00-6077

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Intervenors-Appellants,

v.

NEW YORK CITY BOARD OF EDUCATION, NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES, and WILLIAM J. DIAMOND, DIRECTOR, NEW YORK CITY DEPARTMENT OF PERSONNEL (in his official capacity),

Defendants-Appellees,

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

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

INTERVENORS-APPELLANTS' REPLY BRIEF

Michael E. Rosman
CENTER FOR INDIVIDUAL RIGHTS
1233 20th Street, N.W.
Suite 300
Washington, D.C. 20036
(202) 833-8400

George W.C. McCarter
McCARTER & HIGGINS
39 Avenue of the Commons
Suite 200
Shrewsbury, NJ 07702
(732) 544-5050

Table Of Contents

Table Of Contents i

Table Of Authorities iii

Preliminary Statement 1

Argument 2

I. THE OBJECTING APPELLANTS HAVE A SUFFICIENT INTEREST TO APPEAL AND INTERVENE 2

A. The Objecting Appellants Possess The Necessary Interests 3

B. Appellees' Cases And Other Arguments Fail To Refute The Existence Of An Interest 10

II. THE CITY DEFENDANTS ERR IN ASSERTING THAT THEY ADEQUATELY REPRESENT THE OBJECTING APPELLANTS' INTERESTS 13

III. THE RACE-CONSCIOUS PROVISIONS OF THE SETTLEMENT AGREEMENT ARE INVALID UNDER ANY STANDARD 17

A. Strict Scrutiny Is Applicable And The Lower Court Failed To Apply It 18

B. The Race-Conscious Provisions Of The Settlement Agreement Cannot Meet Strict Scrutiny 20

1. Compelling Interest 20

2. Narrow Tailoring 26

C. The Settlement Agreement Fails Even Under The Looser Standards of *Kirkland* 30

Conclusion 32

Table Of Authorities

Cases

Acha v. Beame, 531 F.2d 648 (2d Cir. 1976) 32

Adarand Constructor, Inc. v. Pena, 515 U.S. 200 (1995) 19

Aiken v. City of Memphis, 37 F.3d 1155 (6th Cir. 1994) (en banc) 21, 23

Brewer v. West Irondequoit Central School Dist., 2000 WL 641052 (2d Cir May 11, 2000) 19

California Democratic Party v. Jones, 2000 WL 807188 (U.S. June 26, 2000) 6

Chance v. Bd. of Examiners, 534 F.2d 993 (2d Cir. 1976) 13, 31, 32

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 24, 30

Daggett v. Commission on Governmental Ethics and Election Practices, 172 F.3d 104 (1st Cir. 1999) 4

Edwards v. City of Houston, 78 F.3d 983 (5th Cir. 1996) (en banc) 17

Ensley Branch, N.A.A.C.P. v. Seibels, 31 F.3d 1548 (11th Cir. 1994) 21, 22

Equal Employment Opportunity Commission v. Local 638, 532 F.2d 821 (2d Cir. 1976) 15, 28

Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) 15

Hayden v. County of Nassau, 180 F.3d 42 (2d Cir. 1999) 18, 19

Hispanic Society of the New York City Police Dep't v. New York City Police Department, 806 F.2d 1147 (2d Cir. 1986) 11

Ingram v. Madison Square Garden Center, Inc., 482 F. Supp. 918 (S.D.N.Y. 1979) 30

Kaplan v. Rand, 192 F.3d 60 (2d Cir. 1999) 10

Kirkland v. New York State Dep't of Correctional Services, 711 F.2d 1117 (2d Cir. 1983) . . . . . 13, *passim.*

Lorance v. AT&T Technologies, 490 U.S. 900 (1989) 7

Mausolf v. Babbitt, 85 F.3d 1295 (8th Cir. 1996) 4

Middleton v. City of Flint, 92 F.3d 396 (6th Cir. 1996) 24, 25

Purnell v. City of Akron, 925 F.2d 941 (6th Cir. 1991) 16

Rodriguez v. Bd. of Ed. of Eastchester Union Free School District, 620 F.2d 362 (2d Cir. 1980) 12

Ruiz v. Estelle, 161 F.3d 814 (5th Cir. 1998) 4

Spagnuolo v. Whirlpool Corp., 717 F.2d 114 (4th Cir. 1983) 15

United States Postal Service v. Brennan, 579 F.2d 188 (2d Cir. 1978) 4

United States v. City of Hialeah, 140 F.3d 968 (11th Cir. 1998) 7, 8, 31

United States v. City of Miami, 664 F.2d 435 (5th Cir. 1981) 7

United States v. New York, 820 F.2d 554 (2d Cir. 1987) 5

United States v. Union Electric Co., 64 F.3d 1152 (8th Cir. 1995) 14

United States v. Virginia, 518 U.S. 515 (1996) 20

Vulcan Society of the New York City Fire Department v. City of New York, 96 F.R.D. 626 (S.D.N.Y. 1983) 30

Statutes And Rules

Civil Rights Act of 1964, Section 707 23

Rule 24(a)(2) 3, 4, 13

Other

7C Charles A. Wright, et al., *Federal Practice And Procedure* § 1909 (2d ed. 1986) 14

Exec. Order 11126 12

Preliminary Statement

The Objecting Appellants' initial brief ("Opening Br.") demonstrates that the Settlement Agreement's bestowal of benefits upon certain Custodians and CEs, based solely on the recipients' race or sex, is (to say the least) shaky as a matter of law. Nonetheless, the brief ("U.S. Br.") of plaintiff-appellee United States and the brief ("Dfs' Br.") of the various defendants-appellees associated with New York City (the "City Defendants") spend relatively little space addressing the propriety of those provisions of the Settlement Agreement, and what they do say does not address many of the arguments the Objecting Appellants made or the questions about the Settlement Agreement's provisions that their initial brief posed. Rather, the United States and the City Defendants spend most of their effort trying to prevent this Court from reaching the merits of the remedial provisions in question. They assert that the Objecting Appellants have no right to make these arguments

here, have no right to intervene in the court below, and, in any event, waived the arguments by not setting them forth in detail at the fairness hearing that took place a few days after they were given the parties' evidence supporting approval of the Settlement Agreement.

