

00-6077

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

NEW YORK CITY BOARD OF EDUCATION, *et al.*,

Defendants-Appellees,

v.

JOHN BRENNAN, JAMES G. AHEARN, and KURT BRUNKHORST,

Intervenors-Appellants,

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

INTERVENORS-APPELLANTS' BRIEF

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Preliminary Statement

Magistrate Judge Levy rendered the opinion and order appealed from. It is published at 85 F. Supp. 2d 130.

Statement Of Jurisdiction

As set forth below, the complaint in this action (the "Complaint") stated a claim pursuant to Section 707 of Title VII of the Civil Rights Act of 1964.

Accordingly, the District Court had jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343 and 1345, and 42 U.S.C. § 2000e-6(b).

The order appealed from, dated February 9, 2000 (the "February 9 Order"), to the extent it approved a settlement agreement between plaintiff and defendants (the "Settlement Agreement") directed the clerk of the District Court to enter the Settlement Agreement "as a final resolution of the claims asserted by the United States." Joint Appendix ("J.A.") 414. Accordingly, this Court has jurisdiction of

this appeal pursuant to 28 U.S.C. § 1291. *United States v. Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO*, 12 F.3d 360, 364 (2d Cir. 1993); *Binker v. Pennsylvania*, 977 F.2d 738, 744 (3d Cir. 1992). The Settlement Agreement also contained various provisions requiring defendants to perform, and refrain from, particular activity (including requiring them to provide permanent status and retroactive seniority, the provisions at issue on this appeal), and this Court thus also has jurisdiction pursuant to 28 U.S.C. § 1292(a). *E.g., Roberts v. St. Regis Paper Co.*, 653 F.2d 166, 170 (5th Cir. 1981) (order requiring company to adhere to seniority system set forth in consent decree appealable under § 1292(a)); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1067 (2d Cir. 1972) (court of appeals has jurisdiction over entire order that includes injunctive relief).

To the extent that the February 9 Order denied appellants' motion to intervene, it is appealable pursuant to 28 U.S.C. § 1291. *New York News Co. v. Kheel*, 972 F.2d 482, 485 (2d Cir. 1992).

Appellants filed a timely notice of appeal from the February 9 Order on March 8, 2000. J.A. 415-16.

Statement Of The Issues

1. Did the lower court err in approving the Settlement Agreement, by which the defendants, various agencies of the City of New York, agreed to engage in race-conscious decision-making and to provide retroactive seniority benefits to individuals on the basis of race and sex to the detriment of the contractual rights of others?
2. Did the lower court err in denying appellants' motion to intervene?

Statement Of The Case

After several years of investigation, and an unsuccessful effort to negotiate a consent decree, the United States commenced this action on January 30, 1996 with the filing of the Complaint. J.A. 28-37. The Complaint asserted that each of the defendants were associated with the City of New York and responsible for a discriminatory pattern and practice in the hiring of permanent Custodians and Custodian Engineers ("CEs") by the New York City Board of Education (the "Board"). Beginning in the fall of 1998, the parties entered into the negotiations that resulted in the Settlement Agreement. The lower court approved the Settlement Agreement in the February 9 Order over the objections of the appellants herein, and denied appellants' motion to intervene.

Statement Of Facts

The Board hires Custodians and CEs for the maintenance of its schools.

The means by which Custodians and CEs are assigned to schools provides the background for the issues on this appeal.

A. Assignments Of Custodians And CEs
Under The Union Contract

During the relevant period, applicants for positions as Custodians and CEs took civil service exams, and were placed on eligibility lists that depended upon their performance on those exams. J.A. 373-74. Applicants could also be hired on a "provisional" basis. Those employees do not have civil service rights and cannot bid for assignments in the manner described below. J.A. 158-59, 378. The provisional hiring process itself was not challenged in this case.

The salaries of Custodians and CEs are dependent on the particular school where each works. Each school has a maximum permissible salary, which is a function of school building size (*i.e.*, its square footage). J.A. 135, 374. Pursuant to a collective bargaining agreement between the Board and Local 891, International Union of Operating Engineers, guidelines on eligibility for particular buildings are based upon a Custodian's permanent seniority, as follows:

<u>Years of Employment</u>	<u>Building Size (in thousand square feet)</u>
1-5	0-50
6-10	51-75
11 or more	76-83

(J.A. 136, 374)

Thus, the guidelines suggest that a permanent Custodian seeking to work in a building of 60 thousand square feet should have a minimum of six years seniority as a permanent Custodian. A similar set of rules governs CEs:

<u>Years of Employment</u>	<u>Building Size (in thousand square feet)</u>
----------------------------	--

1-5	76-100
6-10	101-130
11-15	131-200
16 or more	more than 201

(J.A. 136, 374-75)

Custodians and CEs compete for assignments to particular schools pursuant to a "rating and transfer plan" set forth in a collective bargaining agreement. J.A.

158. Five times each year, a transfer list is promulgated listing the schools with available openings for a Custodian or CE; a permanent Custodian or CE may request transfer to any schools listed for his or her job title. J.A. 137, 158-59, 376.

If a school has a particular requirement, only applicants with that requirement will be considered. J.A. 156, 377 n.18.

The Board first looks to past performance evaluations to determine to whom it will offer the transfer. Performance ratings within .25 points of each other are considered "equivalent." J.A. 137, 376. Among transfer applicants with "equivalent" ratings, seniority determines who will be offered the transfer. In fact, presumably because performance ratings are so often equivalent, seniority determines who will be offered the transfer 90% of the time. J.A. 137, 376.

Seniority also affects certain other assignments which can significantly increase an employee's salary. J.A. 376 n.14.

B. Proceedings In The Court Below

The United States commenced this action pursuant to Section 707 of Title VII, 42 U.S.C. § 2000e-6 (J.A. 28, 370), which authorizes the Attorney General to bring an action whenever she believes that any person or group of person is engaged in a pattern or practice of discriminatory behavior in violation of the substantive provisions of Title VII, and that "the pattern or practice is of such a nature and is *intended* to deny the full exercise of the rights herein described." 42 U.S.C. § 2000e-6(a) (emphasis added).¹ The Complaint alleged that defendants failed or refused to recruit blacks, Hispanics, Asians, and women on the same basis

¹ See also, e.g., *Lopez v. Metropolitan Life Ins. Co.*, 930 F.2d 157, 160 (2d Cir. 1991) ("to make out a pattern or practice case, a plaintiff must show systematic disparate treatment -- that is, that *intentional* racial discrimination is the standard operating procedure of the defendant" (emphasis added)); *In re Employment Discrimination Litigation Against Alabama*, 198 F.3d 1305, 1310 n.8 (11th Cir. 1999) ("In both disparate treatment and pattern or practice cases, the plaintiffs are ultimately required to demonstrate discriminatory intent"); *Equal Employment Opportunity Comm'n v. McDonnell Douglas Corp.*, 191 F.3d 948, 951 (8th Cir. 1999) ("To establish a *prima facie* case of pattern-or-practice discrimination, a plaintiff must prove that the employer 'regularly and purposefully' . . . treated members of the protected group less favorably . . . "); *Latinos Unidos De Chelsea En Accion (Lucha) v. Sec'y of Housing and Urban Development*, 799 F.2d 774, 786 n.21 (1st Cir. 1986) ("'pattern or practice' suits . . . are disparate treatment cases brought under Title VII . . ." (emphasis in original)).

as white males for the Custodian and CE positions; failed or refused to hire blacks and Hispanics for those positions; and used entry-level and promotional written examinations for those positions that excluded blacks and Hispanics from those positions. J.A. 28-37. The Complaint named the Board, the City of New York, the New York City Department of Personnel, and the Director for the Department of Personnel in her official capacity as defendants. (In February 1999, the court below granted defendants' request to substitute the Department of Citywide Administrative Services and the Commissioner of that Department for the last two named defendants. *See* J.A. 13 (Docket Entry No. 66).

