UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, and JANET A. CALDERO, *et al.* Proposed Plaintiff-Intervenors -against- NEW YORK CITY BOARD OF EDUCATION, *et al.*, Defendants, and JOHN BRENNAN, *et al.* Defendant-Intervenors.	Civ. No. 96-0374 (RML)
JOHN BRENNAN, *et al.* Plaintiffs -against- JOHN ASHCROFT, *et al.*, Defendants and JANET A. CALDERO, *et al.* Proposed Defendant-Intervenors	Civ. No. 02-0256 (FB) (RML)

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE[1]

[1] Identical memoranda and supporting declarations are being filed in the two actions.

Proposed Intervenors Janet A. Caldero, Celia I. Calderon, Martha Chellemi, Andrew Clement, Kristen D'Alessio, Laura Daniele, Charmaine DiDonato, Dawn L. Ellis, Marcia P. Jarrett, Mary Kachadourian, Kathleen Luebkert, Adele A. McGreal, Marianne Manousakis, Sandra D. Morton, Maureen Quinn, Harry Santana, Carl D. Smith, Kim Tatum, Frank Valdez, and Irene Wolkiewicz are women and persons of color employed as Custodians and Custodian Engineers[2] by the New York City Board of Education.[3] In 2000, all received retroactive seniority awards under the settlement agreement that the United States entered into with the New York City Board of Education and other municipal defendants ("Municipal Defendants") in *United States v. New York City Board of Education*, Civ. No. 96-0374 (E.D.N.Y.), and most received permanent employment status under this agreement. The awards to Proposed Intervenors were designed to remedy the effects of past race and gender discrimination in the New York City Board of Education's recruitment of Custodians and Custodian Engineers and past race discrimination in the hiring of Custodians and Custodian Engineers.

United States v. New York City Board of Education is a Title VII action brought by the United States against Municipal Defendants, alleging unlawful race and sex discrimination in the recruitment of Custodians and Custodian Engineers in the New York City public schools and unlawful race discrimination in the hiring of Custodians and Custodian Engineers. When the original parties entered into a settlement agreement designed to remedy the effects of this

[2] Since the initial filing of *United States v. New York City Board of Education*, the job titles of Custodians and Custodian Engineers have changed. The position formerly designated "Custodian" is now designated "Custodian Engineer Level I." The position formerly designated "Custodian Engineer is now designated "Custodian Engineer Level II." To preserve continuity, this memorandum will nevertheless use the terms "Custodian" and "Custodian Engineer."

[3] The New York City Board of Education has been replaced by the New York City Department of Education. This memorandum will nevertheless refer to it as the Board of Education, since it is so designated in this action.

discrimination, white male Custodians and Custodian Engineers employed by the New York City Board of Education ("the Brennan intervenors") intervened in the case, claiming that the settlement agreement's awards to Proposed Intervenors, and to other beneficiaries under the agreement, constitute race and gender discrimination against them and other white male Custodians and Custodian Engineers in violation of the Fourteenth Amendment's Equal Protection Clause, 42 U.S.C. §§ 1981 and 1983, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. These individuals also brought a second, separate action challenging the settlement agreement, *Brennan v. Ashcroft*, Civ. No. 02-0256 (E.D.N.Y.), in which they make the same assertions. The relief sought by the Brennan intervenors includes stripping all recipients, including Proposed Intervenors, of the retroactive seniority and permanent employment status received under the settlement agreement. (*United States v. New York City Bd. of Educ.*, Am. Compl. in Intervention; *Brennan v. Ashcroft*, Am. Compl.; Pl. Mem. in Supp. of Prelim. Inj., at 9-10.)

Should Proposed Intervenors lose the retroactive seniority awarded under the settlement agreement, they would become less able to compete for transfer to larger schools since, when more than one individual seeks to transfer to a particular school, and both have the same job performance rating, the school goes to the individual with more seniority. (*E.g.*, Chellemi Decl. ¶ 7; McGreal Decl. ¶ 8.) Because salary is based on the square footage of the school in which a Custodian or Custodian Engineer is placed, the loss of seniority can directly result in a loss of salary. (*E.g.*, Morton Decl. ¶ 8.) Those Proposed Intervenors who have made pension contributions to reflect the awards of seniority and who as a result can retire earlier or with more generous pensions than they would have absent the settlement agreement face the loss of these contributions and the upset of these retirement plans should they lose their retroactive seniority. (Caldero Decl. ¶¶ 8-10; Clement Decl. 9-10.) Most Proposed Intervenors who received

permanent employment status under the settlement agreement would likely lose their jobs if this status were revoked. (*E.g.* Lonergan Decl. in Opp. to Prelim. Inj., ¶¶ 43-45; DiDonato Decl. ¶ 10; Morton Decl. ¶¶ 12-13.) If they somehow could remain as provisional employees after such a revocation, they would lose the civil service protections offered by permanent employment, the stability and salary predictability that comes from permanent placement at a single school, the ability to take on assignments at schools without permanent Custodians for additional salary, and the ability to bid for transfers that bring salary increases. (*E.g.*, Ellis Decl. ¶¶ 7, 11; McGreal Decl. ¶¶ 7-9, 11.)

