No. 00-6077

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

_____

JOHN BRENNAN; JAMES G. AHEARN; KURT BRUNKHORST,

Proposed Intervenors-Appellants,

v.

N.Y.C. BOARD OF EDUCATION; DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES; WILLIAM J. DIAMOND, Personnel 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

_____

BRIEF FOR THE UNITED STATES AS APPELLEE

_____

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. 1331, 1343, and 1345 and 42 U.S.C. 2000e-6 (Section 707 of Title VII of the Civil Rights Act of 1964, as amended). By consent of the plaintiff United States and defendants New York City Board of Education, et al., the district court transferred this civil case to a magistrate judge pursuant to 28 U.S.C. 636(c)(1). This Court has jurisdiction under 28 U.S.C. 636(c)(3) and 1291 to hear the appeal from the magistrate judge's February 9, 2000, order denying the motion to intervene of John Brennan, James G. Ahearn, and Kurt Brunkhorst. Because proposed intervenors were denied intervention in the case and are thus

nonparties that cannot otherwise demonstrate an affected interest in the judgment, this Court does not have jurisdiction to entertain their claim challenging the constitutionality of the retroactive seniority provision of the settlement agreement that was approved by the magistrate judge.

ISSUES PRESENTED

1. Whether the district court abused its discretion in denying the motion to intervene as of right under Fed. R. Civ. P. 24(a)(2), based upon proposed intervenors' failure to demonstrate sufficient interest in the case.

2. Whether, as nonparties, proposed intervenors have standing to appeal the magistrate judge's order approving the retroactive seniority provision of the settlement agreement.

3. If the Court concludes that it has jurisdiction to address the merits, whether the retroactive seniority provision is constitutional.

STATEMENT OF THE CASE

A. The Original Complaint And Settlement Proceedings

After a three-year investigation, the United States filed this action on January 30, 1996, alleging that the New York City Board of Education, the City of New York, the New York City Department of Personnel, and the Director for the Department of Personnel (collectively referred to as the "City") engaged in a pattern and practice of discriminatory employment practices in violation of Title VII of the Civil Rights Act of 1964, as

amended, 42 U.S.C. 2000e et seq. (Title VII) (J.A. 28).[1/] The United States alleged that the City failed or refused to recruit blacks, Hispanics, Asians, and women on the same basis as white (non-Hispanic) men for the positions of school custodian and school custodian engineer; failed or refused to hire and promote blacks and Hispanics on the same basis as whites for positions of custodian and custodian engineer; and used written examinations for the positions of custodian and custodian engineer that had a disparate impact on blacks and Hispanics (J.A. 30-35). The United States pursued two claims in this action: (1) a disparate impact claim on behalf of blacks and Hispanics that challenged the City's use of written, competitive civil service examination numbers 5040 (administered in 1985), 8206 (administered in 1989), and 1074 (administered in 1993) for the positions of custodian and custodian engineer; and (2) a disparate impact claim on behalf of blacks, Hispanics, Asians, and women that challenged the City's recruitment practices for custodian and custodian engineer positions (J.A. 365).

For three years following the filing of the complaint, the United States and City engaged in "highly contentious discovery" that resulted in both parties retaining experts, producing thousands of pages of documents, taking approximately 30 depositions, filing numerous applications to the court regarding

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[1/] "J.A. ___" refers to pages in the Joint Appendix filed with the proposed intervenors-appellants' brief. "R.___" refers to items listed on the district court's docket sheet. "Br. ___" refers to pages in the opening brief filed by proposed intervenors-appellants in this case.

discovery disputes, and over three months of arms-length negotiations (J.A. 344, 368). On February 11, 1999, the parties reached an agreement for settling the case, and submitted the agreement to the district court. The central terms of the agreement include:

> (1) providing permanent, civil service status to 43 identified black, Hispanic, Asian, and female individuals who have been serving provisionally as custodians or custodian engineers, and providing retroactive seniority, including retroactive pension relief, to 54 identified black, Hispanic, Asian, and female incumbent custodians and custodian engineers (including the 43 provisional employees). These individuals will receive retroactive seniority dates pursuant to procedures set out in the agreement, with dates ranging from January 23, 1989, through February 28, 1996 (J.A. 57-60, 369);
>
> (2) adopting, implementing, and maintaining a comprehensive recruitment program designed to increase the number of qualified black, Hispanic, Asian, and female applicants for employment as custodians and custodian engineers with the City's school board (J.A. 60-64, 369); and
>
> (3) refraining from administering the challenged examinations, and developing competitive examinations for permanent custodians and custodian engineers that comply with applicable federal law and reduce the adverse impact against black and Hispanic applicants (J.A. 64-67, 369).

See also R. 183 (United States' Memorandum In Support Of Entry Of Settlement Agreement at 4-5). The agreement and the district court's jurisdiction over the action expire in February 2003 (J.A. 57, 369).

The 54 "offerees" entitled to retroactive civil service and permanent status are listed at Appendix A of the settlement agreement (J.A. 74-76). Eleven of the 54 offerees had previously received permanent status by taking a civil service examination, but are awarded retroactive seniority under the settlement

agreement because they had taken but failed a challenged examination, or fell within the scope of the recruitment claim. Each of the offerees has been employed by the City as a custodian or custodian engineer, and continues to work for the City in either a provisional or permanent basis (J.A. 57). All of the offerees have been rated at least at the "satisfactory" level, and the vast majority of them have been given ratings of "good" and "excellent" (J.A. 358-362). Among the 54 offerees listed in Appendix A of the settlement agreement, 31 are provisional custodians, ten are permanent custodians, 12 are provisional custodian engineers, and one is a permanent custodian engineer (J.A. 74-76).

On March 4, 1999, the district court referred the matter to the magistrate judge to conduct a fairness hearing (R. 68). Notice of the agreement was widely distributed (J.A. 77). Copies of the agreement and instructions on submitting objections were sent to about 2,535 individuals, including all custodians and custodian engineers, and members of Local 891 of the International Union of Operating Engineers, which represents custodians and custodian engineers who work in the City's school facilities (J.A. 162-167). Notice of the agreement was published in area newspapers (J.A. 82, 163-164). Local 891 did not object to the agreement (J.A. 367).

A few days before the fairness hearing, a motion to intervene was filed by John Brennan, James G. Ahearn, and Kurt Brunkhorst (proposed intervenors) (J.A. 102). The proposed

intervenors ranked number 26 (Brennan), 92 (Ahearn), and 194 (Brunkhorst) among those who passed the 1993 custodian examination, one of the civil service tests challenged by the United States (J.A. 346). Brennan and Ahearn were appointed permanent custodians from the list developed by that 1993 test in March 1997, with a start date of April 4, 1997 (J.A. 346). Brunkhorst was appointed a permanent custodian in August 1997 (J.A. 346). Proposed intervenors are presently working as provisional custodian engineers (J.A. 186, 408).

At the fairness hearing on May 27, 1999, the magistrate judge heard from numerous objectors, including proposed intervenors who were represented by counsel (J.A. 170-171). On May 28, 1999, the district court, with the consent of the parties, assigned the magistrate judge authority to enter judgment in the case (J.A. 342). On February 9, 2000, the magistrate judge entered a Memorandum and Order approving the settlement agreement and denying the motion to intervene (J.A. 170).

B. City's Employment Practices For Custodians And Custodian Engineers

The City's school custodians and custodian engineers are responsible for supervising and maintaining school buildings and facilities operated by the City's school system. The responsibilities of custodians and custodian engineers include repairs, heating, ventilation, air conditioning, painting, and cleaning the City's school facilities (J.A. 104). Custodians perform building maintenance functions, but hire others to do most of the cleaning (J.A. 350). Custodians must have a high

school diploma and two years of experience working in a school building or similar structure, and satisfy other various minimum qualifications required by the school board (J.A. 156-157, 350). Custodian engineers perform similar functions to those of custodians, and must have engineering licenses to operate high pressure boilers, experience as a maintenance supervisor, and satisfy other minimum qualifications set by the school board (J.A. 156-157, 350).