Despite bringing this case under the "pattern or practice" provision of Title VII, the United States quickly abandoned any pretense of proving such a pattern or practice, and focussed its case entirely on demonstrating two different disparate impact claims (*i.e.*, claims that required no showing of discriminatory intent). J.A. 381, 385, 404 n.31. First, it claimed that three different civil service exams for the positions of Custodian and CE, *viz.* No. 5040 (given in 1985), 8206/8609 (given in 1989), and 1074 (given in 1993), had a disparate impact against blacks and Hispanics (the "testing claim"). Second, it claimed that defendants' recruiting practices had a disparate impact against blacks, Hispanics, women, and Asians (the "recruitment claim"). J.A. 344, 365; United States' Memorandum In Support Of Entry Of Settlement Agreement And In Response To Objections ("U.S. Settlement Memo."), pp. 3, 9.

Discovery proceeded separately on these two disparate impact claims. Fact discovery and expert discovery on the testing claim closed on October 3, 1997 and July 10, 1998, respectively. J.A. 365. Discovery on the recruiting claim did not begin until the end of June 1998, and was suspended when the parties entered into settlement negotiations in the fall of 1998. J.A. 344, 365.

C. The Settlement Agreement

Defendants and the United States executed a Settlement Agreement on February 11, 1999 and filed it with the Court. J.A. 53-90. They subsequently filed a joint motion with the court below for a hearing pursuant to 42 U.S.C. § 2000e-2(n) to consider objections by those whose interests might be affected by the terms of the Agreement (the "fairness hearing"). J.A. 91-95.

The Settlement Agreement enjoins defendants from discriminating on the basis of race, national origin, or gender in the recruitment or selection of any applicant for the positions of Custodian or CE; requires defendants to implement a comprehensive recruiting program to increase the number of qualified black, Hispanic, Asian, and female applicants; precludes defendants from administering any of the civil service exams challenged in the lawsuit; requires defendants to consult with an expert designated by the United States to reduce the adverse impact of an exam that had not been challenged in the lawsuit; and requires defendants to create and administer test preparation sessions for any future civil service examinations used to hire permanent Custodians or CEs, and to provide preferences to black, Hispanic, Asian, and women applicants for admission to those test preparation sessions. J.A. 53-73, 368-69.

The Settlement Agreement also provided benefits for minority and women provisional employees. Defendants agreed to convert 31 provisional Custodians and 12 provisional CEs to permanent status. They also agreed to give retroactive seniority to 41 Custodians (including the 31 whose provisional status was being converted) and 13 CEs (including the 12 whose provisional status was being converted). J.A. 57, 74-76, 345, 369; U.S. Settlement Memo., p. 39. The Settlement Agreement refers to these 54 individuals as "Offerees," and virtually all of them were listed on a "Stipulation Regarding Provisional Hires" purportedly reflecting the universe of provisional hires between certain dates. J.A. 45-51.² The

² Only two of the original 54 Offerees were not on the Stipulation Regarding Provisional Hires. U.S. Settlement Memo., p. 59 n.28; J.A. 74-76.

Subsequently, the United States and defendants agreed to add four more Custodians and three more CEs to the list of Offerees. Further, two of the original Custodian Offerees were no longer employed as such at the time that the Settlement Agreement came before the court below. The United States and defendants concluded that those two could not participate as Offerees. Thus, at the time of the fairness hearing in the lower court, Offerees included 43 Custodians and 16 CEs. J.A. 139 n.2, 401 n.30.

Settlement Agreement provided them with retroactive seniority dates ranging from January 23, 1989 to February 28, 1996. J.A. 368. The Settlement Agreement did not provide any backpay to the Offerees. J.A. 60, ¶ 17.

The formula by which retroactive seniority dates for those on the Stipulation Regarding Provisional Hires were determined was set forth in Paragraph 15 of the Settlement Agreement. J.A. 58-59. Subparagraph "a" stated that the retroactivity dates for those who never took any of the challenged civil service exams would be the date of his or her provisional hiring. Subparagraphs "b" and "c" stated that the retroactivity dates for those who did take a challenged exam would be the earlier of (1) the date of his or her provisional hiring or (2) the Median Date for the particular civil service exam that he or she took. (The Median Dates for each exam are set forth in Paragraph 5 of the Settlement Agreement. J.A. 55-56. They were negotiated by plaintiff and defendants, and purport to be the midpoint of the hiring period for those exams. Defendants' Memorandum In Support of Settlement, p.

13.)

Nothing in the Settlement Agreement purports to identify which of the Offerees on the Stipulation Regarding Provisional Hires had retroactivity dates determined by subparagraph "a" -- *i.e.*, who never took any challenged exam -- and those whose retroactivity dates were determined by subparagraphs "b" or "c." However, only 19 of the 52 Offerees from the Stipulation Regarding Provisional Hires listed in Appendix A to the Settlement Agreement had retroactive seniority dates different from their provisional hire date and corresponding to one of the Median Dates for the challenged exams. J.A. 74-76. Of the remaining 33, it would seem that either (a) they were covered by subparagraph "a" and thus never took any challenged civil service exam or (b) they took a challenged civil service exam, but received retroactive seniority in excess of, and unrelated to, any harm caused by that exam. Thus, the promotion and retroactive seniority provisions are not "make whole" remedies for the identified victims of discrimination.

D. The Objections To The Settlement Agreement
And The Papers Filed By The Parties

In mid-March 1999, the court below set the fairness hearing for May 27, 1999, and required all objections be to be postmarked on or before April 27, 1999.

J.A. 162. Copies of the Settlement Agreement were distributed to the current Custodians and CEs on or around March 18, 1999. J.A. 169.

The United States received 321 objections and defendants received 350. J.A. 165, 367. Each of the three appellants (the "Objecting Appellants") objected to the settlement on the ground that the provisions calling for permanent status for minority and women provisional employees and retroactive seniority for the minority and women Offerees were discriminatory and unfair. J.A. 96-101.

On May 21, 1999, the United States first served its papers (by overnight mail) in support of the settlement and in response to the objections. J.A. 112.

These papers supported the settlement by asserting that the United States could demonstrate a prima facie case of disparate impact for each of the testing and recruiting claims.

With respect to the testing claim, the United States submitted various responses to requests for admission in which defendants had conceded that lower proportions of blacks and Hispanics passed the challenged civil service exams than whites. The United States did not attempt to show that the exams had any disparate impact against women or Asians.

With respect to the recruitment claim, the United States submitted the Declaration of Orley C. Ashenfelter to support its claim that defendants' recruiting practices had a disparate impact on blacks, Hispanics, Asians, and women. J.A. 113-31. Dr. Ashenfelter compared the proportions of those groups who applied for each of three civil service exams to the proportions of those groups in the relevant qualified labor pool (*i.e.*, in the pool of individuals available and qualified for employment as Custodians and CEs). J.A. 115. Dr. Ashenfelter concluded that there was a statistically significant shortfall between the proportions of those groups actually applying for the jobs and those in the relevant qualified labor pool. J.A. 121-22.

In determining who should be in the relevant qualified labor pool, Dr. Ashenfelter noted that the stated qualifications for Custodian and/or CE varied over each of the three exams that he considered, but that the qualifications generally emphasized experience in a similar position. J.A. 116. Education could sometimes substitute for experience. *Id.* The CE exam required that applicants have a license to operate a high pressure boiler. *Id.* Nonetheless, in deriving the relevant qualified labor pool, Dr. Ashenfelter did not consider experience, education, or relevant licenses. Rather, he simply identified the jobs that each of the various applicants had at the time that they applied and created tables setting forth the proportions of applicants who had various jobs. J.A. 116-18, 126-26. He then took populations statistics and determined the proportions of the relevant groups (blacks, Hispanics, women, and Asians) in those jobs. J.A. 118-19, 127-28. After that, he simply assumed that the relative availability of those groups in his relevant qualified labor

pool was their representation in those jobs weighted by the fraction of applicants for the specific civil service exams under consideration who held that job at the time of application. J.A. 119.³

³ To provide a short numerical example, suppose there had been only two "current jobs" among job applicants, Occupation A, which 25% of the applicants held at the time of application, and Occupation B, which the other 75% held. If Hispanics constituted 20% of those in Occupation A and 10% of those in Occupation B, the relative availability of Hispanics in Dr. Ashenfelter's qualified labor pool would be 5% ($.25 \times .2$) plus 7.5% ($.75 \times .1$) or 12.5%.