In the face of challenges to the constitutionality of the awards by the Brennan intervenors, the United States has chosen not to defend Proposed Intervenors' awards under the settlement agreement. It has done so despite an explicit representation in the settlement agreement that it would defend the awards against any such challenge. (Settlement Agreement, ¶ 9.) It has done so even though Proposed Intervenors have come to rely on the awards and to base future expectations on them. (*E.g.*, Caldero Decl. ¶ 10; Chellemi Decl. ¶ 10; Morton Decl. ¶ 11; Valdez Decl. ¶ 12.) Specifically, the United States has chosen to oppose the relief sought by the Brennan intervenors only as to those African-American and Hispanic recipients who previously took and failed one of the civil service tests challenged as racially discriminatory in its original complaint, thereby abandoning the interests of the majority of the recipients, including all white women, all Asians, and those African-Americans and Hispanics who did not fail one of the tests challenged as discriminatory. (U.S. Partial Opp. to Prelim. Inj., at 2.) For reasons set out in detail below, Municipal Defendants—the parties originally accused of discriminating on the basis of race and sex—are ill situated to act as the sole defenders of the settlement agreement's constitutionality and legality. The United States' decision to walk away from the settlement agreement that it sought, obtained, and enforced through many years of hard-fought litigation

drastically changes these proceedings. In these circumstances, fairness demands that the individuals whose interests lie at the heart of this conflict be permitted to appear and defend these interests.

In light of the United States' sharp reversal in its litigation position, Proposed Intervenors seek to intervene in the above-entitled actions to defend the constitutionality and legality of the awards, both to protect their own economic and employment interests and to protect their interests as women and persons of color in ensuring that the effects of past race and gender discrimination are eradicated. Proposed Intervenors are entitled to intervene because of the danger that, Municipal Defendants' current intent to defend the settlement agreement awards notwithstanding, their vital interest in protecting their employment and employment benefits and in ensuring the remedy of past discrimination will not be adequately represented in these actions.

Therefore, Proposed Intervenors seek to intervene as of right, pursuant to Rule 24(a), Fed. R. Civ. P., or with the Court's permission, pursuant to Rule 24(b), Fed. R. Civ. P. They seek to participate in *United States v. New York City Board of Education* as plaintiff-intervenors and in *Brennan v. Ashcroft* as defendant-intervenors. For the reasons set forth below, Proposed Intervenors' motion to intervene should be granted.

I. PROPOSED INTERVENORS MEET THE REQUIREMENTS FOR INTERVENTION AS OF RIGHT.

Proposed Intervenors seek to intervene in these actions to protect their direct interests in their seniority and their permanent employment status, as well as the jobs, salary, public school placement, civil service protections, and pension investments that flow from these interests. They easily meet the four-part test required by Rule 24(a)(2) for applicants for intervention as of

right.[4] Under Rule 24(a)(2), Proposed Intervenors must "(1) file a timely motion; (2) claim an interest relating to the property or transaction that is the subject of the action; (3) be so situated that without intervention the disposition of the action may impair that interest; and (4) show that the interest is not already adequately represented by existing parties." *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 176 (2d Cir. 2001). While a proposed intervenor must meet all four requirements to intervene as of right, "[a]pplication of the Rule requires that its components be read not discretely, but together." *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 983 (2d Cir. 1984). Thus, for instance, "[a] showing that a very strong interest exists may warrant intervention upon a lesser showing of impairment or inadequacy of representation," while, "[s]imilarly, where representation is clearly inadequate, a lesser interest may suffice as a basis for granting intervention." *Id.* "Doubts regarding the propriety of permitting intervention should be resolved in favor of allowing it, because this serves the judicial system's interest in resolving all related controversies in a single action." *Sierra Club v. Robertson*, 960 F.2d 83, 86 (8th Cir. 1992). Examination of the four factors reveals that Proposed Intervenors are timely seeking to protect direct interests that are imperiled by this litigation and not otherwise adequately represented.

A. The Instant Motion Is Timely.

Timeliness is "evaluated against the totality of the circumstances before the court," *Farmland Dairies v. Comm'r of the N.Y. State Dep't of Agric. & Mkts.*, 847 F.2d 1038, 1044 (2d Cir. 1988), and "defies precise definition, although it certainly is not confined strictly to

[4] Rule 24(a) states:

> Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by the parties.

chronology," *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 70 (2d Cir. 1994). The totality of circumstances here demonstrates that the Proposed Intervenors' motion is timely.

For years, Proposed Intervenors have been aware of the United States' suit alleging a pattern and practice of race and gender discrimination by Municipal Defendants and the possibility that it had implications for them, as people of color and women employed by Municipal Defendants. Indeed, they have actively cooperated with and assisted the United States in its prosecution of the case. They have also been aware of their own interest in the retroactive seniority and permanent employment status received under the settlement agreement in the original case since receipt of these benefits. However, until recent months, there has been no need to intervene to protect their interests, as these interests were being ably represented by the Department of Justice. (*E.g.*, Caldero Decl. ¶ 13; Chellemi Decl. ¶ 11.) Indeed, if Proposed Intervenors *had* sought to intervene in this litigation in 1996, shortly after the Department of Justice initiated prosecution of the original suit, they almost surely would have been unable to meet Rule 24(a)'s requirements because the Department of Justice was acting as *parens patriae*, as the representative of citizens of the United States. *See Hooker Chems.*, 749 F.2d at 984–85. In such cases, there is a strong presumption that the sovereign is fairly representing the interests of the would-be intervenor. *Id.* Only when circumstances changed, and the Justice Department ceased representing these interests in the face of the Brennan intervenors' challenge to the lawfulness of the settlement agreement did the Proposed Intervenors have a valid claim for intervention as of right.

The settlement agreement itself provides, in a paragraph that has been approved by this Court by its Order of February 28, 2002, that, "[i]f any provision of this Settlement Agreement is challenged, the United States . . . shall take all reasonable steps to defend fully the lawfulness of any such position." (Settlement Agreement, ¶ 9.) Given this provision, Proposed Intervenors,

uncounseled individuals who had throughout the litigation understood the United States to be fighting on their behalf and in actual effect representing them in these proceedings, naturally and reasonably expected the United States to continue to advance the same positions in litigation that it had for the past six years and to abide by the commitment it made in the settlement agreement to defend the lawfulness of all the agreement's provisions.

