UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, JANET A. CALDERO, *et al.*, Plaintiff-Intervenors, and PEDRO ARROYO, *et al.*, Plaintiff-Intervenors, -against- NEW YORK CITY BOARD OF EDUCATION, *et al.*, Defendants, and JOHN BRENNAN, *et al.*, Objector-Intervenors	Index No.: 96-0374
JOHN BRENNAN, *et al.*, Plaintiff, -against- JOHN ASHCROFT, *et al.*, Defendants.	Index No.: 02-0256

THE CALDERO INTERVENORS' MEMORANDUM OF LAW IN OPPOSITION TO THE OBJECTOR-INTERVENORS' OBJECTIONS TO APPROVAL OF THE SETTLEMENT AGREEMENT AND IN SUPPORT OF THE CALDERO INTERVENORS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

The Second Circuit, in *Brennan v. N.Y. City Bd. of Educ.*, 260 F.3d 123, 133 (2d Cir. 2001), found that the Objector-Intervenors had an interest sufficient to obtain discovery and present evidence in support of their objections to the Settlement Agreement in this litigation. The Objector-Intervenors, in their mistitled "Motion for Partial Summary Judgment,"[1] now attempt to convert that limited holding into a rule that would in effect require a full trial on the underlying merits of a Title VII claim as a prerequisite to an employer's efforts to remedy past discrimination and prevent its continuation. They seek a radical reinterpretation of the law that would make settlements of Title VII actions as well as voluntary employer efforts to promote race and gender equity nearly impossible. This result would be in direct contravention of the remedial purposes of Title VII.

In setting out their objections to paragraphs 13 through 16 of the Settlement Agreement, the Objector-Intervenors have ignored the heavy burden they shoulder in challenging a voluntary Title VII settlement. Such a settlement carries a presumption of validity, reflecting Congress's express preference for voluntary employer compliance to carry out Title VII's purposes. But the Objector-Intervenors have proceeded as though challenging a fully litigated Title VII judgment, arguing that the Defendants' discrimination in recruitment and hiring, which the Settlement Agreement seeks to remedy, has not been definitively proven. Neither the Supreme Court nor the Second Circuit has ever held, however, that an employer must admit and specifically prove

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[1] The Objector-Intervenors seek no affirmative relief in this case, and therefore necessarily are not entitled to summary judgment on any affirmative claims. *See U.S. v. N.Y. City Bd. of Educ.*, Memorandum and Order at 11 (E.D.N.Y September 2002) (Levy, M.J) ("To the extent that their First and Second Amended Complaints in Intervention could be interpreted as asserting legal claims against any party, they are stricken."). Their pleading should instead be construed as objections to judicial approval of paragraphs 13 through 16 of the Settlement Agreement.

its own unlawful discrimination or a court must find such discrimination to be proven before the employer can settle discrimination suits and undertake efforts to advance race and gender equality in the workplace. The requirement proposed by the Objector-Intervenors would place an enormous burden on both employers and courts, creating a formidable obstacle to settlement of Title VII disputes.

Paragraphs 13 through 16 of the Settlement Agreement comport with applicable law because they are supported by substantial evidence of discrimination, effectively remedy the discrimination, and do so in a way that imposes minimal burdens on third parties, including the Objector-Intervenors. For this reason, this Court must follow the Second Circuit in rejecting "a rule indiscriminately enabling all intervenors in these cases to veto proposed compromises," *Kirkland v. N.Y. State Dep't of Corr. Servs.*, 711 F.2d 1117, 1126 (2d Cir. 1983), and approve the challenged provisions. To this end the Caldero Intervenors, beneficiaries under the challenged paragraphs, oppose the Objector-Intervenors' objections to the challenged provisions.

The Caldero Intervenors also move for partial summary judgment on their claim for a declaratory judgment that the challenged provisions are consistent with the guarantees of the Constitution and Title VII.

STATEMENT OF FACTS

Before the Court is a challenge to judicial approval of portions of an agreement settling *U.S. v. N.Y. City Bd. of Educ.*, a discrimination case brought by the United States against the New York City Board of Education[2] and other municipal Defendants (56.1 Stat. ¶1).[3] The case

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[2] The New York City Board of Education is today called the New York City Department of Education. Nevertheless, consistent with the convention in this case, this Memorandum will refer to the Board of Education throughout.

alleged discrimination in the recruitment of women, African-Americans, Hispanics, and Asians for the civil service positions of school custodian and school custodian engineer,[4] as well as discrimination in hiring African-Americans and Hispanics for these positions. (56.1 Stat. ¶2).

In the early 1990s, when the United States Department of Justice began its investigation of possible discrimination in the recruitment and hiring of custodians and custodian engineers in the New York City public school system, the custodian workforce in one of the most diverse cities in the world was overwhelmingly white and almost exclusively male, and had been for many years. (56.1 Stat. ¶3). 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 of custodians and custodian engineers were men, while 92 percent were white. In 1996, when the Board of Education performed another demographic survey, the story was much the same. For instance, according to this survey, only 21 out of 893 custodians and custodian engineers were women. Only three of these women held permanent, rather than provisional, jobs. (56.1 Stat. ¶4). The demographics of the workforce both reflected and contributed to the significant obstacles faced by women and people of color who considered becoming custodians or custodian engineers. (56.1 Stat. ¶5).

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[3] All references to "56.1 Stat. ¶_____" are to the Caldero Intervenors' Rule 56.1 Statement of Undisputed Facts.

[4] The position formerly known as "custodian" is today referred to as "custodian engineer level I." The position formerly known as "custodian engineer is today referred to as "custodian engineer level II." Nevertheless, the terms "custodian" and "custodian engineer" will be used throughout this Memorandum, consistent with the parties' convention in this case.

Defendants' Recruitment Methods

One reason for the under-representation of women and minorities was the Defendants' methods of recruiting for permanent custodians and custodian engineers. Individuals with the necessary qualifications obtained jobs as permanent custodians and custodian engineers by taking and passing civil service examinations. One such exam, Exam 5040, was given in 1985 for the position of custodian. Another, Exam 8206, was given in 1989 for the custodian engineer title. In 1993, Exam 1074 was given for the custodian position, and Exam 7004 was given in 1997 for both the custodian and custodian engineer titles. (56.1 Stat. ¶6). While in 1997 the Defendants made some additional recruitment efforts, described below, for Exams 5040, 8206, and 1074, they adopted a largely passive recruitment strategy, which led to replication of the demographics of their existing mostly white, almost completely male workforce among those individuals who applied for the exams. (56.1 Stat. ¶7).

The Defendants' recruitment efforts for the custodian and custodian engineer exams in 1985, 1989, and 1993 were minimal. The notice of an upcoming custodian or custodian engineer examination was posted in four Board of Education administrative offices, at least beginning in approximately 1992. (56.1 Stat. ¶8). The exams were automatically included in lists of upcoming civil service exams for city positions in *The Chief*, a local civil service newspaper. 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 for it. Announcements for upcoming custodian and custodian engineer examinations were also included with other announcements of upcoming civil service examinations and distributed to organizations such as public libraries, community agencies, and community colleges that had affirmatively asked to receive information regarding civil service opportunities. (56.1 Stat. ¶9). While the Defendants

undertook additional efforts to try to recruit applicants for other civil service jobs, such as making onsite visits to groups targeted for outreach or to local community colleges and high schools, these visits focused on entry-level titles that had minimal qualifications requirements, and were not intended to recruit for positions such as custodian or custodian engineer, which required specific forms of experience. (56.1 Stat. ¶10).

The Defendants made no efforts to recruit women or minorities to take the custodian and custodian engineer exams given in 1985, 1989, and 1993. Indeed, other than the internal posting described above, the only affirmative effort they made to recruit anyone for the custodian or custodian engineer position specifically was to informally encourage their employees to advertise the relevant exams by word-of-mouth. (56.1 Stat. ¶11). They did not advertise these examinations in newspapers of general readership, in ethnic newspapers or publications, or in newspapers or publications aimed at a female or minority audience. They did not post the notices of these examinations in public school buildings, where they could be seen by the firepersons, handypersons, and cleaners employed by custodians and custodian engineers,[5] nor did they distribute notices directly to these custodial employees. They did not advertise upcoming examinations on the radio. They did not attend job fairs or do outreach to unions, colleges with engineering programs, or other organizations or institutions where qualified custodian or custodian engineer candidates might be found. (56.1 Stat. ¶12). They did not engage in any activities to encourage or assist potential candidates in increasing their

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[5] Every custodian and custodian engineer independently recruits for and hires his or her own custodial staff of firepersons (individuals who operate the school heating systems); handypersons (individuals who are responsible for repairs and maintenance in the schools); and cleaners (individuals who clean the schools). The size of the staff largely depends on the custodian's or custodian engineer's budget, which in turn depends on the size of the school at which the custodian or custodian engineer works. The custodian or the custodian engineer, and not the Board of Education, is the employer of this staff. These staff members are not civil service employees. (56.1 Stat. ¶81).

qualifications for their position, preparing for the civil service examinations, or otherwise bettering their application chances, other than engaging in informal word-of-mouth encouragement and encouraging their employees to do the same. (56.1 Stat. ¶13). Although collective bargaining agreements in force between the Board of Education and Local 891, the union representing custodians and custodian engineers, required the union and the Board of Education to work together to establish a training program that would provide ethnic minority groups with opportunities to prepare for school custodian and school custodian engineer civil service exams, the Defendants never implemented these provisions. (56.1 Stat. ¶14). They did not create or implement any affirmative action or outreach plan to diversify the custodian or custodian engineer workforce. They did not make any efforts to analyze the availability of women and minorities in the qualified workforce or to determine where qualified women and minorities might be found. (56.1 Stat. ¶15).

As a result, the primary form of targeted recruiting for Exams 5040, 8206, and 1074 was word-of-mouth recruiting by current employees. In the absence of any efforts to target the general announcements of civil service examinations to individuals who might be qualified for or interested in the custodian or custodian engineer jobs, word-of-mouth recruiting was especially important for attracting qualified applicants and explaining to them what was necessary to qualify for the position and prepare for the examinations. (56.1 Stat. ¶16).

The Effects of Reliance on Word-of-Mouth Recruiting

Word-of-mouth recruiting by current employees, however, tended to replicate the demographics of the custodian and custodian engineer workforce. (56.1 Stat. ¶17). In part, this was because some custodians and custodian engineers simply did not believe that women or minorities could or should hold these jobs. For instance, one of the female beneficiaries of the

settlement agreement in this case described the reaction her uncle, a custodian engineer, had when in the 1980s she noted that she might want to do that job herself one day: "You wouldn't have a snowball's chance in hell," he told her. A female beneficiary who worked for custodians for more than fifteen years explained that several of the men she worked for dismissed her aspirations of becoming a custodian. "It's a man's job," they told her. When an African-American man who would later become a beneficiary asked the white custodian engineer who employed him about becoming a custodian, his employer dismissed him by simply stating, "It's a rough job." (56.1 Stat. ¶18).

Social science data help explain this form of discrimination. Individuals gain psychological benefits from belonging to groups with members similar to themselves, with whom they personally identify. Demographic characteristics, such as race, gender, or national origin, often form an important part of a person's self-identity. Because being part of a group that reflects the individual's own characteristics positively reinforces this self-identity, individuals are motivated to protect their in-group status from outsiders different from themselves. (56.1 Stat. ¶19). Thus, in a workforce that is almost completely white and male, incumbent white males can be resistant to the idea of women and minorities doing "their" jobs. Given that white males have traditionally enjoyed higher-status and higher-paying occupations than women and minorities, a white male incumbent employee's desire to preserve a job category as white and male in order to protect his self-identity can be especially strong. (56.1 Stat. ¶20).

For similar reasons, individuals are most likely to know, identify with, and network with individuals whom they perceive as similar to themselves. Thus, even when incumbent white male employees are not actively trying to exclude women or minorities, heavy reliance on word-

of-mouth recruiting in a overwhelmingly white, almost exclusively male workforce means that women and minorities are less likely to hear about such things as the availability of a job, the attractiveness of a job, or the requirements to qualify for a job. (56.1 Stat. ¶21). Left to their own choices about whom to recruit for job opportunities, incumbent employees are most likely to recruit individuals from the groups with which they personally identify. Thus, even if a male employee knows a woman qualified for the position, he is less likely to recruit her for the job because he is less likely to personally identify with her. (56.1 Stat. ¶22). Moreover, in many instances, white male employees who work in an overwhelmingly white male workforce may simply not know any qualified potential applicants who are women or persons of color, as research shows that individuals are likely to have professional networks composed of individuals similar to themselves. For example, men in a particular profession are less likely to know women who work in the field than are other women in the profession. (56.1 Stat. ¶23).

In these ways, the lack of women and minorities in custodian and custodian engineer positions over the years exacerbated and formed a part of the City's discriminatory failure to recruit women and minorities for these positions, making it less likely that women and minorities would gain the information necessary to seek these jobs successfully. For instance, Objector-Intervenor and custodian engineer Dennis Mortensen himself testified that being related to someone who was a custodian or custodian engineer provides additional opportunities to obtain these jobs because of the additional information about the exam and what is necessary to prepare for it that the relationship provides. (56.1 Stat. ¶24). In the context of an overwhelmingly white workforce, the informational benefits of such family relationships will obviously tend to accrue to potential applicants who are white. As the experience of beneficiaries in this case confirms, individuals who were outsiders to such networks because of their race or gender often found it

difficult to learn about the examinations and what was necessary to perform successfully on them. (56.1 Stat. ¶25).

Further, the demographic make-up of the custodian and custodian engineer workplace was an additional barrier to the recruitment of women and minorities because to many potential applicants, it sent the clear message, "women and minorities need not apply." If, for example, no women are doing a particular job, it can be easy for potential female applicants to assume that this is true for some particular reason — either because women are not welcome on the job, or because women are somehow unable to perform the job. (56.1 Stat. ¶31). It is even possible, as demonstrated by the testimony in this case, that if no women or minorities are known to hold a particular job, women and minorities will assume they are not eligible for the position until they are invited to apply or are exposed to other women or minorities doing the job. (56.1 Stat. ¶32). One female beneficiary testified that although she had worked for custodian engineers in New York City schools for seven years, she had never seen a female custodian or custodian engineer until she herself became one in 1994; prior to this, based on her observations of the all-male custodian workforce, the idea that women could become custodians would have been laughable to her. (56.1 Stat. ¶33). A Hispanic beneficiary testified that because he saw only white people in custodian and custodian engineer jobs through the years, he concluded "those things are not for us," until he saw women becoming provisional custodians and thought maybe someone like him could too. (56.1 Stat. ¶34). Another Hispanic beneficiary explained that the demographic make-up of the custodian workforce had led him to conclude, "I would never get that job. I would never get that job. There just wasn't any minorities on the job. So I just felt that I wasn't qualified." (56.1 Stat. ¶35). As the testimony of the beneficiaries confirms, if an organization wishes to send a signal to women or minorities that they are not welcome in a job, a way to do

this is to staff the job almost exclusively with white males, which can decrease the attractiveness of the position to women and to men of color, and to rely on word-of-mouth recruiting to fill openings, which decreases the number of women and people of color likely to learn of the job opportunity. (56.1 Stat. ¶36). This is exactly what the Defendants did in regard to Exams 5040, 8206, and 1074. (56.1 Stat. ¶37).