As shown below, these arguments are without merit. The fact that these arguments are the cornerstone of the appellees' opposition to this appeal, however, only underscores the importance of the Objecting Appellants' participation. The parties would sweep every possible problem with the Settlement Agreement under the rug and have this Court (like the court below) approve their handiwork with little or no scrutiny. Someone has to identify the legal flaws with their approach, and right now the Objecting Appellants are the only ones who will do so. For that reason alone, this Court should reject the appellees' various procedural arguments, insist upon reaching the merits of the substantive issues raised, and carefully

scrutinize the provisions of the Settlement Agreement in question. Those provisions cannot be justified.

Argument

I.

THE OBJECTING APPELLANTS HAVE A SUFFICIENT INTEREST TO APPEAL AND INTERVENE

As shown in the Objecting Appellants' initial brief, their interests in the controverted provisions of the Settlement Agreement are sufficient for both appeal and intervention. The United States and the City Defendants do not distinguish between the Objecting Appellants' interests for purposes of appeal and for purposes of intervention (*e.g.*, U.S. Br. 33-34) -- indeed, the City Defendants do not discuss the Objecting Appellants' standing to appeal at all -- and, accordingly, their arguments on both will be considered together.

A. The Objecting Appellants Possess The Necessary Interests

In their initial brief, the Objecting Appellants demonstrate that their interests and legal rights are sufficient to (1) provide them with standing to appeal the lower court's approval of the settlement and (2) constitute the "protectable interest" needed for purposes of intervention under Rule 24(a)(2). Opening Br. 23-33; 51-55. In response, the United States and the City Defendants either literally ignore the interests identified in the opening brief or suggest distinctions that are just wrong as a matter of law.

The Objecting Appellants' initial brief identified two interests: (1) the right to equal treatment, repeatedly identified by recent Supreme Court decisions as sufficient to constitute the "injury in fact" needed for standing under Article III and (2) the contractual interest in the ratings and transfer system adopted in the Collective Bargaining Agreement, wherein seniority is an important (and usually

dispositive) factor in the competition among Custodians and CEs for various schools. Opening Br. 25-28.

With respect to the interest in equal treatment, the City Defendants entirely ignore it. The United States, on the other hand, while not disputing that such an interest is satisfactory for "injury in fact" purposes under Article III, asserts that the interest is still insufficient to constitute an "affected interest" for purposes of appeal. U.S. Br. 35-36. It thus suggests that the "affected interest" requirement (or the "protectable interest" requirement under Rule 24(a)(2)) presents a *higher* standard than the "injury in fact" standard under Article III. This is simply wrong. It is true that the circuit courts have generally split over whether an Article III "injury in fact" is *necessary* to meet the "substantial protectable interest" standard under Rule 24(a)(2). *Daggett v. Commission on Governmental Ethics and Election Practices*, 172 F.3d 104, 109 & n.1 (1st Cir. 1999) ("the circuits are divided as to whether an

intervenor as of right must possess standing under Article III" and citing cases).[1] But an Article III "injury in fact" is considered *sufficient*, and the United States cites no authority to suggest that a harm to an interest meeting Article III's "injury in fact" requirement would be insufficient for appeal or intervention. *See* Opening Br. 54-55.[2]

With respect to the Objecting Appellants' contractual interest in the ratings and transfer system, neither of the appellees bothers to dispute that the Objecting Appellants have such an interest, and that the Settlement Agreement will impair that

---

[1] This Court's opinion in *United States Postal Service v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978) is cited for the proposition that this Court does *not* require Article III "injury in fact" for intervention purposes. *Ruiz v. Estelle*, 161 F.3d 814, 832 (5th Cir. 1998) (following the "better reasoning" in, *inter alia*, this Court's *Brennan* decision); *Mausolf v. Babbitt*, 85 F.3d 1295, 1299 (8th Cir. 1996).

[2] The United States' citation of *United States v. New York*, 820 F.2d 554 (2d Cir. 1987) (U.S. Br. 27) is puzzling. That case specifically recognized -- albeit in *dicta* because the judgment denying a motion to intervene had been affirmed on timeliness grounds -- that a white applicant had a "direct and protectable interest in not being foreclosed from employment as a trooper on account of race." *Id.* at 558. The Court simply noted that the applicant "appear[ed]" to lack the requisite interest *for other reasons*, to wit, that he was ineligible because of his age. *Id.*

interest. Rather, regurgitating the opinion of the lower court, they repeat the mantra that the likelihood that this will affect the ultimate outcome of the Objecting Appellants' future applications for transfers (or, as a variation, affect the Objecting Appellants' salary) is "contingent" and "remote." *E.g.*, U.S. Br. 21, 25-26, 30, 34; Dfs' Br. 10, 14, 16, 17. As shown below, this is just factually false because it fails to consider the multiple transfer applications that can be made each year. But even if it were true, a contract right is still a contract right. The likelihood that a fire insurance contract will benefit the insured may be fairly small -- it would require a fire, after all, that destroys covered property -- but it is hardly a meaningless contract right. No one plausibly could argue that the insured would not have a significantly protectable interest in a lawsuit whereby his or her fire insurance contract might be modified or declared void. No one should plausibly argue that

the Objecting Appellants do not have a significantly protectable interest in their contract rights.

