UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JOHN BRENNAN, JAMES AHEARN, KURT BRUNKHORST, ERNIE TRICOMI, SCOTT SPRING, DENNIS MORTENSEN, JOHN MITCHELL, and ERIC SCHAUER, on behalf of themselves and others similarly situated,	:	
Plaintiffs,	:	Civ No. 02-0256 (FB) (RML)
-against-	:	
JOHN ASHCROFT, RALPH BOYD, UNITED STATES DEPARTMENT OF JUSTICE, NEW YORK CITY BOARD OF EDUCATION, NEW YORK CITY, DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES, and WILLIAM J. DIAMOND,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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This is an action for race and sex discrimination in violation of the Fifth and Fourteenth Amendments to the United States Constitution. By this motion, plaintiffs seek forward-looking injunctive relief preventing defendants from continuing to discriminate on the basis of race and sex in violation of the Constitution and various federal laws. Specifically, they seek an injunction preventing the municipal defendants from providing certain benefits to women and minorities for any competitively-distributed job benefit until this case is resolved.

Background

This case involves the New York City Board of Education's hiring of Custodian Engineers ("CEs"). The Board hires CEs for the maintenance of its schools.

A. The Earlier Lawsuit

The discriminatory actions about which plaintiffs complain were effected pursuant to an agreement (the "Agreement") that was reached to settle a case litigated in this Court, *viz.*, *United States v. New York City Board of Education, et al.*, E.D.N.Y. Civil Action No. 96-0374 (the "earlier lawsuit") involving the Board's hiring of CEs.[1] Accordingly, a brief background of that earlier lawsuit is necessary to understand the basis for this motion.

The United States commenced the earlier lawsuit pursuant to Section 707 of Title VII, 42

[1] There are now two levels of CEs, Level One and Level Two. At the time the earlier lawsuit was commenced, there was only one level of CE (equivalent to the current job category CE Level Two), and a separate job category called "Custodian" (equivalent to the current CE Level One).

U.S.C. § 2000e-6, which authorizes the Attorney General to bring an action whenever he believes that any person or group of person is engaged in a pattern or practice of discriminatory behavior in violation of the substantive provisions of Title VII, and that "the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described." 42 U.S.C. § 2000e-6(a) (emphasis added). The Civil Rights Division of defendant Department of Justice ("DOJ") brought the earlier lawsuit on behalf of the United States. (Defendants Ashcroft and Boyd are, respectively, the current Attorney General and Assistant Attorney General for Civil Rights at DOJ). It was brought against defendant New York City, defendant New York City Board of Education, and an entity and officer who were eventually replaced by defendant Department of Citywide Administrative Services and defendant Diamond. (These entities are referred to collectively as the "municipal defendants").

The complaint in the earlier lawsuit alleged that municipal defendants, various entities and individuals with responsibilities for the hiring of CEs for the New York City school system, failed or refused to recruit blacks, Hispanics, Asians, and women on the same basis as white males for the Custodian and CE positions; failed or refused to hire blacks and Hispanics for those positions; and used entry-level and promotional written examinations for those positions that excluded blacks and Hispanics from those positions.

Despite bringing the earlier lawsuit under the "pattern or practice" provision of Title VII, the United States, represented by DOJ, quickly abandoned any pretense of proving such a pattern or practice, and focussed its case entirely on demonstrating two different disparate impact claims (*i.e.*, claims that required no showing of discriminatory intent). First, it claimed that three

different civil service exams for the positions of Custodian and CE, *viz.* No. 5040 (given in 1985), 8206/8609 (given in 1989), and 1074 (given in 1993), had a disparate impact against blacks and Hispanics. Second, it claimed that defendants' recruiting practices had a disparate impact against blacks, Hispanics, women, and Asians.

B. The Agreement

The municipal defendants and DOJ (on behalf of the United States) executed the Agreement on February 11, 1999 and filed it with the Court. They subsequently filed a joint motion with this Court for a hearing pursuant to 42 U.S.C. § 2000e-2(n) to consider objections by those whose interests might be affected by the terms of the Agreement.