Defendants' Disproportionately White, Male Applicant Pool

Not surprisingly, given the heavy reliance on word-of-mouth recruiting carried out by an overwhelmingly white, almost completely male workforce, 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 women, African-Americans, Hispanics, and Asians in the qualified workforce, as demonstrated by the analysis of the United States' expert, Dr. Orley Ashenfelter. (56.1 Stat. ¶38). Dr. Ashenfelter compared the actual number of qualified female and minority applicants for each of the three exams[6] with the number of applicants that would be expected based on the representation of women and minorities in the available labor pool. (56.1 Stat. ¶39). Dr. Ashenfelter, acknowledging that the custodian and custodian engineer positions required particular qualifications, did not assume that the entire labor force in the New York metropolitan area represented the available labor pool for these jobs. Instead, controlling for the possibility that lack of qualifications for these jobs was the reason for low numbers of applications from women and minorities, he defined the available labor pool as those individuals able and willing to

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[6] More precisely, Dr. Ashenfelter separately considered both the total number of female and minority applicants for each exam and the number of female and minority applicants for each exam considered "qualified" by the Defendants in a *post hoc* review of applicants' qualifications conducted in 1997 as part of this litigation. (56.1 Stat. ¶40).

perform the job in question. (56.1 Stat. ¶41). To determine the demographics of this labor pool of qualified potential applicants — those individuals in the metropolitan area qualified for the job of custodian or custodian engineer who could have applied for the exams and did not — Dr. Ashenfelter necessarily relied upon a somewhat indirect method of measurement, as no data source exists that details the particular educational history, job history, and employment aspirations of all individuals in the metropolitan area. (56.1 Stat. ¶42).

The richest data available to a researcher attempting to determine the demographics of potential applicants for a particular position — in other words, the data a researcher must rely on in determining whether an employer is recruiting applicants representative of the larger qualified pool — are Census data. (56.1 Stat. ¶43). 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. 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. (56.1 Stat. ¶44). 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 as well. The analysis thus assumed that there were large variations across occupations regarding the likelihood that an individual would be able and willing to take a job as custodian or custodian engineer. (56.1 Stat. ¶45). In addition, within a particular occupational group, the analysis did not assume that every individual so employed was equally able and willing to take a job as custodian or custodian engineer. Rather, it assumed that the demographics of those who were in

fact able and willing were the same as 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 those in the "Manager and Professional" group able and willing to perform the job. (56.1 Stat. ¶46).

In several ways, Dr. Ashenfelter's analysis in this case was a conservative one, in that it might well understate the representation of women and minorities in the qualified potential applicant pool and thus the disparities between the expected female and minority applicants and the actual female and minority applicants. (56.1 Stat. ¶47). 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. (56.1 Stat. ¶48). 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 under-representation of women and minorities in the actual applicant pool for the three exams. (56.1 Stat. ¶49).

Despite the conservative aspects of his analysis, Dr. Ashenfelter found gross disparities between the actual and expected number of female and minority applicants for the custodian and custodian engineer exams. Specifically, he found that the number of qualified women, African-Americans, Asians, and Hispanics who applied for Exams 5040, 8069, and 1074 was in each instance smaller than the number that would be expected, based on his calculation of these

individuals' representation in the qualified labor force.[7] (56.1 Stat. ¶50). In every instance the difference between the actual and expected number of applicants was statistically significant — equal to at least two standard deviations[8] — and thus unlikely to be the result of chance. Indeed, these differences were typically far greater than two standard deviations. (56.1 Stat. ¶52).

Specifically, for Exam 5040, the difference ranged from more than four to more than twelve standard deviations. (56.1 Stat. ¶53). 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 were 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. (56.1 Stat. ¶54).

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 exam was not the result of chance. The significance of the disparities for qualified African-American, Hispanic, and female candidates were even greater. Respectively, there was a 99.9999983 percent likelihood, a 99.9936658

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[7] He found similar disparities when he took into account the entire actual applicant pool, rather than only those judged "qualified" by the Defendants. (56.1 Stat. ¶51).

[8] "Standard deviation analysis measures the probability that a result is a random deviation of the predicted result — the more standard deviations the lower the probability the result is a random one. . . . Social scientists consider a finding of two standard deviations significant, meaning there is about one chance in 20 that the explanation for a deviation could be random and the deviation must be accounted for by some factor other than chance." *Waisome v. Port Auth. of N.Y. & New Jersey*, 948 F.2d 1370, 1376 (2d Cir. 1991) (internal citations omitted). A disparity of two standard deviations is thus about 95 percent likely not to be the result of chance.

percent likelihood, and a 99.9999912 percent likelihood that these disparities were not the result of chance. (56.1 Stat. ¶55).

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 were 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. (56.1 Stat. ¶56).

Defendants' Additional Recruitment Efforts

When a civil service exam is given, an eligibility list is created that ranks those individuals who passed the exam based on their performance and any adjustments required by civil service law. Hiring for the relevant position is then made from the eligibility list for the life of the list — generally four years. (56.1 Stat. ¶57). After the civil service eligibility list for Exam 5040 expired in 1990, the Defendants began to hire provisional custodians to meet their workforce needs.[9] They continued to do so until December 1996, when the eligibility list for Exam 1074 was established. (56.1 Stat. ¶58). When the eligibility list for Exam 8206 expired in 1994, they also began to hire provisional custodian engineers. (56.1 Stat. ¶59). The Caldero

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[9] Provisional custodians and custodian engineers perform the same work as permanent custodians and custodian engineers. However, they lack the civil service protections that permanent custodians and custodian engineers enjoy. Unlike permanent custodians and custodian engineers, provisionals can be fired at any time. (56.1 Stat. ¶61). They do not accrue seniority on the job and are not eligible to bid for transfers to different schools. Instead, they are placed and moved at the discretion of the Board of Education. They also are not eligible for "temporary care" assignments, in which a custodian or custodian engineer temporarily takes responsibility for overseeing the cleaning and maintenance of a second school building in addition to his or her primary assignment and collects an increased salary while overseeing the second building. (56.1 Stat. ¶62). The hiring process for the two positions also differs, as described *infra*.

Intervenors were all hired as provisional custodians or custodian engineers during this time period. (56.1 Stat. ¶60).

Provisional custodians and custodian engineers perform the same work as permanent custodians and custodian engineers. Accordingly, the qualifications required for the provisional jobs are the same as the qualifications required for the permanent jobs. (56.1 Stat. ¶63). The hiring process, however, is different. Rather than taking a civil service examination and submitting an experience paper that is reviewed for qualifications by the Department of Personnel,[10] as is required for the permanent positions, applicants for provisional custodian or custodian engineer positions submit a resume to the Board of Education. The Board of Education determines whether candidates have the necessary qualifications, interviews candidates, and makes the decision whether or not to hire the candidate. (56.1 Stat. ¶64).

When the Board of Education began to hire provisional candidates in the early 1990s, it did so with the goal of increasing the representation of women and minorities in the custodian workforce. (56.1 Stat. ¶65). This goal grew from an awareness of and concern regarding the demographics of the largely white, almost all-male permanent custodian workforce. In addition, the Department of Justice was investigating the Defendants' hiring and recruitment of custodians and custodian engineers by 1992. (56.1 Stat. ¶66). As part of its attempt to broaden recruitment, the Board of Education advertised for the provisional positions in several newspapers, including newspapers with a large ethnic or minority audience. (56.1 Stat. ¶67). The Board of Education also encouraged word-of-mouth recruiting for the position, by sending a circular to all incumbent custodians and custodian engineers that suggested they tell their employees about the provisional

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[10] The New York City Department of Personnel is today known as the Department of Citywide Administrative Services. This Memorandum refers to it as the Department of Personnel throughout.

custodian positions and by making the same suggestion informally to the unions that represented custodians' employees. The word-of-mouth recruiting for the provisional positions, moreover, reflected the Board's particular interest in hiring women and minorities. (56.1 Stat. ¶68).

The Defendants have retained few records regarding the provisional hiring process they used throughout the 1990s. (56.1 Stat. ¶69). They did retain, however, a number of records reflecting 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. (56.1 Stat. ¶70). 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. (56.1 Stat. ¶71). If those interviewed were demographically representative of those who applied, the efforts to attract a more diverse applicant pool through newspaper advertising and word-of-mouth recruiting for female and minority applicants appear to have been somewhat successful. (56.1 Stat. ¶72). Compared to the actual applicant pool for the 7004 custodian and custodian engineer exam, given in 1997, a higher percentage of provisional interviewees were female, and that increase was statistically significant.[11] The percentage of African-American and Asian provisional interviewees was also higher than the representation of

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[11] 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 *infra*, because the Defendants also conducted additional minority recruitment efforts for Exam 7004, which were apparently at least somewhat successful in recruiting Hispanics and Asians, the comparison to Exam 7004 may well understate the success of the outreach to these groups through the provisional custodian hiring process.

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. (56.1 Stat. ¶73).

The comparisons of provisional applicant data to Exam 7004 data may understate the effects of the broader provisional recruiting, however, because Exam 7004 was itself the focus of some additional recruitment efforts by the Defendants. Specifically, the Board of Education sponsored a training program for Exam 7004, which it encouraged incumbent custodians and custodian engineers to publicize to their staff. (56.1 Stat. ¶74). In addition, the Board of Education 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 candidates outside the school system. These advertisements explained that the training program was being offered specifically to encourage women, minorities, and other qualified individuals to apply for the exam. (56.1 Stat. ¶75). The Board of Education also contacted various community groups, which included groups with a female or minority constituency, in an attempt to find participants for a second training program, though they did not receive a significant response from this effort. (56.1 Stat. ¶76). Finally, they instructed the 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. (56.1 Stat. ¶77). Despite these efforts, sizeable, strongly significant disparities persisted between the actual and expected number of qualified African-American and female applicants for the exam. (56.1 Stat. ¶78). However the disparity between the actual and expected number of qualified Hispanic applicants 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. (56.1 Stat. ¶79). Thus, while the change in recruitment methods did not correct the disparities between actual and expected applicants for women and African-Americans, it may have had some effect in reducing these disparities for Hispanics and Asians, at least according to some methods of measurement. (56.1 Stat. ¶80).

Custodians' Hiring Practices and Staff

Perhaps one reason that gross disparities persisted between the number of expected and actual female and African-American applicants for Exam 7004, and that by some measures significant disparities persisted between the number of expected and actual Hispanic and Asian applicants for Exam 7004, is the Board of Education's focus on custodians' and custodian engineers' firepersons in its outreach and training efforts for the examination. In addition to advertising, the Board of Education recruited for its Exam 7004 training program by suggesting to custodian and custodian engineers that they might want to tell their firepersons about it. (56.1 Stat. ¶82). Yet, according to tables prepared in approximately 1997 by James Lonergan, Executive Director of the Board of Education's Division of School Facilities, no more than a handful of women were employed as firepersons at that time.[12] Apparently, a little over 15 percent of firepersons were African-Americans, a percentage significantly lower than the 20 percent representation of African-Americans (56.1 Stat. ¶83) in the available labor pool for the custodian and custodian engineer positions. (56.1 Stat. ¶85). Some of the beneficiaries testified about the difficulty of obtaining a fireperson job as a woman or minority. (56.1 Stat. ¶87). Indeed, the Board of Education recognized that there was less racial and gender diversity in the fireperson position than in other custodial staff positions. (56.1 Stat. ¶86).

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[12] These tables were created based on information gathered from a demographic survey of custodians' staff, which was performed in approximately 1995 or 1996 and has not been retained. (56.1 Stat. ¶84).

While the collective bargaining agreements between the Board of Education and the custodians' union over the relevant period prohibited custodians and custodian engineers from discriminating as employers, the Board of Education never sought to monitor or enforce this requirement. (56.1 Stat. ¶88). No process existed for custodians' employees experiencing discrimination to complain to the Board of Education. (56.1 Stat. ¶89). The collective bargaining agreement entered into in 1994 required for the first time that custodians and custodian engineers adopt an affirmative action program in their hiring and promotional decisions, but this provision also was never implemented or enforced. (56.1 Stat. ¶90). Neither were the various joint union-Board training programs required as a method to increase diverse custodian and custodian engineer candidates ever put into effect. (56.1 Stat. ¶91).

U.S. v. N.Y. City Bd. of Educ.

In 1996, the United States sued the Defendants in the present case, alleging that they had engaged in a pattern and practice of discrimination against women, African-Americans, Hispanics, and Asians in recruiting and a pattern and practice of discriminating against African-Americans and Hispanics in hiring. (56.1 Stat. ¶92). As part of that lawsuit and the investigation leading up to it, attorneys for the United States Justice Department identified, interviewed, and consulted with many of the female and minority provisional custodians who later would become beneficiaries under the Settlement Agreement in the case. (56.1 Stat. ¶93).

In 1999, after extensive discovery but before the United States had ever moved for summary judgment, gone to trial, or otherwise affirmatively put forward its theory of the case, the United States and the Defendants entered into a Settlement Agreement in order to avoid the cost and risk of further litigation. The Agreement required both the United States and the Defendants to defend the Agreement against any challenge. It also required the Defendants to

create a recruitment program and undertake specified recruitment efforts, as well as to consult with the United States in designing future civil service examinations and diminishing any discriminatory impact from the eligibility list for Exam 7004. (56.1 Stat. ¶94). 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 successfully recruited through the provisional hiring process and who were successfully working in provisional positions. Paragraphs 14 through 16 also provided retroactive seniority to these individuals, as well as to female and minority custodians and custodian engineers who had previously been successfully recruited for provisional positions, but who had obtained permanent status prior to the entry of the Settlement Agreement. (56.1 Stat. ¶95). With a few minor exceptions, for individuals who had taken Exam 5040, Exam 8206, or Exam 1074, the seniority award was 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 Exam 5040, Exam 8206, or Exam 1074, seniority was retroactive to the provisional hire date. (56.1 Stat. ¶96). By providing these benefits to women, African-Americans, Hispanics, and Asians who were qualified for and successfully performing the jobs of custodian and custodian engineer, the Settlement Agreement was designed to remedy the effects of the Defendants' past recruitment discrimination and prevent discrimination in the future.

Thereafter, the United States and the Defendants moved for judicial approval of the Settlement Agreement. In moving for this approval, the United States explained that the settlement implemented race- and gender-conscious remedies and met the necessary standard for doing so. (56.1 Stat. ¶97). It also explained that "the conversion of the Offerees to permanent

Custodians and Custodian Engineers accomplishes the 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." (56.1 Stat. ¶98). At the fairness hearing regarding the propriety of approving the Settlement Agreement as a Consent Decree, the United States later reiterated its reasons for providing permanent employment status and retroactive seniority to the group of beneficiaries selected, all of whom were successfully serving as either provisional or permanent custodians: "[W]e were very careful in selecting the group of individuals we wanted to become offerees. We needed to consider the 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, and at the same time address the qualifications issues that people raised." (56.1 Stat. ¶99). In support of the Settlement Agreement, the United States presented the statistical evidence demonstrating gross disparities in the actual and expected number of female and minority applicants for Exams 5040, 8206, and 1704, as well as the statistical disparities between the performance of whites and the performance of African-Americans and Hispanics on these exams. (56.1 Stat. ¶100). For their part, the Defendants, in moving for entry of the Settlement Agreement, explained that the agreement was consistent with Title VII's underlying goal of "'ensuring equality of opportunity and the elimination of discriminatory barriers to professional development.'" (56.1 Stat. ¶101). The Defendants did not and do not contend that the relief provided in the Settlement Agreement was meant to provide make-whole relief to individuals who had suffered discrimination. (56.1 Stat. ¶102).

The Court, per Magistrate Judge Levy, heard objections to entry of the Settlement Agreement at a fairness hearing and approved entry of the Settlement Agreement as a Consent

Decree over those objections. *See U.S. v. N.Y. City Bd. of Educ.*, 85 F. Supp.2d 130 (E.D.N.Y. 2000). The provisions of the Agreement were implemented immediately thereafter. (56.1 Stat. ¶103). The individuals identified in the Settlement Agreement, as well as a small number of additional individuals who were found to meet the criteria set out in the Agreement, thus were offered awards of permanent appointment and retroactive seniority.[13] (56.1 Stat. ¶104). As consideration for these awards, the offerees were required to execute releases of all race and sex discrimination claims against the Defendants. (56.1 Stat. ¶105). All but one of the offerees, including all of the Caldero Intervenors, did so, and thus 59 individuals received permanent employment status, retroactive seniority, or both. (56.1 Stat. ¶106). The great majority of the beneficiaries, including all of the Caldero Intervenors, continue to work in these permanent custodian and custodian engineer positions to this day. The beneficiaries have made decisions in reliance on the Settlement Agreement, such as turning down other offers of permanent employment, entering into financial commitments based on the expectation of future employment, and making retirement plans. (56.1 Stat. ¶107).