Defying these reasonable expectations, in April 2002, after six years of active, fiercely fought litigation, the United States in effect reversed its position as to the lawfulness of the benefits it had sought on behalf of Proposed Intervenors and guaranteed to them under the settlement agreement. In so doing, it dramatically changed the face of these lawsuits, from suits in which the United States and the City of New York were defending, against a handful of intervenors, the settlement agreement they had entered into after years of litigation and negotiation, to actions in which the United States, the party that had initiated the underlying lawsuit and obtained the challenged settlement benefits through its efforts, refused to defend the constitutionality and legality of these benefits, despite its commitment in the settlement agreement to defend the benefits against all challenges.

Notwithstanding this drastic change in the complexion of these actions and despite the significant effects this change could have on those settlement agreement beneficiaries whose interests were no longer being defended by the United States, neither the United States nor any other party in these actions gave notice to the affected individuals of the change in the United States' litigation position or its potential effects. (*E.g.*, Caldero Decl. ¶ 14; Morton Decl. ¶ 15; Valdez Dec. ¶ 16.) The Proposed Intervenors did not learn of the shift in position until approximately August 2002, when the ACLU Women's Rights Project alerted the affected beneficiaries of the shift. (*Id.)* Indeed, in August, after the ACLU Women's Rights Project alerted Proposed Intervenors to the United States' change of position, Proposed Intervenors who

called the Department of Justice to seek further information were initially told that they had been misinformed, that there was no change in the United States' position and that the United States was continuing to fully defend their interests. (Caldero Decl. ¶¶ 15-17; Jarrett Decl. ¶ 12.)

When Proposed Intervenors finally learned that their interests were no longer being adequately represented, despite the lack of any notice to them and despite the lack of candor of counsel for the United States, Proposed Intervenors quickly moved for intervention, filing the instant motion approximately two and a half months after learning of the United States' change of position. *See LaRouche v. Fed. Bureau of Investigation*, 677 F.2d 256, 257 (2d Cir. 1982) (finding motion to intervene timely when delay was attributable in large part to applicant's lack of knowledge of the suit and the possibility that it might jeopardize her rights). In short, "the proposed intervenors filed their motion to intervene as soon as they realized that their interest was not protected." *Jansen v. City of Cincinnati*, 904 F.2d 336, 341 (6th Cir. 1990) (finding intervention timely when proposed intervenors knew from the outset of litigation that their interests were at stake, but did not know that their interests were inadequately represented by parties until later developments and moved quickly to intervene upon these developments).

"The most important criterion in determining timeliness is whether the delay in moving for intervention has prejudiced any of the existing parties." *Miller v. Silbermann*, 832 F. Supp. 663, 669 (S.D.N.Y. 1993). Absent such prejudice, a motion will generally be deemed timely. *Id.* The short delay between the time Proposed Intervenors learned that the United States was no longer representing their interests and the filing of the instant motion in no way prejudices the existing parties. Discovery in these actions has been stayed. Courts have generally found no prejudice arising from intervention prior to or soon after commencement of discovery. *See, e.g.*, *Jansen v. City of Cincinnati*, 904 F.2d at 341; *LaRouche*, 677 F.2d at 257–58; *Commack Self-Service Kosher Meats, Inc. v. Rubin*, 170 F.R.D. 93, 100 (E.D.N.Y. 1996); *United States v.*

Schwartzman, 887 F. Supp. 60, 62 (E.D.N.Y. 1995). To further avoid prejudice, Proposed Intervenors seek to participate conditionally in the discovery scheduling conference on October 30, 2002, thus ensuring that these actions will not be further delayed.[5]

Proposed Intervenors do not seek to re-litigate any motion that has already been decided in the instant actions.[6] Nor will their entrance into the cases dramatically change the scope of issues being litigated. *Cf. Smith v. Marsh*, 194 F.3d 1045, 1051 (9th Cir. 1999) (denying motion to intervene when proposed intervenors sought to introduce new issues thus causing delay and prejudice to existing parties); *Wash. Elec. Coop., Inc. v. Mass. Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97 (2d Cir. 1990) (denying motion to intervene when intervention would radically alter scope of lawsuit and inject collateral issues). The focus of these actions will continue to be "whether the proposed [settlement] agreement is lawful, fair, reasonable, adequate, and consistent with the public interest." *United States v. New York City Bd. of Educ.*, Mem. & Order, Civ. No. 96-0374, at 11 (Sept. 30, 2002). In the absence of any prejudice to the existing parties, Proposed Intervenors' motion should be deemed timely.

In addition to the primary question of whether existing parties have been prejudiced by any delay, other factors to be considered in determining timeliness include how long an applicant had notice of the interest before it made the motion to intervene, the prejudice to the applicant if the motion is denied, and any unusual circumstances militating for or against a finding of timeliness. *Pitney Bowes*, 25 F.3d at 70. Further, in the context of a motion to intervene as of

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[5] In the alternative, Proposed Intervenors seek that the discovery stay continue in effect pending decision on this motion to protect Proposed Intervenors' ability to seek discovery in these actions.

[6] In the event, however, that Judge Block does not adopt the Report and Recommendation to deny the Motion for Preliminary Injunction in *Brennan v. Ashcroft*, or finds that the Order denying the Motion for Preliminary Injunction in *United States v. New York City Board of Education* is properly considered a Report and Recommendation and does not adopt it, Proposed Intervenors would seek to file a motion for reconsideration. Similarly, Proposed Intervenors

right, a showing that an applicant otherwise qualifies to intervene, which Proposed Intervenors successfully make below, militates in favor of a finding of timeliness. *LaRouche*, 677 F.2d at 258.