The Agreement provided benefits for minority and women employees. In the original Agreement, the municipal defendants agreed to convert 31 provisional Custodians and 12 provisional CEs to permanent status. They also agreed to give retroactive seniority to 41 Custodians (including the 31 whose provisional status was being converted) and 13 CEs (including the 12 whose provisional status was being converted). The Agreement refers to these 54 individuals as "Offerees." The Agreement provides them with retroactive seniority dates ranging from January 23, 1989 to February 28, 1996.[2] The Agreement does not provide any

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[2] Subsequently, the United States and the municipal defendants agreed to add four more Custodians and three more CEs to the list of Offerees. Further, two of the original Custodian Offerees were no longer employed as such at the time that the Settlement Agreement came before the court below. The United States and the municipal defendants concluded that those two could not participate as Offerees. Thus, at the time of the fairness hearing in the lower court in the earlier lawsuit, Offerees included 43 Custodians and 16 CEs. *United States v. New York*

(continued...)

backpay to the Offerees. *See* Agreement, ¶ 17.

All of the Offerees were either Asian Americans, Hispanic Americans, African Americans, or women. Indeed, paragraph 4 of the Agreement makes it clear that only members of those groups were eligible to be Offerees. *See id.* at ¶ 4 ("the term `Offeree(s)' shall refer to the following individuals . . . (a) All Custodians or Custodian Engineers who are listed in the Stipulation Regarding Provisional Hires as black, Hispanic, Asian, or female and are still employed as Custodians or Custodian Engineers . . . and (b) All black, Hispanic, Asian, or female Custodians or Custodian Engineers who . . . are employed as provisional Custodians or Custodian Engineers").

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

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[2](...continued)
City Board of Education, 85 F. Supp. 2d 130, 151 n.28, 156 (E.D.N.Y. 2000), *rev'd sub. nom, Brennan v. New York City Board of Education*, 260 F.3d 123 (2d Cir. 2001).

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

C. The January 2000 Ruling
And Intervenors' Appeal

In mid-March 1999, the District Court set a fairness hearing in the earlier lawsuit for May 27, 1999, and required all objections be postmarked on or before April 27, 1999. Many Custodians and CEs, including the plaintiffs in this current action, objected to the settlement on the ground that the provisions calling for permanent status for minority and women provisional employees and retroactive seniority for the minority and women Offerees were discriminatory and unfair.

With respect to the recruitment claim, the United States submitted the Declaration of

Orley C. Ashenfelter to support its claim that defendants' recruiting practices had a disparate impact on blacks, Hispanics, Asians, and women.[3] Dr. Ashenfelter compared the proportions of those groups who applied for each of three civil service exams to the proportions of those groups in what he deemed to constitute the qualified labor pool (the pool of individuals available and qualified for employment as CEs).[4] Dr. Ashenfelter concluded that there was a statistically significant shortfall between the proportions of those groups actually applying for the jobs and those in the relevant qualified labor pool. However, Dr. Ashenfelter did not try to identify the recruiting practices that purportedly caused these disparities. Nor did he try to show that the Offerees (all of whom were employed by the New York City Board of Education and who thus presumably had applied for jobs as CEs) were victims of these purportedly discriminatory recruiting practices.

In addition, on May 4, 1999, intervenors Brennan, Ahearn, and Brunkhorst (the "Brennan intervenors") moved to intervene in the action as plaintiffs in the earlier lawsuit. The District Court denied their motion to intervene and approved the settlement agreement in a decision and order dated February 9, 2000. Subsequent to the District Court's approval, the defendants implemented the Agreement, and provided the benefits to the Offerees called for under the Agreement.

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[3] Declaration of Orley C. Ashenfelter sworn to April 1, 1999 (Attachment 3 to United States' Memorandum In Support of Settlement Agreement And In Response To Objections Filed May 21, 1999) in *United States v. New York City Board of Education*, No. 96-0374.

[4] *Id.* at 2.

The Brennan intervenors appealed. The Second Circuit reversed the District Court's order denying intervention, vacated approval of the Agreement, and remanded the matter for further proceedings.

In reversing, the Second Circuit noted that the Brennan intervenors "claimed that the Agreement was impermissibly based on race, ethnicity, and gender . . . " *Brennan v. N.Y.C. Bd. of Educ.*, 260 F.3d 123, 127 (2nd Cir. 2001). The Court concluded that this allegation identified a legally cognizable interest sufficient to warrant intervention pursuant to Rule 24(a) of the Federal Rules of Civil Procedure. Indeed, the Second Circuit recognized that the Brennan intervenors had asserted non-frivolous claims of discrimination. *Id.* at 129.