The salaries of custodians and custodian engineers depend on the size of the schools to which they are assigned (J.A. 135). Each school has a maximum permissible salary that is a function of the size of the school building. The larger the square footage of the school building the higher the maximum permissible salary (or MPR) (J.A. 135). To determine the applicable salary rate, the City's school board uses the employee's first date of service, either provisional or permanent (J.A. 136). A collective bargaining agreement establishes guidelines on eligibility to work in buildings of specific sizes based on the employee's permanent seniority. The guidelines are as follows (J.A. 136):

	Years of Employment	Building Size
Custodians	1-5	0 sq. ft. - 50,000 sq. ft.
	6-10	51,000 sq. ft. - 75 ,000 sq. ft.
	11 or more	76,000 sq. ft. - 82,000 sq. ft.
Custodian Engineers	1-6	76,000 sq. ft. - 100,000 sq. ft.
	6-10	101,000 sq. ft. - 130,000 sq. ft.
	11-15	131,000 sq. ft. - 200,000 sq. ft.
	16 or more	over 201,000 sq. feet

As of 1999, the maximum permissible salaries for school custodians and custodian engineers were as follows (J.A. 136):

Size of School	Maximum Permissible Salary
50,000 sq. ft.	$59,408
75,000 sq. ft.	$62,224
82,000 sq. ft.	$62,806
100,000 sq. ft.	$65,079
130,000 sq. ft.	$68,851
200,000 sq. ft.	$75,701
over 276,000 sq. ft.	$82,371

Under a collective bargaining agreement, employee salaries are restricted in the first five years of employment as follows (J.A. 136):

Time in service	Salary rate
Starting rate	70% of MPR
After 1 year	75% of MPR
After 2 years	80% of MPR
After 3 years	85% of MPR
After 4 years	90% of MPR
After 5 years	100% of MPR

The two categories of custodians and custodian engineers are "provisional" and "permanent," and the process for hiring and terms of employment in these categories are different. The City administers civil service examinations to fill positions for permanent custodians and custodian engineers (J.A. 373). Persons who pass the civil service examination are placed on an eligibility list for open positions (J.A. 373-374). When persons are selected from the eligibility list to proceed to later steps in the hiring process, they are assigned seniority rankings based on the date of hire (J.A. 374). When positions become available, applicants are further screened for available positions. The experience and licensing of applicants are rated and assessed,

and they are interviewed by a committee consisting of individuals from the school board's Department of Human Resources, Office of the Chief Executive of the Division of School Facilities, and a technical representative (J.A. 157).

Once applicants are hired for permanent positions, seniority among custodians and custodian engineers determines school assignments based on the City's rating and transfer plan, which was developed in 1960 pursuant to a collective bargaining agreement between the City's school board and the local union (J.A. 158). Under the ratings and transfer plan, custodians and custodian engineers compete for building assignments based on seniority and performance ratings (J.A. 137). Permanent employees who are interested in working for particular schools may bid for transfer to schools that appear on the school board's periodic "transfer list" (J.A. 137, 159). Where more than one employee within the same five-year seniority band bids to transfer to a school, the employee's performance rating as prepared by the employee's school principal will be the first determinant for selection (J.A. 137, 159). Employees whose average performance ratings over the last four rating periods are within 0.25 of each other, are considered equivalent (J.A. 137). Among employees with equivalent ratings, seniority becomes the deciding factor in awarding the position (J.A. 137). The names of the top five bidders for a transfer are submitted to the community superintendent and local school boards (J.A. 159). The first ranked bidder receives the transfer unless these school

officials object (J.A. 159). Once a permanent employee is assigned to a school on the transfer list, that person may not be displaced on the basis of seniority (J.A. 159).

The process for hiring provisional custodians and custodian engineers is also administered by the City's school board, but does not require passing a civil service examination. The school board advertises and receives unsolicited applications for these provisional positions (J.A. 156). The school board reviews applications to determine which individuals meet the minimum qualifications for these positions (J.A. 156). In 1995, the school board created an interviewing committee consisting of school board officials to interview applicants and make hiring recommendations to the school board's director of plant operations (J.A. 157).

When provisional custodians and custodian engineers are hired, they receive the same orientation and training as permanent employees (J.A. 157). The process for evaluating the performance of provisional employees is the same as for permanent employees (J.A. 157-158).

Unlike permanent custodians and custodian engineers who can bid to work at larger schools that pay higher salaries, provisional employees are assigned to schools based on the needs of the school system (J.A. 158). Placements of provisional employees are accomplished to ensure that vacancies in school buildings are filled when there is no permanent hiring list available or when privatization is in process (J.A. 158).

Because provisional employees do not have civil service or seniority rights, they can be terminated immediately if school officials are not satisfied with their performance (J.A. 158). Provisional employees also may be replaced or transferred unwillingly and cannot participate in the seniority system (J.A. 158).

C. Magistrate Judge's Memorandum Opinion And Order

On February 9, 2000, the magistrate judge entered an order approving the settlement agreement and denying proposed intervenors' motion to intervene. United States v. New York City Bd. of Educ., 85 F. Supp. 2d 130 (E.D.N.Y. 2000). Relying on the City's admissions and expert data and statistical analyses, the magistrate judge determined that the United States made a prima facie showing of disparate impact on both the testing and recruitment claims. The magistrate judge further found that the terms of the agreement were fair and rejected the objections to the agreement.

1. Adverse Impact In Testing And Recruitment

a. Testing claim. The magistrate judge stated that a prime facie showing of disparate impact on the testing claim can be shown by a statistically significant disparity between the representation of the protected group taking the test and the representation of that group passing the test (J.A. 381). Disparate impact can be established by applying the 80% rule or the chi-square test. Under the 80% rule, the disparate impact of a test is shown where the pass rate for minority test-takers is

less than 80% of the pass rate for white test-takers (J.A. 382). The 80% rule is derived from the Uniform Guidelines on Employee Selection Procedures, 44 Fed. Reg. 11,999 (1979), which are the principles created by several federal agencies to govern analysis of disparate impact claims. The chi-square test is a statistical measurement for evaluating the disparity between the expected outcome and the observed frequency of a certain outcome (J.A. 383). While certain deviations occur as a matter of chance, at some point a discrepancy is so large that it is no longer expected to occur as a result of chance alone, and the differences become "statistically significant" for purposes of disparate impact analysis (J.A. 383). The magistrate judge observed that "a disparity of two or three standard deviations or more generally is sufficient to establish a prima facie case of discrimination" (J.A. 388-389, citing Castaneda v. Partida, 430 U.S. 482, 496 n.17 (1997)).

i) Examination No. 5040. This examination was administered in 1985 to 2,013 persons applying for school custodian positions. The overall pass rate was 44.8%. The pass rate was 58.1% for white test-takers, 14.1% for black test-takers, and 27.7% for Hispanic test-takers (J.A. 382). Given these pass rate percentages, the pass rate for black test-takers was 24.2% of the pass-rate for whites, and the pass rate for Hispanic test-takers was 47.7% of the rate for whites. The magistrate judge found that Examination No. 5040 had a disparate impact on blacks and Hispanics because their pass rates were less

than 80% of the pass rate for whites (J.A. 382). Applying the chi-square test, the magistrate judge found that disparity in the pass rates between white and black test-takers was 13.85 standard deviations, and between white and Hispanic test-takers was 8.09 standard deviations (J.A. 383-384). The magistrate judge found that these disparities are statistically significant at the .05 level (J.A. 383-384).

ii) Examination No. 8206. This examination was administered in 1989 to 455 persons applying for positions as custodian engineers. The overall pass rate was 81.1%. The pass rate was 85.1% for whites, 50% for blacks, and 71.1% for Hispanics (J.A. 328). Given these pass rate percentages, the pass rate for black test-takers was 58.7% of the pass rate for whites. The magistrate judge found that Examination No. 8206 had a disparate impact on blacks because their pass rate was less than 80% of the pass rate for whites (J.A. 384). Applying the chi-square test, the magistrate judge found that the disparity in pass rates between white and black test-takers was 5.14 standard deviations, and between white and Hispanic test-takers was 2.15 standard deviations (J.A. 384). The magistrate judge determined that these disparities are statistically significant at the .05 level (J.A. 384).

iii) Examination No. 1074. This examination was administered in 1993 to 1,448 persons applying for positions as school custodians. The overall pass rate was 50.2%. The pass rate was 61.7% for white test-takers, 14.4% for black test-

takers, and 30.8% for Hispanic test-takers (J.A. 382). Given these pass rate percentages, the pass rate for black test-takers was 23.3% of the pass rate for whites, and the pass rate for Hispanic test-takers was 49.9% of the pass rate for whites. The magistrate judge found that Examination No. 1074 had a disparate impact on blacks and Hispanics because their pass rates were less than 80% of the pass rate for whites (J.A. 384). Applying the chi-square test, the magistrate judge found that the disparity in pass rates between white and black test-takers was 12.51 standard deviations, and between white and Hispanic test-takers was 8.06 standard deviations (J.A. 384). The magistrate judge found that these disparities are statistically significant at the .05 level (J.A. 384).