On May 25, 1999, the United States served (by overnight mail) the declaration of Bernard R. Siskin. J.A. 132-53. Dr. Siskin described the analysis he undertook to determine whether there had been a significant correlation between seniority and salary. He concluded that there was not a statistically significant relationship between salary and seniority for Custodians, and a statistically significant relationship between salary and seniority for CEs only at the highest seniority level. J.A. 139. However, Dr. Siskin conceded that seniority is "clearly important for bidding and assignment purposes" (J.A. 137), and noted that non-economic preferences for particular schools might outweigh salary considerations in an employee's decision to apply for, or select, particular schools. J.A. 139, 396. That is, Dr. Siskin simply noted that employees may trade some pecuniary income that seniority might otherwise afford for non-pecuniary job benefits. *See also* J.A. 394.

Defendants served their papers in support of the Settlement Agreement and in response to the objections on the Objecting Appellants on May 24, 1999 by overnight mail. J.A. 154.

The fairness hearing was held before Magistrate Judge Levy on May 27, 1999. J.A. 170-299. Counsel for the Objecting Appellants appeared and argued on their behalf. A variety of different objectors, including appellants and a Hispanic CE, argued that the remedy was discriminatory itself. J.A. 400. That same day, the United States and defendants apparently agreed to a "trial" before Magistrate Judge Levy for all purposes, with appeal directly to this court. Judge Block, to whom the case had been initially assigned, approved that order the next day. J.A. 342, 368.⁴

E. The Motion To Intervene

⁴ In their initial Civil Appeal Pre-Argument statement, the Objecting Appellants identified the failure to obtain their consent to the reference as an issue to be raised on this appeal. While reserving the right to raise this issue with respect to further proceedings should the case be remanded, appellants will not pursue that issue on appeal.

On May 4, 1999, appellants Brennan, Ahearn, and Brunkhorst moved to intervene in the action as plaintiffs. J.A. 102-03. The proposed complaint in intervention (J.A. 107-111) claimed that the proposed action that defendants intended to take pursuant to the Settlement Agreement -- and specifically giving certain provisional Custodians and CEs permanent status and the awarding of retroactive seniority -- violated Title VII, 42 U.S.C. §§ 1981, 1983, and 1985(3), and the Equal Protection Clause of the United States Constitution. J.A. 111.

Each of the Objecting Appellants was and is a permanent Custodian. Each of them took Exam 1074 for the position of Custodian. Brennan ranked 26th on the eligibility list promulgated from that exam at the end of 1996, Ahearn 92nd, and Brunkhorst 194th. Brennan and Ahearn were appointed to the position of Custodian on March 24, 1997, with a start date of April 4, 1997. Brunkhorst was appointed on August 18, 1997. Each of them is also a provisional CE. J.A. 346, 408. As provisional CEs, they can be replaced at any time by permanent CEs, including those Offerees who were made permanent CEs by the Settlement Agreement. J.A. 158, 186.

Defendants opposed appellants' motion to intervene. The United States agreed that intervention would be appropriate, but not as plaintiffs, and only for the purposes of challenging Paragraphs 14 through 16 of the Settlement Agreement (relating to the provisions concerning retroactive seniority) on appeal and only if intervention did not delay approval of the Settlement Agreement. United States' Response To Motion To Intervene, pp. 1-2. In their reply papers, the Objecting Appellants agreed that the intervention could be limited to the retroactive seniority provisions in Paragraphs 14-16 (and provisions related thereto), but argued that some discovery might be needed to determine if the discriminatory provisions of the Settlement Agreement met "strict scrutiny." Reply Memorandum In Support Of Motion To Intervene, pp. 13-14.

F. The Decision Of The Court Below

Magistrate Judge Levy approved the Settlement Agreement and denied the Objecting Appellants' motion to intervene in the February 9 Order. J.A. 363-414.

With respect to the approval of the Settlement Agreement, the court below conceded that the Settlement Agreement implemented race-conscious remedies (J.A. 370), but concluded that there was a general presumption of validity for Title VII voluntary settlements that was particularly strong when the consensual agreement has been reached by a federal agency charged with protecting the public interest (J.A. 371). The lower court asserted that those objecting to such settlements had a "heavy burden" to overcome. J.A. 371-72.

The court below considered the submissions by the United States described above (*see pp. -, supra*) and concluded that they established a prima facie case that (1) the challenged civil service exams had a disparate impact on blacks and Hispanics and (2) the recruiting practices had a disparate impact on blacks, Hispanics, Asians, and women. J.A. 381-89. The lower court also concluded that the complexity, expense, and likely duration of the litigation, the stage of the proceedings, and the amount of discovery completed all militated in favor of approving the Settlement Agreement. J.A. 389-90.

The lower court held that the Settlement Agreement as a whole, and the grant of retroactive seniority in particular, was consistent with Title VII's overall purpose to make persons whole for injuries suffered on account of unlawful employment discrimination. J.A. 390-91. It further found that the retroactive seniority provisions in the agreement were "narrowly tailored" because only persons qualified to be Custodians or CEs would receive remedial relief, no current employee was displaced, and the Settlement Agreement did not establish any permanent numerical requirements or quotas. J.A. 392. Relying upon Dr. Siskin's declaration, the lower court dismissed the objections of those current permanent employees that their competitive seniority rights under the collective bargaining agreement would be diminished by the grant of retroactive seniority to the Offerees. J.A. 393-99.

The lower court also rejected the arguments that the remedy was discriminatory. The court concluded that the race-conscious and sex-conscious elements of the Settlement Agreement, and its grant of retroactive seniority, were appropriate because necessary to eliminate the discriminatory effects of the challenged employment practices. J.A. 400-01.

Finally, the lower court denied the Objecting Appellants' motion to intervene. It concluded that the Objecting Appellants did not have a substantially protectable interest because (1) they had no legally protected interest in any job or appointment and (2) they had no legally protected interest in non-discriminatory treatment because the race-conscious remedies that the Settlement Agreement required of defendants were appropriate remedies to return employees to the positions they would have held but for the alleged discrimination. J.A. 409-10. The court also concluded that any interest in competitive seniority rights was "remote and speculative," because a variety of contingencies would have to take place before one of the Objecting Appellants would be adversely affected by the retroactive grant of seniority (*e.g.*, an Offeree bidding on the same building, similar performance ratings requiring a resort to seniority, and being on adjacent slots on the transfer list for the school). J.A. 411-12.

Finally, the lower court noted that the United States had not opposed limited intervention, but asserted that the Objecting Appellants rejected its proposal. The court saw "no reason to reach out to order a compromise that the proposed intervenors do not want." J.A. 411-12 n.34.

Summary of Argument

The court below conceded that the Settlement Agreement proposed race-conscious decision-making for the defendants, all of whom act under color of state authority. Yet *not once* in an extensive fifty-plus page opinion did the court below cite *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the Supreme Court's seminal case on Fourteenth Amendment analysis of race-conscious programs by state actors. *Not once* did the court below use the phrase "strict scrutiny," the standard the Court applied in *Croson*. Indeed, the court below barely cited any cases decided after *Croson* at all.

Oblivious to all recent cases considering race-conscious decision-making under the Fourteenth Amendment, the court below failed to apply strict scrutiny. Had it done so, the race-conscious provisions of the Settlement Agreement, and even the sex-conscious provisions (which should be analyzed under the intermediate scrutiny standard of *United States v. Virginia*, 518 U.S. 515 (1996)), would have failed the test. A prima facie case of disparate impact discrimination -- *i.e.*, the mere existence of any test or job requirement which has a disparate impact, regardless of whether it is an appropriate test or requirement -- is too slender a reed on which to rest race-conscious or sex-conscious decisions.

Indeed, the court below was so anxious to avoid any thorough examination of the Settlement Agreement, it did not even permit the Objecting Appellants to intervene in the action so that they could take discovery and present evidence on the issue of whether strict scrutiny could be met. In doing so, it ignored the plain interests of the Objecting Appellants in the provisions of the Settlement Agreement awarding retroactive seniority, as well as cases from both this and other circuit courts.

Argument

I.