Implementation of the Settlement Agreement

The awards of permanent status and retroactive seniority help remedy the effects of the Defendants' past discriminatory exclusion of women, African-Americans, Hispanics, and Asians by ensuring that qualified women, African-Americans, Hispanics, and Asians are on the job. (56.1 Stat. ¶110). Significantly, these awards also are an important method of preventing future

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[13] The Objector-Intervenors argue that seven of the individuals so added, including Caldero Intervenor Harry Santana, did not meet the definition of Offeree set out in the Settlement Agreement. (Obj. Mem. at 23). As both the Defendants and the United States have explained, however, when the stipulation regarding provisional hires referred to in the Settlement Agreement is corrected for what no one disputes is erroneous data regarding these individuals' ethnicity, they qualify for relief under Paragraph 4(a). Both parties to the Agreement have thus made it clear that the Agreement was not intended to deny relief to individuals erroneously described as white in the stipulation regarding provisional hires.

discriminatory recruitment. As described above, workforces that are homogeneously white and male are themselves a significant barrier to recruitment of women and minorities for a variety of reasons, and these effects are increased when such workforces rely on word-of-mouth recruiting. The beneficiaries who received permanent status and retroactive seniority under the Settlement Agreement are more likely than white male custodians to know other qualified women or minority candidates, as a result of the recognized phenomenon of individuals tending to network and associate with others like themselves. (56.1 Stat. ¶111). The awards of permanent status ensure that the beneficiaries are in a position to recruit women and minorities they know for the job, tell women and minorities about opportunities known to insiders, hire and mentor potential female and minority applicants on their own custodial staffs, and demonstrate to potential female and minority candidates through their presence on the job that these positions can be successfully obtained and held by individuals other than white males. Thus, the awards help correct many of the obstacles that the beneficiaries, and no doubt others like them, experienced in seeking employment as custodians or custodian engineers.

The awards of retroactive seniority enhance these effects. In the Board of Education custodian system, competitive seniority is primarily relevant as a factor in determining the school at which a custodian is placed. One factor, though not the only or even the primary factor, in deciding whether to grant custodians' requests to transfer to a different school is the relative seniority of the applicants seeking transfer to that school. The transfer process works as follows: Each school is assigned to a particular seniority bracket based on its square footage.[14] In other words, a minimum number of years of seniority is required for custodians to transfer to schools

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[14] Some schools are generally available only to custodian engineers, and not to custodians. Even in those instances when a custodian is permitted to apply for transfer to custodian engineer's school, a custodian engineer's bid for such a school will always trump a custodian's.

within each bracket. A custodian or custodian engineer may bid for schools above his or her seniority bracket, but will only be considered for these schools if no one with the "minimum" amount of seniority applies. When comparing applicants within the same seniority bracket, the applicant with the higher performance rating will be awarded the transfer. This is true even if the applicant with the higher rating has less seniority, as long as both candidates meet the minimum seniority level for the bracket. If the candidates have equivalent ratings (within .25 of a point), seniority is used as a tie-breaker. (56.1 Stat. ¶113).

Larger schools provide custodians with higher salaries, as well as larger custodial staffs and more supervisory authority. Thus, because of the retroactive seniority awards, the beneficiaries are able to compete for larger schools during the transfer process. Beneficiaries who transfer to larger schools will employ larger staffs and have greater supervisory authority than they otherwise would. (56.1 Stat. ¶114). If more custodial staff members, from which ranks custodians often rise, are directly employed by women and minorities, it is reasonable to assume, based both on social science data and on the experiences of beneficiaries, that more female and minority custodial staff members will be encouraged to attempt to become custodians by the leadership of someone "like them" on the job. For the reasons set out above, it is also reasonable to assume that these individuals will also be more likely to participate in the information networks necessary to success as a custodian through interaction with their custodian employers. Beneficiaries at larger schools will also have more opportunities to hire custodial staff, which for the reasons described above is likely to lead to more women and minorities being employed in the custodial system and eventually to more female and minority custodians. In addition, because of the prestige and visibility associated with maintaining larger, higher-profile schools, beneficiaries in such schools are more compelling examples of success in the system

and their examples are more effective recruitment tools for other women and minorities. For these reasons, the awards of permanent employment status and retroactive seniority to the beneficiaries formed an important part of the recruitment program set out in the Settlement Agreement and was integral to efforts to remedy the effects of the Defendants' past discrimination.

In addition, the awards are minimally burdensome to incumbent employees. No incumbent permanent custodians or custodian engineers lost their employment or school assignments to make room for the beneficiaries.[15] (56.1 Stat. ¶115). Given the small number of beneficiaries in a system of over 1000 school buildings, the effects of the retroactive seniority awards on transfers within the system have been and will be limited. (56.1 Stat. ¶117). No lay-offs have occurred since the implementation of the Settlement Agreement or indeed at any time in memory in the custodian workforce. (56.1 Stat. ¶118). The minimal burdens the retroactive seniority awards impose are of the sort that courts have frequently approved to remedy past discrimination.

The Objector-Intervenors' Challenge

In 2001, the Second Circuit granted the Objector-Intervenors' motion to intervene and remanded the case to permit them to conduct discovery to support their claims that the awards of

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[15] Custodians and custodian engineers are eligible on a strict rotating basis for "temporary care" assignments, where they care for a school that is temporarily without a custodian in addition to their own, and collect part of the salary for that school. All custodians and custodian engineers are placed on the temporary case list for their borough upon completion of their probationary period. Temporary care assignments are then offered to the person at the top of the list. When that person completes the assignment, they go to the bottom of the list. Temporary Care assignments are therefore not determined by competitive seniority. In addition, because no new permanent positions were created for the beneficiaries, the appointment of the beneficiaries in this case has no effect on the ability of the Objector-Intervenors to obtain temporary care assignments. (56.1 Stat. ¶116).

retroactive seniority to the beneficiaries violated their rights as incumbent employees.[16] (56.1 Stat. ¶119). *See Brennan v. N.Y. City Bd. of Educ.*, 260 F.3d 123, 133 (2d Cir. 2001). Upon remand, the Objector-Intervenors moved for a preliminary injunction that would have stripped the beneficiaries of their awards of permanent employment status and retroactive seniority. (56.1 Stat. ¶120). Despite its previous role in crafting and advocating for the awards to these individuals, the United States chose not to oppose the Objector-Intervenors' motion as to the majority of the beneficiaries, including all the white female beneficiaries, all the Asian beneficiaries, and those Hispanic and African-American beneficiaries who had not both taken one of the challenged exams and failed to score high enough to obtain permanent appointment. This group included the individuals who became the Caldero Intervenors. (56.1 Stat. ¶121). Despite the United States' failure to comply with its obligations to enforce the Settlement Agreement, the motion for a preliminary injunction was denied. (56.1 Stat. ¶122). The Caldero Intervenors intervened in *U.S. v. N.Y. City Bd. of Educ.*, as plaintiffs seeking a declaratory judgment that the relief provided them pursuant to the Settlement Agreement was lawful and appropriate. (56.1 Stat. ¶123).

ARGUMENT

I. THE CHALLENGED PROVISIONS OF THE SETTLEMENT AGREEMENT CAN BE ENTERED AS A CONSENT JUDGMENT.

The Objector-Intervenors argue that paragraphs 14-16 of the Settlement Agreement cannot be entered as a consent decree because the United States no longer contends that all of the

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[16] At the time the Objector-Intervenors' motion for intervention was granted, the then-Objectors were permanent custodians and provisional custodian engineers. Since that time, one of the initial Objector-Intervenors has left the employment of the Defendants and two additional Objector-Intervenors have been added. Today, none of the Objector-Intervenors are provisionally employed. Three are permanent custodian engineers and one is a permanent custodian.

beneficiaries should receive the retroactive seniority awards it crafted and adopted in those paragraphs.[17] This argument ignores the fact that counsel for the United States executed the Settlement Agreement on February 11, 1999, and thereafter moved for its entry as a consent decree. The United States' "consent" to the Agreement's terms is therefore a matter of record in this case. Having entered into the Settlement Agreement, a subsequent change of heart and loyalties on the United States' part is irrelevant to this Court's power to approve that Agreement.

Like any other contract, a settlement agreement is binding on the parties at the time they objectively manifest their intent to be bound by it. *See Moore v. Beaufort County, N.C.*, 936 F.2d 159 (4th Cir. 1991) (holding defendant county to its obligations under settlement agreement despite change of heart of governing board of county subsequent to entering into agreement). A properly executed agreement is a clear manifestation of intent. Once the parties have entered into the settlement agreement, they are bound to its terms, and cannot simply undo the agreement by changing their minds. *See Allen v. Ala. State Bd. of Educ.*, 816 F.2d 575, 577 (11th Cir. 1987) (holding governmental party bound to terms of settlement agreement when party attempted to withdraw consent to the agreement "after unfavorable publicity"); *Evans v. Waldorf-Astoria Corp.*, 827 F. Supp. 911, 914 (E.D.N.Y. 1993), *aff'd*, 33 F.3d 49 (2d Cir. 1994) (noting that a plaintiff's change of mind "does not excuse her from performance of her obligations under the settlement agreement"). Neither does a simple failure to comprehend all of an agreement's ramifications relieve a party from a duty to comply with a valid settlement agreement. *E.g.*,

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[17] The Objector-Intervenors also argue that the awards of permanent status, granted under paragraph 13 of the Settlement Agreement, should not be approved because the United States no longer consents to this paragraph. However, the United States does not contend that any beneficiary who received permanent status under the Settlement Agreement should lose that status. (*See* Rosman Ex. 53, United States' Response to Defendants Contention Interrogatories to the United States, Response No. 1). Therefore, the United States has not withdrawn its "consent" to the relief awarded under paragraph 13, even under the Objector-Intervenors' novel theory.

George v. Parry, 77 F.R.D. 421, 424 (S.D.N.Y. 1978), *aff'd*, 578 F.2d 1367 (2d Cir. 1978).[18] The United States consented to paragraphs 14 through 16 when it signed the Agreement. A later change in attitude does not somehow invalidate this consent.[19]

Because a settlement agreement binds the parties at the time they consent to enter into it, the Second Circuit has recognized that a party is not entitled to preclude the entry of a consent judgment by reneging on his agreement. *Janus Films v. Miller*, 801 F.2d 578, 583 (2d Cir. 1986). For this reason, a district court is "not free to reject a consent decree solely because [one party] no longer wishe[s] to honor its agreement." *Stovall v. City of Cocoa*, 117 F.3d 1238, 1242 (11th Cir. 1997). Rather, the court must undertake its own review of the fairness, reasonableness, and lawfulness of the agreement, without reference to the change of heart of any of the parties to it. *Id.*

II. AS PART OF THE SETTLEMENT OF A TITLE VII ACTION, PARAGRAPHS 13 THROUGH 16 ENJOY A PRESUMPTION OF VALIDITY.

"[V]oluntary compromises of Title VII actions enjoy a presumption of validity" and therefore should "be approved unless they contain provisions that are unreasonable, unlawful, or

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[18] Moreover, political officials are bound to agreements entered into by their predecessors. *See Barcia v. Sitkin*, 367 F.3d 87, 90 n.1 (2d Cir. 2004) ("although the individual defendants named in the caption no longer serve as the Board's chairman, its members, or the industrial commissioner...no one disputes that the consent decree remains binding on their successors"); *Newman v. Graddick*, 740 F.2d 1513 (11th Cir. 1984) (outgoing state officials had authority to bind incoming officials by consent decree).

[19] The Objector-Intervenors' reliance on *Computerized Med. Imaging Equip. v. Diasonics Ultrasound*, 303 A.D.2d 962, 758 N.Y.S.2d 228 (4th Dep't 2003), is misplaced. In *Computerized Medical*, the court had to determine whether two parties created a new employment contract following the previous contract's expiration. *Id.* at 963. The court held that "there was no enforceable agreement between the parties" because "the parties were unable to reach agreement on terms for extending their business relationship." *Id.* In other words, the parties never agreed on a *new* contract and therefore no *new* contract existed. Here, no one argues a new contract exists. Rather, reliance is placed on the old contract that the parties agreed to. Nor does the Objector-Intervenors' argument that the Settlement Agreement has expired require a different result. The Caldero Intervenors adopt and incorporate by reference Section I.B. of the Arroyo Intervenors' concurrently filed memorandum on this topic.

in violation of public policy." *Kirkland*, 711 F.2d at 1128-29. This is because, in enacting Title VII, Congress expressed a preference for compliance by voluntary means. *E.g.*, *Local Number 93 v. City of Cleveland*, 478 U.S. 501, 515 (1986); *Carson v. Am. Brands*, 450 U.S. 79, 88 n.14 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). "The value of voluntary compliance is doubly important when it is a public employer that acts, both because of the example its voluntary assumption of responsibility sets and because the remediation of governmental discrimination is of unique importance." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 290 (1986) (O'Connor, J., concurring). Settlement agreements are one form of such favored voluntary compliance, *Local Number 93*, 478 U.S. at 517, and thus serve Title VII's intended purpose "as a spur or catalyst to cause employers . . . to self-examine . . . and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." *United Steelworkers v. Weber*, 443 U.S. 193, 204 (1979) (internal citations and quotation marks omitted).

Thus, as previously recognized in this case, the Intervenor-Objectors bear the burden of demonstrating the illegality of the Settlement Agreement. *U.S. v. N.Y. City Bd. of Educ.*, Report and Recommendation, 96-CV-374, at 21 n.24 (RML) (E.D.N.Y. July 24, 2002), *adopted*, 2002 WL 31663069 (E.D.N.Y. November 26, 2002); *see also Brennan*, 260 F.3d at 129. Indeed, because such agreements "may produce more favorable results for protected groups than would more sweeping judicial orders that could engender opposition and resistance . . . and because they also reduce the cost of litigation, promote judicial economy, and vindicate an important societal interest by promoting equal opportunity," *Kirkland*, 711 F.2d at 1129 n.14, the objector's burden is a "heavy" one. *Williams v. Vukovich*, 720 F.2d 909, 921 (6th Cir. 1983).

The Intervenor-Objectors have failed either to acknowledge or meet this heavy burden. Instead they have proceeded as though they are defendants in a discrimination suit, arguing to this Court that the plaintiff has failed to prove its case. However, there is no requirement that unlawful discrimination be proved as a prerequisite either to settlement of a Title VII case or to other forms of voluntary compliance with Title VII. Crafting such a requirement would place an often insurmountable obstacle before any employer that wished to settle a Title VII lawsuit against it or otherwise implement measures to promote race or gender equity in its workplace. *See Wygant*, 476 U.S. at 290 (O'Connor, J., concurring) ("The imposition of a requirement that public employers make findings that they have engaged in unlawful discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations."); *Weber*, 443 U.S. at 210 (Blackmun, J., concurring) (noting that a requirement of a judicial finding of prior discrimination as a prerequisite to an employer's voluntary affirmative action program would "place[] voluntary compliance with Title VII in profound jeopardy" in contravention of Congressional preference). By definition, a settlement agreement resolves a wrong that remains unproven.

The Objector-Intervenors' entrance into this lawsuit does not allow them to force this proof. "[W]hile an intervenor is entitled to present evidence and have its objections heard at the hearings on whether to approve a consent decree, it does not have power to block the decree merely by withholding its consent." *Local 93*, 478 U.S. at 529. "Indeed, a rule indiscriminately enabling all intervenors in these cases to veto proposed compromises would seriously hamper efforts to settle Title VII cases, thereby frustrating Congress's expressed preference for achieving Title VII compliance by voluntary means." *Kirkland*, 711 F.2d at 1126; *see also Airline Stewards & Stewardesses Ass'n v. Am. Airlines*, 573 F.2d 960, 963 (7th Cir. 1978) ("It seems to

us beyond serious dispute that no reasonable parties are going to settle any case if an intervenor can force them to litigate separately the merits of each claim."). Should third parties such as the Objector-Intervenors be permitted routinely to veto such settlements, the burdens not only on employers, but also on courts, which must also bear the costs of this forced litigation, will be incalculable.