The magistrate judge held that the "wide disparities between the pass rates of white test-takers on the one hand, and black and Hispanic test-takers on the other, are sufficient to establish a prime facie showing of adverse impact" (J.A. 384). The magistrate judge found that there was "no dispute that the disparities in testing have created a condition which can serve as a proper basis for the creation of race-conscious remedies" (J.A. 835 (internal quotations omitted)).

b. Recruitment Claim

The magistrate judge stated that "a prima facie showing of discrimination on a recruitment claim [can be shown] by demonstrating a gross disparity between the representation of the protected group in the relevant labor market and the

representation of that group in the total number of applicants for the position at issue" (J.A. 385). The magistrate judge used the following labor force and applicant data for each of the challenged examinations (J.A. 386-388):

Exam 5040					
	Estimated Representation in Labor Pool	Expected Number of Minority or Female Applicants	Actual Number of Minority or Female Applicants	Difference Between Expected and Actual	Z-Statistic
Blacks	24.9%	439	341	98	5.41
Qualified Blacks	23.8%	231	97	134	10.10
Hispanics	24.9%	439	218	221	12.16
Qualified Hispanics	22.5%	218	101	117	9.00
Asians	3.2%	56	15	41	5.61
Qualified Asians	3.3%	32	7	25	4.46
Females	15.9%	289	89	200	12.81
Qualified Females	12.2%	119	37	82	8.02

Exam 8026					
	Estimated Representation in Labor Pool	Expected Number of Minority or Female Applicants	Actual Number of Minority or Female Applicants	Difference Between Expected and Actual	Z-Statistic
Blacks	22.1%	91	41	50	5.94
Qualified Blacks	22.2%	71	29	42	5.64
Hispanics	17.6%	73	42	31	3.95
Qualified Hispanics	17.6%	56	29	27	4.00
Asians	4.9%	20	8	12	2.76
Qualified Asians	4.9%	16	5	11	2.77
Females	9.4%	40	4	36	6.01
Qualified Females	9.4%	32	3	29	5.35

Exam 1074					
	Estimated Representation in Labor Pool	Expected Number of Minority or Female Applicants	Actual Number of Minority or Female Applicants	Difference Between Expected and Actual	Z-Statistic
Blacks	21.4%	300	215	85	5.54
Qualified Blacks	19.7%	165	63	102	8.89
Hispanics	23.1%	324	203	121	7.66
Qualified Hispanics	19.7%	165	96	69	6.03
Asians	6.0%	84	25	59	6.65
Qualified Asians	6.0%	53	14	39	5.53
Females	14.7%	209	71	138	10.34
Qualified Females	12.0%	102	30	72	7.62

Relying on the report of an expert labor economist, the magistrate judge observed that a "Z-statistic of 1.96 or higher indicates that the probability of finding a difference this large or larger is five percent or smaller" (J.A. 386). The magistrate judge stated that "[w]hen the Z-statistic is 1.96 or more, * * * [the difference is] 'statistically significant' * * * [and not due] to chance alone" (J.A. 386). The magistrate judge stated that "[t]he higher the Z-statistic, the smaller the probability that the difference is due to chance alone and, correspondingly, the larger the probability that the difference represents a systematic difference in the rates at which different groups apply" (J.A. 386). Based on the expert data that rendered a Z-statistic greater than 1.96 for blacks, Hispanics, Asians, and women for each examination (pp. 15-16, supra), the magistrate judge found that "the disparities between the expected number of

applicants for the identified groups and the actual observed number * * * indicat[e] significant adverse impact" (J.A. 389).

2. Fairness Of The Agreement

After finding that the United States made a prima facie showing of adverse impact in testing and recruitment, the magistrate judge assessed the overall fairness of the settlement agreement (J.A. 389). The magistrate judge found that the parties' agreement "avoided the need for a complex, expensive, and lengthy trial," and was reached "at an advanced stage in the litigation, following the completion of extensive fact and expert discovery in the testing claim and substantial discovery regarding the recruitment claim" (J.A. 390). The magistrate judge observed that a central purpose of Title VII is to "make [persons] * * * whole for injuries suffered on account of unlawful employment discrimination" (J.A. 390). The magistrate judge held that the relief afforded the 54 offerees is "narrowly tailored" since only "persons who are qualified for the positions of [c]ustodian and [c]ustodian [e]ngineer will receive remedial relief, and no current permanent employee will be displaced" (J.A. 392). The magistrate judge also held that the number of victims entitled to relief "is quite small in comparison with the number of individuals who may have been afforded relief had this matter proceeded to final adjudication" (J.A. 392). The magistrate judge stated that the settlement agreement "does not establish any permanent numerical requirements or quotas" and that the City "will be required to recruit minority and female

candidates actively and to hire on a non-discriminatory basis, but will not be required to achieve or maintain any specific percentage of minorities or women in the relevant workforce" (J.A. 392). The court concluded that "all of these factors weigh in favor of approving the Agreement" (J.A. 390).

3. Objections To The Agreement

The magistrate judge next evaluated the objections to the agreement submitted by permanent employees who alleged that the retroactive seniority relief would adversely affect their relative seniority rights. The magistrate judge relied on a report prepared by the United States' statistical expert, Dr. Bernard Siskin, Ph.D. (J.A. 394). Dr. Siskin "performed a statistical analysis to estimate the historic effect that relative seniority has had on the current group of [c]ustodians and [c]ustodian [e]ngineers" (J.A. 394). Based on the expert's analysis, the magistrate judge found that for custodians, "relative rank is not statistically significant for any seniority group, which means that greater relative seniority within a seniority group does not necessarily translate into greater earnings" (J.A. 396). The magistrate judge observed that while seniority may affect a custodian's placement, other factors such as "performance ratings or non-economic preferences, outweigh the effect of seniority" (J.A. 396). Based on these statistical findings, the magistrate judge found that "'current permanent custodians will not, on average, suffer any loss of earnings as a result of granting retroactive seniority' to the [o]fferees"

(J.A. 396).

Proposed intervenors work for the City as provisional custodian engineers. Relying on the expert's report, the magistrate judge found that for custodian engineers, "relative rank has no statistically significant effect on salary for the first three seniority groups," but that there is a "statistically significant relationship between relative seniority and salary for [c]ustodian [e]ngineers with 16 or more years of experience" (J.A. 396-397). The magistrate judge found, however, that "the Agreement does not give any of the [o]fferees sufficient retroactive seniority for inclusion within that seniority group right now;" thus the terms of the settlement agreement would not cause any loss of earnings for custodian engineers in the highest seniority group (J.A. 397). The magistrate judge also found that the earnings loss for permanent custodian engineers that will result from the award of retroactive seniority to the custodian engineer offerees will be relatively modest. The magistrate judge stated that "[o]nly approximately two percent of all current [c]ustodian [e]ngineers will experience a total loss of more than $5,000 from now until they retire, and those are the employees with the least seniority" (J.A. 398). The magistrate judge found further that under the agreement "no incumbents will be discharged or displaced from their current school assignments" (J.A. 398-399). Based on these findings, the magistrate judge concluded that the "impact of [the] relief on the incumbent [c]ustodians and [c]ustodian [e]ngineers will be minimal and

dispersed" (J.A. 401).