THE LOWER COURT ERRED IN APPROVING THE SETTLEMENT AGREEMENT

The lower court failed to consider the race-conscious remedy imposed by the promotion and retroactive seniority provisions of the Settlement Agreement under strict scrutiny. When examined under that standard, those provisions cannot stand.

A. Appellants Have Standing To Appeal
The Part Of The February 9 Order
Approving The Settlement Agreement

The Objecting Appellants have standing to pursue an appeal of the order approving the Settlement Agreement despite the fact that the court below denied their motion to intervene and, thus, precluded them from becoming parties. While no case is directly on point -- and, indeed, the legal uncertainty surrounding the Objecting Appellants' ability to appeal is an important reason why the lower court should have permitted them to intervene as parties -- Second Circuit authority supports this conclusion.

Most recently, in *Kaplan v. Rand*, 192 F.3d 60 (2d Cir. 1999), this Court held that a shareholder who objected to the amount of fees awarded to plaintiffs' counsel in the settlement of a stockholder derivative action had standing to appeal the lower court's approval of that settlement agreement despite the fact that he had never tried to intervene in the case. This Court cited the general rule that a non-party normally does not have a right to appeal, but that it can if it has an interest affected by the trial court's judgment. It further held that the "affected interest" test was met because shareholders have an "interest" in the financial well-being of the corporation. *Id.* at 67. Indeed, the interest was sufficient despite the fact that the objectionable attorneys' fees were being paid by the corporation's insurance company and would not necessarily affect the finances of the corporation at all. The fact that the payment *might* result in a change in insurance premiums in the future was sufficient. *Id.* at 68 ("These *possibilities*, and the discouragement of

attorneys from instituting future lawsuits of this type against [the corporation], give [the shareholder] an affected interest in the fee order in this case" (emphasis added)).

The *Kaplan* Court also relied on two other factors. First, it noted that Rule 23.1 specifically required notice to the shareholders before a settlement could be approved by the court, and that "[i]t would make little sense to invite a shareholder to file objections in the manner provided by Rule 23.1 and then deny him the right to challenge the district court's ruling on his objection." *Id.* at 67. Second, it found that the process of seeking court approval for a settlement tends to coalesce the interests of plaintiffs and defendants, that "a district court may overlook a `mutual indulgence'" that results from that conflation of interests, and that "appellate review advances the policy of assuring the fairness to shareholders that underlies the requirement of court approval." *Id.*

If anything, this case presents a stronger case for objector standing than *Kaplan* did. The Objecting Appellants here have two separate interests, each of which is stronger than the possible change in financial fortune found sufficient in *Kaplan*. First, they have an interest in equal treatment under the Equal Protection Clause separate and apart from any ability to obtain a particular transfer. The "injury in fact" in an Equal Protection Clause case is the inability to compete on an equal footing. *Adarand Constructors v. Pena*, 515 U.S. 200, 211 (1995) (in challenge to law that created a rebuttable presumption that members of certain racial groups were "disadvantaged," Court rejects suggestion that plaintiff had to show that it has been or will be the low bidder on any contract to have standing); *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 658, 666 (1993) (contractors' association had standing to challenge "preferential treatment to certain minority-owned businesses in

the award of city contracts" regardless of whether "one of its members would have received a contract absent the ordinance"; "[t]he `injury in fact' . . . is the denial of equal treatment resulting from the imposition of the barrier, . . . not the ultimate inability to obtain the benefit"); *Heckler v. Mathews*, 465 U.S. 728, 739 (1984) ("like the right to procedural due process . . . the right to equal treatment guaranteed by the Constitution is not co-extensive with any substantive rights to the benefits denied the party discriminated against"); *Edwards v. City of Houston*, 78 F.3d 983, 1004 (5th Cir. 1996) (en banc) (potential intervenor had a protectable interest in Consent Decree because race-conscious remedies affected its interest "in having equal access to a promotion system and promotion opportunities . . . without reference to race, color, or national origin").

Here, appellants are being treated unequally because the Offerees are obtaining promotions and retroactive seniority on the basis of race or sex. (And, as in *Mathews*, appellants can obtain "equality" from removal of the unfair advantages given to the Offerees. *Mathews*, 465 U.S. at 740 (equal treatment "can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class").) In the future, appellants will encounter the barrier of competitors for buildings whose seniority will be calculated differently: Objecting Appellants' seniority will be calculated from the date of their actual commencement as permanent Custodians, whereas the Offerees' seniority will be calculated by the dates in the Settlement Agreement.

Second, the Objecting Appellants are being deprived of their contractual rights under the collective bargaining agreement. The "rating and transfer plan" therein had two significant features: (1) seniority would be a significant consideration in the competitive bidding for schools and (2) the seniority of each Custodian or CE *and any of his or her competitors for a school transfer* would be determined by the starting date as a permanent Custodian or CE. J.A. 158. Plainly, the second one of that pair of contractual rights has been changed by the Settlement Agreement. Offerees will have their seniority determined by the Settlement Agreement, not by the date of permanent appointment. *United States v. Int'l Brotherhood of Teamsters*, 931 F.2d 177, 183-84 (2d Cir. 1991) (non-party union locals had a sufficient interest in appealing order concerning union elections where

the order was inconsistent with provisions of union constitution concerning elections).⁵

⁵ The Objecting Appellants' two interests distinguish this case from *Hispanic Society of the New York City Police Dep't v. New York City Police Department*, 806 F.2d 1147 (2d Cir. 1986) in which the appellant police officers, many of whom had not even filed objections, were simply on a list for promotion and had no contractual right to any particular selection process. Moreover, *Hispanic Society* was decided before the recent Supreme Court decisions identifying the absence of equal treatment as an "injury in fact"; thus its conclusion that the objecting parties had no interest because they "would not be entitled to promotion" (*id.* at 1152) even if the settlement there were invalidated is questionable at best.

The court below concluded that the Objecting Appellants did not have the "significantly protectable" interest required under Rule 24(a)(2) for intervention. Even assuming *arguendo* that the "affected interest" required for a non-party to appeal is as great as the "protectable interest" under Rule 24(a)(2), the interest here is sufficient to provide standing to appeal because the court below erred in its conclusion. Citing *Kirkland v. New York State Dep't of Correctional Services*, 711 F.2d 1117, 1134 (2d Cir. 1983), the court below noted that those on the eligibility list in that case did not possess any mandated right to any appointment or any other legally protected interest. J.A. 409-10. Even without that *legal* right, though, this court in *Kirkland* did hold that the objectors had a right to intervene, and thus implicitly found that they had the "substantially protectable" interest required under Rule 24(a)(2). *Kirkland*, 711 F.2d at 1126; *Cook v. Pan American World Airways*, 636 F. Supp. 693, 696 (S.D.N.Y. 1986) (noting that implicit holding of *Kirkland*).

Here, of course, the Objecting Appellants have the much stronger contractual right to the "rating and transfer plan" in the collective bargaining agreement.

With respect to the right to equal treatment, the denial of which is considered an "injury in fact" under modern Supreme Court precedent, the court below said only that the interest was not implicated because the legal rights of non-minorities are not affected by reasonable and lawful race-conscious policies. J.A. 410, *citing Kirkland*, 711 F.2d at 1126. While this may be true as a general proposition, it confuses the *interest* the Objecting Appellants may have with the *merits* of the underlying race-conscious policies. One need not demonstrate the impropriety of the underlying policy (*i.e.*, that it is *unreasonable* or *unlawful*) to demonstrate the existence of an interest -- if one did, the only non-parties who could ever intervene or appeal would always win their case. *Cf. Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979) ("The Court of Appeals appeared to confuse the question of whether petitioner had standing with the question of whether she had asserted a proper cause of action"); *Oneida Indian Nation of Wisconsin v. New York*, 732 F.2d 261,

265 (2d Cir. 1984) ("except for allegations frivolous on their face, an application to intervene cannot be resolved by reference to the ultimate merits of the claims which the intervenor wishes to assert following intervention"); *Cook*, 636 F. Supp. at 696 (S.D.N.Y. 1986) (pilots whose seniority could be affected by Age Discrimination in Employment Act lawsuit have sufficient interest under Rule 24; precluding intervention on the ground that intervenors have no seniority right to seniority system that violates ADEA "assumes the validity of the plaintiffs' claims and is therefore premised on a tautology that prejudices the merits of the suit").