Appellees' argument confuses a remote or contingent *interest* with a substantial legal interest that may have a remote or contingent *payoff*. A non-legal interest in a particular price for a product (*e.g.*, Dfs' Br. 15) might be contingent because there are a series of outside influences that might affect the price. But here, the Objecting Appellants have a substantial *legal* interest in both equal treatment and their contract rights, and the Settlement Agreement directly affects those interests. It is true that no one knows for sure whether the vindication of those legal interests ultimately will result in job benefits for the Objecting Appellants, just as no one knows for sure whether a fire insurance contract ultimately will be needed to replace fire-damaged property or whether a political party's First Amendment right to exclude non-party members from its primaries (*California Democratic Party v.*

Jones, 2000 WL 807188 (U.S. June 26, 2000)) ultimately will help it win an election. That hardly makes the *rights* involved contingent.

Curiously, neither the United States nor the City Defendants cite (much less distinguish) *Lorance v. AT&T Technologies*, 490 U.S. 900 (1989), cited and discussed at length in Objecting Appellants' initial brief. Opening Br. 31-32. That case demonstrates that an injury to legal interests occurs with the initial implementation of a discriminatory change to a seniority system. Appellees' failure to deal with it at all is telling.

Although not directly related to the existence of the necessary "interest" to appeal or intervene, *United States v. City of Hialeah*, 140 F.3d 968, 982 (11th Cir. 1998) is also instructive.[3] There, the Court, relying upon *United States v. City of*

---

[3] The United States treats *City of Hialeah* as if it were a case about the interest needed to intervene or appeal, and, accordingly, we respond to the argument on those terms. U.S. Br. 29-30. In fact, *City of Hialeah* supports the proposition (for which the Objecting Appellants cited it) that the Settlement

(continued...)

Miami, 664 F.2d 435 (5th Cir. 1981), held that provisions of a consent decree awarding retroactive seniority to minority police officers and firefighters could not be approved, and that it did not matter if "it was impossible to determine in advance which -- *or even that* -- [other] officers would be affected by the change; the *mere threat of injury to contractual rights [is] sufficient*." *City of Hialeah*, 140 F.3d at 982 (emphasis added). The United States tries to distinguish *City of Hialeah* on the ground that the lower court here concluded that it was "contingent" that the Objecting Appellants' ultimate success in obtaining a transfer would be affected by the Settlement Agreement. U.S. Br. 30. As the italicized quote demonstrates, it is a "distinction" that simply does not distinguish. *See also City of Hialeah*, 140 F.3d at 982 (assertion that "incumbent employees `may even be slightly diminished in

---

(...continued)

> Agreement should not be approved because it undermines the contractual rights of innocent third parties without any evidentiary hearing. Opening Br. 46-48.

their contract rights'" by the award of retroactive seniority to others "is akin to saying that the rights of a pedestrian in a crosswalk may be slightly diminished by a runaway truck").

The appellees even ignore the factual refutation that the Objecting Appellants set forth to the irrelevant "contingency" argument appellees rely upon. As pointed out in our initial brief, the transfer lists are issued five times per year, and any Custodian or CE can make many applications every year. If the number of Offeree Custodians will constitute nearly 10% of the total number of permanent Custodians (U.S. Br. 48), it is hardly a "remote" possibility that the Objecting Appellants will compete with one of the Offerees for a particular transfer at some time in the future. Opening Br. 30-31.[4]

---

[4] Indeed, the United States adds a fact that further supports the likelihood of the Objecting Appellants' being disadvantaged by the Settlement Agreement. According to the United States, performance ratings are considered in determining who obtains a transfer only where "more than one employee

(continued...)

The United States and the City Defendants also ignore the limitations in Dr. Siskin's analysis, which at best demonstrated a weak correlation between seniority and *salary*. Opening Br. 15. Nothing in that analysis refutes a correlation between seniority and *total job benefits*. To the contrary, the United States apparently concedes that employees can and will trade salary for other kinds of job benefits, like working at a prestigious or convenient school. U.S. Br. 48 ("[C]ustodians and custodian engineers might not always bid for the largest school on any particular transfer list; rather, some incumbents may, in fact, bid for smaller schools because of other personal factors, such as proximity of the school to the incumbent's residence"). That, of course, only further underscores that the Settlement

---

(...continued)

> *within the same five-year seniority band* bids to transfer to a school" (U.S. Br. 9 (emphasis added)). *See also* Dfs' Br. 17 (describing circumstances under which Offeree would "take precedence *invariably* over an appellant" (emphasis added)); J.A. 137, 376 (seniority dispositive of the competition 90% of the time).

Agreement has diminished the Objecting Appellants' *contract rights* -- rights that can be used however the owner of them deems proper, be it for salary or some non-pecuniary benefit.

B. Appellees' Cases And Other Arguments Fail To Refute The Existence Of An Interest

The other arguments that the United States and the City Defendants make concerning both the existence of an "affected interest" for purposes of appeal and the existence of a "significantly protectable interest" for purposes of intervention are easily refuted.

The United States claims that *Kaplan v. Rand*, 192 F.3d 60 (2d Cir. 1999), a case discussed at great length in the Objecting Appellants' initial brief (Opening Br. 24-33), is distinguishable because of the remote nature of the Objecting Appellants' interests (a contention already discussed at length) and because "there is no evidence that the United States and the City engaged in any form of collusion." U.S. Br. 34. But it cites nothing from *Kaplan* that suggests that "collusion" between the parties is a prerequisite for a non-party to obtain standing to appeal, and there is, in fact, nothing in that case to suggest anything like that. *Kaplan* mentioned only a "mutual indulgence," *i.e.*, the parties' natural desire to support the agreement that they worked to reach.

