fact that women . . . had not been strongly motivated to seek training or employment in [these positions] 'because of the limited opportunities that have existed in the past for them to work in such classifications.'" 480 U.S. at 621. That is, *Johnson* not only provides no support to the notion that an individual can prove an affirmative action plan to be invalid merely by asserting that women and minorities might not be interested in the particular jobs at issue, it instead indicates

[10] The only basis offered for the Brennan Intervenors' conjecture that lack of qualifications may explain the relevant gaps is Director of School Facilities James Lonergan's observation that very few people have a high pressure boiler license, and thus *a fortiori* very few minorities and women have this license. (JA 1274-1275 (Lonergan 2004 Dep.).) This truism does not undermine the statistical evidence. Moreover, this license is required for the custodian engineer position, not the custodian position. Imbalances of similar or greater proportions in the custodian job undermine the speculation that lack of this qualification explains the race and gender gaps.

that affirmative action is appropriate precisely to *rectify* a lack of interest stemming from a historical absence of opportunities.

Moreover, in applying the far more demanding standard of what is necessary to show a violation of Title VII, this Court has forcefully rejected the notion that an employer can defend against a prima facie showing of disparate impact by hypothesizing a lack of interest in the relevant jobs among women and minorities. *E.E.O.C. v. Joint Apprenticeship Comm.*, 186 F.3d 110, 120 (2d Cir. 1999) (dismissing suggestion that perhaps women and blacks were not interested in becoming electricians as one "derived in large part from stereotypes"); *E.E.O.C. v. Local 638*, 81 F.3d 1162, 1173 (2d Cir. 1996) (rejecting as "specious" suggestion that statistical disparities between employment rates for whites and nonwhites might be explained by differences in motivation); *Sobel v. Yeshiva Univ.*, 839 F.2d 18, 33 (2d Cir. 1988) (rejecting explanations of statistical disparities that relied on unsupported speculation and stereotypes). Given the repeated holdings by the Supreme Court that less evidence is needed to support affirmative action than to establish a Title VII prima facie case, the same conclusion is appropriate here.

Indeed, if the Brennan Intervenors' arguments were correct, an individual challenging an affirmative action plan could overcome *any* showing of disparities between the representation of women and minorities in a job and the broader labor force by suggesting that maybe women and minorities were just not as interested in

the particular job as white males. Such unsupported musings are insufficient to carry a challenger's burden of proof that an affirmative action plan is invalid.

The Brennan Intervenors also summarily assert that the awards impermissibly harm their interests, but do not reference or apply the test set out by the Supreme Court. *Johnson*, 480 U.S. at 637-39. For the reasons set out in Part II.B of the Arroyo Intervenors' brief, the district court correctly found the awards do not unnecessarily trammel the Brennan Intervenors' interests in regard to transfers or TCAs.[11]

2. Differing Expert Opinions as to the Statistics' Persuasiveness Do Not Defeat Summary Judgment.

The district court appropriately entered summary judgment as to the legality of the awards under Title VII, given that, contrary to the assertions of the Brennan Intervenors, "an expert's report is not a talisman against summary judgment." *Raskin v. Wyatt Co.*, 125 F.3d 55, 66 (2d Cir. 1997); *see also In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 187, 193 (2d Cir. 1987) (issue of fact defeating summary judgment "cannot be established by mere speculation or idiosyncratic opinion, even if that opinion is held by one who qualifies as an expert"); *United States v. Various Slot Mach. on Guam*, 658 F.2d 697, 700 (9th Cir. 1981) ("[W]e have difficulty with the notion that to state an opinion is to set forth specific facts

[11] As noted, the Caldero Intervenors do not challenge the conclusion that reliance on retroactive seniority for layoffs would constitute unnecessary trammeling.

[as would be necessary to defeat summary judgment]."); *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666, 673 (D.C. Cir. 1977) (summary judgment is not rendered impossible whenever a party has produced an expert to support its position); *Detwiler v. Offenbecher*, 728 F. Supp. 103, 139-40 (S.D.N.Y. 1989) (expert opinion that an analysis was not based on a reasonable method was insufficient to defeat summary judgment).

The Brennan Intervenors relied on the expert report of Dr. Carrington, which pointed out the necessary imperfections of any analysis based on Census data and statistical sampling, but did not provide any alternative statistical analysis or point to any other available data on which an analysis should rest. (*See* JA 2804 (Jacobsen Decl., Ex. 1).) In the one instance in which Dr. Carrington identified data that he asserted Dr. Ashenfelter should have taken into account, inclusion of that data did not change Dr. Ashenfelter's findings. (JA 2805-2807 (Jacobsen Decl., Ex. 1); JA 2734-2739 (Ashenfelter Reply); JA 1950-1951 (Henderson Rep.).) Because the Brennan Intervenors' expert did not dispute specific facts relied on by the other experts and offered only speculation as to what facts might be shown in a world where more perfect data existed, his opinion was not a basis for withholding summary judgment. *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d at 193.

III. THE COURT CORRECTLY HELD THE GENDER-CONSCIOUS AWARDS WERE LAWFUL UNDER THE EQUAL PROTECTION CLAUSE.

In determining that the awards to the female beneficiaries passed constitutional muster, the district court correctly applied intermediate scrutiny. (SPA 78.) Under Supreme Court precedent, while racial classifications must be narrowly tailored to further a compelling state interest, gender classifications must be at least substantially related to an important state interest. *E.g.*, *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 728-29 (2003); *United States v. Virginia*, 518 U.S. 515, 534 (1996). The relevant question is whether "members of the group benefited by the classification actually suffer a disadvantage related to the classification." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 718 (1982). Gender classifications may be appropriate to compensate women for "particular economic disabilities," to "promote equal employment opportunity," and "to advance full development of the talent and capacities of our Nation's people." *Virginia*, 518 U.S. at 533. The challengers of an affirmative action plan bear the burden of demonstrating its unconstitutionality. *E.g.*, *Wygant*, 476 U.S. at 277-78, 293. The permanent appointments and retroactive seniority were substantially related to remedying the effects of prior gender discrimination in the economic sector in that they placed qualified women in the positions with the tools necessary for them to advance.

Remedying past discrimination "is unquestionably a sufficiently important [interest] to sustain a gender-conscious affirmative action program." *Eng'g Contractors Ass'n, Inc. v. Metro Dade County*, 122 F.3d 895, 908-09 (11th Cir. 1997). Moreover, "a gender-conscious affirmative action program can rest safely on something less than the 'strong basis in evidence' required to bear the weight of a race- or ethnicity-conscious program." *Id.* at 909; *see also Contractors Ass'n of Eastern Philadelphia, Inc. v. City of Philadelphia*, 6 F.3d 990, 1010 (3d Cir. 1993). Probative evidence of some discrimination against women must support a gender-conscious affirmative action program, but this evidence need not suggest *any* discrimination, whether active or passive, by the government actor itself. *Eng'g Contractors Ass'n.*, 122 F.3d at 910; *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1580 (11th Cir. 1994); *Coral Constr. Co. v. Kings County*, 941 F.2d 910, 932 (9th Cir. 1991); *cf. Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 362 (1978) (Brennan, White, Marshall, Blackmun, JJ., concurring in part and dissenting in part) (finding that remedying the effects of past societal discrimination an important state interest under intermediate scrutiny); *Califano v. Webster*, 430 U.S. 313, 318 (1977) (finding gender classification that compensated women for past economic disadvantage served an important governmental objective, whether disadvantage was caused by "overt discrimination or from the socialization process of a male-dominated culture"). Scrutiny of this evidence "is

not . . . directed toward mandating that gender-conscious affirmative action is used only as a last resort, but instead to ensuring that the affirmative action program is a product of analysis rather than a stereotyped reaction based on habit." *Eng'g Contractors Ass'n.*, 122 F.3d at 910 (internal citations and quotation marks omitted).