Finally, the court below stated that the "interest" of the intervenors was "remote and speculative" because an Objecting Appellant might not compete with one of the Offerees for a transfer in the future. J.A. 411-12. This is erroneous for the reason already cited: modern Equal Protection analysis identifies the "injury in fact" to be the denial of equal treatment *regardless* of whether it affects the distribution of a benefit.

In any event, the analysis of the court below (J.A. 411-12) only demonstrates that the odds are small that an Offeree will receive an advantage over one of the Objecting Appellants in any *one* transfer application made by an Objecting Appellant. But the transfer lists are issued five times per year, and any Custodian or CE can make multiple transfer applications. Custodians or CEs may make 20, 35, or 50 applications *every year*, particularly relatively junior employees like the Objecting Appellants. While it is true that a competition with an Offeree is unlikely on any specific one of them, the odds that an Objecting Appellant will compete with an Offeree at some time in the future are pretty good.

In fact, the lower court's argument concerning the speculative nature of the "injury" suffered by the Objecting Appellants echoes the *dissent* in *Lorance v. AT&T Technologies*, 490 U.S. 900 (1989). In that case, the Court held that a change in seniority provisions adopted for sexually-discriminatory purposes created an immediate injury permitting plaintiffs to sue (and that the claims of plaintiffs who waited until they suffered a demotion as a consequence of that new seniority system were time-barred). *Id.* at 905 ("Seniority is a contractual right" and a discriminatory diminishing of competitive seniority violates Title VII). The dissent pointed out that the plaintiffs had no reason to believe that they (or any other women) would be demoted at the time of the adoption of the seniority change and that they might never have been demoted had it not been for the nationwide recession in the early 1980's. *Id.* at 913-14 (Marshall, J., dissenting). The majority plainly rejected the argument that those contingencies precluded the finding of a discriminatory injury at

the time of the change in the seniority system. And while the Civil Rights Act of 1991 amended Title VII to permit plaintiffs to wait until they had suffered the loss of a job benefit before suing, it *affirmed* that the initial adoption of a discriminatory change in a seniority system also creates an injury that allows an immediate lawsuit. 42 U.S.C. § 2000e-5(e)(2) ("an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose . . . when the seniority system is adopted").

Returning to the other factors identified in *Kaplan v. Rand*, Title VII suggests that courts hold fairness hearings. 42 U.S.C. § 2000e-2(n) (precluding collateral challenges from those who had an opportunity to be heard). The Settlement Agreement itself called for a hearing (J.A. 67-69), the parties in this case requested one (J.A. 91-93), and the Court ordered one. Thus, as in *Kaplan*, "[i]t would make little sense to invite an [interested person] to file objections in the manner provided by [42 U.S.C. § 2000e-2(n)] and then deny him the right to challenge the district court's ruling on his objection." *Id.* at 67.

Finally, as in *Kaplan*, appellate review of the settlement avoids the dangers inherent in the coalescing of interests of the plaintiff and defendants, all of whom supported (and continue to support) the Settlement Agreement. *Id.* ("a district court may overlook a `mutual indulgence'" that results from mutuality of interests in having settlement approved). Here, the mutuality of interests is further suggested by the fact that the Settlement Agreement does not provide any backpay for the "victims" of defendants' discriminatory practices (J.A. 60, ¶ 17); that is, the price being paid to make the "victims" whole is being paid largely by those whose competitive seniority rights are diminished by the Settlement Agreement. *Cf.* *Albemarle Paper v. Moody*, 422 U.S. 405, 415-22 (1975) (court should generally award backpay to victims of discrimination; backpay should be denied only for reasons which do not frustrate the central statutory purposes of eradicating discrimination and making victims whole).

B. The Settlement Agreement Should Be Reviewed Under Strict Scrutiny

In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the Supreme Court held that all state race-conscious decision-making is subject to strict scrutiny. *Id.* at 493-94 (opinion of O'Connor, J.); *id.* at 520 (opinion of Scalia, J.). Virtually every court of appeals that has considered the matter has concluded that race-conscious conduct undertaken by state actors pursuant to voluntary consent decrees are subject to the same strict scrutiny as any other state-sponsored race-conscious programs. *Ho by Ho v. San Francisco Unified School Dist.*, 147 F.3d 854, 865 (9th Cir. 1998) (school district must show that race-conscious provision in Consent Decree governing admission of students to public schools is narrowly-tailored to further a compelling governmental interest); *Aiken v. City of Memphis*, 37 F.3d 1155, 1162 (6th Cir. 1994) (all racial preferences, including those in consent decrees, are analyzed pursuant to strict scrutiny); *Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1568-69 (11th Cir. 1994) (race-based hiring in

municipal government pursuant to earlier consent decree subject to strict scrutiny);

Black Fire Fighters Ass'n of Dallas v. City of Dallas, 19 F.3d 992, 995 (5th Cir.

1994) (consent decree requiring the hiring of certain fire fighters by race "receives

strict scrutiny under the Equal Protection Clause"); *Hayes v. North State Law*

Enforcement Officers Ass'n, 10 F.3d 207, 212 (4th Cir. 1993) (race-conscious

hiring pursuant to consent decree subject to strict scrutiny); *Stuart v. Roache*, 951

F.2d 446, 449 (1st Cir. 1991) (consent decree classifying police officers on the

basis of race subject to strict scrutiny).

The classifications here are more than just race-conscious in the sense that is used by many Supreme Court decisions: that is, where the victims of discrimination are made whole and happen to be of one race.⁶ Rather, many of the Offerees (1) never took the civil service exams being challenged and (2) could not have been the victims of any discriminatory recruiting practices (because they applied and obtained jobs). Other Offerees may have taken the civil service exams, but are being given retroactive seniority that exceeds anything that is related to that potential discriminatory act. That is, the Offerees are being given benefits *not* because they are minorities or women who were subjected to discrimination by defendants, *but simply because they are minorities or women.*

⁶ Thus, the cases relied upon by the court below, which focus for the most part upon the propriety of *make whole* remedies, are not on point. J.A. 390-92, 400-01.

It is true that race-conscious remedial conduct need not be victim specific, but, when it is not, it is a different kind of "race-conscious" decision altogether.

Remedying identified discrimination by making victims whole is an appropriate governmental act, as even the most ardent foes of racial preferences concede:

In my view, however, the reason that [governmental action tailored to remedy the detriment to specific construction companies victimized by identified discrimination] would make a difference is not, as the Court states, that it would justify race-conscious action . . . but rather that it would enable race-neutral remediation. Nothing prevents Richmond from according a contracting preference to identified victims of discrimination. While most of the beneficiaries might be black, neither the beneficiaries nor those disadvantaged by the preference would be identified *on the basis of their race*.

Croson, 488 U.S. at 526 (Scalia, J., concurring) (emphasis in original).

Here, the Settlement Agreement is "race-conscious" in a much stronger sense, in that the purpose of the Settlement Agreement cannot be to make whole victims of discrimination. By definition, those who never took a civil service exam cannot have been victimized by it. *See* Defendants' Memorandum In Support of Settlement Agreement, pp. 24-25 (those not listed on Stipulation of Provisional Hires could be included in settlement, pursuant to Section 4(b) of the Settlement Agreement, *only* if they took one of the challenged exams).

C. The Settlement Agreement Cannot Withstand Strict Scrutiny

To survive strict scrutiny, race-conscious action must be for a compelling governmental interest and be narrowly-tailored to meet that interest. The Settlement Agreement cannot meet either prong of the strict scrutiny test.

1. Compelling Governmental Interest. -- The court below concluded that a prima facie case of disparate impact discrimination -- that is, simply showing that a particular test or recruiting practice had a disparate impact on a favored group -- is sufficient to engage in race-conscious and sex-conscious decision-making. J.A. 379-89. Cf. J.A. 177.