As discussed above, Proposed Intervenors moved quickly to intervene as soon as they were given notice that they had an inadequately defended interest in these actions. Approximately two and a half months elapsed between the time Proposed Intervenors received notice and the present motion. Such a delay has typically been found reasonable in the absence of prejudice to existing parties. *See, e.g., Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1250–51 (10th Cir. 2001) (delay of three and a half years not untimely because scheduling order had not been issued and trial date had not been set); *United States v. Union Elec. Co.*, 64 F.3d 1152, 1159 (8th Cir. 1995) (motion to intervene filed four months after initiation of action relating to enforcement of settlement agreement was timely); *LaRouche*, 677 F.2d at 257 (motion to intervene filed two years after relevant court order was timely because "[t]he delay was attributable in large measure to appellant's [proposed intervenor's] ignorance of the *LaRouche* suit and the possibility that it might jeopardize rights" and "[t]he lapse of time has not resulted in any prejudice of substance to the parties"); *Herdman v. Town of Angelica*, 163 F.R.D. 180, 185 (W.D.N.Y. 1995) (finding delay of ten weeks between filing of case and filing of motion to intervene not untimely).

In addition, while the current parties will not be prejudiced by Proposed Intervenors' intervention, should the motion to intervene be denied, Proposed Intervenors may suffer substantial prejudice. This litigation focuses squarely on the propriety of employment benefits received by Proposed Intervenors. Should they not be permitted to intervene, the litigation will continue in their absence, potentially resulting in the dismantling of their settled expectations and

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would seek to participate as parties should the Brennan intervenors appeal the denial of the

causing them to lose their placements at the school of their choice, the enhanced salaries available at those placements, their pension contributions made to "buy back" their years of retroactive seniority, their civil service protections, and even their jobs, as well as diminishing their ability to bid for school placements and salary increases in the future, and leaving them without legal recourse to otherwise protect these interests. If Proposed Intervenors lose the benefits received under the settlement agreement in these actions, those benefits presumably will be lost for good.

The potential prejudice to Proposed Intervenors' interests is increased in that since the United States' reversal of position, the propriety of the awards Proposed Intervenors received under the settlement agreement is being defended only by Municipal Defendants—the very parties that are alleged to have maintained discriminatory recruitment and hiring policies and that entered the settlement agreement only in response to litigation. While Municipal Defendants have ably defended the awards to Proposed Intervenors thus far, the uncertainty of trusting the defense of Proposed Intervenors' retroactive seniority awards and employment status to those parties alleged to have discriminated against women and people of color suggests that Proposed Intervenors may suffer substantial prejudice if denied permission to intervene in these cases. As the United States' actions vividly demonstrate, despite the settlement agreement's provision that the United States and Municipal Defendants will defend against any challenge to it, no real guarantee exists that Municipal Defendants will continue to protect Proposed Intervenors' interests by defending the settlement agreement.

Finally, highly unusual circumstances in these cases strongly militate in favor of a finding of timeliness. In April, the United States reversed its longstanding position as to the benefits received by Proposed Intervenors in a move counsel for Municipal Defendants

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preliminary injunction in either or both cases.

characterized as "extraordinary and unprecedented." (Letter to Court from Norma Cote, dated Apr. 17, 2002.) When the United States chose not to oppose the motion for a preliminary injunction that would strip Proposed Intervenors of the benefits that the United States obtained on their behalf, this lawsuit changed dramatically. The United States' failure to give the affected individuals notice of this change and its possible effect on their interests, and its initial denials through counsel of any change in litigation position when directly questioned on the subject by individual Proposed Intervenors, also must be taken into account as unusual circumstances leading to the conclusion that the instant motion is timely.[7]

B. Proposed Intervenors' Interests in These Proceedings Are Direct and Substantial and May Be Impaired Absent Their Involvement.

Proposed Intervenors' interests in these proceedings are, without question, "direct, substantial, and legally protectable." *Wash. Elec. Coop.*, 922 F.2d at 97. Indeed, as the Second Circuit has explicitly recognized, they—the "Offerees"—have the same interest that the Brennan intervenors demonstrated when they successfully sought entrance into *United States v. New York City Board of Education*: an interest in the seniority that may often determine their placement as custodians within the New York City Public School system and, thus, their salary. *Brennan v. New York City Bd. of Educ.*, 260 F.3d 123, 131 (2d Cir. 2001) ("[The Brennan intervenors'] interest in the underlying action and the Agreement is . . . identical to that of the Offerees [under the settlement agreement].").

Beyond this interest, which the Second Circuit has already specifically found to constitute a sufficient basis for intervention, the majority of Proposed Intervenors have a second,

[7] The lack of notice to affected individuals may have already impaired Proposed Intervenors' interests. Multiple Proposed Intervenors received offers of permanent appointment in Spring 2002, precisely when the United States was concluding that it would no longer defend their awards. Believing that they had already received permanent appointment under the settlement agreement and that these awards were secure, they declined these appointments. Had they been

even more direct, interest in the subject matter: their interest in their permanent employment status received under the settlement agreement, which provides them valuable civil service protections, allows them to remain permanently at schools rather than being subject to repeated moves that undermine their authority and their ability to do their jobs, allows them to acquire seniority and thus compete successfully for transfers to higher paying schools, and allows them to be eligible for temporary assignment to assist in the care of other schools for an enhanced salary. *See Cotter v. Mass. Ass'n of Minority Law Enforcement Officers*, 219 F.3d 31, 34–35 (1st Cir. 2000) (finding black police officers had an interest in litigation brought by white officers alleging that black officers' promotions were based on race in violation of the Equal Protection Clause, because "to say that an officer has no interest in defending [the legality of] his own promotion would be to defy common sense"). This interest is heightened by the fact that, if stripped of permanent status, those individuals formerly provisionally employed as Custodians might lose their employment as Custodians altogether. (Lonergan Decl. in Opp. to Prelim. Inj., ¶¶ 43-45.) Finally, Proposed Intervenors, as women and people of color, have strong interests in the eradication of the effects of past gender and race discrimination.