As set out below, the Objector-Intervenors have failed to carry their heavy burden of demonstrating that paragraphs 13 through 16 of the Settlement Agreement are unlawful.

III. THE SETTLEMENT AGREEMENT DOES NOT INFRINGE ON THE OBJECTOR-INTERVENORS' CONTRACT RIGHTS.

The Objector-Intervenors assert that the retroactive seniority provided by the Settlement Agreement violates their contract rights and can therefore only be entered with their consent. They argue that because they do not consent, the Court must hold a full trial on the merits of the underlying discrimination claims.

Even if the Objector-Intervenors were correct that *any* infringement of their contractual rights, no matter how minor, would permit them to thwart settlement and force a full trial on the merits — a question the Second Circuit has not answered and this Court need not — they have shown no such infringement of a contractual right here. Thus, while the Objector-Intervenors "do have a sufficient interest to argue that the . . . agreement is unreasonable or unlawful, their interest . . . does not require their consent as a condition to any voluntary compromise of the litigation." *Kirkland*, 711 F.2d at 1126.

In its decision granting intervention to the Objector-Intervenors, the Second Circuit considered whether they possessed an interest sufficient to meet the standard for intervention under Rule 24(a)(2). The standard for intervention does not require that the putative intervenor possess a contract right, but merely an interest that could potentially be harmed and that is

unrepresented in the proceedings. *Brennan*, 260 F.3d at 131. In their brief, the Objector-Intervenors make the jump from the Second Circuit's finding that they have an interest sufficient for intervention to an unsupported claim that they have a contract right that the retroactive seniority awards infringe, without providing any basis for the existence of that right. (Obj. Mem. at 38).

Before a court can consider whether a consent decree settling a Title VII action violates the contract rights of a third-party intervenor, that intervenor must first identify the contract right he or she claims the consent decree infringes. *U.S. v. City of Hialeah,* 140 F.3d 968, 979 (11th Cir. 1998) (distinguishing *Local Number 93 v. City of Cleveland,* 478 U.S. 501 (1986), where the union-intervenor did not identify a specific right under its collective bargaining agreement). The Objector-Intervenors point to their "seniority rights," but do not cite to a single page of the collective bargaining agreement (the "CBA") between their union and the Defendants, from which those rights must arise, if they exist.

"Seniority rights" do not exist in the abstract, but stem from the four corners of the collective bargaining agreement. *Wightman v. Springfield Terminal Ry. Co.,* 100 F.3d 228, 233 (1st Cir. 1996) (internal citations omitted) ("It is by now well established that in the absence of a contract creating seniority rights, they do not exist."); *see also Mount Ararat Cemetery v. Cemetery Workers and Greens Attendants Union,* 975 F. Supp. 445, 447 (E.D.N.Y. 1997) ("'Seniority is wholly a creation of the collective agreement and does not exist apart from that agreement.'") (quoting *en banc* decision, *Local 1251 Int'l Union v. Robertshaw Controls Co.,* 405 F.2d 29 (2d Cir. 1968)). Therefore, in order for the Court to consider whether the Settlement Agreement conflicts with the Objector-Intervenors' contract rights, the Objector-Intervenors first

must show that the CBA in this case does create a contract right, a higher burden than the required "interest" showing for intervention.

While the Objector-Intervenors do not specify what exactly they consider to be their contractual "seniority rights," in the Second Circuit's discussion of potential rights possessed by the Objector-Intervenors, the court focused on school transfers. *Brennan*, 260 F.3d at 132. We therefore assume that by "seniority rights" the Objector-Intervenors refer to what they believe is a right to transfer on the basis of seniority.

A. The Retroactive Seniority Awards Do Not Infringe A Right to Transfer Under the Collective Bargaining Agreement.

In *Kirkland*, the Second Circuit made a distinction between a collective bargaining agreement that creates a contractual right and one that creates a mere expectancy of a benefit. 711 F.2d at 1127-28. The court distinguished *U.S. v. City of Miami,* 664 F.2d 435 (5th Cir. 1981), where the Fifth Circuit had found the union-intervenor possessed a contract right under its CBA that could not be altered by a consent decree absent the intervenor's consent, explaining that the holding in *City of Miami* in large part rested on the *guaranteed* status of the interest protected by the contract. That is, the interests protected by the CBA in *City of Miami* were not in any way contingent. *Kirkland*, 711 F.2d at 1127. In *Kirkland*, the Second Circuit found that the CBA provision at issue before it did not provide the same level of guarantee. The court characterized the *Kirkland* intervenors' interest in the continuation of particular civil service promotional procedures as a "mere expectation of promotion," an interest that was sufficient to allow for their intervention, but not sufficient to require their consent to the settlement agreement. *Id.* at 1128.

The Objector-Intervenors have a similarly contingent interest in transfers arising out of the CBA in the instant case. The CBA, Article IV, Ratings and Transfers, provides, "Transfers

of Custodian Engineers will be made on the basis of two main factors, viz. (1) ability and performance; and (2) seniority credit within the title." (Ex. 61[20]).[21] It further makes clear, "Custodian Engineers shall *only be eligible* for promotion, voluntary transfer or temporary care assignment *contingent upon a satisfactory evaluation*[.]" CBA Article IV, section (3) (emphasis added). (*Id.*) The Objector-Intervenors are not guaranteed any particular transfer on the basis of seniority; rather, transfers are awarded on the basis of both seniority and performance. As discussed at p. 23 - 24, *supra,* once an applicant for a transfer falls in the appropriate seniority bracket, he or she is compared to other applicants on the basis of performance ratings, and the transfer is awarded to the applicant with the highest ratings. In the case of a tie, seniority is used as a tie-breaker.[22]

Because the contract makes clear that a custodian is not actually entitled to transfer as a result of his or her seniority, but also will be judged based on evaluations of his or her work, the contract does not provide a right to transfer based on seniority. Instead, it merely explains that seniority is one factor that may affect a custodian's ability to transfer. The Objector-Intervenors' interest in any particular transfer on the basis of seniority must therefore be viewed as a "mere expectation," which while sufficient to allow intervention, is not sufficient to require their consent to the settlement agreement. *Kirkland* at 1128; *see also E.E.O.C. v. Am. Tele. & Tele.*, 556 F.2d 167 (3d Cir. 1977) (union had a right to intervene and present its objections, but not to

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[20] All references to "Ex. __" are to the Exhibits to the Declaration of Emily Martin, dated December 23, 2004.

[21] This excerpt is from the CBA in effect between January 1, 1995 and December 31, 1999. It was not signed until March 22, 2002, and we understand it to be currently in force. (Rosman Ex. 31, Declaration of Salvatore Calderone).

[22] As discussed above, at p. 25 n.15, *supra*, temporary care assignments are also not awarded on the basis of competitive seniority, and therefore cannot serve as a basis for the Objector-Intervenors' so-called "seniority rights."

block settlement, based on objections that agreement violated seniority rights in relation to promotions, when promotions not controlled solely by seniority); *cf. City of Hialeah*, 140 F.3d at 981 (describing interests asserted by intervenors which under the CBA "accrue[d] strictly according to seniority").

The Objector-Intervenors mistakenly rely on the divided Eleventh Circuit decision *City of Hialeah*, 140 F.3d 968, for the proposition that they can force a full trial of the government's case on the merits. (Obj. Mem. at 38-39).[23] The court in *Hialeah* based its holding squarely on its finding that the intervenor was the holder of a contract right. *Id.* This decision does not address the situation presented here, where the intervenor does not possess a contract right.[24] Indeed, the Second Circuit has held that even in cases where the intervenor possesses a *bona fide* right under a CBA, such a right is not an automatic barrier to a stipulated remedy for discrimination under Title VII. *See Bridgeport Guardians, Inc. v. Delmonte*, 248 F.3d 66, 74-75 (2d Cir. 2001). Here, where the right claimed is a "mere expectation," allowing the Objector-Intervenors to force a full trial on the merits runs counter to the policy of favoring voluntary remedies for Title VII claims.

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[23] In addition to the mistaken reliance on *City of Hialeah*, the Objector-Intervenors misread the holding of that case, which says at most that an intervenor who holds a bona fide contract right is entitled to a hearing on the merits *of his objections,* not, as the Objector-Intervenors claim, of the government's discrimination case. *City of Hialeah*, 140 F.3d at 976.

[24] The Objector-Intervenors also make some mention of their seniority-based expectations under civil service law in relation to layoffs. First, and importantly, any suggestion that layoffs are at issue in this case is purely speculative. The record reflects no reason to assume that layoffs are contemplated or likely. (Ex. 60, Deposition of Salvatore Calderone Oct. 1, 2003 Vol. 2 at 26:19-24). *Cf. Kirkland*, 711 F.2d at 1135 (refusing to reach objection to settlement agreement when there was no basis for assuming that the suggested scenario would come to pass). Second, this kind of expectation that civil service procedures will continue to operate as they have previously, when untethered to an enforceable contract right, is precisely the sort of "mere expectation" that *Kirkland* holds does not permit an intervenor to block a settlement agreement. *Id.* at 1128.

Even were this Court to find that the Objector-Intervenors' contractual seniority rights were infringed by the Settlement Agreement's retroactive seniority awards, this would not end the inquiry. The beneficiaries also have contractual rights to the retroactive seniority awards that they received in consideration for releasing any discrimination claims against the Defendants. (Rosman Ex. 39, Settlement Agreement, Appendix G). There is no reason to give the Objector-Intervenors' alleged contractual claims to seniority priority over the beneficiaries' analogous rights.

B. The Awards of Permanent Appointment Infringe Neither the Objector-Intervenors' Contract Rights Nor Any Other Valid Interest.

While the Objector-Intervenors may claim an interest sufficient to intervene for the purposes of objecting to the Settlement Agreement's award of retroactive seniority (though not one sufficient to block approval of that Agreement), they do not have a sufficient interest to challenge the permanent appointments given to the beneficiaries under the Settlement Agreement. In other words, they have no standing to present objections to this provision. Standing requires a party to show that he or she has personally suffered some actual or threatened injury as a result of the allegedly illegal conduct of the defendant. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982). The permanent appointments received by the beneficiaries have not caused any actual or threatened injury to the Objector-Intervenors, as the appointments have threatened neither a contractual right, nor any other interest.

The Objector-Intervenors cannot show an injury from the permanent appointments and indeed have not attempted to do so. The Objector-Intervenors are all permanent employees and thus have not lost the opportunity to become permanent because of the awards to the beneficiaries. (56.1 Stat. ¶106). No male or white custodian or custodian engineer, including the

Objector-Intervenors, was removed from a permanent job in order to give a permanent position to a beneficiary. (56.1 Stat. ¶115). Giving permanent appointments to the beneficiaries did not increase the number of people against whom the Objector-Intervenors must compete for transfers or for temporary care assignments, as no new positions were created for the beneficiaries. (56.1 Stat. ¶115). Thus, the same number of permanent appointments would have been made regardless of who filled the slots. Whatever the precise nature of their interest in grants of retroactive seniority, the permanent appointments do not affect the Objector-Intervenors. Because the Objector-Intervenors lack standing to challenge the appointments, their objection to paragraph 13 of the Settlement Agreement, which grants these permanent appointments should be disregarded and this paragraph should be approved.[25]

IV. THE SETTLEMENT AGREEMENT COMPORTS WITH THE REQUIREMENTS OF TITLE VII.

A. The Retroactive Seniority Provided to the Beneficiaries Should Be Reviewed As a Form of Voluntary Affirmative Action Rather Than a Litigated Judgment.

Consistent with their behavior throughout this litigation, the Objector-Intervenors attempt to obscure the distinction between the standard of review applied to race- and gender-conscious measures voluntarily adopted and that applied to remedies imposed by a court. Specifically, they argue that "any distortion of a pre-existing *bona fide* seniority system [must] be limited to victim-specific remedial relief" and that insufficient evidence has been put forward to establish that the beneficiaries of paragraphs 14 through 16 were all victims of the Defendants' discrimination. (Obj. Mem. at 39). The Supreme Court has made clear, however, that there is a

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[25] Similarly, the Objector-Intervenors have no standing to object to the awards of retroactive seniority to the beneficiaries for noncompetitive purposes, such as awards of seniority that allow the beneficiary to buy back credits in the pension system, thus permitting an earlier retirement.

sharp distinction between the restrictions Title VII places on a court ordering remedial relief and the discretion Title VII affords an employer seeking to undo barriers to equal employment opportunity. *Local Number 93, Int'l Ass'n of Firefighters, AFL-CIO C.LC. v. City of Cleveland,* 478 U.S. 501, 515 (1986) ("[W]e hold that whether or not § 706(g) [of Title VII] precludes a court from imposing certain forms of race-conscious relief [that benefits individuals who were not the actual victims of discrimination], that provision does not apply to relief awarded in a consent decree.") Thus, cases interpreting a court's power to order non-victim specific relief pursuant to § 706(g) of Title VII (which defines courts' remedial powers under the act), *e.g.*, *Acha v. Beame*, 531 F.2d 648, 656 (2d Cir. 1976), are simply irrelevant to determining the lawfulness of a settlement agreement. *See* 42 U.S.C. § 2000e-2(g).

Nor do the restrictions imposed on a court's powers under § 706(g) indirectly limit the forms of relief that can be approved and adopted as a consent decree, as it is well-established that a consent decree may provide broader relief than that which could be ordered by a court as part of a litigated judgment. *Local 93*, 478 U.S. at 525-526; *Kozlowski v. Coughlin*, 871 F.2d 241, 244 (2d Cir. 1989). In the Title VII context, such remedies going beyond victim-specific relief are often an appropriate means of furthering the goals of Title VII by dismantling prior patterns of employment discrimination and preventing discrimination in the future. *See generally Local 93*, 478 U.S. at 514-515.[26]

Based on these principles, in *Local 93*, the Supreme Court rejected an intervenor's challenge to a consent decree in a Title VII case when the intervenor argued, based on cases interpreting § 706(g), that the consent decree unlawfully utilized racial preferences to provide

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[26] Indeed, in certain circumstances, courts have the power to award this form of affirmative, non-victim-specific relief in furtherance of these purposes as well. *Sheet Metal Workers' Int'l Ass'n v. E.E.O.C.*, 478 U.S. 421, 474-475 (1986).

benefits to individuals who were not the actual victims of the defendant's discriminatory practices. 478 U.S. at 515. 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.

The reason for the distinction between the limits on a court-ordered remedy and a consent decree is the protection Title VII carves out for employer discretion. As *Local 93* explains, Congress's concern in enacting §706(g) was in preventing courts from unilaterally requiring employers to make certain kinds of employment decisions. Indeed, "a principal purpose" of the section "was to protect the managerial prerogatives of employers." *Id.* at 520. "[W]hatever the limitations Congress placed in § 706(g) on the power of federal courts to impose obligations on employers or unions to remedy violations of Title VII, these simply do not apply when the obligations are created by a consent decree" and thus are themselves an exercise of managerial discretion. *Id.* at 522-23; *see also Weber*, 443 U.S. at 206-207 (describing employer's power to establish race-conscious affirmative action as a form of employer prerogative protected by Title VII).

Nor does a consent decree's modification of seniority rights or interests somehow automatically create an exception to the rule set out in *Local 93*. Indeed, the consent decree at issue in *Local 93* included just such a modification. The decree provided that promotions of eligible minority firefighters would be made on a one to one basis with non-minority firefighters until a certain number of promotions had been made. It also established goals for future promotions of minority firefighters. A seniority system was in effect in the fire department, and seniority was one factor previously used in ranking candidates for promotion. The consent

decree provided that seniority would continue to be used for ranking candidates "except where necessary to implement the specific requirements of the consent decree." *Local 93*, 478 U.S. at 510. Thus, the decree 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) (Kennedy, J., dissenting), *aff'd sub nom. Local 93*, 478 U.S. at 515. The award of benefits in *Local 93* to individuals who had not been shown to be the victims of discrimination therefore did affect incumbent firefighters' seniority rights to promotion. Yet the Supreme Court gave no special consideration to this factor in holding that Title VII did not prohibit the extension of voluntary remedies to individuals who had not been shown to be individual victims.[27] *See also Weber*, 443 U.S. at 208-09 (approving voluntary affirmative action plan that modified seniority rights as they related to eligibility for on-the-job training program).