The gender-conscious awards rest on constitutionally ample evidence of discrimination, including both the statistical evidence of women's severe underrepresentation in the custodian workforce and extensive anecdotal evidence of sex discrimination in the field. (JA 546-554 (Ashenfelter Decl.); JA 2796-2812 (Jacobsen Decl., Ex. 1).) *Cf. Ensley Branch*, 31 F.3d at 1580-81 (evidence of women's gross underrepresentation in city positions and anecdotal evidence of discrimination a sufficient basis for gender-conscious remedy); *Coral Constr. Co.*, 941 F.2d at 932. The anecdotal evidence included women being told directly and indirectly by men working in the field that women don't get jobs as custodians (JA 2345 (D'Alessio Dep.); JA 3025 (Daniele Dep. at 76); JA 2455 (McMahon Dep. at 13); a female custodial employee being groped and sexually harassed by her custodian supervisor (JA 3023 (Daniele Dep. at 69); a female custodial employee being denied overtime, when all the men on staff got overtime (JA 3029 (Ortega de Green Dep. at 54-55); male custodial employees refusing to take direction from female custodians (JA 3033 (DiDonato Dep. at 37), Doc 535, Ex. J (Caldero Dep.)

at 71-72, JA 3037 (Jarrett Dep. at 55); School Construction Authority contractors refusing to deal with female custodians (JA 3041 (Luebkert Dep. at 80-81), Doc. 535, Ex. L (Morton Dep.) at 96); female applicants for the custodian job being harassed by male applicants at a custodian test preparation class (JA 3034 (DiDonato Dep. at 41-42); a potential female applicant being given incorrect information by a male custodian about the job's requirements in an apparent effort to talk her out of applying (JA 3024 (Daniele Dep. at 72 -73); a female custodial employee being told by coworkers that the custodian didn't want her around (Doc. 535, Ex. J (Caldero Dep.) at 45); a school principal telling a female custodian she should be a cleaner instead of a supervisor (JA 3048 (Tatum Dep. at 71- 72); a school principal asking if it were a joke that a woman was the new custodian (Doc. 535, Ex. O (Wolkiewicz Dep.) at 81); a school principal telling a female custodian to dress in jeans instead of the business attire other custodians wore (JA 3037 (Jarrett Dep. at 53); female custodial employees being denied opportunities to work on boilers because it was a man's job (JA 3045-3047 (Tatum Dep. at 40-41, 43, 53); JA 3030 (Ortega de Green Dep. at 85); a plant manager refusing to call in an emergency in a female custodian's building unless it was verified by a male custodian (Doc. 535, Ex. L (Morton Dep. at 88-89)); a female custodial employee being told that she should not object to working for an alcoholic custodian because he was "a good old boy" (JA 3051 (Quinn Dep. at 62)); male custodians refusing

to assist a female custodian when equipment malfunctioned (JA 3052 (*id.* at 82)); and a female custodian being told by a male custodian she should be home "barefoot, pregnant and taking care of her two kids" (Doc. 535, Ex. L (Morton Dep. at 96-97).)

Contrary to the Brennan Intervenors' implication, there is no evidence in the record supporting an inference that an interest in remedying discrimination is somehow a *post hoc* justification for the awards. The contemporaneous statements by the United States and Defendants clearly demonstrate that the agreement's awards were motivated by this interest in remedying the effects of sex discrimination. (JA 484 (U.S. Mem. in Supp.) (setting out district court's duty to eliminate the discriminatory effects of the past and prevent like discrimination in the future); JA 495-496 (offering proof of underrepresentation of female applicants); JA 498 (indicating U.S.'s goal of remedying past discrimination by increasing the number of women in the Board's workforce); JA 195 (Defs. Mem. in Supp. of Entry)(agreement consistent with goal of "ensuring equality of opportunity and the elimination of discriminatory barriers to professional employment"); JA 202 (describing agreement's awards as remedying discrimination).)

In addition, the awards are substantially related to advancing this interest. A court determines whether a substantial relationship exists by considering factors

such as whether the program stigmatizes any group and whether the individuals benefiting from the program are qualified for the positions they attain. *Bakke*, 438 U.S. at 373-74; *see also Fullilove v. Klutznick*, 448 U.S. 448, 520-21 (1980) (Marshall, Brennan, Blackmun, JJ., concurring). While the evidence cited above makes clear that many of the female beneficiaries indeed suffered discrimination, contrary to the Brennan Intervenors' contention, a gender-conscious affirmative action plan in public employment need not limit its benefits to actual or likely victims of the public employer's discrimination. Rather, the plan must provide benefits to members of the *class* so disadvantaged. As noted by the Brennan Intervenors, Justice Brennan's opinion in *Bakke* provides guidance as to the requirements of intermediate scrutiny in this regard, stating, "Such relief does not require a predicate proof that recipients of preferential advancement have been individually discriminated against; it is enough that each recipient is within a general class of persons likely to have been the victims of discrimination." 438 U.S. at 363. The reference to discrimination includes societal discrimination, which is fully relevant under intermediate scrutiny, as Justice Brennan later makes clear. *Id.* at 366 (approving "preferential treatment for those likely disadvantaged by societal . . . discrimination . . . even without a case-by-case determination that those benefited suffered from . . . discrimination"); *see also Hogan*, 458 U.S. at 728 ("In limited circumstances, a gender-based classification favoring one sex can

be justified if it intentionally and directly assists *members of the sex* that is disproportionately burdened." (emphasis added).

The Brennan Intervenors also imply that to be a proper affirmative action remedy, the agreement should have provided retroactive seniority to every woman in the custodial workforce, not just those who had worked provisionally. But there is no requirement that voluntary affirmative action, entered into as a result of a compromise agreement, must be perfect in order to be valid. *E.g.*, *Stuart*, 951 F.2d at 454 (finding promotional goals to be narrowly tailored when they fell short of minority population eligible for promotion). To so require would be to implement an unprecedented standard even more restrictive than the narrow tailoring required under strict scrutiny. The district court correctly held that the gender-conscious awards are substantially related to an important state interest, and thus fully comport with the Constitution.

IV. THE DISTRICT COURT ERRED IN HOLDING THERE WAS NO "STRONG BASIS IN EVIDENCE" OF RECRUITMENT DISCRIMINATION JUSTIFYING RACE-CONSCIOUS AFFIRMATIVE ACTION UNDER THE EQUAL PROTECTION CLAUSE.

When a strong basis in evidence suggests that a public employer has discriminated on the basis of race in violation of federal law, the employer has a compelling interest sufficient to justify adopting narrowly tailored, race-conscious

measures to remedy the effects of that discrimination. *See, e.g.*, *Croson*, 488 U.S. at 492; *Paradise*, 480 U.S. at 167 (1987); *U.S. v. Sec'y of Housing and Urban Dev.*, 239 F.3d 211, 219 (2d Cir. 2001). The evidence showed that Defendants' reliance on and encouragement of word-of-mouth recruiting, in combination with an absence of other advertising or outreach designed to reach individuals with the specific skills required, led to a dramatic underrepresentation of applicants of color and thus provided an appropriate basis for the narrowly-targeted affirmative action measures set out in the agreement. At the very least, the Caldero Intervenors set out evidence sufficient to raise a question of fact. The district court improperly concluded that the evidence did not support the inference that Defendants had caused the shortfall in minority applicants.