The Second Circuit identified the Brennan intervenors' non-frivolous discrimination claim as one asserting "that any impairment of their interests in their positions as provisional Custodian Engineers and in their seniority rights as [CEs] would constitute impermissible discrimination rather than a proper restorative remedy based on past discrimination against the Offerees." *Id.* at 133. *See also, e.g., id.* at 130 ("The government alleges that race/ethnicity/gender discrimination prevented the Offerees from obtaining positions as permanent [CEs] and that the remedy provided by the Agreement merely restores them to positions they would have held but for such discrimination").

D. This Lawsuit

As already noted, the United States and the municipal defendants did not wait for the Second Circuit's decision before implementing the Agreement. Instead, in early 2000, during the

pendency of the appeal, they accorded retroactive seniority and permanent status to the Offerees. *See* December 14, 2001 hearing transcript in *United States v. New York City Board of Education* at 23-25. As a result, when Plaintiffs John Mitchell and Eric Schauer applied for transfers to more desirable positions with more pay in different schools, they were rejected, in favor of Offerees. Had the Offerees who obtained the positions not received the retroactive seniority benefits provided for in the agreement, Mitchell and Schauer would have obtained the positions in question.

John Mitchell is a Custodian Engineer employed at P.S. 128 in Manhattan. Declaration of John Mitchell, ¶ 1. Early in 2001, he applied for a better position as the Custodian Engineer at P.S. 166. *Id.* at ¶ 2. Instead of appointing Mitchell, the Board chose Pedro Arroyo, a Hispanic. *Id.* at ¶ 3. Prior to the implementation of the Agreement, Mitchell had more seniority than Arroyo, and would have received the job. But as a result of the retroactive seniority conferred on him by the Agreement, Arroyo received the job. *Id.* at ¶¶ 4-5.

Eric Schauer is a Custodian Engineer employed at P.S. 30 in the Bronx. Declaration of Eric Schauer, ¶ 1. Early in 2001, he applied for a better position as Custodian Engineer at Junior High 145. *Id.* at ¶ 2. Instead of appointing Schauer, the Board chose Kevin LaFaye, a Hispanic. *Id.* at ¶ 3. Prior to the implementation of the Agreement, Schauer had more seniority than LaFaye, and would have received the job. But as a result of retroactive seniority conferred on him by the Agreement, LaFaye received the job. *Id.* at ¶¶ 4-5.

Mitchell, Schauer, and the other plaintiffs all intend to apply in the future for positions as

Custodian Engineers in other schools in New York City, and expect to do so repeatedly in this and subsequent years. *See* Mitchell & Schauer declarations, ¶ 6, and the other plaintiffs' declarations, ¶ 3. (Transfer lists are issued five times per year, and any Custodian can make many applications each year.)[5] Each time they apply for such transfers, Plaintiffs will again face the risk of being rejected in favor of Offerees with greater seniority conferred based on the Agreement, unless this Court enjoins the enforcement of the Agreement. Seniority is dispositive of the competition 90% of the time. *Brennan*, 260 F.3d at 127. Moreover, "the exercise of seniority has a domino effect. If an Offeree obtains a desirable transfer, all comparable employees with more seniority than [one of the plaintiffs] but less than that of an Offeree may seek transfers at the next level of desirability, thereby foreclosing the particular [plaintiff]" from receiving that transfer as well. *Id.* at 132. Thus, plaintiffs' ability to obtain any of a wide array of desirable transfers is threatened by the retroactive seniority conferred on the Offerees by the Agreement. In addition to affecting plaintiffs' ability to obtain their preferred assignments, the loss of relative seniority will also affect them because seniority is used in making "temporary care" assignments, which give CEs the ability to temporarily serve as CE for two schools, not just one, and be paid for both.[6]

Accordingly, plaintiffs bring this motion for a preliminary injunction barring the

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[5] *See, e.g., United States v. New York City Board of Education*, 85 F. Supp. 2d at 139; Declaration of Bernard R. Siskin in *U.S. v. N.Y.C. Bd. of Educ.*, sworn to May 24, 1999 ("Siskin Decl.), ¶ 5: Declaration of James Lonergan in *U.S. v. N.Y.C. Bd. of Educ.*, sworn to May 20, 1999, ¶ 19.