In their attempt to argue that the Settlement Agreement does not comply with Title VII, the Objector-Intervenors rely on *Chance v. Board of Examiners,* 534 F.2d 993 (2d Cir. 1976), and *Acha*, 531 F.2d at 648, two cases that consider the validity of court-ordered relief, not consent decrees, and that both predate the Supreme Court's ruling in *Local 93.*[28] The later

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[27] The Objector-Intervenors argue that § 703(h) of Title VII shows a special "solicitude" toward seniority systems. (Obj. Mem. at 39). Section 703(h) of Title VII states, "[I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate. . . ." 42 U.S.C. § 2000e-2(h). As the Supreme Court has held, this provision defines "what is and what is not an illegal discriminatory practice in instances in which the . . . operation of a seniority system is challenged as perpetuating the effects of [prior] discrimination." *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 761-62 (1976). The section thus simply limits the scope of an employer's possible liability and is not relevant to the propriety of either voluntary or court-ordered remedies to discrimination.

[28] Nor can there be any question of the continuing vitality of the Court's holding in *Local 93*, as the Supreme Court itself relied on it earlier this year in its assessment of the intersection of the law of consent decrees and Eleventh Amendment jurisprudence. *See Frew ex rel. Frew v. Hawkins*, 540 U.S. 431 (2004).

Supreme Court case makes clear that *Chance* and *Acha* are of limited relevance in the present situation.[29]

B. The Challenged Provisions of the Settlement Agreement are a Lawful Form of Voluntary Race- and Gender-Conscious Relief under Title VII.

When an employer enters into a consent decree that provides race- and gender-conscious relief, the legality of that decree under Title VII is measured against the same standard as any other voluntary affirmative action program. *See Local 93*, 478 U.S. at 517-18; *Johnson*, 480 U.S. at 630; *U.S. v. City and County of San Francisco*, 696 F. Supp. 1287, 1304, n.37 (N.D. Cal. 1988), *aff'd sub nom. Davis v. City and County of San Francisco*, 890 F.2d 1438 (9th Cir. 1989). A program does not discriminate in violation of Title VII if it (1) addresses a manifest imbalance in traditionally segregated job categories; and (2) does not unnecessarily trammel the rights of non-minority employees. *Johnson*, 480 U.S. at 630.

The individual challenging the lawfulness of an affirmative action program under Title VII bears the burden of proving that the affirmative action program is invalid. *Id.* at 626. The Objector-Intervenors fail to acknowledge their burden of proof in challenging the Settlement Agreement's provisions under Title VII. They also fail to address the factors articulated by the Supreme Court in *Johnson*. A review of the Settlement Agreement and the undisputed facts shows that they will not be able to carry their burden.

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[29] To the extent that the Objector-Intervenors rely on *Chance* and *Acha* to argue that the retroactive seniority awards constitute race and gender discrimination in violation of § 703 of Title VII (that is, the substantive nondiscrimination requirements of the statute), here too the cases are of limited relevance given intervening Supreme Court precedent. The Court ruled that employers could undertake voluntary race- and gender-conscious affirmative action plans that benefited individuals who were not victims of discrimination in *Weber*, 443 U.S. at 193. It set out the standard for review of such plans under § 703 in *Johnson v. Transp. Agency, Santa Clara, California*, 480 U.S. 616 (1987). As explained in Part IV.B, *infra*, the retroactive seniority provided in the settlement agreement comports with these requirements.

1. The Settlement Agreement Addresses a Manifest Imbalance.

To comport with Title VII, a race- or gender-conscious affirmative action measure must address a manifest imbalance in traditionally segregated job categories. Where the job requires special qualifications, this imbalance may be shown by a comparison of the percentage of women or minorities in the employer's workforce with women's and minorities' representation in that portion of the area labor force possessing those qualifications. A showing of prior discrimination is not required. "[A]n employer seeking to justify the adoption of a plan need not point to its own prior discriminatory practices, nor even to evidence of an 'arguable violation' on its part." *Id.* at 630, (*quoting Weber*, 443 U.S. at 212). As discussed in detail above, statistical analysis of the custodian and custodian engineer workforce as compared to the qualified labor pool in New York City found a significant disparity between the number of women and minorities who applied for employment as custodians or custodian engineers and the number that would be expected based on their representation in the qualified labor force. (pp. 10 to 14, *supra.*) As also noted above, in the 1980s and 1990s, the custodian workforce was overwhelmingly white, and almost exclusively male, and thus these positions were a traditionally segregated job category. (pp. 9 to 10, *supra*). These factors fulfill the first requirement for the implementation of a voluntary affirmative action program under Title VII.

2. The Settlement Agreement Does Not Unnecessarily Trammel the Interests of White Male Employees.

An affirmative action program that is lawful under Title VII will not unnecessarily trammel the interests of male or non-minority employees. *Id.* at 637-38. This does not mean that there will be no effect on the male or non-minority employees, but rather that the effect will not rise to an unacceptable level. Hallmarks of a potentially invalid affirmative action program include: (1) discharging male or non-minority employees and replacing them with beneficiaries;

(2) creating an absolute bar to the advancement of male or non-minority employees; (3) blind hiring, based solely on statistics with no consideration of whether the individual hired is qualified for the position; and (4) attempting to maintain a racial or gender balance, rather than adopting a temporary measure designed to remedy imbalance. *Id.* at 637-39; *see also Davis*, 890 F.2d at 1448-49.

The challenged provisions of the Settlement Agreement did not discharge any incumbent custodians or custodian engineers and replace them with beneficiaries. Nor did it create an absolute bar to the advancement of white male custodians or custodian engineers. The Objector-Intervenors may apply for whatever transfers they wish. All transfers are still open to any applicant who meets the requirements. Given the large number of public schools in New York City and the small number of beneficiaries who have received retroactive seniority, it has not in any way become impossible for them to attain these transfers, either officially or *de facto*. Indeed at least one of the Objector-Intervenors has successfully obtained a transfer since the implementation of the Settlement Agreement. (Ex. 54, Lonergan Decl. III ¶ 34). Nor did the Settlement Agreement institute blind hiring; all of the beneficiaries were already employed as custodians or custodian engineers and thus fully qualified for the permanent positions they received. (Rosman Ex. 39, Settlement Agreement ¶ 13). Finally, the Settlement Agreement attempted to improve the manifest imbalance in the jobs by implementing a one-time hiring and grant of retroactive seniority. It did not involve any requirements for future hiring or maintenance of a particular racial or gender balance. The race and gender-conscious affirmative action awards employed by the Settlement Agreement are therefore valid under Title VII.

C. The Relief Provided in the Settlement Agreement Is an Appropriate Resolution of the Recruiting Discrimination Alleged in This Case.

Not only do the challenged provisions not violate Title VII, they also affirmatively forward the purposes of Title VII by helping to remedy the clear pattern of discrimination identified by the United States in its lawsuit. In *Local 93*, the Supreme Court set out three broad guidelines for evaluation of a consent decree: (1) it must spring from and serve to resolve a dispute within the court's subject matter jurisdiction; (2) it must come within the general scope of the case made by the pleadings; and (3) it must further the objectives of the law upon which the complaint was based. 478 U.S. at 525.

The challenged provisions of the Settlement Agreement clearly fulfill all three of these requirements. First, it is undisputed that this Court has subject matter jurisdiction over this case. Second, as set out in greater detail below, the permanent appointments and retroactive seniority partially remedy the pattern and practice of recruitment discrimination alleged in the case, and thus come within the general scope of the case made by the pleadings.[30] Third, the relief also furthers the objectives of Title VII, as set out below, by diversifying a workforce shaped by

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[30] The Objector-Intervenors claim that Title VII does not permit a claim of disparate impact discrimination in recruiting and that recruiting discrimination is thus not properly remedied by the Settlement Agreement. This argument fails for two reasons. First, the complaint's allegation that Defendants' "fail[ed] and/or refus[ed] to recruit blacks, Hispanics, Asians and women" on the same basis as white men is clearly not limited to a claim of disparate impact. Second, the Objector-Intervenors' legal argument is frivolous. Section 703(a)(2) of Title VII states that it is unlawful for an employer "to limit . . . applicants for employment in any way that would deprive or tend to deprive *any individual* of employment opportunities . . . because of such individual's race, color, religion, sex, or national origin" 42 U.S.C. 2000e-2(a)(2) (emphasis added). The category "any individual" obviously includes potential applicants. Thus, word-of-mouth recruiting in a particular workplace, for instance, would have an unlawful disparate impact if it tended to limit applicants to those of the same race as the current workforce and so tended to deprive potential applicants of other races of employment opportunities. Our research has not uncovered a single case where a court has adopted the Objector-Intervenors' contrary interpretation of this language. Many courts, however, have applied disparate impact analysis to recruiting practices. *See, e.g., U.S. v. City of Warren*, 138 F.3d 1083, 1094 (6th Cir. 1998) ("Moreover, [defendant's] assertion that disparate impact analysis is inapplicable to its recruiting practices is plainly incorrect."); *Thomas v. Washington County Sch. Bd.*, 915 F.2d 922, 925-26 (4th Cir. 1990); *NAACP v. Town of East Haven*, 998 F. Supp. 176 (D. Conn. 1998).

discrimination and preventing the continuation of past discriminatory patterns. Paragraphs 13 through 16 are thus substantially related to the objective of eliminating the Defendants' recruitment discrimination and so reasonably resolve this case. *See Kirkland*, 711 F.2d at 1132.

The United States' Complaint asserted that the Defendants had "fail[ed] and/or refus[ed] to recruit blacks, Hispanics, Asians and women" on the same basis as white men, and the statistical and other evidence in this case amply support this allegation. (Ex. 1 , Complaint at 5; *see supra* at pp. 12-14, *infra* at Parts V.A.1, 2). Because of this discrimination, the permanent custodian and custodian engineer workforce was overwhelmingly white and male. (56.1 Stat. ¶38). The awards of permanent status and retroactive seniority help remedy the Defendants' past discrimination by putting qualified women, African-Americans, Hispanics, and Asians on the job and thus diversifying the permanent custodian and custodian engineer workforce. (p. 21, *supra*).

In addition, the increased representation of women and minorities in the workforce is itself an important part of efforts to correct the Defendants' recruitment practices. Many courts recognize that gross overrepresentation of white men in a workforce not only reflects, but also exacerbates, the failure to recruit women and minorities when combined with a defendants' reliance on word-of-mouth advertising. (pp. 8-9, *supra*). See *Thomas*, 915 F.2d at 925 (reliance on word-of-mouth advertising and limited posting of openings violates Title VII because "in the context of a predominately white work force, [these policies] serve to freeze the effects of past discrimination"); *E.E.O.C. v. Metal Serv. Co.*, 892 F.2d 341, 350 (3d Cir. 1990) (noting that 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) (observing that "[r]eliance 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) (stating that word-of-mouth hiring as primary method of recruiting is discriminatory "because of its tendency to perpetuate the all-white composition of a workforce"); *see also Kyriazi v. Western Electric 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).

By opening the ranks of custodian and custodian engineer to additional qualified women and minorities, the relief provided under the Settlement Agreement makes it less likely that word-of-mouth recruitment will continue to perpetuate an overwhelmingly white, overwhelmingly male workforce in the future. (pp. 23-24, *supra*). Because individuals are more likely to know and identify with individuals like themselves , the beneficiaries are more likely than white males to themselves recruit women and minorities for the custodian and custodian engineer jobs. (*Id.*)

In addition, the change in the composition of the permanent custodian and custodian engineer workforce ensured by the Settlement Agreement itself sends a message to potential qualified female and minority applicants and thus is part of the remedy to past recruitment problems. As the Supreme Court has recognized, a message that minorities are not welcome to apply can be communicated "by [an employer's] consistent discriminatory treatment of actual applicants, by the manner in which he publicizes vacancies, his recruitment techniques, his responses to casual or tentative inquiries, and *even by the racial or ethnic composition of that part of his work force from which he has discriminatorily excluded members of minority groups*." *Int'l Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 365 (1977) (emphasis added). In this manner, "[a]n employer's reputation for discrimination may discourage minorities from

seeking available employment." *Local 28 of the Sheet Metal Workers Int'l Ass'n v. E.E.O.C.*, 478 U.S. 421, 449 (1986); *see also, e.g., Ass'n Against Discrimination in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256, 284 (2d Cir. 1981) (holding failure to recruit minority candidates discriminatory, particularly in context where minority employment is extremely low); *Town of East Haven*, 998 F. Supp. at 186-88 (holding that town's recruiting practices had disparate racial impact in part because overwhelmingly white incumbent workforce created perception of hostility to black applicants). As Dr. Phillips explained and as the experience of beneficiaries confirms, the low rate of female and minority applications likely in part stemmed from women and minorities' reasonable conclusion that they were unwanted in the custodian and custodian engineer positions, given the demographics of the incumbent workforce.[31] (pp. 8-9, *supra*). Had the Defendants' recruitment practices not posed a discriminatory barrier to women and minorities in the past (and had their hiring practices not posed an additional discriminatory barrier to African-Americans and Hispanics), a far more diverse permanent workforce would have been in place at the time the Settlement Agreement was crafted, and that diversity would have itself encouraged applications from diverse candidates. The relief provided by the Agreement partially remedies the effects of this prior discrimination and in doing so helps to change the patterns that created this discrimination.

The retroactive seniority awards also remedy the effects of women and minorities' past exclusion. While the awards of permanent status help open a closed system to greater participation by women and minorities, putting beneficiaries in a position to recruit women and

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[31] Of course, other factors may also have contributed to this impression — for instance, overt discriminatory comments made by the Defendants' employees and agents to potential female and minority applicants of the sort that some beneficiaries have described, or general awareness of the discriminatory impact of the Defendants' civil service exams, which could have led minorities to conclude that it was futile to apply. *See, e.g., Teamsters*, 431 U.S. at 365. (Ex.19, Tatum Dep. at 40:21 – 42:13).

minorities they know for the job, tell women and minorities about opportunities known to insiders, hire and mentor potential female and minority applicants on their own custodial staffs, and demonstrate to potential female and minority candidates through their presence on the job that these positions can be successfully obtained and held by individuals other than white males, the awards of retroactive seniority support and strengthen these effects. *See generally Weber*, 443 U.S. at 208 (finding affirmative action plan did not violate Title VII because its purpose, like the purpose of the statute, was "to break down old patterns of racial segregation and hierarchy" and to open opportunities that had previously been closed). Because the retroactive seniority enhances beneficiaries' ability to transfer to larger schools, they are more likely to have greater supervisory authority. (pp. 31-32, *supra*). As employers of larger numbers of individuals, beneficiaries will have increased opportunities to mentor and encourage their own staff to become custodians or custodian engineers. Because individuals tend to network and associate with others like themselves, the beneficiaries are more likely to themselves employ women and minorities, thus bringing greater diversity into the ranks from which custodians often rise. (p. 31, *supra*). The increased presence of women, African-Americans, Hispanics, and Asians as employers of custodial staff also makes it more likely that female and minority staff members will have access to the information networks necessary to success in the custodian exam as a result of interaction with their employers. (Ex. 19, Tatum Dep. at 45:4 – 46:8; Ex. 22, Mortensen Dep. 198:23 – 200:12).

In addition, beneficiaries who work at larger schools as a result of their seniority awards will gain increased visibility. Thus, their examples will be more effective recruitment tools for other women and minorities. (Phillips Decl. Ex. 1 at 9). 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 v. Bollinger*, 539 U.S. 306, 333 (2003) ("critical mass" of minority students enrolled in law school helped break down racial stereotypes).