Proposed Intervenors' interests are threatened if they are not permitted to appear in these proceedings even more than the Brennan intervenors' interests were threatened with impairment in the absence of intervention. *See Brennan*, 260 F.3d at 132. A prerequisite for intervention as of right is a showing that "disposition of the proceeding without the involvement of the putative intervenor would impair the intervenor's ability to protect its interest." *Wash. Elec. Coop.*, 922 F.2d at 98.

Should these proceedings result in Proposed Intervenors being stripped of the benefits they received under the settlement agreement, they will be less able to compete with other

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timely informed of the change in the United States' position, they might have acted differently.

Custodians for placement in larger schools and the larger salaries that these schools bring. Some would be stripped of their current placements and be put into limbo in an attempt to reconstruct what would have occurred had the United States and Municipal Defendants not entered into the settlement agreement. (*See, e.g.*, Morton Decl. ¶ 9.) Rescission of the retroactive seniority granted under the settlement agreement could also affect retirement plans of several of the Proposed Intervenors, who have made pension contributions to "buy back" the years for which they received retroactive seniority and are in danger of losing these contributions and the ability to retire at the time that they had expected. (Caldero Decl. ¶¶ 8-10; Clement Decl. ¶¶ 8-10 .) Most Proposed Intervenors would lose their permanent employment status and thus their civil service protections, their ability to accrue seniority, and their eligibility for temporary assignments at increased salary to maintain other public school buildings in addition to their own. (*E.g.*, Chellemi Decl. ¶¶ 7, 9; Jarrett Decl. ¶¶ 8-9.) With such loss of permanent employment status, it is not at all clear they would be able to retain their positions as Custodians. (*E.g.* Lonergan Decl. in Opp. to Prelim. Inj., ¶¶ 43-45; DiDonato Decl. ¶ 10.) All individuals who received permanent employment status under the settlement agreement would suffer this harm, including the multiple Proposed Intervenors who gave up alternative opportunities to obtain permanent employment status in the years since receipt of the settlement agreement benefits in reliance on the award of permanent employment status received under the settlement agreement. (*See* Ellis Decl. ¶¶ 9-10; Morton Decl. ¶¶ 10-11; Valdez Decl. ¶¶ 11-12.)

Proposed Intervenors face substantial prejudice if they are not permitted to represent their interests in these actions. Fairness therefore dictates that they be given a chance to speak for themselves in these proceedings that directly center upon their seniority and employment status. *See Cotter*, 219 F.3d at 35 ("[E]ven a small threat that the intervention applicants present

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(Morton Decl. ¶¶ 10-11; Valdez Decl. ¶¶ 11-13.)

promotions could be jeopardized would be ample reason for finding that their ability to protect their interest 'may' be adversely affected."); *In re Birmingham Reverse Discrimination Employment Litig.*, 833 F.2d 1492, 1496 n.13 (11th Cir. 1988) (en banc) (African-American individuals seeking to intervene to defend city's affirmative action plan entitled to intervention as of right "because they represented the interests of persons whose jobs were directly at stake given the relief sought by plaintiffs"); *Baker v. City of Detroit*, 504 F. Supp 841, 849 (E.D. Mich. 1980) ("Fairness dictated that the black police officers who would be hurt by a ruling against affirmative action be heard. This is especially true since . . . plaintiffs . . . requested that black officers who had already received affirmative action promotions be demoted to their prior rank.").

Any decisions made in these proceedings that modify or otherwise impair the benefits received under the settlement agreement will not be redressable by the affected individuals except within the context of these proceedings. No alternative fora exist by which the Proposed Intervenors may defend the legality of their seniority and permanent employment status. The potential impairment to Proposed Intervenors' interests is thus dramatically exacerbated. *Cf. United States v. City of New York*, 198 F.3d 360, 367 (2d Cir. 1999) (holding proposed intervenors failed to demonstrate that their interests might be impaired absent intervention when alternative fora existed in which they could bring their claims); *Fed. Trade Comm'n v. First Capital Consumer Membership Servs., Inc.*, 206 F.R.D. 358, 363 (W.D.N.Y. 2001) (finding proposed intervenor failed to demonstrate impairment of its interests when other opportunities to protect those interests were available); *see also Utah Ass'n of Counties*, 255 F.3d at 1254 (finding even when alternative fora exist, motion to intervene should not be denied on this basis if applicant's interest will be prejudiced by inability to participate in the main action).

C. Proposed Intervenors' Interests Will Be Inadequately Represented if They Are Not Permitted to Intervene.

If Proposed Intervenors are not permitted to intervene, the existing parties to the litigation will not adequately represent their interests. The Supreme Court has described the burden of showing inadequate representation as "minimal" and has made clear that an intervenor need only show that representation "*may* be inadequate," not that it *is* inadequate. *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972) (emphasis added); *see also LaRouche*, 677 F.2d at 258. As a result, "[t]he proposed intervenors need show only that there is a *potential* for inadequate representation." *Grutter v. Bollinger*, 188 F.3d 394, 400 (6th Cir. 1999) (emphasis in original). "The possibility that the interests of the applicant and the parties may diverge need not be great in order to satisfy this minimal burden." *Utah Ass'n of Counties*, 255 F.3d at 1254 (internal quotation marks omitted).