The magistrate judge denied the objections raised by 54 individuals who are on eligibility lists from custodian examination number 1074 given in 1993, and the custodian engineer examination number 7004 given more recently in 1997 (J.A. 403-404). The magistrate judge held that because these individuals are on eligibility lists, they "do not possess a legally protectable interest" in the mere expectation of an appointment in the future, and stated that the court "is not required to consider the interests of those who lack a legal basis for their claims" (J.A. 403-404).

The magistrate judge also addressed various claims by other objectors that the remedies in the agreement are "unduly narrow" (J.A. 404). The magistrate judge determined that the "proposed remedies are 'substantially related' to eliminating the disparate impact of the challenged hiring practices" (J.A. 405). The magistrate judge denied requests by objectors that the remedy be expanded to include additional individuals (J.A. 405-407).

4. Motion To Intervene

The magistrate judge denied the motion to intervene, finding that proposed intervenors failed to demonstrate an interest that would be affected by the award of retroactive seniority to the 54 offerees (J.A. 409). The magistrate judge held that proposed intervenors had no cognizable interest in their seniority rankings because, as provisional custodian engineers on an eligibility list, the proposed intervenors have no "vested

property right in a particular position or appointment" (J.A. 409-410). The magistrate judge further determined that even if proposed intervenors could assert a cognizable interest in their seniority rights, "that interest would be remote and speculative" because it would "require a confluence of multiple, independent contingencies for any of the proposed intervenors to be denied a transfer due to the grant of retroactive seniority to the [o]fferees" (J.A. 411). Because of the various contingencies that would need to occur for a proposed intervenor to be denied a transfer as a direct result of the grant of retroactive seniority to the offerees, the magistrate judge held that the interest claimed by proposed intervenors "is not the type of 'direct, substantial, and legally protectable' interest contemplated by Rule 24(a)(2)" (J.A. 412).

STANDARDS OF REVIEW

The magistrate judge's denial of the motion to intervene should be reviewed for abuse of discretion. New York News, Inc. v. Kheel, 972 F.2d 482, 485 (2d Cir. 1992); United States v. Hooker Chems. & Plastics Corp., 749 F.2d 968, 990-991 (2d Cir. 1984) ("[T]he great variety of factual circumstances in which intervention motions must be decided * * * support an abuse of discretion standard of review."). The magistrate judge's legal conclusions should be reviewed de novo and its findings of fact for clear error. Goosby v. Town Bd., 180 F.3d 476, 492 (2d Cir. 1999), cert. denied, 120 S. Ct. 982 (2000).

SUMMARY OF ARGUMENT

The magistrate judge did not abuse his discretion in denying the motion for intervention. In a detailed opinion, the magistrate judge found that proposed intervenors could not assert sufficient interest in the retroactive seniority provision that would warrant intervention under Rule 24(a)(2). Specifically, proposed intervenors failed to show a "direct, substantial, and legally protectable interest" in their seniority rankings that would be adversely affected by awarding retroactive seniority to 54 identified offerees. The magistrate judge found that the likelihood that any of the three proposed intervenors would be adversely affected by the award of retroactive seniority status to one of the 54 offerees is so "remote" and "contingent" on numerous independent eventualities that proposed intervenors' interests are not sufficient to satisfy the standards for intervention.

Recognizing that they may not satisfy the standards for intervention under Rule 24(a)(2), proposed intervenors argue that they, in any event, are entitled to appeal the merits of the magistrate judge's order approving the retroactive seniority provision as nonparties with an "affected interest" in the final judgment. Proposed intervenors, however, fail to show how their "affected interest" as nonparties is any different from the interests demonstrated under Rule 24(a)(2). Indeed, because proposed intervenors failed to show sufficient interest under Rule 24(a)(2), they are foreclosed from bringing a nonparty

appeal of the magistrate judge's order.

Finally, even if this Court determines that the magistrate judge erred in denying intervention or that proposed intervenors have standing to bring a nonparty appeal, and addresses the merits of their claim, the retroactive seniority provision is constitutional because it is narrowly tailored to serve the City's compelling governmental interest in remedying the adverse effects caused by its civil service examinations and recruitment practices.

ARGUMENT

I

THE MAGISTRATE JUDGE PROPERLY DENIED THE MOTION TO INTERVENE AS OF RIGHT UNDER FED. R. CIV. P. 24(a)(2)

Proposed intervenors sought intervention as a matter of right under Federal Rule of Civil Procedure 24(a)(2). Rule 24 provides:

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

To intervene as of right, proposed intervenors must show: (1) that the application is "timely"; (2) that they have an "interest in the action"; (3) that their ability to protect that interest "may be impaired by the disposition of the action"; and (4) that the applicant's interest "is not protected adequately by

the parties to the action." New York News, Inc. v. Kheel, 972 F.2d 482, 485 (2d Cir. 1992). "Failure to satisfy any of these requirements is sufficient grounds to deny the application." Ibid.; see also United States v. New York, 820 F.2d 554, 556 (2d Cir. 1987). The magistrate judge acted well within his discretion in denying the motion to intervene.

Under Rule 24(a)(2), proposed intervenors must demonstrate a cognizable interest in the subject matter of the action to warrant intervention. That demonstrated interest must be "direct, substantial, and legally protectable" (Washington Elec. v. Massachusetts Mun. Wholesale Elec., 922 F.2d 92, 97 (2d Cir. 1990); see also Donaldson v. United States, 400 U.S. 517, 531 (1971)), "as opposed to remote or contingent" (Restor-A-Dent v. Certified Alloy Prods., Inc., 725 F.2d 871, 874 (2d Cir. 1984)). An interest that is "contingent upon the occurrence of a sequence of events before it becomes colorable," will not satisfy the rule. Washington Elec., 922 F.2d at 97. For various reasons, proposed intervenors fail to show a legally cognizable interest warranting intervention under Rule 24(a)(2).

1. In their complaint in intervention, proposed intervenors asserted that their interest in the case was based on the potential adverse effect that the retroactive seniority provision of the settlement agreement could have on their own seniority rankings (J.A. 109; see also R. 129 (Proposed Intervenors' Brief In Support Of Motion To Intervene at 6-9)). Specifically, proposed intervenors alleged that

> [a]t least some of the retroactive seniority dates proposed to be awarded to the "Offerees" are ahead of the dates presently enjoyed by plaintiffs/intervenors. To the extent that occurs, retroactive seniority dates awarded under the Settlement Agreement will damage plaintiffs/intervenors by delaying or preventing their promotion to more senior, and higher paying, positions as Custodians/Custodian Engineers.

(J.A. 109). The proposed intervenors similarly assert in their brief (Br. 51) that they should be granted intervention based on their interests in the ratings transfer system.

"The inquiry into the substantiality of the claimed interest [under Rule 24(a)(2)] is necessarily fact specific." Michigan AFL-CIO v. Miller, 103 F.3d 1240, 1245 (6th Cir. 1997); see also United States v. Hooker Chems. & Plastics Corp., 749 F.2d 968, 990-991 (2d Cir. 1984); Grutter v. Bollinger, 188 F.3d 394, 398 (6th Cir. 1999). The magistrate judge in this case found facts showing that proposed intervenors' interest was "remote and speculative." Because of the process by which custodians and custodian engineers compete for transfers to larger, higher-paying school facilities, various independent events would have to occur for proposed intervenors to be denied a transfer as a direct result of the retroactive seniority awarded to one of the 54 offerees. The magistrate judge found that, as an initial matter, "out of the hundreds of other [c]ustodians, including the hundreds who already have higher seniority than the proposed intervenors," one of the "[o]fferees would have to request a transfer to the same school as the proposed intervenor" (J.A. 411). The magistrate judge found further that to qualify for a transfer to the same school, the offeree and proposed

intervenor would need to "have the same job title * * * (i.e., a [c]ustodian [e]ngineer cannot bid on a school slated for a [c]ustodian, or vice versa)" (J.A. 411). The magistrate judge also found that the likelihood that a proposed intervenor would be denied a transfer as a direct result of the award of retroactive seniority to an offeree is further diminished once the proposed intervenors, who are currently working provisionally, become permanent custodian engineers, since there are only 12 offerees working as provisional custodian engineers (J.A. 411).