[6] *United States v. N.Y.C. Bd. of Educ.*, 85 F. Supp. at 139 n.7.

enforcement of the Agreement's provisions awarding the Offerees permanent status and retroactive seniority for any competitively-awarded job benefit until this lawsuit is resolved on the merits.

Argument

THIS COURT SHOULD ISSUE A PRELIMINARY INJUNCTION

This Court should issue a preliminary injunction because plaintiffs can satisfy each of the alternative tests for a preliminary injunction, based on the likely unconstitutionality or illegality of the Agreement's race and sex-conscious provisions (or, at least, serious questions concerning their legality). Indeed, although no discovery has taken place yet, and plaintiffs believe that their case will only improve when it does, it seems quite unlikely that the defendants here can meet the Second Circuit's requirement of showing that the remedy is a "proper restorative remedy based on past discrimination *against the Offerees*." *Brennan*, 260 F.3d at 133 (emphasis added).

I. Legal Standard For Preliminary Injunction

It is well-established in this Circuit that a party is entitled to entry of a preliminary injunction by demonstrating (1) irreparable harm and (2) either (a) likelihood of success on the merits or (b) sufficiently serious questions going to the merits of the case to make them a fair ground for litigation and a balance of hardships tipping decidedly in its favor. *Zervos v. Verizon New York*, 252 F.3d 163, 172 (2d Cir. 2001); *Forest City Daly Housing, Inc. v. Town of North Hempstead*, 175 F.3d 144, 149 (2d Cir. 1999); *Polymer Technology Corp. v. Mimran*, 37 F.3d 74,

77-78 (2d Cir. 1994); *Jackson Dairy v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979). Each of these alternative tests is met in this case.

II. Irreparable Harm Will Result Unless A Preliminary Injunction Is Issued Against the Agreement.

As shown below, plaintiffs will likely suffer race and sex discrimination in violation of the Constitution if a preliminary injunction is not issued. That constitutes irreparable harm *per se*. *See Shaw v. Hunt*, 517 U.S. 899, 908 (1996) ("[a] racial classification causes `fundamental injury' to the `individual rights of a person'"); *Brewer v. West Irondequoit Central School District*, 212 F.3d 738, 744-45 (2d Cir. 2000) (irreparable harm shown by plaintiff challenging race-based admissions policy); *Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1423 (11th Cir. 1984) ("[I]rreparable injury may be presumed from the fact of discrimination"); *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997) (racial and sexual preferences disfavoring white males constitute irreparable harm); *Back v. Carter*, 933 F. Supp. 738, 754 (N.D. Ind. 1996) (same); *Equal Open Enrollment Ass'n v. Bd. of Educ. of Akron*, 937 F. Supp. 700, 709 (N.D. Oh. 1996) (same); *Milwaukee County Pavers Ass'n v. Fiedler*, 707 F. Supp. 1016, 1032 (W.D. Wis. 1989) (same); *see also Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) ("`When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary'"), *quoting* 11A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure*, § 2948 (2d ed. 1973). Moreover, plaintiffs are also threatened with irreparable economic injury, since the domino effect of the exercise of seniority rights, *see Brennan*, 260 F.3d at 132, makes it impractical for them to seek damages later for any

transfers they are denied as a result of the Agreement. *See O'Donnell Construction Co. v. District of Columbia*, 963 F.2d 420, 429 (D.C. Cir. 1992) (speculative showing involved in determining whether plaintiff would have received contracts in absence of racial preferences made damages remedy inadequate and qualified as irreparable harm).

III. Plaintiffs Are Likely To Succeed On The Merits Because The Racial Preferences Contained in the Agreement Are Unconstitutional.