The United States claims that the Objecting Appellants have no interest as provisional CEs in the Settlement Agreement because they have no vested interest in a permanent CE position. U.S. Br. 27-28. But shortly thereafter, the United States concedes that the grant of permanent status as CEs to some of the Offerees affects the Objecting Appellants. U.S. Br. 28-29 (any interest in the grant of permanent status "must be limited to the grant of permanent status to custodian engineers, and not to custodians"). It is quite true that, by favoring some applicants for the permanent CE positions based solely upon race or sex, the Settlement Agreement implicates the Objecting Appellants' right to equal treatment. (Indeed, it is not clear which, if any, of the Offerees made permanent CEs by the Settlement Agreement previously had expressed an interest in applying for that position by taking examination 7004 as Objecting Appellants Brennan and Ahearn did. J.A. 346, ¶ 15.)

The United States also cites *Hispanic Society of the New York City Police Dep't v. New York City Police Department*, 806 F.2d 1147 (2d Cir. 1986) as an "analogous" case (U.S. Br. 34-35), but its extended discussion does not bother to refute the distinction of that case in the Objecting Appellants' initial brief. Opening Br. 28 n.5. The interests present here were not present in *Hispanic Society* and/or had not been fully developed in the law at the time of the decision.

The City Defendants assert that a transfer to another school "is not a promotion in the traditional sense of the word." Dfs' Br. 16.[5] But whether it is a "promotion" or not is irrelevant; it is a job benefit. The ability to transfer (which increases with seniority) may be used by a Custodian or CE to obtain more money or work at a more prestigious or convenient school. The fact that there is a contractually-defined system for resolving the competition among Custodians and CEs for transfers demonstrates that it is a valuable job benefit. *Cf. Rodriguez v. Bd. of Ed. of Eastchester Union Free School District*, 620 F.2d 362, 365-66 (2d Cir. 1980) (school board's transfer of art teacher from junior high school to elementary school constituted interference with a privilege of employment despite the fact the transfer did not diminish teacher's salary, benefits, or seniority rights, or increase her workload; "[r]egardless of whether a higher wage-rate is at issue,

---

[5] They apparently do not dispute that the grant of permanent status to provisional employees *is* a "promotion in the traditional sense of the word."

female teachers have the statutory right to compete on an equal basis with their male counterparts throughout the entire school system"); Exec. Order 11126 (government contracting agencies required to include in their contracts that contractor will not discriminate in "employment, upgrading, demotion, or transfer").

Finally, both the United States and the City Defendants cite this Court's decision in *Kirkland v. New York State Dep't of Correctional Services*, 711 F.2d 1117 (2d Cir. 1983). U.S. Br. 28; Dfs' Br. 14. But, as set forth in the Objecting Appellants' initial brief, this Court *permitted* intervention in *Kirkland*. Opening Br. 28-29, 51-52. *See also, e.g.*, *Chance v. Bd. of Examiners*, 534 F.2d 993, 996 (2d Cir. 1976) (where "excessing" plan (*i.e.*, plan for laying off employees) changed "last hired first fired" rule to rule requiring racial proportionality, union representing employees allowed to intervene). Appellees have no explanation for that result, and make no attempt at all to defend the lower court's weak effort to distinguish *Kirkland*. Opening Br. 52.

II.

THE CITY DEFENDANTS ERR IN ASSERTING THAT THEY ADEQUATELY REPRESENT THE OBJECTING APPELLANTS' INTERESTS

The United States does not dispute that plaintiffs have met the remaining three elements required under Rule 24(a)(2). The City Defendants dispute only the Objecting Appellants' demonstration that their interests are not being adequately represented by the parties here. Dfs' Br. 17-19. That contention is meritless.

Remarkably, the City Defendants claim that *they* are adequately representing the Objecting Appellants' interests in this litigation -- despite the fact that they take precisely the opposite position on the only relevant issue remaining, the propriety of the Settlement Agreement's race-conscious promotions and grants of retroactive seniority. This alone is sufficient to demonstrate the inadequacy of their representation. *See United States v. Union Electric Co.*, 64 F.3d 1152, 1170 (8th Cir. 1995) (interests of non-settling individuals potentially responsible for CERCLA clean up costs and whose right to contribution would be extinguished by Consent Decree not adequately represented; "Both the existing plaintiffs and existing defendants have an interest in entry of the Consent Decree that is contrary to the interest of the intervenors who oppose entry of the Consent Decree on the ground that it is unfair to them"); 7C Charles A. Wright, *Federal Practice And Procedure*, § 1909 at 319-21 (2d ed. 1986) ("An interest that is not represented is surely not

adequately represented and intervention must be allowed . . . Almost as easy to resolve are the cases in which the party who may, in some senses, represent the absentee also is adverse to the absentee. The absentee cannot be required to look for adequate representation to one who is his opponent").