The retroactive seniority awarded under the Settlement Agreement accomplished these goals while also reasonably reflecting the circumstances of the individual beneficiary: an individual received seniority dating either to (1) his or her provisional employment date, thus measuring actual time on the job, or (2) to the "median exam date," a date keyed to a custodian or custodian engineer exam previously taken by the individual, thus roughly corresponding to the individual's demonstrated interest in and efforts to obtain the job. (Rosman Ex. 39, Settlement Agreement ¶ 14-16). While this measure is somewhat imprecise, as is the nature of a settlement rather than a fully litigated judgment, it is reasonable and fair. *See Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003) (noting that because compromise is the nature of settlement, close review of a settlement's precise terms is often unproductive); *E.E.O.C. v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir. 1985) (because compromise lies at the heart of settlement, courts reviewing settlements should refrain from precise determination of parties' legal rights); *U.S. v. Texas Educ. Agency*, 679 F.2d 1104, 1108 (5th Cir. 1982) (a settlement is a compromise rather than an attempt to precisely delineate legal rights); *see also* Ex. 52 at 13 (Defendant's Mem. in Support of Settlement Agreement) (explaining that retroactive seniority dates are compromise resulting from extensive negotiations). The adjustment made to the relative seniority of incumbent employees, including Objector-Intervenors, is no different in kind than that which courts have frequently been found appropriate remedies for past discrimination. *See generally Franks*, 424 U.S. at 747; *Am. Tele. and Tele. Co.*, 556 F.2d at 177.

For these reasons, the challenged provisions addressed the recruitment discrimination complained of in this case. The Agreement thus advanced Title VII's goal of equality of employment opportunities by helping to remove "artificial, arbitrary, and unnecessary barriers to employment [that] operate invidiously or discriminate" on the basis of race or gender. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). Because this is a sufficient basis for approval of the provisions, the Court need not proceed to the inquiry of whether the beneficiaries are also individual victims of the Defendants' recruitment discrimination or make individualized determinations as to the injury incurred and remedy afforded to each one. *Cf. Airline Stewards*, 573 F.2d at 963 (rejecting intervenors' argument that in order to approve a settlement agreement, court required to hear "in excess of 100 mini-trials" in order to demonstrate that each individual beneficiary was in fact a victim of discrimination and that the remedy allotted to each was calibrated to the particular injury suffered).[32]

V. PARAGRAPHS 13 THROUGH 16 OF THE SETTLEMENT AGREEMENT ARE CONSISTENT WITH THE CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION.

A. Objector-Intervenors Bear the Burden of Demonstrating that the Challenged Provisions Are Not Narrowly Tailored to Serve a Compelling State Interest.

The Objector-Intervenors have the burden of demonstrating that the challenged provisions of the Agreement are unconstitutional. *See, e.g., Wygant*, 476 U.S. at 293 (plaintiffs

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[32] Should the Court determine that such an inquiry is nevertheless necessary, the Caldero Intervenors are prepared to put forward evidence of injury through such individualized hearings. The Declarations of Marianne Manousakis and Maureen Quinn, Exs. 26 and 73, respectively, are appended as examples of the showing of discrimination that would be made by individual Caldero Intervenors. Thus, in the event the Court finds that the standard set forth here is not the appropriate measure of the reasonableness of the relief under Title VII, the Caldero Intervenors request the opportunity to put forward evidence demonstrating the individual injuries they suffered as a result of the Defendants' discrimination in recruitment, as well as argument regarding the appropriate standard to be applied in such individualized determinations. *Cf. Teamsters*, 431 U.S. at 368-70 (approving individualized hearings and determinations in the context of a litigated judgment).

bringing a constitutional challenge to an affirmative action plan "bear the ultimate burden of persuading the court that the . . . evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently 'narrowly tailored'"); *Engineering Contractors Ass'n of S. Fla. v. Metro. Dade County*, 122 F.3d 895 (11th Cir. 1997) (same). The legal standard for review of a settlement agreement incorporating a race-conscious remedy by a public employer is the same used in determining the validity of a public employer's voluntary affirmative action plan. *E.g.*, *Stuart v. Roache*, 951 F.2d 446, 449 (1st Cir. 1991); *Paganucci v. City of N.Y.*, 785 F. Supp. 467, 477 (S.D.N.Y. 1992), *aff'd* 993 F.2d 310 (2d Cir. 1993). The Constitution has been interpreted to require a governmental actor to narrowly tailor any race-conscious actions to serve a compelling state interest. *Grutter*, 539 U.S. at 326; *Adarand Constrs., Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *U.S. v. Sec'y of Hous. and Urban Dev. (HUD)*, 239 F.3d 211, 219 (2d Cir. 2001). However, "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause." *Grutter*, 539 U.S. at 327. Because "[n]ot every decision influenced by race is equally objectionable," such "[s]trict scrutiny is not strict in theory, but fatal in fact." *Id.* at 326, 327 (internal quotation marks omitted).

The standard for review of a public employer's gender-conscious remedies is somewhat less clear. *Harrison & Burrowes Bridge Constructors v. Cuomo*, 981 F.2d 50, 62 (2d Cir. 1992). The Constitution demands an "exceedingly persuasive justification" for gender classifications, and such classifications must be "at least" substantially related to an important governmental interest to pass constitutional muster. *U.S. v. Virginia*, 518 U.S. 515, 534 (1996). The fullest analysis of the appropriate standard for review of gender-conscious affirmative action programs

since the Supreme Court's articulation of this standard, however, has concluded that the appropriate question is still the less demanding inquiry of whether the gender-conscious program has a substantial relationship to an important government interest. *Engineering Contractors Ass'n*, 122 F.3d at 908; *see also Concrete Works of Colo., Inc. v. City and County of Denver*, 321 F.3d 950, 959-60 (10th Cir. 2003); *MD/DC/DE Broad. Ass'n v. Fed. Communications Comm'n*, 236 F.3d 13, 23 (D.C. Cir. 2001); *Independent Enterprises, Inc. v. Pittsburgh Water and Sewer Auth.*, 103 F.3d 1165, 1176 n.8 (3d Cir. 1997).

B. Remedying the Effects of the Defendants' Past Race and Gender Recruitment Discrimination Is a Compelling State Interest.

Paragraphs 13 through 16 partially remedy the effects of the Defendants' past race and gender discrimination in recruitment. Such remedies of a state actor's past discrimination unquestionably serve a compelling state interest. *See, e.g.*, *Croson*, 488 U.S. at 492; *U.S. v. Paradise*, 480 U.S. 149, 167 (1987) (plurality opinion); *HUD*, 239 F.3d at 219. A public employer need not make findings that it engaged in unlawful discrimination prior to implementing such a remedy, nor must a court have so found. *Wygant*, 476 U.S. at 289-90 (O'Connor, J., concurring); *Barhold v. Rodriguez*, 863 F.2d 233, 236 (2d Cir. 1988). Rather, a state actor may adopt a race-conscious remedy when it has "a strong basis in evidence for its conclusion that remedial action was necessary." *Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277 (plurality opinion)). A "strong basis in evidence" is evidence "approaching a prima facie case of a constitutional or statutory violation." *Id.* at 500; *Kirkland*, 711 F.2d at 1130-31 (finding unrebutted prima facie case a sufficient predicate for settlement adopting race-conscious remedies).

Gender-conscious relief, in contrast, may be adopted on a lesser showing "that the preference rests on evidence-informed analysis rather than on stereotypical generalizations."

Engineering Contractors Ass'n, 122 F.3d at 910; *see also Contractors Ass'n of E. Philadelphia, Inc. v. City of Philadelphia*, 6 F.3d 990, 1010 (3d Cir. 1993) ("Logically, a city must be able to rely on less evidence in enacting a gender preference than a racial preference because applying *Croson*'s evidentiary standard to a gender preference would eviscerate the difference between strict and intermediate scrutiny."). While "[t]he ultimate burden remains with the [challenging] employees to demonstrate the unconstitutionality of an affirmative action program," *Wygant*, 476 U.S. at 277-78 (plurality opinion); *see also id.* at 292-93 (O'Connor, J., concurring), the defenders of an affirmative action program have the burden of producing this evidence. *Concrete Works of Colo. v. City and County of Denver*, 36 F.3d 1513, 1522 (10th Cir. 1994); *Aiken v. City of Memphis*, 37 F.3d 1155, 1162 (6th Cir. 1994).

A strong basis in evidence of the Defendants' recruitment discrimination supports the relief awarded in paragraphs 13 through 16 of the Settlement Agreement.[33] The core of this evidence is the expert statistical analysis introduced in this case, demonstrating gross disparities between the percentage of actual female and minority applicants for the custodian and custodian engineer exams and the representation of women and people of color among potential qualified applicants. Courts have consistently recognized that such statistical disparities between the actual representation of women and minorities and their representation in the available labor force may constitute *prima facie* evidence of either pattern and practice or disparate impact discrimination in violation of Title VII and thus represent a strong basis in evidence for

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[33] As set out above, the Objector-Intervenors have no standing to challenge either the relief awarded under paragraph 13 of the Agreement or the noncompetitive aspects of the seniority awarded pursuant to paragraphs 14-16. Nevertheless, out of an abundance of caution, the Caldero Intervenors address the constitutionality of the entirety of the challenged relief.

fashioning race-conscious remedies.[34] *See, e.g.*, *Croson*, 488 U.S. at 501 ("There is no doubt that . . . 'gross statistical disparities . . . alone in a proper case may constitute *prima facie* proof of a pattern or practice of discrimination.'") (quoting *Hazelwood Sch. Dist. v. U.S.*, 433 U.S. 299, 307-08 (1977)); *Wygant*, 476 U.S. at 292 (O'Connor, J., concurring) ("evidence of a disparity between the percentage of qualified blacks on a school's teaching staff and the percentage of qualified minorities in the relevant labor pool sufficient to support a *prima facie* Title VII pattern or practice claim by minority teachers would lend a compelling basis for a competent authority . . . to conclude that implementation of a voluntary affirmative action plan is appropriate to remedy apparent prior employment discrimination"); *Peightal v. Metro. Dade County*, 26 F.3d 1545, 1555-56 (11th Cir. 1994) (finding gross statistical disparities between relevant workforce and available labor pool support a *prima facie* case and constitute strong basis in evidence); *Stuart*, 951 F.2d at 450 (finding "strong basis in evidence" supporting race-conscious relief when statistical evidence was sufficient to make out a *prima facie* disparate impact case under Title VII); *Davis*, 890 F.2d at 1442-44, 1446-47 (same); *Kirkland*, 711 F.2d at 1130-31 (same); *Paganucci*, 785 F. Supp. at 477 (same).

1. The Statistical Evidence.

The United States' expert, Dr. Ashenfelter, analyzed the relationship between the qualified pool of potential applicants for Exams 5040, 8206, and 1074 and the qualified pool of actual applicants for that position, using standard statistical methods and the best available data.

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[34] The Objector-Intervenors argue that a *prima facie* case of disparate impact discrimination does not constitute a strong basis in evidence of a public employer's past discrimination. This argument is incorrect, and we adopt and incorporate by reference section II.B.1.a. of the Arroyo Intervenors' concurrently filed brief in regard to this topic. The Objector-Intervenors also argue that one cannot make "make out" or "establish" or "support" a *prima facie* case of disparate impact discrimination in recruitment because Title VII does not prohibit this form of disparate impact discrimination. This is incorrect, as explained *supra* note 30.

(pp. 13-18, *supra).* The demographics of the pool of qualified potential applicants — those individuals qualified for the job of custodian or custodian engineer who could have applied for the exams and did not — necessarily require a somewhat indirect method of measurement. (56.1 Stat. ¶42). As most anyone attempting to determine whether an employer is recruiting applicants representative of the larger qualified pool, Dr. Ashenfelter relied on Census data. (56.1 Stat. ¶43). Taking into account both Census data demonstrating the demographic make-up of various occupational groups and the distribution of *actual* applicants across these occupational groups, Dr. Ashenfelter created a model used to analyze the demographics of *potential* applicants: if a large percentage of actual applicants came from a particular occupational category, the assumption made was that a large percentage of potential applicants would come from that occupational category as well. (56.1 Stat. ¶45).

Thus, in many ways, this analysis was a conservative one in its tendency to understate the representation of women and minorities in the qualified potential applicant pool. For instance, Dr. Ashenfelter did not weigh the data to account for occupations in which women and minorities are more well-represented and had a deeper pool of qualified candidates, but from which few exam applicants have actually originated, that simply was not tapped through the methods of recruitment relied on for those examinations. (56.1 Stat. ¶¶47-48). *Cf. Markey v. Tenneco Oil Co.*, 635 F.2d 497, 500 (5th Cir. 1981) (agreeing with employment discrimination plaintiff that calculation of geographic labor market based on localities where actual hirees lived was error "for the simple reason that the areas from which an employer actually draws his employees are not necessarily the areas from which we might reasonably expect him to draw them" and explaining that this approach "would permit an employer to limit the number of blacks in his employ merely by recruiting and hiring from predominately white areas"); *Clark v.*

Chrysler Corp., 673 F.2d 921, 928 (7th Cir. 1982) ("The appropriateness of determining the relevant labor market by the actual composition of an employer's workforce or applicant pool has been questioned when recruitment practices are themselves challenged as discriminatory.").

The analyses by Dr. Ashenfelter found gross and persistent disparities between the actual number of female and minority applicants and the expected number. These disparities were consistent through the years. (56.1 Stat. ¶49). Specifically, he found that the number of qualified women, African-Americans, Asians, and Hispanics, who applied for Exams 5040, 8069, and 1074 were smaller than the number that would be expected. (*Id.*) In every instance, the difference between the actual and expected number of applicants was equal to at least two standard deviations and thus unlikely to be the result of chance.[35] (56.1 Stat. ¶52). Indeed, in almost all instances the disparities were far greater than two standard deviations. In other words, there was approximately 5 percent likelihood that the disparity is the result of chance. (*Id.*) For Exam 5040, the likelihood that the measured disparities were the result of chance ranged from a high of 0.0008196 percent to a low of 0.0000000 percent. (56.1 Stat. ¶¶53, 54). For Exam 8206, the likelihood that the disparities were the result of chance ranged from 0.5780136 percent to 0.0000002 percent. (56.1 Stat. ¶55). And for Exam 1074, these likelihoods ranged from 0.0000032 percent to 0.0000000 percent. (56.1 Stat. ¶56)

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[35] The Caldero Intervenors' expert, Dr. Jacobsen, performed the same comparison in regard to Exam 7004, using the same methods. (Jacobson Ex. 1 at 3-6). Prior to Exam 7004, the Defendant undertook some efforts to recruit minorities and women to take the exam, and Dr. Jacobsen's analysis suggests that these efforts may have had some limited results, though failed to solve the recruitment problems leading to underrepresentation. (Jacobson Ex. 1 at 6) Specifically, the analysis by Dr. Jacobsen found that the number of qualified women, African-Americans, Asians, and Hispanic individuals who applied for Exams 7004 was smaller than the number that would be expected, based on her calculation of these individuals' representation in the qualified labor force. (Jacobson Ex. 1 at 5, Table 2, Table 4). In every instance but one, these differences were also statistically significant — equal to at least two standard deviations and to as many as eleven standard deviations. She did not find a statistically significant difference between the actual and expected number of qualified Hispanic exam applicants. (Jacobson Ex. 1 at 5, Table 2, Table 4).

"A finding of two or three standard deviations (one in 384 chance the result is random) is generally highly probative of discriminatory treatment." *Waisome v. Port Auth. of N.Y. and N.J.*, 948 F.2d 1370 (2d Cir. 1991); *see also Hazelwood*, 433 U.S. at 308 n.13. This is because "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." *Hazelwood*, 433 U.S. at 307 (quoting *Teamsters*, 431 U.S. at 340 n.20). For this reason, gross statistical disparities of the sort present in this case have consistently been held to establish a *prima facie* violation of Title VII under either a pattern and practice or a disparate impact theory. In other words, even when standing alone, statistical evidence demonstrating disparities of more than two or three standard deviations alone supports an inference not only of disparate impact, but also of intentional discrimination. *Id.* at 307-08; *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 158-59 (2d Cir. 2001); *Ottaviani v. State Univ. of N.Y. at New Paltz*, 875 F.2d 365, 371-73 (2d Cir. 1989).