An employer need not prove its own past discrimination in order to implement race-conscious affirmative action. *See, e.g.*, *Wygant*, 476 U.S. at 289-90 (O'Connor, J., concurring) *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950, 958 (10th Cir. 2003); *Ensley Branch*, 31 F.3d at 1565; *Stuart*, 951 F.2d at 450; *Kirkland v. N.Y. State Dep't of Corr. Servs.*, 711 F.2d 1117, 1130 (2d Cir. 1983). Nor is the relevant question whether the United States proved its recruitment discrimination claims, for by settling prior to

judgment it by definition did not.[12] Rather, the requisite "strong basis in evidence" is evidence "approaching a prima facie case of a constitutional or statutory violation." *Croson*, 488 U.S. at 500, 501; *see also, e.g.*, *Wygant*, 476 U.S. at 292; *Cotter v. City of Boston*, 323 F.3d 160, 169 (1st Cir. 2003); *Concrete Works of Colorado, Inc.*, 321 F.3d at 971; *Kirkland*, 711 F.2d at 1130-31; *Paganucci v. City of New York*, 785 F. Supp. 467, 477 (S.D.N.Y. 1992), *aff'd* 993 F.2d 310 (2d Cir. 1993). Here, the undisputed evidence supports a prima facie case of both intentional pattern-and-practice and disparate impact recruitment discrimination in violation of Title VII. In concluding that Defendants did not cause the racial disparities among qualified applicants, the district court ignored relevant evidence and failed to draw all inferences in the Caldero Intervenors' favor.

1. The Prima Facie Case of Pattern and Practice Recruitment Discrimination.

In moving for court approval of the settlement, the United States relied not only on disparate impact arguments, but also on disparate treatment cases and the inference of intentional discrimination arising from gross statistical disparities, explaining, "[s]tatistical analyses of adverse impact may alone suffice to establish a *prima facie* showing because racial or gender imbalance in a work force is often a telltale sign of purposeful discrimination." (JA 484-489 (U.S. Mem. in Support

[12] *But see Kirkland*, 711 F.2d at 1131 (defendant's entrance into settlement without rebutting a *prima facie* case amounts to an admission of unlawful discrimination).

of Entry).) The undisputed evidence supports a prima facie case of intentional pattern-and-practice recruitment discrimination, the same claim that the United States set out in its complaint. (JA 81 (Complaint).)

Gross statistical disparities of the sort present in this case have consistently been held to establish a prima facie violation of Title VII under a pattern and practice intentional discrimination theory. *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307, 308 n.13 (1977); *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 158-59 (2d Cir. 2001); *Ottaviani v. State Univ. of N.Y.*, 875 F.2d 365, 371-73 (2d Cir. 1989). In concluding that the necessary strong basis in evidence for race-conscious relief was absent because there was no evidence that Defendants' recruiting practices had caused the relevant disparities, the district court misinterpreted and misapplied the applicable legal standard, as the gross statistical disparities themselves provided powerful circumstantial evidence of causation.

This is because the first step in a multiple regression analysis, such as the one relied on here, "is to specify all of the possible 'legitimate' (*i.e.*, nondiscriminatory) factors that are likely to significantly affect the dependent variable and which could account for disparities." *Ottaviani*, 875 F.2d at 367. If, after controlling for these other likely causes, there remains a significant racial disparity between predicted and actual outcomes, "plaintiffs in a disparate

treatment case can argue that the net 'residual' difference represents the unlawful effect of discriminatory animus on the allocation of jobs or job benefits." *Id.*; *cf. E.E.O.C. v. Chicago Miniature Lamp Works*, 947 F.2d 292, 297-303 (7th Cir. 1992) (finding reliance on word-of-mouth advertising can constitute a pattern and practice of intentional recruitment discrimination, but finding that relevant statistical evidence in that case failed to control for relevant variables) *with E.E.O.C. v. O&G Spring & Wire Forms Specialty Co.*, 38 F.3d 872 (7th Cir. 1994) (finding plaintiff had established intentional pattern and practice discrimination in hiring and recruiting through statistical analysis that appropriately defined the relevant labor market). While no particular threshold of statistical significance automatically establishes a prima facie case, "[t]he existence of a 0.05 [*i.e.*, 5 percent] level of statistical significance indicates that it is fairly unlikely that an observed disparity is due to chance, and it can provide indirect support for the proposition that disparate results are intentional rather than random." *Ottaviani*, 875 F.2d at 372.

The observed racial disparities in this case far exceeded the 5 percent level of statistical significance and established a prima facie case of intentional pattern and practice discrimination. For Exam 5040, the likelihood that the measured disparities between actual and expected qualified minority applicants were the result of chance ranged from a high of 0.0008196 percent to a low of 0.0000000

percent. For Exam 8206, the likelihood that the disparities were the result of chance ranged from 0.5780136 percent to 0.0000003 percent. And for Exam 1074, these likelihoods ranged from 0.0000032 percent to 0.0000000 percent. (JA 561-563 (Ashenfelter Decl.); JA 2791-2792 (Jacobsen Decl. ¶ 9).) Dr. Ashenfelter utilized the best and most appropriate available labor pool information, when he relied on Census data to create a model to analyze the demographics of potential qualified applicants based on the occupational categories from which actual qualified applicants came. (JA 2798 (Jacobsen Decl., Ex. 1).) *Cf., e.g.*, *Joint Apprenticeship Comm.*, 186 F.3d at 117 (defining potential qualified applicant pool based on occupational data); *O & G Spring*, 38 F.3d at 877-78 (same); *De Medina v. Reinhardt*, 686 F.2d 997, 1007 (D.C. Cir. 1982). By constructing a pool based on the distribution of occupational categories from which qualified candidates for the position actually hailed, Dr. Ashenfelter indirectly controlled for qualifications—the "legitimate" factor most likely to account for any disparities—yet gross disparities remained. Such statistical anomalies allow for an inference of discriminatory animus. Indeed, this Court's precedent requires no further showing of causation to establish a prima facie case of intentional pattern and practice discrimination.

In this case, moreover, post-remand discovery revealed anecdotal evidence of intentional discrimination supporting the statistical evidence. Some

beneficiaries were explicitly discouraged by Defendants' employees from seeking a job as custodian or custodian engineer, because of their race. (JA 3637 (Tatum Dep. at 40-41); JA 3651 (Smith Dep. at 34).) *Cf. Teamsters*, 431 U.S. at 365 (discriminatory message can be communicated by employer's "response to casual or tentative inquiries"). An African-American beneficiary testified that while he was not told about a custodian exam, his white coworkers were. (JA 3652, 3653 (Smith Dep. at 39, 98-99).) Multiple beneficiaries assumed that because they had never seen a minority employed as a custodian and Defendants had never indicated that minority applicants were welcome, they would never be given the job and thus that there was no reason to take the exam. (JA 3693-3694 (Villegas Dep. at 64-65); JA 3647 (Fernandez Dep. at 57-58).) *Cf. Sheet Metal Workers*, 478 U.S. at 479 ("An employer's reputation for discrimination may discourage minorities from seeking available employment."); *Teamsters*, 431 U.S. at 365 (a message that minorities are unwelcome can be communicated "by the racial or ethnic composition of that part of his work force from which he has discriminatorily excluded members of minority groups"). Defendants' ongoing violation of their CBA obligations to institute affirmative action training programs provides further circumstantial evidence of intentional discrimination. *E.g., Craik v. Minn. State Univ. Bd.*, 731 F.2d 465, 472 (8th Cir. 1984); *see Coser v. Moore*, 739 F.2d 746, 751 (2d Cir. 1984).

When a prima facie case of gross statistical disparities of the sort shown here is presented in a traditional Title VII case, the burden of production shifts to the defendant, who may meet it by "attacking the validity of the plaintiffs' statistical evidence, and by introducing statistical evidence of [its] own to negate the inference of discrimination that ha[s] been raised." *Ottaviani*, 875 F.2d 365; *see also Robinson*, 267 F.3d at 159. The procedural posture of this case is sharply different and bears emphasis: the question presented here is not whether the United States or any other party has proved by a preponderance of evidence that Defendants in fact engaged in intentional recruitment discrimination. Nor must a showing be made that Defendants would have been unable to rebut the prima facie case, which is another way of saying the same thing. *Bushey*, 733 F.2d at 226; *see also Kirkland*, 711 F.2d at 1129-30. When evidence approaching a prima facie case supports the inference of past race discrimination by a public employer, the employer must be granted the discretion to remedy the effects of that discrimination, rather than being forced as a prerequisite either to marshal evidence definitively proving a case against itself or to submit to suit and a judicial determination of liability. *See, e.g.*, *Wygant*, 476 U.S. at 290-92 (O'Connor, J., concurring). The district court erred in finding the evidence of Defendants' recruitment discrimination an insufficient basis for race-conscious remedies.