1. The United States inadequately represents Proposed Intervenors' interests.

In these proceedings, the presumption of adequate representation that typically follows when a government is prosecuting litigation on behalf of its citizens is clearly inapplicable. When a governmental entity suing on behalf of its citizens is a party in a case, would-be intervenors generally must make "a strong affirmative showing that the sovereign is not fairly representing the interests of the applicant" to overcome the presumption that the government, acting as *parens patriae*, is adequately representing the applicant's interests. *Hooker Chems.*, 749 F.2d at 985. While the United States brought the original litigation on behalf of the interests of its citizens to enforce the nondiscrimination requirements of Title VII, recent events unambiguously demonstrate that it is today unwilling to represent the interests of Proposed Intervenors adequately. By walking away from the settlement agreement that it successfully sought, negotiated, and enforced on behalf of Proposed Intervenors, the United States has made

clear that it has ceased to represent these individuals' interests. Indeed, it has explicitly refused to continue representation of Proposed Intervenors' interests. (*See* U.S. Partial Opp. to Prelim. Inj., at 2.) No stronger showing is possible. Whatever public interest the United States represents in this litigation, it clearly does not include the particular interests of Proposed Intervenors. *See Union Elec. Co.*, 64 F.3d at 1169 (government did not adequately represent proposed intervenors when their interests were narrower than the broad public interests represented by the government and when government had already disregarded proposed intervenors' interests); *Conservation Law Found. of New England, Inc. v. Mosbacher*, 966 F.2d 39, 44 (1st Cir. 1992) (representation of proposed intervenors' particular financial interests inadequate when government, in pursuit of public interest, attempted to enter into consent decree that would harm proposed intervenors' interests).

2. Municipal Defendants inadequately represent Proposed Intervenors' interests.

Although Municipal Defendants are currently seeking the same ultimate result in this litigation as Proposed Intervenors—retention of the settlement agreement's provisions without amendment—Municipal Defendants' interests diverge from those of Proposed Intervenors, and this lack of identity in interests presents a strong likelihood that Municipal Defendants will inadequately represent Proposed Intervenors' interests.[8] The Second Circuit has required "a

[8] Neither can Municipal Defendants, although also governmental entities, be considered to be acting as *parens patriae.* A *parens patriae* presumption that a governmental entity is adequately representing the interests of its citizens apply only when a governmental entity is acting in its status as sovereign. *United States v. State of New York*, 820 F.2d at 558; *Commack*, 170 F.R.D. at 103. It has no application when the entity is acting in its capacity as employer. *United States v. State of New York*, 820 F.2d at 558. Thus, Municipal Defendants, present in this lawsuit in their capacity as employers, cannot be presumed to represent the Proposed Intervenors' interests adequately, as a municipality under certain circumstances would otherwise be presumed to represent its citizens. In addition, those circumstances may not be present here because it is not clear that a *parens patriae* analysis has any application when a governmental entity appears as a defendant in an action. *See Natural Resources Defense Council, Inc. v. New York State Dep't of Envtl. Conservation*, 834 F.2d 60, 61-62 (2d Cir. 1987); *Herdman*, 163 F.R.D. at 190.

more rigorous showing of inadequacy in cases where the putative intervenor and the named party have the same ultimate objective," *Sequa Corp.*, 240 F.3d at 179, but in such cases, applicants for intervention may rebut a presumption of adequacy by demonstrating that their interests diverge from and potentially conflict with those of the named party, *see id.* at 179–80. In determining whether divergent interests demonstrate inadequate representation, "all reasonable doubts should be resolved in favor of allowing the absentee, who has an interest different from that of any existing party, to intervene so that he may be heard in his own behalf." 7C Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 1909 at 346 (2d Ed. 1986 & Supp.). In these actions, fairness demands that this opportunity be granted to Proposed Intervenors.

Proposed Intervenors seek to protect their employment, their seniority, their salaries, their job placements, their civil service protections, their pension contributions, and the decisions and plans they have made on the basis of these things. They face significant personal losses should they be stripped of the benefits received under the settlement agreement. As persons of color and women employed by Municipal Defendants, they also have a compelling interest in remedying the effects of Municipal Defendants' discrimination on the basis of race and gender. Municipal Defendants, on the other hand, accused on all sides of engaging in unlawful race and gender discrimination, may well seek to avoid liability and to minimize litigation by accommodating as many of the various interests in the case as possible. The significant divergence in the stakes of this litigation for Proposed Intervenors and for Municipal Defendants undermines the assumption that Municipal Defendants will adequately defend Proposed Intervenors' interest. *LaRouche*, 677 F.2d at 258 (divergent interests sufficient to presume inadequate representation when proposed intervenor sought to enforce Freedom of Information Act obligations against FBI despite the FBI's expressed willingness to comply because "the

FBI's primary interest is in the defense of the liability claims, not the disclosure of documents"); *N.Y. Pub. Interest Research Group v. Regents*, 516 F.2d 350, 352 (2d Cir. 1975) (pharmacists seeking to intervene to defend a regulation promulgated by the state addressing advertising of prescription drugs were not adequately represented by the state because the pharmacists had economic interests in sustaining the regulation not shared by the state); *see also, e.g.*, *Sierra Club v. Robertson*, 960 F.2d 83, 86 (8th Cir. 1992) (interests of environmental groups and the state in challenging proposed forest management plan sufficiently disparate to assume environmental groups did not adequately represent the state's interest); *Planned Parenthood of Minn. v. Citizens for Cmty. Action*, 558 F.2d 861, 870 (8th Cir. 1977) (disparate interests sufficient to find inadequate representation when proposed intervenors wished to defend constitutionality of a zoning ordinance to protect their property values while named defendants sought to avoid personal liability).