The magistrate judge found that the next contingency that would need to occur is that the "performance ratings of the [o]fferee and the proposed intervenor would have to be within .25 points of each other" (J.A. 411). The magistrate judge observed that "[i]f the proposed intervenor has a higher ranking, then he will outrank the [o]fferee, regardless of seniority, [and] [c]orrespondingly, if the [o]fferee has a higher rating, then it will be that rating, and not his or her relative seniority, that will place the [o]fferee ahead of the proposed intervenor in the competition for that school" (J.A. 411).

The magistrate judge found that the final contingency that would need to occur is that the "[o]fferee and proposed intervenor would have to occupy positions 1 and 2 on the transfer list for that school, [such that] [i]f they are, for example, numbers 2 and 3 and someone else is number 1 and receives the transfer, then it will be that person and not the [o]fferee who

prevented the proposed intervenor from getting the assignment" (J.A. 412). The magistrate judge found that "if they are numbers 1 and 3 and the [o]fferee gets the transfer, then the [o]fferee has not necessarily deprived the proposed intervenor of that assignment, since the number 2 bidder would most likely have received the assignment otherwise" (J.A. 412). Because it was unlikely that any of the three proposed intervenors would be directly adversely affected by the retroactive seniority awarded to one of the 54 offerees, the district court determined that their interest was "not the type of 'direct, substantial and legally protectable interest' contemplated by Rule 24(a)(2)" (J.A. 412). See, e.g., New York, 820 F.2d 554 (applicant who had been denied admission to state police academy as a result of imposition of court-ordered minority hiring system and who was ineligible for academy admission regardless of court's order due to his age, did not have a sufficiently cognizable legal interest that would satisfy criteria for intervention).

2. Second, proposed intervenors cannot claim an interest warranting intervention because, as provisional custodian engineers, state law precludes them from having a vested interest in permanent custodian engineer positions. Under New York law, a "probationary employee, unlike a permanent employee, has no property rights in his position and may be lawfully discharged without a hearing and without any stated specific reason." Meyers v. City of N.Y., 208 A.D.2d 258, 262 (App. Div. 1995). Moreover, a person on an eligibility list for a permanent

position "does not possess 'any mandated right to appointment or any other legally protectible interest.'" Kirkland v. New York State Dep't of Correctional Servs., 711 F.2d 1117, 1134 (2d Cir. 1983) (quoting Cassidy v. Municipal Civ. Serv. Comm'n, 337 N.E.2d 752 (N.Y. 1975)), cert. denied, 465 U.S. 1005 (1984).

3. Proposed intervenors also lack an economic interest in the retroactive seniority provision because, as the magistrate judge found, for custodian engineers seniority has no statistically significant effect on salary except in the upper seniority ranks (i.e., among custodian engineers with more than 16 years of service) (J.A. 396; see also J.A. 139 (Declaration of Dr. Siskin)). Should proposed intervenors, who are employed as provisional custodian engineers, become permanent, their salaries will not be significantly affected at the lower seniority level. Moreover, there are only 12 offerees who work as provisional custodian engineers and will receive retroactive seniority status, but the agreement does not give any of these offerees sufficient seniority for inclusion in the upper seniority group (J.A. 397).

4. Proposed intervenors also assert (Br. 26, 57) that they will be harmed by the grant of promotion (i.e., permanent status) to the offerees. Proposed intervenors worked as permanent custodians in the past (J.A. 96, 99, 101, 104), but are now employed as provisional custodian engineers (J.A. 186). To the extent that proposed intervenors can assert a sufficient interest in the grant of permanent status to the offerees, it must be

limited to the grant of permanent status to custodian engineers, and not to custodians. At the fairness hearing, counsel for proposed intervenors essentially conceded (J.A. 186-187) that they would not be affected by the grant of permanent status to the custodian offerees. Thus they waived any right to make that argument on appeal. Furthermore, proposed intervenors have no interest that is affected by the award of permanent status to the custodian offerees, and thus cannot intervene in this case on that basis.[2/]

5. Finally, United States v. City of Hialeah, 140 F.3d 968 (11th Cir. 1998), which proposed intervenors cite (Br. 46-47) in support of their contention that the retroactive seniority provision will affect their job benefits, is factually distinguishable. In City of Hialeah, the court of appeals affirmed the district court's findings that race-conscious, retroactive competitive seniority agreed to by the City, pursuant to the settlement of a Title VII lawsuit affecting the City's police and fire departments, would severely impact "a wide range of contractual rights that existing collective bargaining agreements clearly guarantee incumbent employees." Id. at 981. The court of appeals in City of Hialeah found that numerous benefits were "accrue[d] strictly according to seniority," including 1) selecting firefighters for mandatory overtime; 2)

[2/] Furthermore, proposed intervenors may be foreclosed from claiming (Br. 26) that they were injured by the grant of retroactive seniority to women since they never asserted this claim in their complaint. Wilson v. Fairchild Republic Co., 143 F.3d 733, 738 (2d Cir. 1998).

selecting firefighters for certain positions in the fire department, including appointment to the hazardous materials team; and 3) promoting individuals within the police department. Id. at 981-982. The court of appeals also affirmed the district court's findings that seniority had a "substantial and often decisive impact" on other areas of police and firefighter employment, including days off, vacation time, and shift preference. Id. at 982. However, unlike in City of Hialeah, the magistrate judge, relying on expert evidence and statistical data, found that seniority had a limited effect on determining salaries (see pp. 18-19, supra), and that it was highly unlikely that the award of retroactive seniority status to 54 identified offerees would have any affect on the ability of any of the three proposed intervenors to obtain a transfer to another school (see pp. 26-27, supra). In view of these facts, the magistrate judge did not abuse its discretion in finding that proposed intervenors failed to demonstrate sufficient interest in the retroactive seniority provision to warrant intervention.

II

PROPOSED INTERVENORS DO NOT HAVE STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE RETROACTIVE SENIORITY PROVISION OF THE SETTLEMENT AGREEMENT

Because proposed intervenors do not satisfy the standard for intervention under Rule 24(a)(2), they lack standing to challenge the constitutionality of the settlement agreement. It is well settled that one who is not a party to a lawsuit, or has not properly become a party, has no right to appeal a judgment

entered in that suit. Marino v. Ortiz, 484 U.S. 301, 304 (1988); Karcher v. May, 484 U.S. 72 (1987); United States v. International Bhd. of Teamsters, 931 F.2d 177, 183 (2d Cir. 1991); Edwards v. City of Houston, 78 F.3d 983, 993 (5th Cir. 1996). If a nonparty wants to have that right, "he should intervene in the district court * * * since an intervenor has the rights of a party * * * including the right to appeal." In re Brand Name Prescription Drugs Antitrust Litig., 115 F.3d 456 (7th Cir. 1997). "If the district court denies the motion to intervene, the disappointed movant can appeal that denial." Ibid.

There is an exception to this general rule where a nonparty has an "interest that is affected by the trial court's judgment." Kaplan v. Rand, 192 F.3d 60, 67 (2d Cir. 1999); Teamsters, 931 F.2d at 183; cf. Marino, 484 U.S. at 301 ("the court of appeals suggested that there may be exceptions to this general rule, primarily 'when the nonparty has an interest that is affected by the trial court's judgment' * * * [but] [w]e think the better practice is for such a nonparty to seek intervention for purposes of appeal; denials of such motions are, of course, appealable").

Because proposed intervenors were denied leave to intervene for failure to show sufficient interest in the case, and thus never obtained the status of party litigants in the suit, their appeal is limited to the denial of their motion to intervene. See, e.g., Edwards, 78 F.3d at 993 (would-be intervenors who were denied leave to intervene and never obtained status of party

litigants could not seek review of final judgment approving consent decree).