Before examining the case law, we pause to consider the implications of this theory. If the court below were correct, race-conscious or sex-conscious decision-making would be permissible in a wide array of circumstances:

- * If a governmental employer prefers bilingual employees and significantly fewer whites than Hispanics are bilingual, the employer can create race-preferences for whites;
- * If a public school requires its teachers to have a certain college degree, and that requirement eliminates more minorities than whites, the public school can engage in race-conscious hiring favoring the disparately-impacted minorities;
- * If a police department refuses to hire those with a criminal record, and that refusal disparately impacts racial minorities, the police department can implement a program that favors those groups in hiring;

- * If a fire department requires that firefighters be able to drag a hose, and this requirement has a disparate impact upon women, the fire department can institute preferences for women; and
- * If a state school uses standardized tests that have a disparate impact on minorities (like the SAT test), then it, too, can provide preferences for those minorities adversely impacted.

Actually, one need not stray from the facts of this case for an example of an extraordinarily broad basis for enacting race-conscious or sex-conscious policies.

The court below concluded that plaintiff had shown a prima facie case on its disparate impact recruiting claim because the proportions of individuals applying were significantly different from the relevant qualified labor pool figured by plaintiffs' own expert -- with the demographics of that "qualified" labor pool being determined by the demographics of (more or less) general population statistics. *See* discussion *infra* at -; J.A. 386 n.19. Of course, there are many reasons why the demographic breakdown of applicants for a particular job might differ from the demographic breakdown of the general population. For one thing, it is at least possible that women are not as interested as men in taking jobs as Custodians or CEs. *E.E.O.C. v. Sears, Roebuck & Co.*, 839 F.2d 302, 320-21 (7th Cir. 1988) (fact that women were less interested in sales commission jobs explained statistical

evidence that low proportions of them had those jobs). In other cases, inexpensive recruitment practices will naturally lead to a disparate impact. *E.E.O.C. v. Consolidated Service Systems*, 989 F.2d 233, 235 (7th Cir. 1993) (word of mouth recruitment, producing largely Korean employees, was cheapest method of recruiting). See generally *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 992 (1988) ("[T]he inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures. It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance"); *United States v. City of Chicago*, 870 F.2d 1256, 1261 (7th Cir. 1989) ("The fact that blacks happen not to do as well on some examination as whites, or vice versa, does not establish that the examination is discriminatory . . . There is no

iron law of human behavior that every racial or ethnic group will perform equally well on nonbiased examinations in all field of human endeavor").

Presumably because it would lead to the proliferation of racial preferences, then, lower courts have rejected a prima facie case of disparate *impact* discrimination as the "compelling interest" required by strict scrutiny. *People Who Care v. Rockford Bd. Of Educ.*, 111 F.3d 528, 534 (7th Cir. 1997) (provision calling for certain percentage of hired teachers to be black or Hispanic could not be justified by statistical disparities or underrepresentation; "there is no finding that the school district has ever discriminated (by which we mean discriminate intentionally -- the only kind of discrimination that violates the equal protection clause");

Wessman v. Gittens, 160 F.3d 790, 817 (1st Cir. 1998) (Lipez, J., dissenting) (although dissenting judge supports race-conscious admissions at selective public school, he rejects claim that low percentages of African Americans or Hispanics applying to the school or the disparate impact of admissions exam to the school are sufficient to justify race-conscious policy; "these disparate impact contentions are

wrong because they do not account for the centrality of proof of discriminatory animus in justifying a race-conscious remedial program"). Cf. *City of Boerne v. Flores*, 521 U.S. 507, 531 (1997) (where legislative record primarily consisted of neutral laws "which as an incident of their normal operation, have adverse effects on churches and synagogues" and did not have "examples of legislation enacted or enforced due to animus or hostility to the burdened religious practices or that . . . indicate some widespread pattern of religious discrimination in this country," Congress exceeded its authority under Section 5 of the Fourteenth Amendment in passing law prohibiting state laws from substantially burdening religion).

Even if, contrary to the foregoing authorities, a prima facie disparate impact case were sufficient to create a basis for state actors to employ racial or gender preferences, its application here, at least insofar as Asians and women are concerned, would be inappropriate. The United States did not contend, nor did it present any evidence, that women or Asians were victimized by the civil service exams. Rather, their inclusion as Offerees is based solely on the disparate impact recruiting claim, and that claim is supported solely by Dr. Ashenfelter's declaration.⁷

⁷ One of the more galling aspects of the decision of the court below is its repeated reference to the evidence submitted by the United States as undisputed and un rebutted. *E.g.*, J.A. 385 n.18 ("neither defendants nor objectors rebut" Dr. Ashenfelter's declaration); J.A. 394 (referring to Dr. Siskin's "unchallenged opinion"); J.A. 399 ("None of the objectors has challenged the statistical analysis presented by Dr. Siskin"). These declarations were served literally *a few days* before the fairness hearing on May 27, 1999. In the case of Dr. Siskin's declaration, it was received one day prior to the hearing. J.A. 132, 189-90. Thus, the Objecting Appellants had no real opportunity to present opposing evidence at the fairness hearing; and the denial of their motion to intervene precluded them from presenting evidence at any other time.

Dr. Ashenfelter compared the demographic breakdown of those applying to take the civil service exams to the demographic breakdown of those in the same professions as the current jobs of those applying. *See* discussion *supra*, pp. - & n.. This analysis, then, does nothing to attribute the "disparate impact" to any particular recruiting practice employed by the city. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657 (1989) (plaintiffs must show that "the disparity they complain of is the result of one or more of the employment practices that they are attacking"); 42 U.S.C. § 2000e-2(k)(1)(B)(i).

Moreover, Dr. Ashenfelter's analysis just ignores the actual qualifications for the Custodian and CE jobs. It assumes that the demographic breakdown of *qualified and willing* furnace operators (to cite just one "current job" of those applying) -- *i.e.*, those with the necessary qualifications to be a Custodian or CE, including interest in the job, experience, and (with respect to CEs) a license to operate a high pressure boiler -- is exactly the same as the demographic breakdown for *all* furnace operators. Dr. Ashenfelter provided no evidence or reason to make such an assumption, and none appears obvious to the naked eye. (If anything, the discrepancy between the demographic breakdown of applicants and the demographic breakdown of qualified applicants suggests that the assumption could not be justified.) In short, Dr. Ashenfelter used population statistics that are little better than general populations statistics. Any discrepancy between the demographic breakdown in such a general population and the demographic

breakdown for those applying to be a Custodian or CE proves nothing. *E.g.*, *Wards Cove*, 490 U.S. at 651 ("Measuring alleged discrimination in the selection of accountants, managers, boat captains, electricians, doctors, and engineers . . . by comparing the number of nonwhites occupying these jobs to the number of nonwhites filling cannery worker positions is nonsensical"); *id.* at 653-54 (using cannery workers as the relevant labor population for unskilled noncannery workers was improper because "the vast majority of these cannery workers did not seek jobs in unskilled noncannery positions"); *Watson*, 487 U.S. at 996 ("statistics based on an applicant pool containing individuals lacking minimal qualifications for the job would be of little probative value").

A further weakness of Dr. Ashenfelter's analysis is perhaps best illuminated by the rejection by the court below of objections that Native Americans made to the Settlement Agreement. They asserted that they should be included as Offerees. The court rejected those objections because "there has been no showing of disparate impact against them *as a result of the challenged examinations*." Accordingly, there is no appropriate basis to include them in the Agreement's remedial provisions." J.A. 406 (emphasis added). Of course, *precisely the same thing* could have been said about Asians and women. They were included as Offerees only because Dr. Ashenfelter included them in his "recruitment claim" analysis, and, presumably, Dr. Ashenfelter included them in his analysis only because the United States asked him to do so -- and did not include other groups because the United States did *not* ask him to include those other groups. If the "strong basis in evidence" of past discrimination depends upon the arbitrary

selection of groups to study, how "compelling" or "important" can the interest of the government be?