2. The Prima Facie Case of Disparate Impact Discrimination.

Not only did the evidence of Defendants' recruitment discrimination constitute a prima facie case of intentional pattern and practice discrimination, it also supports a prima facie case of disparate impact discrimination. As the district court concluded (SPA 43-44), a prima facie disparate impact case also provides a strong basis in evidence justifying adoption of race-conscious remedies. *See Paganucci*, 785 F. Supp. at 477, *aff'd* 993 F.2d 310, 312 (2d Cir. 1988); *Kirkland*, 711 F.2d at 1130-31; *see also Croson*, 488 U.S. at 501 (referring to "prima facie case of a constitutional or statutory violation"); *Peightal v. Metro. Dade County*, 26 F.3d 1545, 1555-56 (11th Cir. 1994); *Stuart*, 951 F.2d at 450; *Donaghy v. City of Omaha*, 933 F.2d 1448, 1458-60 (8th Cir. 1991); *Davis v. City and County of San Francisco*, 890 F.2d 1438, 1442-44, 1446-47 (9th Cir. 1989). (The Caldero Intervenors incorporate by reference part III.A.1 of the Arroyo Intervenors' brief, explaining this further.)

Plaintiffs establish a prima facie case of disparate impact discrimination by demonstrating a causal relationship between a particular employment practice or practices and a racial disparity. *Robinson*, 267 F.3d at 160. That is, the statistics upon which a disparate impact claim typically rests "must be of a kind and degree sufficient to reveal a causal relationship between the challenged practice and the

disparity." *Id.* The district court erred in finding the evidence of recruitment discrimination did not meet this standard.

First, it failed to recognize that just as in the pattern and practice context, a properly measured disparity between actual and expected minority applicants that is exceedingly unlikely to be random is itself compelling circumstantial evidence that Defendants' recruitment practices caused the disparity. The multiple regression analysis employed here identified the legitimate factors most likely to account for the racial disparities—namely, difference in qualifications. *See Ottaviani*, 875 F.2d at 367. Although "statistical analysis, by its very nature, can never scientifically prove" causation, "a plaintiff may establish a *prima facie* case of disparate impact discrimination by proffering statistical evidence which reveals a disparity substantial enough to raise an inference of causation"—that is, one "so great that it cannot be accounted for by chance." *Joint Apprenticeship Comm.*, 186 F.3d at 117; *see also Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-95 (1988); *Waisome v. Port Auth. of N.Y. and N.J.*, 948 F.2d 1370, 1375 (2d Cir. 1991). "A finding of two or three standard deviations (one in 384 chance the result is random) is generally highly probative of discriminatory treatment." *Waisome*, 948 F.2d at 1376. As set out above, the statistical disparities here are gross and give rise to the inference that the Defendants' recruiting methods caused the low numbers of applications from qualified minorities.

Second, testimony supported the conclusion that Defendants' reliance on word of mouth recruiting and limited advertising caused the racial disparity. Multiple beneficiaries testified that they did not apply for one of the relevant exams because they were not aware of the opportunity and would have done so if they knew that the exam was being offered. (JA 3653 (Smith Dep. at 98-99); JA 3685 (Chioke Dep. at 74-75).) *See Teamsters*, 431 U.S. at 361-66 (victims of discrimination include those who would have sought a position but for the challenged practice); *cf. E.E.O.C. v. Joe's Stone Crab*, 220 F.3d 1263, 1279 (11th Cir. 2000) (finding no causation because no woman testified that she would have applied for a position but was unaware of opportunity). One African-American beneficiary testified that while he was not told about the exam, his white coworkers were. (JA 3652, 3653 (Smith Dep. at 39, 98-99).) Some beneficiaries testified that they did not take one of the relevant exams because they were not informed or were misinformed of the necessary requirements. (Doc 546, Ex. 28 (Santana Dep.) at 57-58, JA 3689-3690 (Clement Dep. at 20-21).) *Cf. Teamsters*, 431 U.S. at 388 (providing misleading information about job requirements to minorities discriminatory). Others were not informed of classes to prepare for the exam and performed poorly as a result. (JA 3640 (Tatum Dep. at 50-51); JA 3646 (Fernandez Dep. at 53-55).) *Cf. United States v. Ironworkers Local 86*, 443 F.2d 544, 548 (9th Cir. 1971) (lack of publicity for information concerning

apprenticeship training program discriminatory). Indeed, one of the Brennan Intervenors himself testified that it was easier for insiders and relatives of custodians to learn the information necessary for successful performance on custodian exam than it was for outsiders. (JA 3660 (Mortensen Dep. at 198-99).) Moreover, testimony indicated that the discriminatory effects of Defendants' recruitment practices were self-perpetuating, as beneficiaries assumed that because they had never seen minorities employed as custodians, they would never be given the job. (JA 3693-3694 (Villegas Dep. at 64-65); JA 3647 (Fernandez Dep. at 57-58).) *Cf. Sheet Metal Workers*, 478 U.S. at 479 ("An employer's reputation for discrimination may discourage minorities from seeking available employment."); *Teamsters*, 431 U.S. at 365 (a message that minorities are not welcome to apply can be communicated "by the racial or ethnic composition of that part of his work force from which he has discriminatorily excluded members of minority groups"). The district court ignored this anecdotal evidence of causation.

Third, the inference that Defendants' recruitment methods caused the shortfall in applications from qualified minorities is supported by evidence that when Defendants changed their recruitment methods in 1997, the number of minorities applying increased, with the disparity between the actual and expected number of qualified Hispanic applicants and the actual and expected number of all Asian applicants (including both qualified and unqualified applicants) shrinking to

a statistically insignificant difference. (JA 2802 (Jacobsen Decl., Ex. 1).) *See United States v. City of Warren*, 138 F.3d 1083, 1092 (6th Cir. 1998) (increased minority response when recruitment methods changed demonstrated that previous recruitment methods caused racial disparity). The court ignored this evidence in concluding causation had not been shown.

Finally, reliance on word-of-mouth recruiting in the absence of other methods targeted to reach qualified candidates has the well-recognized effect of replicating the demographics of an incumbent workforce. *See, e.g., Grant*, 635 F.2d at 1016; *see also, e.g., Thomas*, 915 F.2d at 925; *Metal Serv. Co.*, 982 F.2d at 350; *Lams*, 766 F.2d at 392; *Barnett*, 518 F.2d at 549; *United States v. Georgia Power Co.*, 474 F.2d 906, 925 (5th Cir. 1973). Expert testimony explained that these effects could be expected and were self-reinforcing, as the resulting racial makeup of the workforce itself made it less likely that people of color would learn about relevant opportunities and discouraged qualified minorities from applying. (JA 2825 (Phillips Decl., Ex. 1).) Given the reasonable expectation that Defendants' recruiting methods would tend to duplicate the demographics of the existing workforce, an inference of causation is appropriate. *See E.E.O.C. v. Steamship Clerks Union*, 48 F.3d 594, 605-07 (1st Cir. 1995) (inferring causation when a recruitment practice would predictably exclude minorities). The district court did not address this precedent or expert testimony.

The district court thus failed to grant all reasonable inferences to the Caldero Intervenors and improperly granted summary judgment on the Brennan Intervenors' claim that evidence of recruitment discrimination did not support voluntary, narrowly-tailored race-conscious relief.