1. Proposed intervenors rely (Br. 24-27) on Kaplan, supra, in arguing that despite their failure to demonstrate an interest in the retroactive seniority provision to warrant intervention under Rule 24(a)(2), they are nonetheless entitled to appeal as nonparties the district court's judgment approving that aspect of the settlement agreement. The Kaplan case, however, is factually distinguishable and cannot be relied on as the basis for overturning the magistrate judge's order.

Kaplan involved a stockholders derivative action that was brought against the officers and directors of a large, publicly-traded company, alleging that these defendants were responsible for financial losses and other detriments as a result of illegal discriminatory employment practices. Over stockholder objections, the district court approved a settlement agreement that required the company to pay counsel for plaintiffs $1 million in legal fees and make reports available to stock-holders. One stockholder objector appealed.

This Court held in Kaplan that a shareholder who had not been a party to a derivative action against the company in district court, and never moved to intervene, had standing to appeal the award of attorneys fees because he had an "affected interest" in the judgment. 192 F.3d at 67. The Court found that, as a general matter, a shareholder "who objects to the payment of a fee from corporate funds in compensation of

attorneys who have brought a derivative action on behalf of the corporation has an interest that is affected by the judgment directing payment of the fee." Ibid. The Court found that the stockholder had an "affected interest" in the payment of attorneys fees because "although counsel for plaintiffs have obtained the assurance of counsel for [the company] that the [company's] insurance premiums were not increased as a result of the proposed settlement when the insurance policy was renewed * * * the corporation's premium might well have been reduced upon renewal but for the proposed settlement." Id. at 68. The Court found that the "substantial payment ordered * * * may call for increased premiums in the years to come." Ibid. The Court also noted an underlying concern of collusion, stating that "in seeking approval of their settlement proposal, plaintiffs' attorneys' and defendants' interests coalesce and mutual interest may result in mutual indulgence," and that a "district court may overlook a 'mutual indulgence.'" Id. at 67. The Court concluded that "[t]hese possibilities, and the discouragement of attorneys from instituting future lawsuits of this type against [the company], give [the stockholder] an affected interest in the fee order in this case." Id. at 68.

Unlike the stockholder in Kaplan, who was able to show an interest affected by the judgment, proposed intervenors cannot demonstrate such an interest here. There is no case law that suggests the showing of "affected interest" as a nonparty is any different from showing a "significant, direct and legal interest"

required to intervene under Rule 24(a)(2). The magistrate judge in this case properly assessed proposed intervenors' affected interest in the retroactive seniority provision of the settlement agreement when he denied the motion for intervention. The magistrate judge held that the likelihood that the retroactive seniority awarded to the 54 offereees would interfere with a transfer request by one of the three proposed intervenors was "remote and speculative," and that too many independent contingencies would have to occur for any of the proposed intervenors to be denied a transfer on that basis (J.A. 411-412; see pp. 26-27, supra). Furthermore, there is no evidence that the United States and the City engaged in any form of collusion. The magistrate judge's determination that proposed intervenors failed to demonstrate an interest warranting intervention under Rule 24(a)(2) thus foreclosed them from having standing to appeal as nonparties.

Contrary to proposed intervenors' argument (Br. 28 n.5), the facts in the present case are analogous to those in Hispanic Society v. New York City Police Department, 806 F.2d 1147 (2d Cir. 1986), where this Court held that white police officers could not appeal from a consent decree settling a Title VII action against the City police department because the white officers failed to show an interest that was affected by the district court's judgment. The white officers in Hispanic Society sought to appeal the portion of a settlement agreement that required that the names of black and Hispanic police

candidates, who did not appear on an eligible list for promotion to sergeant, be added to the list until the racial and ethnic composition of individuals promoted to that rank was the same as the composition of the group of candidates taking the test. 806 F.3d at 1151. White officers who were not on the original eligible list, and who had not sought to intervene in the action, appealed the judgment approving the settlement agreement. This Court found that the white officers did not have an affected interest to appeal as nonparties because they "were not on the original eligible list, * * * [had] no right to promotion under state law, and * * * [did] not allege that the examination discriminated against them." Id. at 1152. The Court found further that "[e]ven if the settlement were invalidated" the white officers "would not be entitled to promotion." Ibid. Given these facts, this Court held that the white officers could not appeal from the settlement as nonparties because they failed to show an interest affected by the judgment. Id. at 1152.

2. Proposed intervenors also argue (Br. 25-27) that they are entitled to appeal as nonparties because of their general interest in equal protection. However, to establish an interest under Rule 24(a)(2), or as a nonparty, the movant must show a "legal interest as distinguished from the interests of a general and indefinite character." H.L. Hayden Co. v. Siemens Med. Sys., Inc., 797 F.2d 85, 88 (2d Cir. 1986). Proposed intervenors must show a "tangible threat to a legally cognizable interest." Harris v. Pensley, 820 F.2d 592, 601 (3d Cir.), cert. denied,

484 U.S. 947 (1987). Where courts of appeals have permitted nonparties to appeal a final judgment, the affected interests shown in the judgment have been direct and significant. See, e.g., Teamsters, 931 F.2d 177 (union affiliates' asserted contractual interest in preserving provisions of their international union constitution with respect to election of officers, which was abrogated by a district court order, was sufficient to confer standing to challenge that decision); Curtis v. City of Des Moines, 995 F.2d 125 (8th Cir. 1993) (parents whose daughter had been raped could appeal district court order determining rapist's right to recovery from officers who beat him, even though parents had not been parties to that action, because they had an interest in the proceeds of the rapists' recovery based on the judgment they had recovered against him); Martin-Trigona v. Shiff, 702 F.2d 380 (2d Cir. 1983) (non-party trustees in bankruptcy proceeding had standing to appeal from a district court order granting habeas corpus to debtor who had been imprisoned for civil contempt, where trustees were real parties in interest and where stay imposed by trial court made futile any effort by the trustees to intervene). Unlike the nonparties in these cases, proposed intervenors fail to show an affected interest in the district court's judgment approving the retroactive seniority provision of the settlement agreement.

III

THE RETROACTIVE SENIORITY PROVISION IS CONSTITUTIONAL

As argued above, the magistrate judge properly denied the motion to intervene and proposed intervenors do not have standing to appeal as nonparties. Accordingly, this Court is without jurisdiction to address the issue of the constitutionality of the retroactive seniority provision raised by proposed intervenors in their opening brief. Should this Court nonetheless reach this issue, it should find that the retroactive seniority provision is constitutional.

Proposed intervenors argue (Br. 36) that the retroactive seniority provision does not satisfy strict scrutiny and thus violates the Equal Protection Clause of the Fourteenth Amendment. 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. Brewer v. West Irondequoit Cent. Sch. Dist., No. 99-7168, 2000 WL 641052 at *6 (2d Cir. May 11, 2000); see also Howard v. McLucas, 871 F.2d 1000, 1006 (11th Cir. 1989); Edwards v. City of Houston, 37 F.3d 1097, 1112 (5th Cir. 1994). "There are two prongs to this examination. First, any racial classification must be justified by a compelling governmental interest. Second, the means chosen by the State to effectuate its purpose must be narrowly tailored to the achievement of that goal." Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986) (internal quotations omitted). The City has

a compelling governmental interest in remedying the effects of the adverse impact caused by its civil service examinations and recruitment practices. The retroactive seniority provision is narrowly tailored to satisfy that compelling interest.[3/]

A. The City Has A Compelling Interest In Remedying The Adverse Effects Caused By Its Civil Service Examinations And Recruitment Practices

A showing of compelling interest to warrant the use of race-based remedial measures can be satisfied "upon some showing of prior discrimination by the governmental unit involved." Wygant, 476 U.S. at 274, citing Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977). Whether race-conscious relief serves a remedial purpose with respect to past discrimination is an evidentiary issue. Ensley Branch, NAACP v. Seibels, 31 F.3d 1548, 1565 (11th Cir. 1994). The court need not make formal findings of discrimination; rather a "strong basis in evidence" that the consent decree or voluntary action is needed to remedy past discrimination is sufficient. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989), quoting Wygant, 476 U.S. at 277); see also Peightal v. Metropolitan Dade County, 26 F.3d

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[3/] Proposed intervenors argue (Br. 45) that the magistrate judge erred in failing to apply strict scrutiny analysis to the retroactive seniority provision. Whether the retroactive seniority provision satisfies strict scrutiny is a legal question subject to de novo review. Although the magistrate judge did not purport to apply strict scrutiny, he found that the City's "disparities in testing created a 'condition which can serve as a proper basis for the creation of race-conscious remedies'" (J.A. 385, quoting Kirkland, 520 F.2d at 1129), and that the retroactive seniority provision is "narrowly tailored" (J.A. 392). These findings of fact and conclusions of law by the magistrate judge clearly would support a determination that the retroactive seniority provision satisfies strict scrutiny.