2. Narrow Tailoring. -- Assuming *arguendo* that the prima facie cases of testing and recruiting "disparate impact" discrimination were sufficient to create a compelling governmental interest in the race-conscious provisions of the Settlement Agreement, the remedy proposed by the promotions and retroactive grant of seniority are not narrowly-tailored. There is no effort to identify the current effects of the past discrimination -- that is, how many minorities or women were actually harmed by defendants' discriminatory acts or how many would be currently employed if job-related exams had been employed -- and to match the remedy to meet an identified discrepancy. The Offeree group has only modest overlap with the group that suffered discrimination by taking the discriminatory tests, and, presumably, no overlap with the group that suffered discrimination by not responding to the discriminatory recruiting practices. Moreover, although monetary benefits could have been awarded to the Offerees, the Settlement Agreement places

the burden of the remedial relief on innocent third parties who did not engage in discrimination. *People Who Care v. Rockford Bd. Of Educ.*, 111 F.3d 528, 533 (7th Cir. 1997) ("equitable decrees often affect innocent third parties; their interests must be fully considered in the formulation of the decree, especially when the interests are of constitutional dignity").

D. The Settlement Agreement Also Fails Under The Standard Of *Kirkland*

The court below relied heavily on *Kirkland*, a 1983 decision of this Court, and other, even older cases, in concluding that the race-conscious remedies here were entitled to a presumption of validity, and that the objectors had to overcome a heavy burden in challenging those remedies. As shown above, that simply is not the law any longer. Race-conscious remedies by state actors are subject to strict scrutiny, and those *defending* such action have to demonstrate that they can survive strict scrutiny. As shown above, a showing of prima facie disparate impact is no longer sufficient to establish the compelling governmental interest needed to pass strict scrutiny.

But even the much looser standards of *Kirkland* require reversal of the order approving the Settlement Agreement. First, in concluding that the Settlement Agreement did not trammel the rights of affected third parties, *Kirkland* relied heavily on the fact that the settlement agreement there did not interfere with any property right of any third party. *Kirkland*, 711 F.2d at 1134 ("the adjustment of the rank-ordering system does not deprive intervenors of any vested property right which they had under New York law"). Here, as shown previously, the Objecting Appellants' rights under the collective bargaining agreement to a particular process -- the "rating and transfer plan" under which each candidate's seniority is determined by the date of appointment as a permanent Custodian or CE -- has been affected. *Cf. United States v. City of Hialeah*, 140 F.3d 968, 975 (11th Cir. 1998) ("a consent decree requires the consent of all parties whose legal rights would be adversely affected by the decree").

City of Hialeah is a case on all fours. The United States there negotiated a settlement agreement with the City of Hialeah to settle a lawsuit claiming discrimination against African Americans in the city's police and fire departments based in part on the disparate impact of entry-level exams for those positions. The agreement (unlike the Settlement Agreement here) provided for \$ 450,000 in backpay for eligible claimants. It also required the City to hire thirty African Americans, 15 as police officers and 15 as firefighters, and to grant them retroactive benefit and competitive seniority based upon the date of their initial applications. Various individual police officers intervened, and objected to the grant of competitive seniority (where employees compete for benefits like shift assignments, promotions, and transfers) but not benefit seniority (which did not affect the intervenors). The intervenors participated in the fairness hearing concerning the settlement agreement, but were not allowed to present evidence. *Id.* at 972.

Relying heavily on the decision of the Fifth Circuit in *United States v. City of Miami*, 664 F.2d 435 (former 5th Cir. 1981) (en banc), the *City of Hialeah* court concluded that the prima facie case of discrimination presented by the United States was insufficient to support a settlement agreement that affected the contractual rights of third parties.⁸ *E.g.*, *City of Hialeah*, 140 F.3d at 978 ("an objecting party's rights [cannot] . . . be dispensed with upon nothing more than a prima facie showing of discrimination. Proof at trial is required.") The court concluded that the grant of retroactive seniority did affect the rights of the intervenors, rejecting the argument of the United States that it was "speculative" whether the retroactive grant would cause any of the intervenors to lose any specific job benefit. *Id.* at 982

⁸ In *Kirkland*, this Court also relied upon *City of Miami*, but distinguished it on the ground that (unlike in *City of Miami*) no contractual or other property rights were affected by the settlement agreement in *Kirkland*. See *Kirkland*, 711 F.2d at 1126-28.

("The objectors were not required to prove with certainty that particular employees would lose contractual benefits").

The Eleventh Circuit also rejected the argument of the United States that the policy favoring negotiation and settlement of Title VII claims, as well as the recognition that the Department of Justice represents all citizens, militated in favor of approval. *Id.* at 984. The court held:

These arguments are heavy with irony, given that the Department of Justice restricted its "negotiations" to the City, a party with no interest adverse to the Department's competitive seniority proposals. If the Department had been concerned about the interests of all citizens and had been interested in "negotiation" and "settlement" in the non-Orwellian sense, it would have attempted to reach an agreement with all of those whose rights were at stake. Instead, the Department disregarded the interests and rights of some parties based upon their race, and it asked a United States district court to do the same.

Id.

The Settlement Agreement here also fails the two-part test that *Kirkland* set out to determine whether race-conscious procedures avoid a disparate impact on any group: (1) whether they "mandate the appointment of members of the plaintiff-class *who are the victims of the defendant's discrimination*" and (2) whether "they calculate the number of victims to be appointed . . . by reference to the percentage of victims within the total applicant pool." *Kirkland*, 711 F.2d at 1134 (emphasis added). Here, the promotion and retroactive benefits of the Settlement Agreement are not limited to those who were the victims of the challenged civil service exams or recruiting practices. And there is no evidence that the parties ever bothered to calculate the number of victims within the applicant pool.

II.

THE COURT BELOW ERRED IN DENYING THE MOTION TO INTERVENE

"In order to establish a right to intervene under Rule 24(a)(2), a would-be intervenor must establish that its application is timely, that it has an interest in the subject of the action, that disposition of the action may as a practical matter impair its interest, and that representation of its interest by existing parties is inadequate."

H.L. Hayden Co. v. Siemens Medical Systems, Inc., 797 F.2d 85, 87-88 (2d Cir.

1986). A lower court's determination on the question of intervention is reviewed for

abuse of discretion. Either an error of law or a clear error of fact may constitute an

abuse of discretion. *Herman v. Davis Acoustical Corp.*, 196 F.3d 354, 356 (2d

Cir. 1999).

Here, the lower court erred as a matter of law in concluding that the Objecting Appellants lack the interest required by Rule 24(a)(2). Since the Objecting Appellants can meet each of the other requirements for intervention, the order denying intervention should be reversed.⁹

A. The Court Below Erred In Concluding That The Objecting Appellants Lacked The Interest Required By Rule 24(a)(2)

⁹ Obviously, to the extent that this Court agrees with Objecting Appellants that the race-conscious provisions in the Settlement Agreement should have been rejected outright, this Court need not reach the question of intervention. If, however, this Court believes that further proceedings are necessary, it should order the court below to allow the Objecting Appellants to intervene.

In the context of a motion to intervene pursuant to Rule 24(a)(2), "[t]he term 'interest' . . . defies a simple definition." *Restor-A-Dent Dental Laboratories v. Certified Alloy Products, Inc.*, 725 F.2d 871, 874 (2d Cir. 1984). The economic interests of a proposed intervenor have been held sufficient. *New York Public Interest Research Group, Inc. v. Regents of the University of the State of New York*, 516 F.2d 350, 352 (2d Cir. 1975) (fact that economic interests of the pharmacy profession could be affected by a change in a regulation which prohibits drug advertising was sufficient to constitute the requisite interest for purposes of intervention). This is so even if the economic interests would be insufficient to constitute an Article III "injury in fact." *United States Postal Service v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978) (postal employees' union had standing to intervene under Rule 24(a)(2) in suit by Postal Service seeking to enjoin small mail carrier from doing business; "there was no need to impose the standing requirement

[of Article III] upon the proposed intervenor"); *Grutter v. Bollinger*, 188 F.3d 394, 398 (6th Cir. 1999) ("an intervenor need not have the same standing necessary to initiate a lawsuit").