V. THE DISTRICT COURT CORRECTLY HELD THAT RACE-CONSCIOUS RELIEF WAS CONSTITUTIONALLY PROVIDED TO REMEDY THE EFFECTS OF TESTING DISCRIMINATION, BUT INCORRECTLY LIMITED THIS HOLDING TO A SUBSET OF AFRICAN-AMERICAN AND HISPANIC BENEFICIARIES.

For the reasons set out in Part III of the Arroyo Intervenors' brief and the opinion of the district court, a strong basis in evidence supported the conclusion that the challenged exams discriminated on the basis of race and the race-conscious relief to African-American and Hispanic beneficiaries was narrowly tailored to remedy the effects of that discrimination. (SPA 66, 74.) Remedying the effects of testing discrimination thus provided a compelling interest justifying relief to all the African-American and Hispanic beneficiaries. The district court committed legal error, however, in concluding that the settlement agreement was ambiguous as to whether the United States and Defendants intended to create particular subclasses of African-American and Hispanic beneficiaries. The district court further erred by (a) concluding that uncommunicated subjective intent by one of two contracting parties is relevant to the interpretation of a contract and (b) privileging the

testimony of a witness who could provide no competent evidence as to the intent of the parties in crafting the agreement. The court thus improperly concluded that seven African-American men and four Hispanic men (a group that includes the male Caldero Intervenors) received their awards pursuant to the recruiting claim rather than the testing claim and that the legality of these awards must be tested solely against the evidence of Defendants' recruitment discrimination.

"Under New York law, whether the language of a contract is unambiguous, and if so, what construction is proper, are legal questions subject to *de novo* review." *Seiden Assocs., Inc. v. ANC Holdings, Inc.*, 959 F.2d 425, 429 (2d Cir. 1992) (internal citations omitted); *see Thompson v. McQueeney*, 868 N.Y.S.2d 443, 447 (N.Y. App. Div. 2008). To the extent they are findings of fact, a district court's interpretations of an ambiguous contract are reviewed for clear error; to the extent they are mixed findings of fact and law, they are reviewed for error. *United States Naval Inst. v. Charter Communications, Inc.*, 875 F.2d 1044, 1049 (2d Cir. 1989).

1. The Settlement Agreement Unambiguously Draws No Distinctions Among African-American and Hispanic Beneficiaries.

The plain language of the settlement indicates that the United States and Defendants did not agree that each African-American and Hispanic beneficiary would obtain relief pursuant to either one of the United States' claims of

discrimination or the other. The district court thus incorrectly relied on extrinsic evidence to determine the Defendants' and United States' intent regarding the classification of the beneficiaries. *See, e.g.*, *Collins v. Harrison-Bode*, 303 F.3d 429, 433 (2d Cir. 2002) ("Under New York law, the question of ambiguity *vel non* must be determined from the face of the agreement, without reference to extrinsic evidence."); *Thompson*, 868 N.Y.S.2d at 446 ("Whether a contract is ambiguous is a question of law and extrinsic evidence may not be considered unless the document itself is ambiguous").

To determine if a contract is ambiguous, a court must examine the "entire contract and consider the relation of the parties and the circumstances under which it was executed," with the wording to be considered "in the light of the obligation as a whole and the intention of the parties as manifested thereby." *Kass v. Kass*, 696 N.E.2d 174, 181 (N.Y. 1998). The agreement is not ambiguous regarding the classification of beneficiaries, as none of the relevant language is "capable of more than a single meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *Walk-In Medical Centers, Inc. v. Breuer Capital Corp.*, 818 F.2d 260, 263 (2d Cir. 1987). The agreement makes no distinction between or allusion to "testing beneficiaries" and "recruiting

beneficiaries." Rather, it sets out a single system for determining beneficiaries and calculating their awards, without reference to the underlying claims. (JA 105-106, JA 107-110 (Settlement).) The simple term "offeree" is used throughout, without modifier. (*Id.*) While the agreement does include sections explicitly headed "Terms Relating to Recruitment Claim" and "Terms Relating to Testing Claim," neither makes any reference to the beneficiaries or the relief to be awarded them. (JA 110, 114.) The natural reading and plain meaning of this document is that the parties intended the relief to beneficiaries to flow from both claims.[13]

Instead of analyzing the language of the agreement, the district court seized upon its silence regarding how the parties would have proceeded if they had foreseen that a court would find the evidence of recruitment discrimination insufficient to justify race-conscious affirmative action. (SPA 117.) However, under New York law, such silence does not create ambiguity. *E.g.*, *Nissho Iwai Europe PLC v. Korea First Bank*, 782 N.E.2d 55, 60 (N.Y. 2002) (stating, "ambiguity does not arise from silence, but from 'what was written so blindly and

[13] While the agreement also does not distinguish between white female or Asian beneficiaries and African-American or Hispanic beneficiaries, the United States never alleged that Defendants discriminated against Asians or women in testing, and thus the legality of the relief to the Asian and white female beneficiaries is necessarily measured against the recruitment claim. Given that the United States alleged that Defendants discriminated against African-Americans and Hispanics in *both* testing and recruitment, however, the legality of relief to the African-American and Hispanic beneficiaries is properly measured against *both* the testing and the recruitment claims.

imperfectly that its meaning is doubtful,'" and thus interpreting the contract based on its "literal meaning"); *Greenfield v. Philles Records, Inc.*, 780 N.E.2d 166, 171 (N.Y. 2002) (finding that contract's silence on particular point did not create ambiguity and relying on plain language). In the face of such silence, it is thus inappropriate to attempt to divine what the parties would have done in the face of a legal or factual development not addressed in the contract. 780 N.E.2d at 173; *Reiss v. Financial Performance Corp.*, 764 N.E.2d 958, 961 (N.Y. 2001) (agreement's omission of a provision addressing a foreseeable contingency does not empower court to imply new terms to address this contingency). This approach is especially appropriate here given the nature of this agreement as a settlement of a dispute between legal adversaries. Aside from the intent to implement the terms set out in the agreement, it is highly unlikely that the United States and Defendants shared the same subjective "intentions" in crafting this agreement. The court thus erred in declaring the agreement ambiguous and seeking extrinsic evidence.

2. No Competent Evidence Supported the District Court's Conclusion that African-American and Hispanic Beneficiaries Should Be Categorized as Testing Beneficiaries or Recruiting Beneficiaries.

As a matter of law, the subjective intent of one party is irrelevant to interpreting an ambiguous contract unless this intent was communicated to the other party. *SR Int'l Bus. Ins. Co., Ltd. v. World Trade Center Props., LLC*, 467

F.3d 107, 125 (2d Cir. 2006); *Prop. Asset Mgmt., Inc. v. Chicago Title Ins. Co.*, 173 F.3d 84, 87 (2d Cir. 1999) (intent must be manifested by act or words); *Jones v. Hirschfeld*, 348 F. Supp. 2d 50, 61 (S.D.N.Y. 2004) (statement of one party's intentions made four years after entry into agreement could not affect interpretation of that agreement, given that these intentions were undisclosed and not manifested in agreement); *Wells v. Shearson Lehman/Am. Express*, 526 N.E.2d 8, 15 (N.Y. 1988) ("Uncommunicated subjective intent alone cannot create an issue of fact where otherwise there is none"); *Fisher v. A.W. Miller Technical Sales, Inc.*, 762 N.Y.S.2d 205, 209 (N.Y. App. Div. 2003) ("In the absence of any evidence that the views now advanced were either discussed or considered by the parties during the process leading up to the execution of the agreement, the words in the contract must be given the meaning which those to whom they are addressed would reasonably be expected to perceive"); *Hudson-Port Ewen Assoc., L.P. v. Kuo*, 566 N.Y.S.2d 774, 777 (N.Y. App. Div. 1991) *aff'd*. 578 N.E.2d 435 (N.Y. 1991) (same). The district court based its conclusion that the settlement agreement should be interpreted to classify African-Americans and Hispanics as either recruitment or testing beneficiaries on its finding that the United States intended this classification when it entered into the agreement. (SPA 135.) This reliance was error because the only testimony from an actual participant in the negotiations established that the United States never communicated such intentions.