1545, 1553 (11th Cir. 1994). "Appropriate statistical evidence setting forth a prima facie case of discrimination is sufficient to provide a strong basis in evidence to support a public employer['s] affirmative action plan." Aiken v. City of Memphis, 37 F.3d 1155, 1163 (6th Cir. 1994); see also Croson, 488 U.S. at 501; Hazelwood, 433 U.S. at 307-308. Indeed, showing that a challenged employment procedure has a disparate impact is a sufficiently firm basis for adopting narrowly tailored race-conscious remedial measures. Seibels, 31 F.3d at 1565.

In this case, the need for a race-based remedy was established by the United States' showings that the challenged written examinations had a disparate impact on blacks and Hispanics, and that the City's practices for recruiting individuals to apply to take the examinations had a disparate impact on blacks, Hispanics, Asians, and women. A prima facie showing of discrimination can be established based upon a statistical analysis. See Hazelwood, 433 U.S. at 307-308; International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 (1977); Guardians Ass'n v. Civil Serv. Comm'n, 630 F.2d 79, 88 (2d Cir. 1980); United States v. Fairfax County, 629 F.2d 932, 939 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981) ("statistics can establish a prima facie case [in a disparate treatment case], even without a showing of specific instances of overt discrimination"). Statistical analyses of adverse impact may alone suffice to establish a prima facie showing because racial or gender imbalance in a work force "is often a telltale

sign of purposeful discrimination." Teamsters, 431 U.S. at 339. "If a disparity is sufficiently large, then it is unlikely that it is due solely to chance or accident, and, in the absence of evidence to the contrary, one must conclude that racial or other class-related factors entered into the selection process." Castaneda v. Partida, 430 U.S. 482, 494 n.13 (1977).

1. Establishing a prima facie showing of disparate impact for a testing claim requires a demonstration of a statistically significant disparity between the representation of the protected group passing the test and the representation of the protected group taking the test. See Guardians, 630 F.2d at 79. Based upon expert statistical evidence, and the City's own admissions, the magistrate judge found that there was a statistically significant disparity in the pass rate for white test-takers, and the pass rates for black and Hispanic test-takers for each of the three challenged examinations (see pp. 11-14, supra). The disparity was evident, and unrefuted, when applying either the 80% rule or the chi-square test (see pp. 11-14, supra).

2. A prima facie showing of disparate impact on the recruitment claim is established by showing a disparity between the representation of the protected group in the relevant labor market and the protected group's representation among applicants for the positions in question. See United States v. City of Warren, 138 F.3d 1083, 1092-1094 (6th Cir. 1998). A statistical disparity of more than two or three standard deviations may support an inference of discrimination. Hazelwood, 433 U.S. at

311 n.17. Relying on expert labor force data prepared by Dr. Orley C. Ashenfelter, the magistrate judge found statistical disparities of greater than two or three standard deviations for blacks, Hispanics, Asians, and women, with respect to recruiting these protected groups for each of the three challenged examinations (see pp. 14-16, supra).

Proposed intervenors argue (Br. 41-43) that the magistrate judge erred in relying on Dr. Ashenfelter's expert data to support its determination that the United States made a prima facie showing of disparate impact on the recruitment claim. The magistrate judge's adoption of Dr. Ashenfelter's statistical analysis is a finding of fact that cannot be overturned unless clearly erroneous. A finding of fact is clearly erroneous "when the reviewing court is left with a firm and definite conviction that a mistake has been made." Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985).

The magistrate judge's adoption of Dr. Ashenfelter's statistical analysis was proper and provides a sufficient factual basis for finding disparate impact in recruitment. While proposed intervenors argue (Br. 41-42) that Dr. Ashenfelter used the incorrect relevant labor market in assessing disparate impact in recruitment, there is nothing in the record to suggest that the magistrate judge clearly erred by relying on Dr. Ashenfelter's expert analysis as support for its finding that the City's recruitment practices have a disparate impact on blacks,

Hispanics, Asians, and women.[4/]

Proposed intervenors argue (Br. 41 n.7), however, that they did not have a real opportunity to provide opposing evidence to the magistrate judge. The facts show that proposed intervenors did indeed have more than sufficient time to request a continuance of the fairness hearing in order to present their own data to refute Dr. Ashenfelter's findings, or at least to file objections to his analysis. The magistrate judge conducted the fairness hearing on May 27, 1999. The United States filed Dr. Ashenfelter's declaration, in which he set forth his statistical analysis, about one week prior to the hearing, on May 21, 1999, along with its memorandum supporting entry of the settlement agreement and in response to objections (R. 182-185). During the fairness hearing, counsel for proposed intervenors stated that he received Dr. Ashenfelter's declaration along with the United States' memorandum, but he did not request permission from the magistrate judge to extend the time for briefing of the

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[4/] Dr. Ashenfelter is a tenured professor of economics at Princeton University and is an expert labor economist and statistician. In defining the relevant labor pool, Dr. Ashenfelter evaluated the backgrounds of individuals that the school board had considered qualified for custodian and custodian engineer positions, including level of education, job history, and supervisory experience (J.A. 116-118). Dr. Ashenfelter used these factors and census data of workers in New York State, New Jersey, and Connecticut who work in New York City, and "assumed that the relative availability of Blacks, Asians, Hispanics, and females is the average of their representation in these occupations weighted by the fraction of applicants who worked in these jobs" (J.A. 119). Based on these various calculations, Dr. Ashenfelter reports a statistically significant disparity in the number of blacks, Hispanics, Asians, and women who applied to take each of the challenged examinations (J.A. 120-121, 129-131).

settlement agreement to refute Dr. Ashenfelter's declaration (J.A. 184-185). The magistrate judge entered his decision on February 2, 2000, eight months after the fairness hearing. Yet in these eight months, proposed intervenors failed, as objectors, to attempt to refute Dr. Ashenfelter's analysis.

The statistical findings of the magistrate judge that there is a disparate impact in the City's testing and recruitment of custodians and custodian engineers provide a strong basis in evidence to support the City's compelling interest in adopting appropriate, race-based remedial measures.

B. The Retroactive Seniority Provision Is Narrowly Tailored To Remedy The Effects Of The Adverse Impact Of The City's Civil Service Examinations And Recruitment Practices

The Supreme Court has set forth several factors to determine whether race-conscious relief is narrowly tailored: (1) the necessity for the relief; (2) the flexibility and duration of the relief; (3) the relationship of the numerical goals to the relevant labor market; (4) the efficacy of alternative remedies; and (5) the impact of the relief on the rights of third parties. See Croson, 488 U.S. at 507-508; United States v. Paradise, 480 U.S. 149, 171 (1987). The retroactive seniority provision challenged by proposed intervenors satisfies each of these factors.