The City Defendants specifically claim that they "actively defended the appellants' most essential interest -- their permanent appointment as school custodians." Dfs' Br. 18. But that hardly required much "active defending." The law is clear that even a court does not have the power to remove incumbent employees from their jobs as a remedy for discrimination under Title VII. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 579 n.11 (1984) ("Lower courts have uniformly held that relief for actual victims does not extend to bumping employees previously occupying jobs"); *Equal Employment Opportunity Commission v. Local 638*, 532 F.2d 821, 830 (2d Cir. 1976) (reversing district court order requiring removal of one member of union-industry committee that oversees a training program for apprentices and replacing him with a minority representative; "[t]his is . . . a quota which must be met by replacing (or, in the parlance of the trade, by `bumping') a white incumbent from the [committee]. This

is forbidden by Title VII and the law of this circuit"); *Spagnuolo v. Whirlpool Corp.*, 717 F.2d 114, 121 (4th Cir. 1983) ("This review of our previous cases makes clear that the district court's authority in preparing a scheme whereby relief will be provided to injured employees does not, in the first instance, extend to ordering the displacement or bumping of incumbent employees"). The City Defendants, then, want credit for managing to "win" something for the Objecting Appellants they could not possibly have lost.[6]

[6] In contrast, and as noted in the Objecting Appellants' initial brief, the City Defendants did manage to avoid expending any money for backpay, despite the fact that backpay is a normal and usual form of relief in Title VII cases. Opening Br. 33.

In any event, even if the City Defendants actually had managed to defend something at risk for the Objecting Appellants, that would hardly make their representation adequate for purposes of approving the Settlement Agreement. *E.g.*, *Purnell v. City of Akron*, 925 F.2d 941, 950 (6th Cir. 1991) (although parties agreed that estate administrator would adequately represent interests of illegitimate children in Section 1983 claim against city for violation of deceased's constitutional rights, he would not adequately represent their interests in state wrongful death claim because paternity had not yet been established and recovery depended upon individual circumstances; "[i]nterest need not be wholly `adverse' before there is a basis for concluding that existing representation of a `different' interest may be inadequate" (citations omitted)). The City Defendants claim that the Rule 24 requirement that the interest should "relate to the property or transaction which is the subject of the action" really means that adequacy of representation must be

considered only with respect to all possible interests of the potential intervenors. Dfs' Br. 18. That contention is unsupported by any case, including the unreported Southern District case they cite.

Finally, the City Defendants' effort to distinguish *Edwards v. City of Houston*, 78 F.3d 983 (5th Cir. 1996) (en banc) is to no avail. Dfs' Br. 19. The court there examined a specific paragraph of a consent decree that precluded airport police from transferring to become "Class A" police officers. An organization representing airport police sought to intervene, and the court held that "it is clear" that the parties, all of whom sought to uphold the consent decree, did not "represent the interest sought to be protected by the [organization]." *Id.* at 1005. The holding was not predicated on any analysis of how hard the defendants had challenged the underlying claims of discrimination that led to the consent decree.

III.

THE RACE-CONSCIOUS PROVISIONS OF THE SETTLEMENT AGREEMENT ARE INVALID UNDER ANY STANDARD

In their initial brief, the Objecting Appellants demonstrate that the provisions granting permanent status to certain provisional employees, identified solely on the basis of race and sex, and the grant of retroactive seniority to those and certain already-permanent employees, again identified solely on the basis of race and sex, were invalid (1) under the strict scrutiny analysis applicable to race-conscious settlement agreements and (2) even under the standard of *Kirkland*, 711 F.2d at 1117. The United States and the City Defendants argue to the contrary, but their arguments cannot withstand scrutiny.

A. Strict Scrutiny Is Applicable And The Lower Court Failed To Apply It

The Objecting Appellants' initial brief (pp. 33-34) demonstrates that strict scrutiny must be applied to the grant of benefits for racial reasons in the Settlement Agreement. The United States concedes that this is so. *E.g.*, U.S. Br. 37 ("Under the Equal Protection Clause, courts must apply strict scrutiny to government classifications based on race, including such race-conscious classifications voluntarily implemented by a public employer in a consent decree").

The City Defendants, however, claim that strict scrutiny is inapplicable because it is only applied to certain "select" affirmative action tools. Dfs' Br. 12 (citing *Hayden v. County of Nassau*, 180 F.3d 42, 49 (2d Cir. 1999)). In fact, courts must apply strict scrutiny whenever race is used as a criterion for the distribution of a government benefit. *Adarand Constructor, Inc. v. Pena*, 515 U.S. 200, 227 (1995) ("all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny"); *Brewer v. West Irondequoit Central School Dist.*, 2000 WL 641052, *6 (2d Cir May 11, 2000) ("Strict scrutiny applies to all government classifications based on race"; strict scrutiny applied to program which took race into account in permitting interdistrict student transfers).

There were no racial preferences at all in *Hayden*; rather the defendant police department there simply designed an entrance exam so as to minimize adverse racial impact. No selections of police candidates were made based upon race. Here, in contrast, it is undisputed that most of the Offerees were chosen because of their race (and the others were chosen because of their sex). J.A. 55 (Settlement Agreement ¶ 4) ("Offerees" defined to include only "black, Hispanic, Asian, or female" Custodians or CEs). Strict scrutiny is applicable.

Although the lower court never used the words "strict scrutiny" or "compelling interest," or made any overt attempt to apply "strict scrutiny," the United States bravely attempts to reinterpret the lower court's opinion and to suggest that the requisite factual findings and conclusions of law were made. U.S. Br. 38 n.3. Taking snippets of the opinion out of context, though, cannot change its basic thrust. Rather than apply the skepticism to racial classifications that strict scrutiny requires, the court below applied a presumption of validity (enhanced by the presence of the United States Department of Justice) and required the Objecting Appellants (and other objectors) to overcome a heavy burden. J.A. 371-72.