2. The Anecdotal Evidence.

While the statistical evidence alone makes out the required *prima facie* case, anecdotal evidence also provides a strong basis for concluding that the Defendants' recruitment practices during the time in question were discriminatory:

- Several of the Settlement Agreement's female and minority beneficiaries 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. (56.1 Stat. ¶ 26). *Cf. Teamsters*, 431 U.S. at 361-66 (describing victims of hiring discrimination as including those individuals who were qualified for the position at issue and would have sought an available position but for the

challenged practice). At least one African-American Beneficiary testified that while he didn't know Exam 1074 was being given, his white coworkers did. (56.1 Stat. ¶ 27).

- Some beneficiaries assumed that because they had never seen a woman or a minority employed as a custodian, and the Defendants had never indicated that female or minority applicants were welcome, they would never be given the job and thus there was no reason to take the exam. (Ex. 26, Manousakis Decl. ¶ 14). *Cf. Sheet Metal Workers*, 478 U.S. at 449 ("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").
- Some beneficiaries were explicitly discouraged by employees of the Defendants from seeking a job as custodian or custodian engineer because of their race or gender. (56.1 Stat. ¶ 28). *Cf. Teamsters*, 431 U.S. at 365 (discriminatory message can be communicated by employer's "response to casual or tentative inquiries").
- Some beneficiaries did not take one of the relevant exams because they were not informed or were misinformed of the experience requirements to take the exam due to the Defendants' failure to publicize these requirements. (56.1 Stat. ¶ 29). *Cf. id.* at 338 (provision of false or misleading information about job requirements to minorities discriminatory).

- Others were not informed of preparation classes and other opportunities to prepare for the exam and performed poorly on the exam as a result. (56.1 Stat. ¶ 30). *Cf. United States v. Ironworkers Local* 86, 443 F.2d 544, 548 (9th Cir. 1971) (lack of publicity of information concerning apprenticeship training program discriminatory).
- Dennis Mortensen, one of the Objector-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. (56.1 Stat. ¶ 24). The testimony of the beneficiaries echoed this observation. (Id.)

While not necessary for the *prima facie* case that courts have held to provide a strong basis in evidence for race-conscious remedial efforts, this anecdotal evidence of recruitment discrimination provides additional support for the race- and gender-conscious remedies included in the Settlement Agreement.

3. The Objector-Intervenors' Complaints as to the Sufficiency of the Evidence.

The Objector-Intervenors have failed to carry their burden in attempting to rebut the strong evidentiary support for the Settlement Agreement.

Initially, the Objector-Intervenors contend that because the United States has not "tried to prove" that the Defendants *intentionally* discriminated in recruitment practices, any race-conscious measure to remedy the discrimination is unconstitutional.[36] (Obj. Mem. at 50). First, as set out above, no proof of intentional discrimination is necessary to establish the strong basis

[36] They do not claim that proof of intentional discrimination is necessary to support the gender-conscious remedies in the Settlement Agreement.

in evidence required for race-conscious remedies; a showing of disparate impact is sufficient. Second, in making this argument, the Objector-Intervenors again ignore the fact that they are not challenging a litigated judgment in a discrimination case, but are instead objecting to a judicially approved settlement agreement. Contrary to the Objector-Intervenors' suggestion, "the Supreme Court has never required that, before implementing affirmative action, the employer must have already proved that it has discriminated." *Ensley Branch NAACP v. Seibels*, 31 F.3d at 1548, 1565 (11th Cir. 1994); *see also Wygant*, 476 U.S. at 289-90 (O'Connor, J., concurring); *Barhold*, 863 F.2d at 236.

The proper question in determining the legality of the Settlement Agreement is not whether the United States has proved its case, for by settling prior to trial and judgment it by definition has not done so.[37] As set out above, the proper question is whether there is a strong basis in evidence to conclude that discrimination occurred. The relevant statistical disparities, in addition to the other evidence, more than meet this standard and support an inference of intentional discrimination. Thus, even if intentional discrimination was the touchstone, the United States' complaint alleged that the Defendants have implemented a policy and practice of discrimination "by failing and/or refusing to recruit blacks, Hispanics[,] Asians and women on the same basis as [white] (non-Hispanic) men," an allegation that clearly encompasses intentional discrimination (Ex. 1, Complaint at 5), and the evidence supports the inference that the Defendants did intentionally discriminate, as alleged in the Complaint.

The Objector-Intervenors also attempt to attack the methodology underlying the statistical evidence, asserting that Dr. Ashenfelter's analysis does not take into account the

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

qualifications and interests of the potential applicant pool and that these factors might explain the gross disparities between actual and potential applicants.

The Objector-Intervenors' assertion that Dr. Ashenfelter's analysis does not account for potential applicants' qualifications is simply incorrect. While no source of data directly describes the particular educational background, employment history, and demographics of each individual in the local labor pool, and thus it is impossible to directly measure the experience of those potential applicants who did not apply for the custodian or custodian engineer exams, Dr. Ashenfelter's analyses of the potential applicant pool controlled for experience indirectly by using occupation as a proxy for experience. (56.1 Stat. ¶ 42). By examining the occupations of actual applicants for the exams and assuming that the larger pool of potential applicants was similarly distributed across occupational categories, Dr. Ashenfelter used reasonable and widely accepted methods to indirectly control for the qualifications of the larger labor force. (56.1 Stat. ¶ 45).

The Objector-Intervenors suggest no alternative data source that would have permitted a more direct measurement of experience, nor do they provide any demonstration that a more direct measurement would change the results of the analyses. Instead, they argue in effect that it is impossible to show statistical evidence of recruitment discrimination, because no perfect data set exists that will measure precisely the potential applicant pool for a particular position. *Cf. Sobel v. Yeshiva Univ.*, 839 F.2d 18, 35 (2d Cir. 1988) ("Accepting [the defendant's] contention [that multiple regression analysis is useless when multiple factors may be at work] would have the practical effect of insulating universities from charges of discrimination in the setting of faculty salaries, since such claims may well be virtually unprovable by any other means.") The Objector-Intervenors' position is not supported by law.

As the Second Circuit has expressly held, statistical data regarding the potential applicant pool often will form the basis of a Title VII claim "especially in cases such as this one in which the actual applicant pool might not reflect the potential applicant pool" as a result of the very practices being challenged as discriminatory. *EEOC v. Joint Apprenticeship Comm. (JAC)*, 186 F.3d 110, 119 (2d Cir. 1999). Indeed, it is a "well-established principle" that data describing the potential applicant pool may demonstrate discrimination. *Id.* at 120. There is generally no way to measure or analyze this pool other than through the sort of Census data that the Objector-Intervenors wish to discount here, and such data is therefore appropriately and necessarily relied on to indirectly measure experience or qualifications. *De Medina v. Reinhardt*, 686 F.2d 997, 1007 (D.C. Cir. 1982) (relying on Census occupational data to determine relevant labor pool and noting, "We do not believe that a plaintiff is required to prove that each individual in the comparison pool is qualified in every way for a particular Agency position. . . . The focus thus should be on whether the Census statistics give us a meaningful estimate of the proportion of women in the labor market reasonably likely to possess the minimum qualifications . . . ."); *see, e.g., EEOC v. O & G Spring & Wire Forms Specialty Co.*, 38 F.3d 872, 877-78 (7th Cir. 1994) (defining potential applicant pool based on occupational data); *JAC*, 186 F.3d at 117 (same).

In addition, the Objector-Intervenors have failed to make *any* demonstration that if qualifications in the potential applicant pool were more precisely measured, the disparities would disappear. Yet the Second Circuit has expressly held that a party challenging the validity of a multiple regression analysis in an employment discrimination case must "make a showing that the factors it contends ought to have been included would weaken the showing of a . . . disparity made by the analysis." *Sobel*, 839 F.2d at 34; *see Bazemore v. Friday*, 478 U.S. 385, 403-04 n.14 (1986). In the absence of any evidence that a more precise measure of qualifications would

explain the disparities between actual and expected applicants, "unsupported conjecture and assertions . . . cannot operate to debunk those statistics." *JAC*, 186 F.3d at 120. Thus, an assertion that a proxy used in a multiple regression analysis somewhat imperfectly represents the factor it stands for does not without more show that the factor, if better measured, would favor men over women, or whites over minorities. *Sobel*, 839 F.2d at 34-35. In other words, without a showing that the imprecision affects the likely result, there is no reason to assume that could a more direct measure of qualifications be made, or were a better proxy for qualifications available, this measure would demonstrate white men in the potential applicant pool were more likely to be qualified for the custodian positions than women or persons of color and thus account for the disparities.[38] *Id.* The Objector-Intervenors have made no showing in support of their conjecture.

The Objector-Intervenors speculate that the gross disparities between the actual and expected number of female and minority exam applicants may simply be the result of a relative lack of interest in the positions among potential female and minority applicants. This is insufficient to rebut the statistical evidence. In a recent Title VII case, the Second Circuit was presented with a similarly unsupported argument "that the disparity between the character of the potential applicants and the actual applicants can be attributed to a general lack of interest on the part of Blacks and women in becoming electricians." The court rejected this position as one

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[38] The only gesture toward evidence supporting the conclusion offered by the Objector-Intervenors is James Lonergan's testimony that very few minorities or women had a high-pressure boiler license. First, a high pressure boiler license is only a requirement for the custodian engineer position, and is irrelevant for the custodian position and thus for Exams 5040 and 1074. More importantly, the only apparent basis for Mr. Lonergan's assertion is his own observation as a supervisor of custodians employed by the New York City Board of Education. Thus, he concludes that women and minorities do not have high-pressure boiler licenses because he has not seen significant number of women or minorities employed as custodian engineers in the public schools. This circular reasoning in no way undermines the statistical evidence of recruiting discrimination in this case.

"derived in large part from stereotypes." *JAC*, 186 F.3d at 120; *see also EEOC 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, when absolutely no showing had been made that whites were more motivated than nonwhites or that controlling for motivation would account for this disparity); *Sobel*, 839 F.2d at 33 (rejecting defendants' proffered "gender-neutral" explanations of statistical disparities when those explanations relied solely on speculation and stereotypes, unsupported by the record). Again, a party seeking to discredit a statistical analysis through an assertion that it fails to control for a particular variable bears the burden of showing that were that variable taken into account, the race and gender disparities would decrease or disappear. *JAC*, 186 F.3d at 120; *Sobel*, 839 F.2d at 34-35. No such showing has been made here.[39]

In short, the Objector-Intervenors suggest various imperfections in the statistical showing of gross disparities between the actual and expected number of female and minority applicants, but they fail to provide any analysis which accounts for these alleged imperfections. They also fail to demonstrate that were the variables they suggest taken into account, the measured disparities would be affected. "A plaintiff in a Title VII suit need not prove discrimination with scientific certainty[.]" *Bazemore*, 478 U.S. at 400. Mere demonstration that the relevant statistics do not reach this level of certainty does not rebut the *prima facie* case of discrimination that clearly constitutes a strong basis in evidence for race-conscious affirmative action.

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[39] In addition, in the context of recruitment discrimination it is especially inappropriate to assume that women and people of color did not apply for the position at issue because they were not interested in it; such a glib explanation completely ignores the dynamic relationship between recruitment methods and an applicant's interest. Employers recruit precisely so they can *interest* qualified candidates for that position. A pronounced and consistent failure to interest anyone but white men in the relevant position is itself strongly suggestive of discriminatory recruitment practices.

Next, despite their assertion that a *prima facie* case of disparate impact discrimination is irrelevant to any attempt to justify race-conscious relief, the Objector-Intervenors attempt to impose the standards for a disparate impact *prima facie* case on the recruiting discrimination evidence and argue that the evidence comes up short. Specifically, they assert that an insufficient showing of causation has been made between an identified recruiting practice and the shortfall in female and minority applicants. But as set forth above, the statistical disparities, in combination with the anecdotal evidence, establish a *prima facie* case of pattern or practice discrimination. Thus, the Objector-Intervenors' criticism is largely beside the point.

Moreover, the evidence supports a *prima facie* case of disparate impact discrimination. Although "statistical analysis, by its very nature, can never scientifically prove" causation, the Second Circuit has held that "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." *JAC*, 186 F.3d at 117; *see also Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-95 (1988). 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 women and minorities.

In addition, causation is demonstrated in this case by simple logic. The only methods by which the Defendants specifically recruited for Exam 5040, 8206, and 1074 were through encouragement of word of mouth recruiting and posting examinations in the Board of Education administrative offices, where they were unlikely to be seen by anyone other than incumbent

employees.[40] (56.1 Stat. ¶¶ 8,16). In addition, no particular effort was made to ensure that qualified female and minority potential applicants were informed of the position and invited to apply. (56.1 Stat. ¶ 11). *Cf. Ass'n Against Discrimination in Employment, Inc.*, 647 F.2d at 284 (holding failure to recruit minority candidates discriminatory, especially when minorities were very poorly represented in incumbent workforce). These practices tended to replicate the demographics of the incumbent workforce, a well-recognized effect of word-of-mouth recruiting. (56.1 Stat. ¶ 7) *See, e.g., Thomas*, 915 F.2d at 925. The grossly disproportionate white male workforce that these methods produced made it less likely that women and minorities would learn about the relevant opportunities and discouraged applications from qualified women and minorities. (56.1 Stat. ¶ 24). Not surprisingly, there were indeed gross statistical disparities between the actual and expected number of female and minority applicants for the position. (56.1 Stat. ¶ 50)

This inference of causation is strengthened by evidence that when the Defendants changed their recruiting methods, they had greater success in attracting women and minorities. For instance, when particular efforts were made to recruit female and minority provisional custodians in the early and mid-90s through broader advertising and targeted word-of-mouth outreach, the available records suggest that women applied for the positions at a higher rate. (56.1 Stat. ¶¶ 67-70). Similarly, the Defendants made some limited efforts to recruit diverse candidates for Exam 7004, through advertising and training, in contrast to earlier exams. (56.1 Stat. ¶ 50). These efforts seem to have significantly reduced the disparities between actual and expected qualified Hispanic applicants and between actual and expected Asian applicants.

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[40] While these exams were listed in general announcements of all civil service examinations leading to City employment, no effort was made to publicize these exams or the custodian and custodian engineer positions to individuals likely to be qualified for work as a custodian or custodian engineer. (56.1 Stat. ¶¶ 9,10).

(56.1 Stat. ¶ 50). For these reasons, the evidence is sufficient to support a disparate impact *prima facie* case.

There is thus a substantial basis in evidence for concluding that the Defendants discriminated in recruitment in the past. Because the evidence meets the standard required to justify race-conscious remedial measures, it necessarily also rests on "evidence-informed analysis" and thus meets the lesser standard required to justify gender-conscious remedial measures. *Engineering Contractors Ass'n*, 122 F.3d at 908, 910; *Contractors Ass'n of E. Phila.*, 6 F.3d at 1010.

C. Paragraphs 13 through 16 of the Settlement Agreement are Narrowly Tailored to Serve the Interest of Remedying the Effects of the Defendants' Past Recruitment Discrimination.

The portions of the Settlement Agreement to which the Objector-Intervenors object are narrowly tailored to remedy the effects of the Defendants' recruitment discrimination. Factors relevant in determining whether a race-conscious remedy is narrowly tailored include: "(1) the necessity for relief and the efficacy of alternative remedies, (2) the flexibility and duration of the relief, (3) the relationship of the numerical goals of the relief to the relevant labor market (or to its analog in a case involving something other than employment discrimination), and (4) the impact of the relief on the rights of third parties." *HUD*, 239 F.3d at 219. Because the relief is narrowly tailored to this purpose, it is necessarily also substantially related to it, and thus meets the less demanding standard for gender-conscious relief. *See Ensley Branch NAACP*, 31 F.3d at 1582.

As the narrow tailoring factors enumerated above suggest, race- and gender- conscious relief need not be limited to make-whole relief to proven victims of discrimination, contrary to the suggestion by the Objector-Intervenors. As Justice O'Connor explained in her pivotal concurrence in *Wygant*, 476 U.S. at 287, the fractured Court in that case 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." *See also Croson*, 488 U.S. at 509-10 (listing relief to individual victims of discrimination as only one of multiple forms of relief, including racial preferences and other broader forms of remedial relief that can be constitutionally undertaken given sufficient evidence of past discrimination). The Supreme Court has recently reaffirmed that narrowly-tailored race-conscious measures are not limited to efforts to make whole identified victims of discrimination. *Grutter v. Bollinger*, 539 U.S. 306, 333-41 (2003).