1. Necessity Of Relief

The relief in dispute clearly satisfies the first element of strict scrutiny because the retroactive seniority awarded to the 54 offerees is necessary to remedy the adverse effect that

challenged examination numbers 5040, 8026, and 1074, had on black and Hispanic test-takers, and that the challenged recruitment practices had on blacks, Hispanics, Asians and women. A central purpose of Title VII is to "make persons whole for injuries suffered on account of unlawful employment discrimination." Franks v. Bowman Transp. Co., 424 U.S. 747, 763 (1976). "Make-whole" relief should place the "injured party * * * as near as may be, in the situation he would have occupied if the wrong had not been committed." Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-419 (1975); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971) (victims of employment discrimination are entitled under Title VII to the "opportunity to obtain jobs that they would have earned had there been no discrimination"). The award of retroactive, competitive seniority is "absolutely essential to obtaining" the goals of Title VII. Franks, 424 U.S. at 764, n.21; see also Freedman v. Air Line Stewards & Stewardesses Ass'n, 730 F.2d 509, 513 (7th Cir.), cert. denied, 469 U.S. 899 (1984); Association Against Discrimination in Employment v. City of Bridgeport, 647 F.2d 256, 287 (2d Cir. 1981), cert. denied, 455 U.S. 988 (1982). The retroactive seniority provision makes whole the loss in seniority that black and Hispanic test-takers experienced in failing the City's civil service examinations, as well the 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.

Proposed intervenors suggest (Br. 35-36) that not all offerees are victims of the discriminatory practices challenged by the United States in this lawsuit. However, proposed intervenors failed below to object to the settlement agreement on the ground that it affords relief to individuals who are not identified victims of discrimination, nor did they identify below any specific offeree whom they contend should not be entitled to relief. Because it was proposed intervenors' burden to raise these objections below, see Teamsters, 431 U.S. at 360-362, they have waived the ability to raise this argument on appeal.

2. The Flexibility And Duration Of The Relief

The duration of the relief is discrete and limited. The award of retroactive seniority to 43 provisional employees and 11 permanent employees is a one-time occurrence and grants relief to individuals who are currently employed by the City. See Paradise, 480 U.S. at 185-186 (approving one-time imposition of race-conscious promotions until valid promotion procedures could be developed and implemented).

3. Relationship Of The numerical Goals To The Relevant Labor Market

The award of retroactive seniority to the 54 offerees is not over-inclusive because under the terms for settlement, retroactive seniority is awarded only to identified black, Hispanic, Asian, and female individuals currently employed by the

City as custodians and custodian engineers.[5/] Moreover, the magistrate judge found that the relief is "narrowly tailored" because each of the 54 individuals awarded retroactive seniority is "qualified to work for the positions of [permanent] [c]ustodian and [c]ustodian [e]ngineer]," and "no current permanent employee will be displaced" (J.A. 392). In fact, provisional employees engage in the same work as their permanent counterparts but without the protections and benefits afforded under the State's civil service system. Paradise, 480 U.S. at 177-178 (relief was appropriate where only qualified applicants were promoted and where employer was not obligated to make unnecessary or gratuitous promotions).

4. Efficacy Of Alternative Remedies

The proposed intervenors do not offer alternative remedies for granting retroactive seniority relief to the City's minority and female custodians and custodian engineers who were adversely impacted by the City's employment practices, except to argue (Br. 44) that back pay is a more appropriate form of relief because it would avoid affecting their own seniority. The Supreme Court has not, however, "required remedial plans to be limited to the least

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[5/] The number of offerees entitled to retroactive seniority relief under the settlement agreement has been slightly modified since entry of the magistrate judge's order. Proposed intervenors are aware of these slight modifications and challenge only the magistrate judge's approval of the agreement as it relates to the 54 offerees listed in Appendix A. The magistrate judge was fully aware that the composition of the offerees would be slightly modified, and in fact some slight modifications had occurred just prior to entry of the magistrate judge's order (see J.A. 401 n.30).

restrictive means of implementation." Paradise, 480 U.S. at 184. Narrowly tailored retroactive seniority is a "necessary" component of remedial relief absent "justification for denying that relief," even when it conflicts with the interests of incumbent employees who have benefitted from the prior discriminatory employment practice. Franks, 424 U.S. at 767. The Court stated in Franks:

> [I]t is apparent that the denial of seniority relief to identifiable victims of racial discrimination on the sole ground that such relief diminishes the expectations of other, arguably innocent, employees * * * generally frustrates the central "make whole" objective of Title VII. These conflicting interests of other employees will, of course, always be present in instances where some scarce employment benefit is distributed among employees on the basis of their status in the seniority hierarchy.

Id. at 774. In this case it was neither unreasonable nor unfair to require the City's incumbent custodians and custodian engineers to bear a modest burden of the remedy, since they have implicitly benefitted from the adverse impact that the City's civil service examinations had on minorities. Moreover, the award of retroactive seniority was the only way to ensure that persons adversely impacted by the challenged employment practices received the full relief necessary to eliminate the adverse effects of those practices and place these individuals in the positions that they would have otherwise occupied.

5. Impact Of The Relief On The Rights Of Third Parties

The retroactive seniority provision does not impose an unacceptable burden on incumbent custodians and custodian engineers. As the magistrate judge explained (pp. 25-27, supra),

the likelihood that proposed intervenors will be denied a transfer as a sole and direct result of the retroactive seniority awarded to one of the 54 offerees is "remote and speculative" because of the many independent contingencies that must occur for this situation to arise. Moreover, custodians 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.

The impact on incumbent employees is slight, since the number of offerees who will be awarded retroactive seniority is a small percentage of the total number of permanent custodians and custodian engineers who are employed by the City. See, e.g., Teamsters, 431 U.S. 376 n.62 (in assessing adverse impact, court can consider the number of victims of discrimination and the number of non-victim incumbents affected by the relief); see also EEOC v. Rath Packing Co., 787 F.2d 318, 335 (8th Cir. 1986). Among the 54 offerees listed in the settlement agreement, 41 will receive retroactive seniority in the position of custodian, and 13 will receive retroactive seniority in the position of custodian engineer. The City employees approximately 958 permanent and provisional custodians and custodian engineers (J.A. 155). Among that number there are 438 permanent school custodians, 391 permanent custodian engineers, 73 provisional custodians, and 56 provisional custodian engineers (J.A. 155). Given these numbers, custodian offerees constitute only 9.3% of

all permanent custodians, and custodian engineer offerees constitute a mere 3.3% of all permanent custodian engineers (see J.A. 74-76, 155). Cf. City of Bridgeport, 647 F.2d at 286-287.

The grant of retroactive seniority to the 54 offerees will affect few of the benefits enjoyed by the incumbent custodians and custodian engineers. Seniority does not affect benefits such as vacation schedules, shift assignments, or leave time (J.A. 160-161). Given these facts, the retroactive seniority provision imposes minimal intrusion on white male incumbent employees, and it "does not require the layoff and discharge of white [incumbent] employees and therefore does not impose burdens of the sort that concerned the plurality in Wygant, 476 U.S. at 283 (opinion of Powell, J.) ("layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives")." Paradise, 480 U.S. at 182-183.

Finally, the retroactive seniority provision does not impose an absolute bar to white advancement. Paradise, 480 U.S. at 182; United Steelworkers v. Weber, 443 U.S. 193, 208 (1979). The settlement agreement does not prevent white male incumbent employees from bidding for transfers to other schools in the City's school system. Nevertheless, even in the "remote and speculative" event that the retroactive seniority awarded to one of the 54 offerees does diminish or delay the expectation of a proposed intervenor to transfer to another larger school, that does not render the settlement agreement invalid. A district

court has "not merely the power but the duty to render a decree which will, so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future," and the "choice of remedies to redress racial discrimination is 'a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court." Paradise, 480 U.S. at 183-184 (internal quotations and citations omitted); see also EEOC v. Hiram Walker & Sons, Inc., 768 F.2d 884 (7th Cir. 1985), cert. denied, 478 U.S. 1004 (1986) (district court's discretion to approve a consent decree is quite broad). The magistrate judge did not err in approving the retroactive seniority relief to the 54 offerees.

CONCLUSION

For the foregoing reasons, the magistrate judge's order should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation set out in Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect 7.0, and contains 12,049 words.

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CERTIFICATE OF SERVICE

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