B. The Race-Conscious Provisions Of The Settlement Agreement Cannot Meet Strict Scrutiny

The Objecting Appellants' initial brief demonstrates that the race-conscious provisions of the Settlement Agreement cannot meet strict scrutiny (and the sex-conscious provisions cannot meet the standard of *United States v. Virginia*, 518 U.S. 515 (1996)). The United States is the only appellee that makes any effort to show that those provisions can meet strict scrutiny, and its arguments are unsupported by the cases it cites and the facts of this case.

1. Compelling Interest. -- The Objecting Appellants' initial papers demonstrate that a prima facie case of unintentional disparate impact discrimination -- which can be shown simply by demonstrating that some hiring or promotion criterion selects candidates in a way different from pure racial proportionality -- cannot be the "compelling interest" that justifies the use of racial preferences. Opening Br. 37-39. The United States cites cases only for the proposition that "statistical evidence" can provide the strong basis in evidence that would justify a race-conscious selection procedure. U.S. Br. 39.

The statistical evidence described in the cases cited by the United States, though, is more than simply statistics showing that a test or criterion has a disparate impact. Rather, those cases demonstrate that *certain kinds* of statistical evidence -- specifically, statistics demonstrating a gross disparity in the demographic breakdown between *qualified* applicants and the demographic breakdown of those actually hired -- can suggest *intentional* racial discrimination. *E.g., Aiken v. City of Memphis*, 37 F.3d 1155, 1163 (6th Cir. 1994) (en banc) (gross disparity between proportion of qualified minorities and proportion of minorities actually hired constitutes "proof . . . to demonstrate *intentional* discrimination in the selection of minorities to those particular positions" (emphasis added)); *Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1565 (11th Cir. 1994) (race-conscious decisions can be justified by disparity between proportion of minorities hired and

those "willing *and able* to do the work" (emphasis added)).[7] Even when such evidence is presented, it is not conclusive; those challenging race-conscious

---

[7] Thus, *Ensley Branch* does not, as the United States suggests, support the proposition that "showing that a challenged employment procedure has a disparate impact is a sufficiently firm basis for adopting narrowly tailored race-conscious remedial measures." U.S. Br. 39. In fact, a careful reading of the case demonstrates that it stands for precisely the opposite proposition.

At another point in the decision, not cited by the United States, the *Ensley Branch* court does hold that proof of all elements of a disparate impact claim -- *i.e.*, a showing that a hiring criterion has a disparate impact *and* the absence of any showing that the criterion is job-related -- can support race-conscious remedial measures. *Ensley Branch*, 31 F.3d at 1554, 1565-66 (where police officer and firefighter tests had adverse impact and failed to meet "job relatedness" requirement, they discriminated against minorities and could be used as the basis for a compelling governmental interest). In this respect, *Ensley Branch* is inconsistent with the authorities cited on pages 39-40 of the Objecting Appellants' initial brief, and we respectfully disagree with its holding. But even *Ensley Branch* recognizes that mere disparate impact is insufficient. In addition to the police and fire departments, the consent decree in *Ensley Branch* also implemented racial preferences in other areas of municipal employment, and relied upon the adverse impact of various requirements and written tests used for the selection of employees in those areas. Some of those selection procedures plainly did have an adverse impact on minorities. *Id.* at 1556 (various selection devices "defended on the grounds that these practices either had no adverse impact upon blacks or women, *or* were sufficiently job-related to be effective predictors of future job performance" (emphasis added)); *id.* at 1574 (only two-thirds of the written tests employed in 1991 had no disparate impact on the passing rate of blacks). Despite this "prima facie" showing of disparate impact discrimination, the *Ensley Branch* court held that there was *no evidence* of "past discrimination" sufficient to constitute a compelling government interest outside the police and fire departments. *Id.* at 1567.

government programs should be given the opportunity to rebut the inference of intentional discrimination that such raw statistics imply. *Aiken*, 37 F.3d at 1163.

Although it brought this action as a "pattern or practice" claim under Section 707 of Title VII, the United States never pursued any claim for intentional discrimination in this lawsuit. Opening Br. 6-8. Moreover, statistics showing the disparate impact of a single selection criterion or test, as the United States relies upon here, cannot meet the standard for statistics suggesting intentional discrimination. Most obviously, not everyone who fails to meet the selection criterion or pass the test is a "qualified" member of the labor force. (This is especially true if the test or criterion is job-related, the issue that the court below never considered.) And not everyone who meets the criterion or passes the test is necessarily hired.

With respect to the so-called "disparate impact in recruiting" evidence from Dr. Ashenfelter, the Objecting Appellants' initial brief demonstrates that the analysis fails to identify any recruiting practice with a disparate impact and completely ignores the relevant qualifications for Custodians and CEs in creating a qualified labor pool for comparison purposes. Opening Br. 13-15, 40-43. Remarkably, the United States does not even *bother* to defend Dr. Ashenfelter's improper selection of the relevant qualified pool. Indeed, to the contrary, it proceeds to identify *other* job requirements that Dr. Ashenfelter apparently was not even aware of. U.S. Br. 6-7 ("Custodians must have a high school diploma"). *Compare* J.A. 116, ¶ 5 (Dr. Ashenfelter testifying that "[t]here was no fixed education requirement").