In an analogous Sixth Circuit reverse discrimination case that challenged the constitutionality of a consent decree instituting affirmative action in a city fire department, the court recognized that such divergence in interests overturned any presumption of adequate representation by the city. *Jansen*, 904 F.2d at 343. When African-American employees and job applicants sought to intervene to defend the consent decree's provisions, the court granted the motion, reasoning:

> The proposed intervenors have a significant interest in enforcing the City's commitment to racially integrate the Division of Fire through affirmative action. The City, in contrast, has an interest in protecting its integrity as an employer; therefore the City's interest in the consent decree resides in its authorizing function. These differences in interest pose more than a mere disagreement over litigation strategy.

Id. Similarly, a Connecticut district court permitted a minority contracting firm to intervene in an action challenging the constitutionality of an ordinance establishing an affirmative action set-aside based on the recognition that "[i]ndividual minority or women-owned firms have a

different position and interest from that of the City" and therefore "may present different insight, arguments and claims from those of the City." *Associated Gen. Contractors of Conn., Inc. v. City of New Haven*, 130 F.R.D. 4, 11 (D. Conn. 1990). Proposed Intervenors' interests similarly diverge from Municipal Defendants' interests in these proceedings.

In concrete terms, this divergence in interests threatens to compromise the adequacy of Municipal Defendants' representation because Municipal Defendants' self-interests may prevent them from mounting a full defense to the charges made by the Brennan intervenors. Assuming, *arguendo*, that some of the benefits provided to the Proposed Intervenors under the consent decree are appropriately described as race-conscious relief, in order to defend the agreement's constitutionality Municipal Defendants must demonstrate that there was a strong basis in evidence for concluding that the relief was necessary to remedy the effects of their own prior acts of racial discrimination.[9] *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 501 (1989). Yet, in the very settlement agreement that Municipal Defendants here attempt to defend, they explicitly denied the allegations that they have "failed and/or refused to recruit blacks, Hispanics, Asians, and women on the same basis as white (non-Hispanic) men for the positions of School Custodian . . . and School Custodian Engineer" or otherwise engaged in the discrimination originally alleged by the United States. (Settlement Agreement, at 1–2.) Absent intervention,

Municipal Defendants—the same parties issuing these strong denials of past discrimination—will be the only parties marshalling evidence to demonstrate that they formerly discriminated on the basis of race (and gender) in their recruitment processes, given the United States' apparent abandonment of this contention. The constitutionality of the settlement agreement may turn on this evidence.

The legal disincentives for Municipal Defendants to produce such evidence of their own past discrimination are obvious, particularly if any of these discriminatory practices continue into the present day. Not surprisingly, courts have often recognized this possible barrier to defense of an affirmative action plan posed by self-interest and have permitted beneficiaries of affirmative action plans to intervene to defend those plans as a result. *See Cotter*, 219 F.3d at 35–36 (finding city employer unlikely to represent affirmative action beneficiaries' interests adequately because of its disincentives to prove its own unlawful discrimination); *Grutter*, 188 F.3d at 401 (finding state university unlikely to represent potential affirmative action beneficiaries' interests adequately because of "legitimate and reasonable concerns" that the university "is unlikely to present evidence of past discrimination by the University itself or of the disparate impact of some current admissions criteria"); *Jansen*, 904 F.2d at 343–44 (finding city unlikely to represent affirmative action beneficiaries' interests adequately because of disincentive to prove

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[9] The applicable standard to demonstrate the constitutionality of state-sponsored gender-conscious relief is unsettled in the Second Circuit, *see Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 62 (2d Cir. 1992), but it is certainly possible that such a showing of prior discrimination on the part of Municipal Defendants is necessary in this context as well, *see Building Ass'n of Greater Chicago v. County of Cook*, 256 F.3d 642 (7th Cir. 2001); *Brunet v. Columbus*, 1 F.3d 390, 403-04 (6th Cir. 1993); *but see Eng'g Contractors Ass'n v. Metro. Dade County*, 122 F.3d 895, 908 (11th Cir. 1997); *Contractors Ass'n of Eastern Philadelphia, Inc. v. City of Philadelphia*, 6 F.3d 990, 1010 (3d Cir. 1996). If so, the above analysis applies to the defense of any gender-conscious relief in the settlement agreement as well. If the settlement agreement does not provide race- or gender-conscious relief, but instead simply provides remedies to individual victims of discrimination, the potential conflict between Proposed Intervenors' interests and Municipal Defendants' interests is even starker, because defense of the settlement agreement would then presumably require some evidence of particular

its own unlawful discrimination); *Associated Gen. Contractors*, 130 F.R.D. at 11–12 (finding minority contractor entitled to intervene in action challenging affirmative action set-aside because "its interest in the set-aside is compelling economically and thus distinct from that of the City"); *Baker*, 504 F. Supp. at 849 (permitting intervention of parties with incentive to demonstrate city's past discrimination in challenge to affirmative action plan when "[t]here was no guarantee that the City would provide extensive evidence of its own past discrimination in justification of the affirmative action plan").