Indeed, make-whole relief to individuals who have been proven victims of discrimination is not race- or gender-conscious relief, for make-whole relief is based not on an individual's race or gender, but on his or her injury. *See Croson*, 488 U.S. at 526 (Scalia, J., concurring) (pointing out that victim-specific remediation is race neutral, in contrast to race-conscious preferences); *Associated Gen. Contractors v. Coalition for Econ. Equity*, 950 F.2d 1401, 1417 n.12 (9th Cir. 1991) (same); *Acha*, 531 F.2d at 654-56 (same, in regard to sex); *Davis v. N.Y. City Hous. Auth.*, 60 F. Supp. 2d 200, 236 (S.D.N.Y. 1999) (same). In contrast, "[t]he predicate" for actual narrowly tailored race-conscious relief "is that past [discrimination] actually affected the class of persons to whom the relief runs, even if the class includes persons who are not themselves victims of discrimination." *N.Y. City Hous. Auth.*, 60 F. Supp. 2d at 236. The relief in the challenged paragraphs of the Settlement Agreement comports with this requirement, remedying only specifically identified discrimination, in that it provides race- and gender-conscious relief only to those groups found to have been discriminated against in recruitment: African-Americans, Hispanics, Asians, and women. *See Associated Gen. Contractors*, 950 F.2d at 1417

(finding that plan was likely narrowly tailored when it "provides preferences only to those minority groups found to have previously received a lower percentage of specific types of contracts than their availability to perform such work would suggest"); *cf. Croson*, 488 U.S. at 506 (finding plan not narrowly tailored when it offered preferences to "Spanish-speaking, Oriental, Indian, Eskimo, and Aleut" persons in the absence of any showing of discrimination against these groups).[41] The remaining factors relevant to a narrow tailoring analysis are considered point by point, below.

1. Necessity for Relief and Efficacy of Alternative Remedies.

The challenged relief was necessary. People of color and women took civil service exams to become permanent custodians in the New York City school system at rates far lower than would be expected based on the demographic makeup of the qualified labor pool in New York City. (56.1 Stat. ¶ 50). The almost all-male, disproportionately-white workforce that resulted discouraged applications from women and minorities, and the heavy reliance on word-of-mouth recruitment by this workforce tended to replicate the demographic make-up of incumbent employees. (56.1 Stat. ¶¶ 17-24). As described in Section IV.C, *supra*, the permanent appointments and retroactive seniority provided in the Settlement Agreement were part of the efforts to remedy the effects of this past discrimination and prevent future recruitment discrimination by: (1) helping to undo the closed system that had ensured only white males knew about job opportunities as custodians and felt welcome as custodians; (2) increasing the

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[41] As requested above, *supra* note 32, should the Court rule that a demonstration must be made that the beneficiaries were individual victims of discrimination in order to support the relief awarded to them in the Settlement Agreement, the Caldero Intervenors seek individualized hearings in order to determine their status as victims and the relief appropriately awarded. As noted, the Declarations of Marianne Manousakis and Maureen Quinn, Exs. 26 and 73, respectively, are representative of the type of evidence that would be adduced at such hearings.

likelihood that women and minority custodians would mentor and recruit other female and minority custodians; and (3) showing by example that women and minorities could successfully hold these jobs. The relief was thus an integral part of the Settlement Agreement's remedy for previous discriminatory patterns of recruitment.

The relief in this case was undertaken in conjunction with race-neutral remedies and only after alternative remedies had been attempted and had failed to remedy the Defendants' recruitment discrimination. *Cf. Grutter*, 539 U.S. at 339 (narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives" that would achieve the objectives sought, though it "does not require exhaustion of every conceivable race-neutral alternative."). As discussed previously, in recruiting provisional custodians in the early and mid-nineties, and in recruiting applicants for Exam 7004 in 1997, the Defendants made some efforts to broaden their recruiting pool. (56.1 Stat. ¶ 65). For instance, they ran advertisements for provisional custodian positions in newspapers with a predominately minority readership. (56.1 Stat. ¶ 67). They sponsored a training class for Exam 7004, which they advertised in these publications and which they encouraged custodians to publicize to their qualified minority staff. (56.1 Stat. ¶¶ 74-75). They also reached out to groups with a female or minority constituency in an attempt to find participants for additional training. (56.1 Stat. ¶ 76).

While these efforts apparently had some positive effects, the number of actual female, African-American, Hispanic, and Asian applicants for Exam 7004 was still smaller than that predicted based on these groups' representation in the pool of qualified potential applicants and these disparities were statistically significant for most of these groups. (56.1 Stat. ¶¶ 78-80). The persistence of these disparities, in the face of the Defendants' race-neutral methods to broaden recruitment, demonstrated the necessity of the relief set out in the challenged paragraphs

of the Settlement Agreement. *See Barhold*, 863 F.2d at 238 (finding affirmative action plan that took gender and race into account in addition to seniority in approving transfers to certain localities to be narrowly tailored when recruitment efforts alone had proved insufficient in increasing minority and female representation in those localities).

In addition, the Settlement Agreement adopted this race-conscious and gender-conscious relief in conjunction with race- and gender-neutral recruiting requirements, including posting notices of provisional custodian positions and custodian examinations in all public schools, printing prominent advertisements of provisional custodian positions and custodian examinations in newspapers with a substantial minority readership, and airing advertisements for these positions on radio stations with a significant number of black, Hispanic, or Asian listeners. This utilization of race- and gender-neutral remedies in conjunction with race- and gender-conscious methods is a further indicator that the race- and gender-conscious relief was narrowly tailored to remedy past discrimination and prevent its continuation. *See Ensley Branch, NAACP*, 31 F.3d at 1571 (strict scrutiny requires "consideration of race-neutral alternatives," either prior to or in conjunction with implementation of an affirmative action plan) (quoting *Coral Constr. Co. v. King County*, 941 F.2d 910, 923 (9th Cir. 1991)) (a minority business enterprise program "should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation in public contracting").

2. Flexibility and Duration of the Relief.

The challenged paragraphs provide a one-time adjustment to the employment status and seniority of certain female and minority custodian and custodian engineers, in contrast to an inflexible remedial program of indefinite duration, such as race-conscious hiring or promotion goals or set-asides that extend far into the future. *See Cotter v. City of Boston*, 323 F.3d 160, 172 (1st Cir. 2003) (finding one-time promotion of African-American officers to be narrowly tailored

remedy for vestiges of past discrimination, in part because "there were no quotas or long-term guidelines established, and there is nothing in the decision requiring affirmative action in future decisions"). Such a one-time isolated remedy, closely tied to the particular effects of discrimination present at the time when the Defendants entered into the Settlement Agreement, is far less likely to run afoul of the Constitution than one of lengthy or unlimited duration because a "race-conscious program's 'temporary' nature ensures that it 'will not last longer than the discriminatory effects it is designed to eliminate.'" *Wessmann v. Gittens*, 160 F.3d 790, 829 (1st Cir. 1998), (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 513 (1980) (Powell, J., concurring)); *see also Adarand Constrs v. Slater.*, 228 F.3d 11-17, 1179 (10th Cir. 2000) ("A[n] . . . important factor in any narrow-tailoring analysis is a limit on the duration of the race-conscious measures at issue."); *Barhold*, 863 F.2d at 238 (finding measure to be narrowly tailored in part because it was designed as a temporary measure).

Flexibility is less of a concern with such a one-time remedy than when the challenged relief extends into the indefinite future, where changes in circumstances may require flexibility in response. *Cf.*, *HUD*, 239 F.3d at 220 (finding narrowly tailored race-conscious remedy flexible when it could be adjusted in response to changes in circumstance). But the challenged relief is indeed flexible, because the permanent status and retroactive seniority awarded under the Settlement Agreement in no way act as a bar to non-beneficiaries obtaining transfers to the school of their choice or temporary care assignments. *See Barhold*, 863 F.2d at 238 (finding affirmative action plan that took into account race and gender, as well as seniority, in authorizing transfers to be flexible and thus narrowly tailored because race and gender were not the only relevant factors in allowing transfers).

3. *Relationship of the Numerical Goals of the Relief to the Relevant Labor Market.*

The relationship of the numerical goals of the relief to the relevant labor market is less easily analyzed with regard to paragraphs 13 through 16, which do not establish hiring goals, but simply extend permanent employment status and retroactive seniority to existing employees. However, even after Settlement Agreement beneficiaries received permanent appointments, women and minorities were still underrepresented in permanent custodian and custodian engineer positions relative to their representation in the relevant labor market. For instance, in 1997, when Exam 7004 was given, women were estimated to make up 8.4 percent of qualified test takers in the external labor pool. (Jacobsen Ex. 1 at Table 2). Fifteen women received permanent employment status under the Settlement Agreement, bringing women's representation in the permanent custodian and custodian engineer workforce up to approximately 4 percent. (56.1 Stat. ¶ 108). Similarly, African-Americans were estimated to make up 20.1 percent of the qualified test-takers in 1997. (Jacobsen Ex. 1 at Table 2). Sixteen African-Americans received permanent status under the Agreement, bringing their representation in the permanent workforce to approximately 5 percent. (56.1 Stat. ¶ 109). The relief in the Settlement Agreement is clearly not broader than that suggested by the representation of women and minorities in the relevant labor market.[42] Indeed, it is narrower, but "a local government need not choose between a program that aims at parity and no program at all." *Engineering Contractors Ass'n*, 122 F.3d at 927 n.6; *see also Stuart*, 951 F.2d at 454 (finding promotional goals to be narrowly tailored when they fell short of minority population eligible for promotions).

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[42] *See also Ensley Branch NAACP*, 31 F.3d at 1582 (to be substantially related to an important state interest, there is no requirement that hiring goals be tied to proportion of women in the qualified workforce).

4. Impact of the Relief on the Rights of Third Parties.

Finally, and crucially, the challenged relief does not have a significant impact on the interests of third parties, including those of the Objector-Intervenors. All of the Objector-Intervenors have permanent employment status. The beneficiaries' receipt of permanent employment status thus in no way limits the Objector-Intervenor's ability to obtain permanent employment. Nor does this relief affect the Objector-Intervenors' ability to receive temporary care assignments and the salary enhancements they bring; no new permanent positions were created for the beneficiaries, and thus the Objector-Intervenors would have been competing with the same number of permanent custodians and custodian engineers for these assignments whether or not the Settlement Agreement provided the beneficiaries permanent employment.[43] (56.1 Stat. ¶ 115-16).

The retroactive seniority received by the beneficiaries has affected the relative seniority rankings of some third parties, including the Objector-Intervenors. Seniority is primarily relevant to custodians because it is one factor (though not the only factor) in determining both the size of school a custodian is eligible to bid for when schools become available for transfer and which custodian will receive the school if more than one custodian bids for it. (56.1 Stat. ¶ 112). Thus, the retroactive seniority relief provided by the Settlement Agreement may affect an Objector-Intervenor's ability to obtain the transfer of his choice if a beneficiary with an equivalent performance rating and more seniority has bid for the same school.

It is worth noting, however, that in the almost five years since implementation of the agreement, none of the Objector-Intervenors has lost a transfer to a beneficiary. (Ex. 54,

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[43] Again, for these reasons, the Objector-Intervenors do not have standing to challenge the permanent status awards.

Lonergan Decl. III ¶ 33-34; Ex. 22, Mortensen Dep. at 117:12-119:14, 177:5-177:12; Ex. 64, Ahearn Dep. 150:17-150:20; 154:1-176:20; Ex. 68, Brennan Dep. at 95:13-129:5; 139:14-156:22; 161:12-163:19). This is perhaps because there are currently fewer than 59 beneficiaries in a custodian workforce employed in more than 1000 public schools. (56.1 Stat. ¶117). "[H]ence, there [is] still a considerable number of reassignment possibilities for White males." *Barhold*, 863 F.2d at 238. For this reason, the retroactive seniority in no way imposes an "absolute bar" to the Objector-Intervenors' advancement. *City and County of San Francisco*, 696 F. Supp. at 1310. Should an Objector-Intervenor lose a particular transfer opportunity, he is free to seek a different transfer opportunity in the future. Indeed he can request transfers to several different schools, by order of preference, at the same time. (Ex. 54, Lonergan Decl., III, at ¶ 27).

For these reasons, the impact on third parties of the retroactive seniority award is slight or non-existent. The Objector-Intervenors have no "legitimate, firmly rooted expectations" that they will receive a particular school when they bid for a transfer, as there is always the strong possibility they will be in competition with others for this benefit. *Cotter*, 323 F.3d at 171. For just this reason, "as the Supreme Court has observed in the context of access to employment . . . the denial of a new application is much less burdensome than the loss of an existing good." *HUD*, 239 F.3d at 220 (quoting *Wygant*, 476 U.S. at 282-83); *see also, e.g.*, *Reynolds v. City of Chicago*, 296 F.3d 524, 528 (7th Cir. 2002) (finding delayed promotion for a few white employees a modest burden); *Stuart*, 951 F.2d at 454 (finding promotion goals to impose a minor burden on innocent third parties when goal only slightly limited white officers' opportunities to become sergeants and white officers passed over for one promotion could reapply). The relevant

facts and applicable law clearly demonstrate that the interests of the Objector-Intervenors have not been unnecessarily trammeled.[44]

Because the awards under the Settlement Agreement are narrowly tailored to the compelling purpose of remedying past discrimination, and thus are necessarily are also substantially related to this purpose, the gender-conscious remedies created by the Settlement Agreement are also constitutional. For these reasons, the Objector-Intervenors have failed to carry their burden of proving that the challenged relief is inconsistent with the requirements of the Equal Protection Clause.

CONCLUSION

The Objector-Intervenors apparently contend that make-whole relief to proven individual victims of discrimination is the only method by which a public employer can remedy the effects of past discrimination and undo patterns of segregation and hierarchy in the workplace. In other words, they propose a radical change in the law governing public employers' race- and gender-conscious efforts to remediate their own past discrimination. They further assert that third parties may insist upon a level of proof approaching scientific certainty in testing claims that such discrimination has occurred. Were such a contention accepted, objectors would routinely be able to disrupt settlement of Title VII claims, forcing full trials on the merits. This result, which would run directly counter to Congress's preference for voluntary compliance with Title

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[44] While the awards of retroactive seniority could also theoretically affect the order in which lay-offs occurred, lay-offs have not occurred in the custodian workforce in memory, and there is no indication in the record that any are contemplated. (56.1 Stat. ¶ 118). Should layoffs nevertheless be instituted in the custodian or custodian engineer workforce, whether the retroactive seniority awards would result in any change in the order of layoffs would depend on a host of factors, including but not limited to the number of permanent custodian and custodian engineers appointed since implementation of the Settlement Agreement and the number of lay-offs required. Given the absence of any indication that lay-offs are actually likely and the difficulty of theorizing in the abstract how the Objector-Intervenors might be affected should any layoffs occur, the issue is not properly presented here. *See Kirkland*, 711 F.2d at 1135.

VII and its protection of employers' discretion under Title VII, is nowhere required in the law. Having permitted the Objector-Intervenors to put forward and support their objections to paragraphs 13 through 16 of the Settlement Agreement, the Court should approve these provisions as lawful and reasonable methods of remedying the effects of the Defendants' recruitment discrimination and preventing discrimination in the future.

For the reasons set forth above, the Caldero Intervenors' Motion for Partial Summary Judgment should be granted.

Dated: New York, New York
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By: _____

Lenora M. Lapidus (LL 6592)
Emily J. Martin (EM 2924)
American Civil Liberties Union
Women's Rights Project
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2615

Derek J.T. Adler (DA 9118)
Melissa R. Chernofsky (MC 9673)
Hughes Hubbard & Reed LLP
One Battery Park Plaza
New York, NY 10004
(212) 837-6000

Attorneys for Plaintiff-Intervenors
Janet Caldero, et al.

NY 908851_1