Instead of defending Dr. Ashenfelter's creation of a relevant qualified labor pool through improper general population statistics, the United States simply asserts that the lower court's wholesale adoption of his analysis "is a finding of fact" and "was proper"; and that there is "nothing in the record to suggest that the [lower court] clearly erred by relying on Dr. Ashenfelter's expert analysis as support . . . " U.S. Br. 41. They also extol Dr. Ashenfelter's credentials, and repeat (without justifying) his analysis. U.S. Br. 42 n.4. Such banal generalities cannot substitute for actual analysis. Statistical evidence of discrimination must be based on proper labor pools, and courts must review the analysis to ensure that it meets the requirements of strict scrutiny. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 501 (1989) ("But where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task"); *Middleton v. City*

of Flint, 92 F.3d 396, 406 (6th Cir. 1996) (reversing district court judgment dismissing challenge to racial quota; "[w]e hold that, *as a matter of law*, the district court erred by adopting, without deeper analysis, Dr. Bendick's raw statistics concerning the city's general labor pool as the relevant population against which to gauge the City of Flint's police promotion policies and practices" (emphasis added)); *id.* at 407-08 (rejecting expert's analysis as based upon improper assumptions that minorities and non-minorities, and men and women, are equally inclined and qualified to become police officers).

The United States also argues that the Objecting Appellants should have submitted evidence at the fairness hearing or should have sought a continuance. U.S. Br. 42. This ignores the fact that the court below did not take *any* evidence at the fairness hearing. Nor does the United States explain how the non-party Objecting Appellants had the authority to seek a continuance from the court below, but (at least according to the United States) do not have the right to appeal or intervene.

In any event, the Objecting Appellants *did* ask for the authority to submit evidence -- by seeking to become parties. Of course, the Objecting Appellants wanted to submit evidence *after* taking a reasonable amount of discovery so that they could understand the purported bases for Dr. Ashenfelter's analysis and submit intelligent and thorough opposition; the United States opposed the Objecting Appellants' application in the court below and it continues to oppose intervention in this Court. For the United States to criticize the Objecting Appellants for failing to submit additional evidence without the benefit of any discovery is just disingenuous.[8]

---

[8] It is also disingenuous for the United States to suggest that it "filed" Dr. Ashenfelter's declaration "about one week" prior to the fairness hearing, a statement for which it has no support. U.S. Br. 42. In fact, the United States served its papers in support of the settlement on Friday May 21, 1999, and they were received on Monday May 24, 1999, three days before the fairness hearing on May 27, 1999. J.A. 112. They were not "filed" until about one year later, in preparation for this appeal. J.A. 26 (Docket Nos. 183-86). *Compare also* U.S. Br. 5 (motion to intervene filed "[a] few days before the fairness hearing") *with* Dfs' Br. 7 (correctly noting that Objecting Appellants moved to intervene on May 4, 1999).

2. Narrow Tailoring. -- The Objecting Appellants' initial brief demonstrates that the group of minority and women Offerees selected for favorable treatment by the Settlement Agreement has little or no connection with the charges of discrimination litigated by the United States in this case. Opening Br. 11-12; 34-36; 43-44. Appellees have somewhat different reactions to this argument, although no one disputes that at least some Offerees never took any challenged examination. The United States argues that there is a connection to the charges of discrimination, and, in any event, the Objecting Appellants waived their argument. U.S. Br. 44-45. The City Defendants argue that it does not matter. Dfs' Br. 22-24. Both are wrong.

The United States asserts that the retroactive seniority granted to the Offerees is just a "make whole" remedial provision that compensates for

> the loss in seniority that black and Hispanic test-takers experienced in failing the City's civil service examinations, as well the [sic] black, Hispanic, Asian, and female provisional custodians who are currently employed by the City but who may have been otherwise deterred from taking the test because of the disproportionately low minority pass rates, and individuals who were discouraged from applying to take the test because of the City's inadequate recruitment.

U.S. Br. 44-45. As already discussed, the first category of injured persons identified has little connection to the group selected as Offerees. The second and third categories identified cannot withstand even the slightest scrutiny.

In order for "low minority pass rates" to deter even blacks and Hispanics -- the only groups for whom there *was* a low pass rate -- from taking the exams in question, those low pass rates would have to be generally known. There is nothing in the record to suggest that they were. And even if they were generally known, a known low pass rate is not a generally-recognized message of exclusion that should deter. *E.g., Equal Employment Opportunity Commission v. Local 638*, 532 F.2d 821, 832-33 & n.6 (2d Cir. 1976) (ruling that it would be too speculative to allow even those who were deterred from applying to union because of union's general reputation for discrimination to obtain backpay remedy, where the "discriminatory practices complained of were covert" and "where the alleged deterrence stemmed not from an officially announced discriminatory policy but from rumors of unfairness"). Moreover, the idea that *Asians* and *females* were deterred by a low pass rate for *blacks* and *Hispanics* defies any comprehension.

The notion that the Settlement Agreement provides make whole relief for individuals "discouraged from applying to take the test because of the City's inadequate recruitment" policies is even more improbable. As appellees never tire of repeating, the Offerees receiving promotions and/or retroactive seniority are current Custodians and CEs, mostly (but not exclusively) provisional Custodians and CEs. Thus, according to the United States, the unidentified "inadequate" recruitment practices of the City Defendants were so nuanced that they encouraged individuals to apply for jobs as provisional Custodians and CEs, but discouraged them from taking the exams that would give them permanent status.

The United States also asserts that the Objecting Appellants waived the "narrow tailoring" argument concerning the lack of congruence between the victims of the City Defendants' alleged discriminatory practices and the Offerees by failing to assert it in the lower court. This simply is not true. J.A. 105, ¶ 6 ("many of the persons referred to as `Offerees' in the Settlement Agreement . . . did not take any of the Challenged Examinations"); J.A. 109, ¶ 10 (same); Reply Brief In Support Of Motion To Intervene (Docket No. 130), p. 1 n.1. Its further contention that the Objecting Appellants should have "identif[ied] below any specific offeree they contend should not be entitled to relief" (U.S. Br. 45) is, once again, just disingenuous. The Objecting Appellants opposed *all* of the race-conscious promotions and grants of retroactive seniority. And if the United States wanted

them to identify those Offerees who never took a challenged exam, it should not have opposed the Objecting Appellants' efforts to intervene and take discovery.[9]

[9] The United States also errs (*see* U.S. Br. 29 n.2) in suggesting that the Objecting Appellants did not raise issues concerning sex discrimination in the court below. J.A. 96 (arguing that it is reverse discrimination "[t]o hire a person or persons based solely on their race or gender"); J.A. 108-09 (noting that the class of Offerees includes women).