Norma Cote, prior counsel for Defendants and the only participant in the settlement negotiations to testify, stated unequivocally that neither party to the agreement ever communicated any intention to classify beneficiaries as either testing or recruitment beneficiaries in negotiating and finalizing the agreement. (JA 4010 (Aug. 20, 2007 Hr'g Tr.)("The Federal Government never made any distinction between who—between which legal theory applied to any individual beneficiary. If any."); JA 4023 (Q: "Did the defendants ever communicate any intention to the United States to classify each offeree as either a testing claim beneficiary or recruitment claim beneficiary?" A: "Never.").)[14] Nor did the parties ever discuss calibrating relief to a particular beneficiary's injury pursuant to a particular claim of discrimination. (JA 4026-4027.) No party offered any contrary evidence that the United States had in fact communicated these intentions. The district court thus erred in interpreting the agreement based on its mixed finding of fact and law as to the relevance of United States' subjective intent in entering into it.[15]

In finding that the Board and the United States intended to classify each African-American and Hispanic beneficiary as either a recruitment beneficiary or a testing beneficiary, the district court credited the testimony of Katherine Baldwin,

[14] *See also* JA 4011, 4012.

[15] This error was compounded by the district court's refusal to permit questioning addressed to *Defendants*' uncommunicated subjective intent. (JA 4021-4022.)

formerly a second-level attorney supervisor representing the United States in this case. (SPA 133-134.) Baldwin, however, had no personal knowledge of the settlement negotiations or the process by which the beneficiaries were selected. (JA 4077 (Aug. 20, 2007 Hr'g Tr.) ("I was not involved in the construction of the list because I was two layers removed."); JA 4078 (Q: "Well, do you know then how that list was composed and who on that list from these two categories—" A: "No, I do not have direct knowledge of that.").)[16] Instead, she hypothesized that the agreement must have been intended to classify beneficiaries as either victims of recruiting discrimination or victims of testing discrimination, because of an unwritten Justice Department policy she described addressing make-whole relief for individual victims. She did not recall ever communicating that policy to the line attorneys who actually negotiated the settlement agreement, however, nor could she testify to any other method by which the attorneys had been informed of it. (JA 4095-4096 (Q: "Do you personally recall conveying the policy you mentioned earlier regarding make-whole relief to the line attorneys in this matter?" A: "I don't specifically recall whether I did or I didn't.").)

Moreover, despite Baldwin's assertion that unwritten Justice Department policy would have limited the awards to make-whole relief to individual victims, no evidence was presented that either party made *any* inquiry as to whether any

[16] *See also*, *e.g.*, JA 4085, 4089, 4090, 4094.

beneficiary was a victim of recruiting discrimination. (JA 4021 (Q: "Did you undertake any individualized inquiry to determine whether [individuals added to the beneficiary list had] been victims of recruiting discrimination or testing discrimination?" Cote: "No."); JA 4024 (Q: "Did the defendants [and the] United States in this process ever jointly pursue any individualized inquiry to determine whether each offeree was, in fact, a victim?" Cote: "No." Q: "Did the United States ever communicate to you that it had independently undertaken such individualized inquiries?" Cote: "No.").)[17] Instead, the uncontradicted evidence showed that the parties asked only three questions to determine whether an individual would be an offeree: (1) does the individual currently work as a custodian or custodian engineer; (2) is the individual African-American, Hispanic, Asian, or female; and (3) has the individual worked provisionally as a custodian or custodian engineer during the stipulated time frame. (*See* JA 105 (Settlement, at ¶ 4).)[18] If all three questions were answered in the affirmative, the individual was made a beneficiary.

The court below committed clear error in relying on Baldwin's testimony, as Baldwin had no personal knowledge of the parties' negotiations or the method by which the beneficiaries were selected and thus was not competent to testify as to

[17] *See also, e.g.*, JA 4108 (Ms. Baldwin testifying that she does not know if beneficiaries were ever individually interviewed).

[18] *See also* JA 4009-4010, 4020-4021, 4029, 4097-4098 (Aug. 20, 2007 Hr'g Tr.); JA 706, 707 (Feb. 2003 Hr'g Tr.).

the parties' objectively manifested intentions in entering into the settlement agreement. *See, e.g.*, *Nycal Corp. v. Inoco PLC*, 988 F. Supp. 296, 303 n.42 (S.D.N.Y. 1997), *aff'd* 166 F.3d 1201 (2d Cir. 1998) (unpublished table decision) (holding that witness who had not personally participated in settlement negotiations and had not specifically discussed relevant question with negotiators could not give relevant, competent, or admissible evidence raising a question of fact as to meaning of ambiguous contract). The only testimony offered by an actual negotiator of the agreement compels the conclusion that beneficiaries were identified by determining which individuals who had been hired provisionally during the selected time period were African-American, Hispanic, Asian, and/or female, rather than through individualized analysis of each beneficiary's employment history and its relation to a specific claim.

VI. THE BRENNAN INTERVENORS' ASSERTED CONTRACT RIGHTS DO NOT CHANGE THE ANALYSIS AS TO THE LEGALITY OF THE AWARDS.

The Brennan Intervenors argued to the district court that it should not enter the challenged retroactive seniority awards as a consent decree because the awards violated their rights under the CBA between their union and Defendants. They fully succeeded in this argument. The district court indeed declined to enter the relevant portions of the agreement as a consent decree. (SPA 82-84.) Given that these provisions had already been fully implemented by Defendants years before,

however, it remained necessary to consider whether this implementation was permissible under the Equal Protection Clause and Title VII.

Indeed, prior to summary judgment briefing, the court specifically ordered all parties to address (1) whether the challenged paragraphs could be entered as a consent judgment; (2) if so, the relevant standard of review for judicial approval or disapproval of the challenged paragraphs; and (3) if not, the relevant standard of review for determining the legality of the benefits that had been awarded pursuant to the challenged paragraphs. (JA 781-782.) No party argued that the standard of review under the Equal Protection Clause or Title VII depended on whether the paragraphs could be entered as a consent judgment. *See, e.g.*, *Local 93*, 478 U.S. at 501 (lawfulness of action taken pursuant to a consent decree analyzed by the same standard as voluntary affirmative action measures). For the reasons found below, the retroactive seniority awards have a limited impact on the Brennan Intervenors, and thus are permissible affirmative action under Title VII and the Equal Protection Clause. (SPA 58, 73-74.) This Court's relevant inquiry as to their contract rights appropriately ends with this conclusion.

If the Brennan Intervenors believe that the Defendants have implemented an affirmative action plan that violates the CBA, they can, of course, bring any timely grievances pursuant to the procedure set out within the CBA in order to seek a remedy for that breach. But they themselves previously conceded in proceedings

below that any contract claim is not a basis for injunctive relief stripping the beneficiaries of the awards received under the agreement.[19] (Doc. 229, Plaintiff-Intervenors' Resp. to the Motions for Partial Dismissal or Partial S.J. (Dec. 20, 2001), 3, 14-15.) Instead, the Brennan Intervenors' sole argument with regard to the CBA was that because of the challenged awards' effect on their contract rights, the District Court should decline to place its judicial imprimatur on the challenged awards. (*Id.* (describing CBA claim as solely "a claim that provisions of a settlement agreement should not be judicially approved because they breach rights").) Given their full success in pressing this claim below, it is not clear what they seek in raising contract arguments to this Court.