Here, the Objecting Appellants have two interests that actually satisfy Article III's "injury in fact" requirement, and, *a fortiori*, the requirement of Rule 24(a)(2): their interest in the right to equal treatment and their interest in the "ratings and transfer system" procedure contained in the collective bargaining agreement. The earlier discussion demonstrating that the Objecting Appellants have an "interest affected" by the order of the court below, sufficient to give them standing to appeal the order approving the Settlement Agreement, will not be repeated here. *See* discussion *supra*, pp. -. That discussion also demonstrates that the court below erred in concluding that the Objecting Appellants lacked the protectable interest required by Rule 24(a)(2). *Kirkland*, 711 F.2d at 1126 (although non-minorities "do not have a legally protected interest in the *mere* expectation of appointments," they do have "a sufficient interest to argue that the decree or agreement is unreasonable or unlawful" (emphasis in original)).

The court below tried to distinguish *Kirkland* by asserting that *Kirkland* permitted only conditional intervention, whereas the Objecting Appellants wanted unconditional intervention. J.A. 410-11 n.34. This distinction was both untrue and disingenuous. As already noted (pp. -, *supra*), and although the court below chose not to mention it, the Objecting Appellants agreed to limit their intervention to Paragraphs 14-16 of the Settlement Agreement (and provisions related thereto), as the United States requested. The United States did suggest several other conditions, which the Objecting Appellants did not accept: that the Objecting Appellants be limited to appealing any order approving the Settlement Agreement (*i.e.*, precluding the Objecting Intervenors from taking any discovery), that the intervention not cause any delay in approval, and that the Objecting Appellants only intervene as defendants. But it was disingenuous for the court below to rely upon the Objecting Appellants' failure to agree to all of these conditions because *the*

decision approving the Settlement Agreement had already rendered the first two of the those three conditions moot. At the time that the court below denied the motion to intervene, it would have been pointless for the Objecting Appellants to take any discovery to determine whether the Settlement Agreement could meet strict scrutiny, and intervention could not possible have delayed approval, because the Settlement Agreement already had been approved.¹⁰

¹⁰ Thus, at the time that the motion to intervene was denied, the only pertinent dispute between the United States and the Objecting Appellants was whether the latter should intervene as plaintiffs or defendants. Because the Objecting Appellants opposed the course of action that the defendants were about to take, they submitted a proposed complaint against the defendants pursuant to Rule 24(c), and thus characterized themselves as "plaintiffs." *Stallworth v. Monsanto Co.*, 558 F.2d 257, 262 (5th Cir. 1977) (in race discrimination case where defendant company settled case by abolishing certain seniority rights, court approves intervention of white non-union employees as plaintiffs).

In any event, the conditions the United States would have imposed were inappropriate. As shown previously, race-conscious remedies adopted pursuant to a consent decree are subject to strict scrutiny. Nonetheless, such questions as how many of the Offerees had taken any of the challenged civil service exams or the basis for Dr. Ashenfelter's assumptions concerning the relevance of general population statistics went unanswered in the court below. A "fairness" hearing in which the objecting parties get the relevant evidence just a few days before the hearing and have no opportunity to cultivate contrary evidence is hardly fair.¹¹

Assuming *arguendo* that the retroactive seniority provisions do not fail strict scrutiny on their face, the Objecting Appellants should have been given the opportunity to intervene and take a limited amount of discovery to assess whether the parties' defense could meet strict scrutiny. *Edwards v. City of Houston*, 78

¹¹ Other objectors first saw the parties' response to their objections at the fairness hearing itself. *See, e.g.*, J.A. 196, 199-202.

F.3d 983, 1003 (5th Cir. 1996) (en banc) ("the would-be intervenors had no adequate opportunity [at a fairness hearing] to set forth a factual basis for their challenges to the liability or remedial provisions in the Consent Decree"; they "did not have the benefit of prior discovery and were precluded from calling rebuttal witnesses of their own").

Cases from other circuits demonstrate that intervention has been permitted in cases very similar to this one. In *Edwards*, a consent agreement provided remedial promotions and retroactive seniority for African American and Hispanic police officers with the Houston Police Department (HPD). *Id.* at 991-92 & n.11. A police union whose members would be adversely affected by those promotions had the right to intervene under Rule 24(a)(2) because of its members' interest "in having equal access to a promotion system and promotion opportunities within the HPD . . . without reference to race, color, or national origin." *Id.* at 1004. *See also Grutter v. Bollinger*, 188 F.3d 394, 398-99 (6th Cir. 1999) (in suit by white students claiming that university's admissions policies discriminated against them on basis of race, groups representing African American and Latino students had a sufficient interest under Rule 24 in the increased chances for admission and resulting additional educational opportunity that a race-conscious admissions policy would

afford those students); *Howard v. McLucas*, 782 F.2d 956, 959 (11th Cir. 1986)

(proposed consent order creating system whereby members of African American

plaintiff class would receive 240 target promotions at air force base was sufficient

to give white and non-black employees the necessary interest to intervene).¹²

B. The Other Rule 24(a)(2)
Factors Were All Met

The court below made no effort to rebut the Objecting Appellants' demonstration that their motion was timely and that they met the other requirements of Rule 24(a)(2). Rather, it relied only on the absence of a protectable interest in denying the Objecting Appellants' motion to intervene. In fact, the other requirements for intervention as of right were met.

¹² The court below quickly brushed aside cases like *Howard v. McLucas* by asserting that the "school transfers at issue here are wholly distinguishable from the promotion routes to higher titles that were at issue" in cases like *McLucas*. J.A. 412, n.35. It is true that school transfers and promotions are different job benefits. It is unclear why that makes them "wholly distinguishable" from one another for purposes of intervention. (And, of course, the Settlement Agreement here does provide for promotions for provisional Custodians and CEs.)

The Settlement Agreement was first proposed in February 1999. Although there were some initial news accounts of the proposed Settlement Agreement shortly thereafter, current Custodians and CEs were not provided with copies of the agreement and a description of its terms until after the court below granted the joint motion for a fairness hearing. The Objecting Appellants received copies of the Settlement Agreement on March 18, 1999. J.A. 169. They began to seek legal assistance -- *pro bono* since they could not afford an attorney. A motion to intervene was made on May 4, 1999, 47 days later. Under the circumstances, that motion was timely. *United States v. Yonkers Bd. of Education*, 902 F.2d 213, 218 (2d Cir. 1990) (where district court in school desegregation case ordered defendants to consider one of two sites for a new junior high school in March 1988, and the site selected shortly thereafter required that its dedication for park use be discontinued by state legislature, and where court ordered that site be

discontinued as park land on June 30, 1989, motion to intervene by those objecting to circumvention of state legislative process, made 59 days later, on August 28, 1989, was timely). Moreover, since the parties at the time were simply preparing their papers to support the Settlement Agreement and in response to objections, they could not have been prejudiced by the short delay by the Objecting Appellants in moving subsequent to receiving the Settlement Agreement in mid-March.

Edwards, 78 F.3d at 1002.

The Objecting Appellants' interest can be, and will be, impaired by a judgment in this case because 42 U.S.C. § 2000e-2(n) could preclude them from making a subsequent challenge. *Edwards*, 78 F.3d at 1005. Indeed, a failure to permit the Objecting Appellants to intervene, combined with the preclusive effect of Section 2000e-2(n), would violate their rights to due process under the Fourteenth Amendment. *Cf. Edwards*, 78 F.3d at 1002 n.25.

Finally, it is plain that none of the existing parties is adequately representing the Objecting Appellants' interests. The existing parties support the Settlement Agreement, including its provisions governing retroactive seniority. *Id.* at 1005.

Conclusion

For the foregoing reasons, the February 9 Order, to the extent it approved the Settlement Agreement, should be modified so that approval is withheld from the provisions providing for promotions and retroactive seniority. In the alternative, the February 9 Order should be vacated to the extent it approved the Settlement Agreement and reversed to the extent it denied the Objecting Appellants' motion to intervene, so that the lower court can consider the propriety of the retroactive seniority provisions after the Objecting Appellants have been given the opportunity to take discovery and present evidence.

Respectfully submitted,

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Certificate of Compliance

I certify that:

Pursuant to Fed. R. App. P. 32(a)(7)(C), the attached brief is proportionately spaced, has a typeface of 14 points or more and contains 11,781 words.

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I hereby certify that I served the foregoing Intervenors-Appellants' Brief by placing two copies in two separate envelopes, and depositing each envelope in a

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