As has been discussed above, the promotion and retroactive seniority provisions contained in the Agreement are not simply "make whole" remedies for identified victims of discrimination, since they confer benefits on minority and female employees who were not affected by the alleged disparate impact of the City's job tests and recruitment practices. *Id.* at 4-5. For example, many of the Offerees (1) never took the civil service exams being challenged and (2) could not have been the victims of any discriminatory recruiting practices (because they applied for and obtained jobs). Other Offerees may have taken the civil service exams, but are being given retroactive seniority that exceeds anything that is related to that potential discriminatory act.[7]

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[7] Nor is retroactive seniority necessarily the proper remedy for those who *did* take the exam. Even assuming *arguendo* that the tests were not job-related -- a point never litigated in the earlier lawsuit -- a plaintiff would not be entitled to a benefit if it could be shown that (s)he would have been denied the benefit even without the discriminatory test. *Caviale v. State of Wisconsin*, 744 F.2d 1289, 1295-96 (7th Cir. 1984) ("We agree with the district court that Caviale should be denied damages if her qualifications . . . were such that she would not have received the position even" absent the selection criterion with disparate impact); *Legault v. aRusso*, 842 F. Supp. 1479, 1491 n. 17 (D.N.H. 1994), *citing East Texas Motor Freight Systems, Inc. v. Rodriguez*, 431 U.S. 395, 400, 402, 403 n.9 (1977); *Wade v. New York Telephone Co.*, 500 F. Supp. 1170, 1180 (S.D.N.Y. 1980).

Thus, as the United States conceded in the earlier lawsuit, these provisions confer benefits based on the Offerees' race or sex, not their status as victims of discrimination. *See* Brief of the United States in *Brennan v. New York City Board of Education*, Second Circuit No. 00-6077 ("U.S. Appeals Br.") 37-50 (arguing that race-based remedy was justified under strict scrutiny). That is, the United States never argued in the Second Circuit that the Agreement should be approved because it was not race-based or sex-based. *Id*. This distinction is important because race-based relief, unlike victim-specific relief designed to make victims whole, is presumptively unconstitutional. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 526 (1989) (Scalia, J., concurring) (contrasting "preference to identified victims of discrimination" with "preference" to minorities "on the basis of their race"); *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 700 n.7 (9th Cir. 1997) (same); *Chance v. Bd. of Examiners*, 534 F.2d 993, 998 (2d Cir. 1976) (distinguishing between preference made "because [recipient] is black" and preference "because . . . he has been discriminated against").

A. Racial Preferences Are Only Tolerated In Exceptional Cases Involving Egregious, Deliberate Discrimination

Racial preferences may be used when they are necessary to remedy the present effects of past discrimination against minority groups. However, the use of race for remedial purposes is subject to strict scrutiny. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) ("all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed under a reviewing court under strict scrutiny"). Strict scrutiny forbids the use of race unless it is necessary to serve a compelling governmental interest and is narrowly tailored to

achieve that interest. *Id*. (Similarly, sex-based preferences are subject to heightened scrutiny, requiring that any sex-based classification have an "exceedingly persuasive justification," *United States v. Virginia*, 518 U.S. 515, 533 (1996), a standard similar to that used for racial classifications.)[8] The same scrutiny applies to racial or sexual preferences contained in settlement agreements as to other state-sponsored affirmative-action plans. *E.g.*, *Aiken v. City of Memphis*, 37 F.3d 1155, 1162 (6th Cir. 1994) (en banc) (strict scrutiny applied to consent decree); *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1568-69 (11th Cir. 1994) (same); *Hayes v. North State Law Enforcement Officers Association*, 10 F.3d 207, 212 (4th Cir. 1993) (same); U.S. Appeals 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").

Race-based remedies are not appropriate in most cases of discrimination, and are permissible only as a last resort, when egregious or longstanding discrimination makes race-neutral remedies ineffective.

As the Supreme Court has explained,

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[8] *E.g., Builders Association of Greater Chicago v. County of Cook*, 256 F.3d 642, 647 (7th Cir. 2001) (noting the similarity in standards); *Michigan Road Builders Association v. Milliken*, 834 F.2d 583, 595 (6th Cir. 1987) (striking down sex-based preference because there was no evidence of state discrimination against women to support it), *aff'd*, 489 U.S. 1061 (1989).

> In most cases, the court need only order the employer or union to cease engaging in discriminatory practices, and award make-whole relief to the individuals victimized by those practices. In some instances, however, it may be necessary to require the employer or union to take affirmative steps to end discrimination effectively to enforce Title VII. Where an employer or union has engaged in *particularly longstanding or egregious discrimination*, an injunction simply reiterating Title VII's prohibition against discrimination will often prove useless and will only result in endless enforcement litigation. In such cases, requiring recalcitrant employers or unions to hire and to admit qualified minorities roughly in proportion to the number of qualified minorities in the workforce may be the only effective way to ensure the full enjoyment of the rights protected by Title VII.