Moreover, even assuming that the CBA provides the Brennan Intervenors with certain protections as to their seniority interests, the beneficiaries themselves possess clear contractual rights to their retroactive seniority dates. Each beneficiary entered into a separate contractual agreement with the Defendants, wherein each beneficiary released any and all claims of discrimination against Defendants (whether or not these claims were addressed in the current lawsuit) in

[19] Nor did the complaint in the second action plead any breach of contract claims. (JA 4333-4345 (Amended Compl.).) Indeed, the Brennan Intervenors could not have pled such affirmative claims, given that "when an employer and a union enter into a collective bargaining agreement that creates a grievance procedure," as is the case here, "an employee subject to the agreement may not sue the employer directly for breach of contract but must proceed in accordance with the contract." *Bd. of Educ. v. Ambach*, 70 N.Y.2d 501, 508 (1987); *see Albala v. County of Nassau*, 705 N.Y.S.2d 615, 616 (N.Y. App. Div. 2000).

consideration for the particular retroactive seniority award described in the agreement. (*See* JA 173-174 (Settlement, App. G).)[20] The Brennan Intervenors offer no rationale for privileging their own contract claims to a certain seniority system over the beneficiaries' contract claims to their retroactive seniority awards. Any valid contract claim by the Brennan Intervenors is thus offset by the equal or greater contract rights of the beneficiaries. In other words, contract law cannot determine the answer to the questions presented here. The questions this Court must answer are whether the challenged awards are permissible under Title VII and the Equal Protection Clause.

In any case, the challenged awards do not violate any vested rights under the CBA. First, the Brennan Intervenors cannot argue that the permanent appointments violate any contractual right created by the CBA. Nothing in the CBA limits the methods Defendants may use to appoint individuals to permanent positions. *See Kirkland*, 711 F.2d at 1128 (finding intervenors had no vested rights violated by a change in procedures for permanently appointing employees).

Second, the CBA does not provide the Brennan Intervenors with any entitlement to transfer based on seniority violated by the retroactive seniority awards, given that any transfer is contingent on many factors in addition to

[20] The situation is thus materially different from *United States v. City of Hialeah*, where the challenged provisions of the settlement agreement had not been implemented and so the identified beneficiaries had given no consideration for their awards. 140 F.3d 968, 975 (11th Cir. 1998).

seniority and that Defendants retain considerable discretion over the award of any transfer under state law and the CBA. Given the discretion retained by Defendants in the rating and transfer process and the uncertainty of any individual's claim to a particular transfer, the Brennan Intervenors' interest in transfers is a "mere expectancy," *see id.* at 1127-28, and thus the retroactive seniority awards do not violate any right under the CBA. *See, e.g., County of Nassau v. N.Y. State Public Employees Relations Bd.*, 547 N.Y.S.2d 339, 341-48 (N.Y. App. Div. 1989), *aff'd*, 563 N.E.2d 266 (N.Y. 1990) (where CBA provided that faculty appointments would be based on seniority, but college retained discretion to consider qualifications, refusal to base appointments on seniority did not violate CBA); *Cassidy v. Mun. Civil Serv. Comm'n*, 337 N.E.2d 752, 754 (N.Y. 1975) (finding receipt of highest examination score on a civil service test did not vest any right to appointment, when examination scores were not the sole determinant of fitness for position).

VII. THE DISTRICT COURT ERRED IN CRAFTING A REMEDY STRIPPING TEN BENEFICIARIES OF ALL SENIORITY EARNED ON THE JOB AND THE ABILITY TO EARN SENIORITY IN THE FUTURE.

In its April 25, 2007, Order, the district court for the first time held that the permanent appointments, and the seniority flowing from them, were "conceptually identical" to the retroactive seniority awarded to beneficiaries. (SPA 123.) The

court also held that at least one of the Brennan Intervenors, Dennis Mortensen, was injured by the appointments, because he became a permanent custodian engineer after the beneficiaries were appointed, and therefore had less seniority than the beneficiaries had actually earned on the job. Based on these rulings, the court ultimately declared the Constitution had been violated by the "award" of seniority calculated by reference to *actual* date of appointment to a group referred to the by the court as male "recruiting beneficiaries."[21] (SPA 147 (Judgment ¶ 3.) The court thus in effect declared that not only must the relevant beneficiaries be stripped of all seniority *actually earned on the job*, but also that they must never be permitted to accrue seniority in future, because their original appointment was tainted. Such a remedy is unprecedented in the history of employment discrimination litigation.[22] Ironically, in seeking to remedy the perceived slight to the Brennan Intervenors' seniority interests, the district court did far greater violence to the beneficiaries' seniority interests, without justification in law or equity. This was error.

1. The Brennan Intervenors Were Not Injured by the Permanent Appointments.

The Brennan Intervenors did not put forward evidence that they were injured by the permanent appointments and thus had standing to challenge them. The

[21] The affected Caldero Intervenors are Salih Chioke, Harry Santana, Carl Smith, and Frank Valdez.

[22] Indeed, the Brennan Intervenors never requested this extreme remedy.

court erred in concluding that such injury had been shown because Dennis Mortensen became a permanent custodian engineer in 2002 and thus has earned less seniority than those beneficiaries appointed as custodian engineers in 2000. (SPA 122.)

First, it is undisputed no new positions were created for any of the beneficiaries (JA 2785 (Caldero Intervenors' Rule 56.1 Statement, ¶ 115)), and the Brennan Intervenors have never made any showing that their own appointments were delayed by the beneficiaries' permanent appointments. Indeed, Dennis Mortensen became a permanent custodian engineer the very day after he sought appointment (JA 3657 (Mortensen Dep. at 90-93)). If the beneficiaries had not been appointed to these permanent positions in 2000, presumably someone else would have been, and two years later, when Dennis Mortensen became permanent, he would have stood behind the same number of individuals in terms of his relative seniority. Dennis Mortensen's actual position would thus be the same in either situation.

Second, the court's analysis does not support the notion that any of the beneficiaries appointed as custodians, rather than custodian engineers, harmed the Brennan Intervenors. Scott Spring is the only Brennan Intervenor who is a custodian and he became permanent three years before anyone became permanent pursuant to the agreement. (*See* JA 3807 (Spring Dep. at 58-59).) Because

custodians do not compete directly with custodian engineers for transfers or TCAs,[23] even under the district court's analysis the relevant beneficiaries appointed as custodians[24] cannot possibly have harmed any of the named Brennan Intervenors—and thus the Brennan Intervenors cannot represent any such theoretical injury suffered by members of the certified class. *Lewis v. Casey*, 518 U.S. 343, 357 (1996); *Warth v. Seldin*, 422 U.S. 490, 502 (1975);*O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). Because they cannot have suffered any injury from these appointments, they are entitled to no remedy—and certainly not the radical remedy at issue here.

2. The Court Erred in Crafting a Remedy That Strips Seniority Earned on the Job From Innocent Employees.

While it is not uncommon to provide retroactive seniority to specific individuals as a remedy in discrimination cases and thus to adjust the rank order of individuals within the seniority system, virtually no precedent exists for a court *stripping* seniority actually earned by innocent employees as a remedy for an employer's discrimination.[25] The Judgment's use of the word "award" in reference

[23] All the Brennan Intervenors, including Mortenson, have seniority dates prior to 2000 for purposes of layoffs.

[24] Namely, Edwin Howell, Jerry Dale Lewis, Bernard Rowell, Harry Santana, Carl Smith, and Gerardo Villegas.