The City Defendants claim that it does not matter that the remedy does not fit the discriminatory charges. Dfs' Br. 22-23. They miscite two district court cases from the late 1970's and early 1980's (long before *Croson*) to prove this point. First, they claim that the court in *Ingram v. Madison Square Garden Center, Inc.*, 482 F. Supp. 918 (S.D.N.Y. 1979) granted retroactive seniority to "future employees." Dfs' Br. 23. Even a cursory reading of the case demonstrates otherwise. *Ingram*, 482 F. Supp. at 922 ("[T]he Court now concludes that an award of retroactive seniority is appropriate. This, however, does not necessarily mean that each class member is entitled to such relief. Only actual victims of [union's] discriminatory referral practices are entitled to retroactive seniority"). In *Vulcan Society of the New York City Fire Department v. City of New York*, 96 F.R.D. 626 (S.D.N.Y. 1983) (Dfs' Br. 23), appointments and retroactive seniority were provided only to minorities who took the challenged examination.

C. The Settlement Agreement Fails Even Under The Looser Standards of *Kirkland*

The Objecting Appellants' initial brief demonstrates that strict scrutiny, not the standards of *Kirkland v. New York State Dep't of Correction Services*, 711 F.2d 1117 (2d Cir. 1983), apply to the race-conscious aspects of the Settlement Agreement. But it also demonstrates that those provisions fail even under the pre-*Croson* standards used in *Kirkland* because (1) the Settlement Agreement modifies the Objecting Appellants' legal rights under the Collective Bargaining Agreement and (2) the Settlement Agreement does not meet the two-part test set forth in *Kirkland* for identifying those race-conscious remedies that have an acceptably small impact on third parties. Opening Br. 45-49.

None of the appellees have any response to this argument. The City Defendants say nothing at all about *United States v. City of Hialeah*, 140 F.3d 968 (11th Cir. 1998), a case discussed at great length in the Objecting Appellants' initial brief, and the United States discusses it only in connection with the Objecting Appellants' relevant interests for intervention and appeal. *See* pp. -, *supra*. *City of Hialeah*, though, is directly on point and shows that the Settlement Agreement should not be approved.

Appellees also ignore the emphasis *Kirkland* placed on limiting remedies to identified victims of discrimination. Opening Br. 48-49. This has been a significant part of this Court's jurisprudence. *E.g., Chance v. Bd. of Examiners*, 534 F.2d 993, 998 (2d Cir. 1976) (where low proportion of minorities were caused by civil service exam that had been found not to be job-related, the Court nonetheless rejects lower court's race-conscious plan for future layoffs because "[t]he relief fashioned by the court below was not designed to benefit only those affected by the employer's prior discriminatory conduct" where it was conceded "that only a small percentage of the minority supervisors appointed since the inception of this litigation failed the examinations found to be discriminatory"); *id.* at 999 ("[i]f a minority worker has been kept from his rightful place on the seniority list by his inability to pass a discriminatory examination, he may, in some instances, be entitled to preferential treatment *not because he is Black, but because, and only to the*

extent that, he has been discriminated against" (emphasis added)); *Acha v. Beame*, 531 F.2d 648, 653-54 (2d Cir. 1976) (emphasizing and expounding upon these portions of *Chance*). As already shown, the Settlement Agreement's remedial provisions concerning promotion and retroactive seniority have little connection to those allegedly victimized by the City Defendants' practices. *See* pp. -, *supra*.

Conclusion

For the foregoing reasons, the lower court's order dated February 9, 2000 should be modified to reject the race-conscious portions of the Settlement Agreement or the order should be vacated and the Objecting Appellants permitted to intervene.

Respectfully submitted,

Michael E. Rosman
CENTER FOR INDIVIDUAL RIGHTS
1233 20th Street, N.W.
Suite 300

Washington, D.C. 20036
(202) 833-8400

George W.C. McCarter
McCARTER & HIGGINS
39 Avenue of the Commons
Suite 200
Shrewsbury, NJ 07702
(732) 544-5050

Certificate of Compliance

I certify that:

Pursuant to Fed. R. App. P. 32(a)(7)(C), the attached reply brief is proportionately spaced, has a typeface of 14 points or more and contains 6887 words.

_____

Michael E. Rosman
Attorney for Intervenors-Appellants

Certificate Of Service And Filing

I hereby certify that I served the foregoing Intervenors-Appellants' Reply Brief by placing two copies in two separate envelopes, and depositing each envelope in a U.S. Post Office box on July 13, 2000 addressed as follows:

Michael D. Hess
Stephen J. McGrath
Alan Beckoff
Corporation Counsel of the City of New York
Law Department
100 Church St.
New York, NY 10007

Lisa Wilson Edwards
U.S. Dept. of Justice, Civil Rights Division
P.O. Box 66078
Washington, DC 20035-6078

Pursuant to Rules 25(a)(2)(B)(ii) and 25(d) of the Federal Rules of Appellate Procedure, I also certify that, on July 13, 2000 original and ten copies of this reply brief to the Clerk of the Court by a commercial carrier for delivery within three calendar days.

_____
Michael E. Rosman