Local 28, Sheet Metal Workers v. EEOC, 478 U.S. 421, 448-49 (1986) (emphasis added).

"The only cases found to present the necessary `compelling interest' sufficient to `justify a narrowly-tailored race-based remedy' are those that expose . . . `pervasive, systematic, and obstinate discriminatory conduct.'" *Associated General Contractors v. Drabik*, 214 F.3d 730, 737 (6th Cir. 2000), *quoting Adarand Constructors, Inc. v. Pena*, 515 U.S. at 237, *citing United States v. Paradise*, 480 U.S. 149 (1987). Thus, race-conscious remedies are unconstitutional where the "record is devoid of proof of a history of egregious and pervasive discrimination." *Dallas Fire Fighters Ass'n v. City of Dallas*, 150 F.3d 438, 441 (5th Cir. 1998), *citing Local 28*, 478 U.S. at 448-49. *See also Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989) ("In the extreme case, some form of narrowly-tailored racial preference might be necessary to break down patterns of *deliberate exclusion*") (emphasis added). In the ordinary case, remedies are limited to identified victims of discrimination. *See Chance v. Board of Examiners*, 534 F.2d 993, 998-99 (2d Cir. 1976) (error for court to impose race-conscious remedy which was not limited to "those affected by the employer's prior discriminatory conduct").

Even when the use of race is necessary, "the court should also take care to tailor its orders to fit the nature of the violation it seeks to correct," *Local 28*, 478 U.S. at 476; *see also id.* at 481, so that it does not "discriminate more than is necessary to cure the effects of the earlier discrimination." *Builders Association of Greater Chicago v. County of Cook*, 256 F.3d 642, 646 (7th Cir. 2001); *accord Shaw v. Hunt*, 116 S. Ct. 1894, 1902-03 (1996); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 280 & n.6 (1987); *Middleton v. City of Flint*, 92 F.3d 396, 412 (6th Cir. 1996); *Contractors Association of Eastern Pennsylvania v. Philadelphia*, 91 F.3d 586, 596 (3d Cir. 1993) (burden on whites must be "close to the minimum necessary to redress the discrimination justifying the preference"); *Podberesky v. Kirwan*, 38 F.3d 147, 153 (4th Cir. 1994). Thus, "race-conscious affirmative measures [should] not be invoked simply to create a racially balanced workforce," *Local 28*, 478 U.S. at 475, and should be reserved for exceptional cases, such as where an "employer or labor union [] has engaged in persistent or egregious discrimination" or "such relief is necessary to dissipate the lingering effects of pervasive discrimination." *Id.* at 476; *see also id.* at 480 (race-based remedies constitutional where there have been "egregious violations of Title VII" and "alternative remedies" would not be effective).

In short, race can constitutionally be used only as a "last resort," *Richmond v. J.A. Croson Co.*, 488 U.S. at 519 (1989) (Kennedy, J., concurring); *Engineering Contractors Ass'n v. Metro. Dade County*, 122 F.3d 895, 926 (11th Cir. 1997); *Alexander v. Estepp*, 95 F.3d 312, 316 (4th Cir. 1996); *Hayes v. North State Law Enforcement Officers Ass'n*, 10 F.3d 207, 217 (4th Cir. 1993), "in the extreme case," *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989), and then only when the racial classification remedies the violation "with greater precision that any alternative

means." *Wygant v. Jackson Board of Education*, 476 U.S. 267, 280 n.6 (1986) (plurality opinion).

The defendant has the burden of proving that its racial or gender preference is constitutional. *Brewer v. West Irondequoit Central School District*, 212 F.3d 738, 744 (2d Cir. 2000) (defendant "bears the burden" of proving racial classification is constitutional); *Johnson v. Board of Regents of University of Georgia System*, 236 F.3d 1234, 1244 (11th Cir. 2001) (same), *citing Bass v. Board of County Commissioners*, 256 F.3d 1095, 1114 (11th Cir. 2001), *citing City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510-11 (1989); *Middleton v. City of Flint*, 92 F.3d 396, 397, 404, 407 (6th Cir. 1996) (same; defendant has "heavy burden"); *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997) ("The burden of justifying differential treatment by ethnicity or sex is always on the government"); *accord Builders Ass'n of Greater Chicago v. County of Cook*, 256 F.3d 642, 647 (7th Cir. 2001); *see also United States v. Virginia*, 518 U.S. 515, 533 (1996) ("The burden of justification [for a sex-based classification] is demanding and it rests entirely on the State").