[25] The Caldero Intervenors have located only one case in the history of employment discrimination litigation in which a court took away some measure of earned seniority from innocent employees to remedy hiring discrimination. *See Brunet v. City of Columbus*, 1 F.3d 390, 412-13 (6th Cir. 1993). In the sixteen

to appointment date seniority is a misnomer. The agreement awarded each relevant beneficiary permanent appointment and *retroactive* seniority. Appointment date seniority was *not* awarded, but has been earned by the individual beneficiaries by successful performance in their permanent positions over the past nine years. Even if, despite the Brennan Intervenors' lack of standing, this Court affirms the district court's implicit holding that the permanent appointment of the male "recruitment beneficiaries" violated the Constitution, a remedy that bars the beneficiaries from earning seniority cannot stand.

Indeed, the Supreme Court has previously rejected the type of remedy set out here. In *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), the Court explained how and when to remedy harm to seniority interests suffered by individual victims of hiring discrimination; the analysis it set out is fundamentally at odds with the district court's.[26] In holding that an award of retroactive seniority to a victim of hiring discrimination does not impermissibly harm innocent, previously-hired employees, the Supreme Court specifically distinguished the type of remedy at issue here. It stated, "With reference to the problems of fairness or

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years since, no court has followed its conclusory holding that the only possible remedy to discriminatory hiring was to strip two individuals of earned seniority, rather than providing retroactive seniority to those whose own hiring was delayed by discrimination.

[26] While *Franks* is a Title VII case, the Supreme Court has found its discussion of whether and when innocent employees may be called upon to share the burden of remedying prior discrimination directly relevant in the Equal Protection context. *Wygant*, 476 U.S. at 281.

equity respecting the conflicting interests of the various groups of employees, . . . [n]o claim is asserted that nondiscriminatee employees holding . . . positions they would not have obtained but for the illegal discrimination should be deprived of the seniority status *that they have earned*." *Id.* at 776 (emphasis added). The *Franks* Court acknowledged that as a result, even with an award of retroactive seniority to the date they had been discriminatorily denied the positions at issue, "most discriminatees will still remain subordinated in the [seniority] hierarchy to a position inferior to that of a greater total number of employees than would have been the case in the absence of discrimination"—the precise injury that the Brennan Intervenors have asserted. *Id.* Rather than concluding that such a result represented an impermissible continuation of discrimination, however, the Supreme Court held that this incompleteness was a *virtue* of the remedy, because "[this] *sharing of the burden* of the past discrimination . . . is entirely consistent with any fair characterization of equity jurisdiction . . . ." *Id.* (emphasis added).

In other words, when considering this precise question, the Supreme Court held that granting retroactive seniority to individuals whose hiring was delayed by race discrimination, while simultaneously declining to strip the innocent employees hired in their place of the seniority they had actually earned, represented a result consistent with and demanded by principles of equity. In

contrast, the result ordered by the district court places the entire burden on the shoulders of the innocent beneficiaries.

Moreover, the district court's decision to render the relevant beneficiaries unable to accrue seniority sharply increases their exposure to layoff, which raises particular concerns under the Equal Protection Clause. Pursuant to New York Civil Service Law § 80(1), employees with the least seniority are the first to be laid off. N.Y. CIV. SERV. § 80(1) Should the district court's Judgment be upheld, the relevant beneficiaries will *always* be first in line for layoffs. They will lose their jobs before any custodians hired in the nine years since they became permanent and before any custodian who will be hired in the future. Imposing the burden of layoffs on this class of innocent employees in order to remedy an Equal Protection violation directly contravenes *Wygant*, 476 U.S. at 283. *Wygant* strongly suggests that the Constitution does not permit layoffs of innocent employees to remedy an employer's past race discrimination, noting, "[L]ayoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive." *Id.*

In addition, by making it impossible for the relevant beneficiaries to compete for the increases in salary and responsibility that can only come from transfers to larger schools, the Judgment operates as an "absolute bar" to the beneficiaries' advancement, and thus does not withstand scrutiny as a remedy for

racial discrimination under the Equal Protection Clause. *See, e.g.*, *Paradise*, 480 U.S. 149, 182 (finding remedy for past racial discrimination constitutionally permissible because it did not serve as absolute bar to advancement of innocent third parties); *Barhold v. Rodriguez*, 863 F.2d 233, 238 (2d Cir. 1988) (concluding that remedy for past racial discrimination was constitutional because ample opportunities remained for innocent employees to obtain transfers and promotions); *United States v. City and County of San Francisco*, 696 F. Supp. 1287 (N.D. Cal. 1988) (finding remedy for race discrimination constitutionally permissible because it did not serve as absolute bar to innocent third parties), *aff'd sub nom.*, *Davis*, 890 F.2d 1438; *cf. Johnson*, 480 U.S. at 637-38 (upholding remedy for past discrimination under Title VII because it did not absolutely bar innocent third parties from competing for relevant positions). The Constitution limits the burdens that individual employees can be made to shoulder to remedy an employer's discrimination, as the Brennan Intervenors themselves passionately argue when their own interests are at stake. Here, in order to remedy the Brennan Intervenors' alleged injury, the court perpetrated a much greater one, by permanently taking all job security and all right to compete for advancement away from innocent employees. The Equal Protection Clause does not permit this.

Had the Brennan Intervenors actually shown that they would have obtained their own permanent appointments sooner in the absence of the permanent

appointments, they might well have been entitled to make-whole relief in the form of retroactive seniority, given the court's implicit finding that these appointments were discriminatory, *cf., e.g.*, *Bourdais v. New Orleans City*, 485 F.3d 294, 299-300 (5th Cir. 2008); they would not, however, be entitled to a remedy that renders a group of innocent employees of color permanent second-class citizens within the workplace, eternally "junior" to every newly appointed custodian or custodian engineer. Because this remedy places an unjustifiably heavy burden on these individuals, it is improper. *See generally Teamsters*, 431 U.S. at 375 ("Especially when immediate implementation of an equitable remedy threatens to impinge upon the expectations of innocent parties, the courts must look to the practical realities and necessities inexplicably involved in reconciling competing interests in order to determine the special blend of what is necessary, what is fair, and what is workable.") (internal quotation marks and citation omitted).

VIII. THE DISTRICT COURT ABUSED ITS DISCRETION IN CERTIFYING A CLASS.

The district court certified a Brennan Intervenor class made up of employees whose seniority was affected by the challenged awards. (SPA 87, 124.) Because no pre-motion conference had been held (as required by Judge Block's individual rules) and no briefing schedule had been set, only the Brennan Intervenors briefed

class certification. Certifying a class under these circumstances constituted an abuse of discretion. *See e.g.*, *Robinson*, 267 F.3d at 162 (standard of review).

"[A] Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *In re IPO Sec. Litig.*, 471 F.3d 24, 33 (2d Cir. 2006). In an adversary system, rigorous analysis flows from argument by all parties. Allowing only one party to be heard, particularly on a matter that may lead to liability, constitutes denial of due process and abuse of discretion. *See Nelson v. Adams USA*, 529 U.S. 460, 465 (2000); *cf. United States Nat'l Bank of Or. v. Indep. Ins. Agents of Am.*, 508 U.S. 439, 448 (1993). The district court abused its discretion when it certified the class.

CONCLUSION

For the reasons set out above, the district court's Judgment should be affirmed to the extent it concluded that the permanent appointments and retroactive seniority awards complied with Title VII and the Constitution. To the extent it concluded that these awards violated the Constitution as to eleven male beneficiaries, the Judgment should be reversed and remanded with instructions to provide additional declaratory relief.

Dated: August 21, 2009

Respectfully submitted,

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

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) as modified by this Court's order because this brief contains 24,636 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

Dated: August 21, 2009

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Certificate of Service

Pursuant to Fed. R. App. P. 25(d), I certify that on August 21, 2009, I electronically filed the foregoing Brief of Intervenors-Appellees-Cross Appellants Janet Caldero et al. with the Clerk of the Court using the Second Circuit's Electronic Case Filing system. The Brief was served by operation of the Court's ECF system on all parties indicated on the Notice of Docket Activity, including the following counsel:

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