Perhaps equally importantly, given Municipal Defendants' status as governmental entities, even if producing evidence of their past discrimination did not expose them to suit from past employees, current employees, or would-be employees, it would likely expose them to potentially significant political consequences. Courts have often found such adverse political consequences create a divergence in interests that prevents any assumption of adequate representation. *See Meek v. Metro. Dade County*, 985 F.2d 1471, 1478 (11th Cir. 1993) (voters seeking to intervene to defend voting system challenged under Voting Rights Act made sufficient showing that they would be inadequately represented by county, based on social and political divisiveness of issue and fact that the "County Commissioners were likely to be influenced by their own desires to remain politically popular and effective leaders"); *LaRouche*, 677 F.2d at 258 (finding FBI inadequately represented would-be intervenor's interests when she sought to enforce FBI's obligations to disclose documents under the Freedom of Information Act, because if plaintiffs' assertions that documents proved FBI wrongdoing were correct, "the Bureau may have an incentive to protect itself from embarrassment by not disclosing damaging evidence about its agents' misdeeds"); *Planned Parenthood*, 558 F.2d at 870 (finding city inadequately represented property owners' interests in defending zoning ordinance excluding

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discriminatory acts by Municipal Defendants against Proposed Intervenors.

Planned Parenthood when a switch in two City Council votes would change the city's litigation position and issue was politically controversial).

Because Municipal Defendants' legal and political self-interest presents a significant disincentive to proving their own past discrimination, they do not adequately represent the interests of the Proposed Intervenors. *See Natural Resources Defense Council*, 834 F.2d at 61–62 (inadequate representation demonstrated when divergent interests permit prospective intervenors to assert justifications for challenged law that could not equally be asserted by defendant state).[10]

For these reasons, Proposed Intervenors must be permitted to enter the suit to ensure vigorous defense of the constitutionality of the settlement benefits. The continued vitality of the measures designed to remedy past discrimination should not lie in the sole protection of those parties accused of engaging in that discrimination. Proposed Intervenors have a right to ensure that their interests are adequately represented. Fairness demands that they be given an opportunity to speak on their own behalf.

[10] Indeed, even absent such clear disincentives to Municipal Defendants asserting the necessary justifications for the settlement agreement, the difference in the potential consequences of the current litigation for Municipal Defendants and Proposed Intervenors alone demonstrates the likelihood of inadequate representation. Because of the importance of the settlement benefits to Proposed Intervenors and the significant, personalized risk of harm to them should the benefits be deemed illegal, they are likely to offer a more vigorous defense to the challenge to the settlement agreement. In *New York Public Interest Research Group*, 516 F.2d at 352, the Second Circuit found that the State of New York inadequately represented the interests of a group of pharmacists in defending an advertising regulation's constitutionality because of the direct economic interest the pharmacists had in the regulation. The court reasoned that because of this interest, the pharmacists "will make a more vigorous presentation of the economic side of the argument" than would the State. The same immediacy of interest, not shared by Municipal Defendants, here counsels in favor of permitting intervention. *See also Grutter*, 188 F.3d at 400 (finding inadequate representation in part because proposed intervenors were at greater risk of harm than defendant from holding that affirmative action policy was unconstitutional and thus were more likely to defend the policy vigorously).

II. IN THE ALTERNATIVE, PERMISSIVE INTERVENTION UNDER RULE 24(B) IS APPROPRIATE IN THIS CASE.

In the alternative, Proposed Intervenors present a compelling case for permissive intervention under Rule 24(b), Fed. R. Civ. P., which provides: "Upon timely application anyone may be permitted to intervene in an action . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common" and the intervention will not "unduly delay or prejudice the adjudication of the rights of the original parties." As a general rule, "[p]ermissive intervention is accorded the broad discretion of the court and is to be liberally granted." *Miller v. Silbermann*, 832 F. Supp. 663, 673 (S.D.N.Y. 1993) (internal quotation marks and citations omitted). There is no requirement that a proposed intervenor demonstrate inadequate representation of its interests by existing parties to be granted permissive intervention. *New York v. Abraham*, 204 F.R.D. 62, 66–67 (S.D.N.Y. 2001); *Commack Self-Service Kosher Meats, Inc. v. Rubin*, 170 F.R.D. at 106; *New York v. Reilly*, 143 F.R.D. 487, 490 (N.D.N.Y. 1992).

For the reasons set out above, the instant motion is timely. The Proposed Intervenors obviously present issues of fact and law in common with these actions. The central question they wish to resolve, as do all parties to the main actions, is the legality of the benefits awarded under the settlement agreement. *See, e.g.*, *Miller*, 832 F. Supp. at 673; *McNeill v. New York City Housing Auth.*, 719 F. Supp. 233, 250 (S.D.N.Y. 1989). Furthermore, as set out in detail above, intervention will not prejudice the adjudication of the rights of the existing parties.

In considering motions for permissive intervention, courts may properly consider "'whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.'" *United States Postal Serv. v. Brennan*, 579 F.2d 188, 191–92 (2d Cir. 1978) (quoting *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977)).

The "just and equitable adjudication of the legal questions presented," *id.*, requires the presence of Proposed Intervenors in these actions, as do "considerations of fairness," *Miller*, 832 F. Supp. at 674, given that Proposed Intervenors' interests lie at the heart of the present controversy. In addition, Proposed Intervenors will bring a novel perspective to and clarify the issue before the Court, presenting important facts about the actual effects of the relief sought by the Brennan intervenors. *See Commack Self-Service Kosher Meats*, 170 F.R.D. at 106 (noting that proposed intervenors, "rabbis, kosher consumers, and rabbinical and lay organizations," will offer new legal and fact-based perspectives to the defense of the constitutionality of New York Kosher laws). Thus, even if this Court should find intervention as of right inappropriate in this case, it should grant permissive intervention under Rule 24(b).

CONCLUSION

For the foregoing reasons, Proposed Intervenors Janet Caldero *et al.* are entitled to participate in *United States v. New York City Board of Education* as plaintiff-intervenors and in *Brennan v. Ashcroft* as defendant-intervenors, either as a matter of right pursuant to Fed. R. Civ. P. Rule 24(a) or with the Court's permission pursuant to Fed. R. Civ. P. Rule 24(b).

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Respectfully submitted,

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