B. There Is No Showing Of Intentional Discrimination, Much Less Egregious Intentional Discrimination, In This Case, And Little Evidence Of Any Discrimination At All.

Here, the United States abandoned its claim alleging a "pattern or practice" of discrimination, and based the Agreement solely on two claims of disparate impact (unintentional discrimination). Moreover, the Agreement is based solely on a prima facie case of disparate impact -- that is, simply a showing that a particular test or recruiting practice had a disparate

impact on a disfavored group. Thus, there is no evidence of intentional discrimination, much less persistent or egregious discrimination. Accordingly, there is no basis for using race at all. *See People Who Care v. Rockford Bd. Of Educ.*, 111 F.3d 528, 534 (7th Cir. 1997) (provision calling for certain percentage of hired teachers to be black or Hispanic could not be justified by statistical disparities or underrepresentation; "there is no finding that the school district has ever discriminated (by which we mean discriminate intentionally -- the only kind of discrimination that violates the equal protection clause)"); *accord Builders Ass'n of Greater Chicago v. County of Cook*, 256 F.3d 642, 644 (7th Cir. 2001); *Wessman v. Gittens*, 160 F.3d 790, 817 (1st Cir. 1998) (Lipez, J., dissenting) (although dissenting judge supports race-conscious admissions at selective public school, he rejects claim that low percentages of African Americans or Hispanics applying to the school or the disparate impact of admissions exam to the school are sufficient to justify race-conscious policy; "these disparate impact contentions are wrong because they do not account for the centrality of proof of discriminatory animus in justifying a race-conscious remedial program"); *see also Local 28*, 478 U.S. at 475 ("race-conscious affirmative measures [should] not be invoked simply to create a racially balanced workforce").

If a prima facie case of disparate impact -- a mere showing that a particular test or recruiting practice had a disparate impact on a disfavored group -- were a sufficient basis for race-conscious and sex-conscious remedies, that would have radical implications. Race preferences would become permissible in most cases, rather than the exceptional cases envisioned by the Supreme Court:

* If a government employer preferred bilingual employees and significantly fewer whites than Hispanics are bilingual, the employer could create race-preferences for whites;

* If a public school requires its teachers to have a certain college degree, and that requirement eliminates more minorities than whites, the public school can engage in race-conscious hiring favoring the disparately-impacted minorities;

* If a police department refuses to hire those with a criminal record, and that requirement eliminates more minorities or males than whites or females, the police department can implement a program that favors minorities or males in hiring;

* If a fire department requires that firefighters be able to drag a hose, and this requirement has a disparate impact upon women, the fire department can institute preferences for women; and

* If a state school uses standardized tests that have a disparate impact on minorities (like the SAT test), then it, too, can provide preferences for those minorities adversely impacted.

Even if, contrary to the foregoing authorities, a prima facie disparate impact case were sufficient to create a basis for state actors to employ racial or gender preferences, its application here would be inappropriate, since there is no evidence of what caused the purported disparate impact against Asians or women, and racial or sexual preferences are unconstitutional when they include groups that were not subjected to discrimination. "A state or local government that has discriminated just against blacks may not by way of remedy discriminate in favor of blacks *and* Asian-Americans *and* women." *Builders Association of Greater Chicago v. County of Cook*, 256 F.3d 642, 646 (7th Cir. 2001) (emphasis in original), *citing Croson*, 488 U.S. at 506 (inclusion of Orientals, Indians, Eskimos, and Aleuts in affirmative action plan belied its purported remedial purpose and showed lack of narrow tailoring); *accord Associated General Contractors Association v. Drabik*, 214 F.3d at 737; *Monterey Mechanical*, 125 F.3d at 714-15; *L. Ferriozzi*

Concrete Co. v. Casino Reinvestment Development Authority, 776 A.2d 254, 261-62 (N.J. App. 2001) (striking down affirmative action plan solely because it was not limited to groups that had been shown to be subject to discrimination). The United States did not contend, nor did it present any evidence, that women or Asians were victimized by the civil service exams. Rather, their inclusion as Offerees is based solely on the disparate impact recruiting claim, and that claim is supported solely by Dr. Ashenfelter's declaration.

Dr. Ashenfelter compared the demographic breakdown of those applying to take the civil service exams to the demographic breakdown of those in the same professions as the current jobs of those applying. *See* Discussion, *supra*, pp. 6-7. This analysis, then, does nothing to attribute the "disparate impact" to any particular recruiting practice employed by the City, as Title VII requires. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657 (1989) (plaintiffs must show that "the disparity they complain of is the result of one or more of the employment practices that they are attacking"); 42 U.S.C. § 2000e-2(k) (1) (B) (i).

C. The Racial Preferences In The Agreement Are Not Narrowly Tailored To Remedying Identified Discrimination.

Assuming *arguendo* that the prima facie cases of testing and recruiting "disparate impact" discrimination were sufficient to create a compelling governmental interest in the race-conscious provisions of the Agreement, the remedy proposed by the promotions and retroactive grant of seniority are not narrowly-tailored. There is no effort to identify the current effects of the past discrimination -- that is, how many minorities or women were actually harmed by defendants' discriminatory acts or how many would be currently employed if job-related exams had been

employed (even assuming the exams in question were *not* job-related) -- and to match the remedy to meet an identified discrepancy. The Offeree group has only modest overlap with the group that allegedly suffered discrimination by taking the tests, and, presumably, no overlap with the group that suffered discrimination by not responding to the discriminatory recruiting practices. By definition, the Offerees were not adversely affected by the challenged recruiting practices, since they sought and obtained employment.

The inclusion of Offerees who were never subjected to any discrimination also contradicts the Second Circuit's emphasis on limiting remedies to identified victims of discrimination whenever possible. *See, 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*).

Moreover, although monetary benefits could have been awarded to the Offerees, the

Agreement places the burden of the remedial relief almost entirely on innocent third parties who did not engage in discrimination. *People Who Care v. Rockford Bd. Of Educ.*, 111 F.3d 528, 533 (7th Cir. 1997) ("equitable decrees often affect innocent third parties; their interests must be fully considered in the formulation of the decree, especially when the interests are of constitutional dignity"). Assuming some race-based or sex-based relief were required, there is no reason why the relief could not (*at least* in part) have taken the form of a remedy (like backpay) that would *not* affect innocent third parties.

In short, the Agreement's retroactive seniority provisions "constitute impermissible discrimination rather than a proper restorative remedy based on past discrimination against the Offerees." *Brennan*, 260 F.3d at 133.

IV. The Balance of Hardships Favor Plaintiffs

The plaintiffs will continue to suffer violations of their constitutional rights, and thus irreparable harm, unless the Agreement is enjoined. A damages remedy would be especially inadequate given the domino effect of the seniority system. *See Brennan*, 260 F.3d at 132. Moreover, the public interest would be served by issuing a preliminary injunction. "It is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Michigan Liquor Control Commission*, 23 F.3d 1071, 1079 (6th Cir. 1994); *accord O'Donnell Construction Co. v. District of Columbia*, 963 F.2d 420, 429 (D.C. Cir. 1992) (noting "public's interest in maintaining a system of laws free of unconstitutional racial preferences"); *Back v. Carter*, 933 F. Supp. 738, 754 (N.D. Ind. 1996) (public interest was served by enjoining

racial and sexual preferences); *Equal Open Enrollment Ass'n v. Bd. of Educ. of Akron*, 937 F. Supp. 700, 709 (N.D. Oh. 1996) (same); *Milwaukee County Pavers Ass'n v. Fiedler*, 707 F. Supp. 1016, 1034 (W.D. Wis. 1989) (same). On the other hand, a preliminary injunction would impose little hardship on the defendants, who would merely be required to suspend their implementation of the Agreement and return to the *status quo* pending trial. Given the Second Circuit's belief that a resolution of the Agreement's constitutionality would be "heavily factual" (*Brennan*, 260 F.3d at 133), that *status quo* should be restored.

Conclusion

For the foregoing reasons, this Court should issue a preliminary injunction against the defendants prohibiting them from continuing to provide the benefits of permanent status or retroactive seniority (from Paragraphs 13-16 of the Agreement) to the Offerees for any competitively-distributed job benefit until resolution of this matter.

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