08-5171-cv

Nos. 08-5171-cv (L), 08-5172-cv (xap), 08-5173-cv (xap),
08-5375-cv (xap), 08-5149-cv (con), 08-4639-cv (con)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee-Cross-Appellant,

JANET CALDERO, CELIA I. CALDERON, MARTHA CHELLEMI, SALIH CHIOKE, ANDREW CLEMENT, KRISTEN D'ALESSIO, LAURA DANIELE, CHARMAINE DIDONATO, DAWN L. ELLIS, MARCIA P. JARRETT, MARY KACHADOURIAN, KATHLEEN LUEBKERT, ADELE A. McGREAL, MARGARET McMAHON, MARIANNE MANOUSAKIS, SANDRA D. MORTON, MAUREEN QUINN, HARRY SANTANA, CARL D. SMITH, KIM TATUM, FRANK VALDEZ, and IRENE WOLKIEWICZ,

Intervenors-Appellees-Cross-Appellants,

(For continuation of caption see inside cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

FINAL REPLY BRIEF FOR THE UNITED STATES AS CROSS-APPELLANT

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Intervenors-Appellees

v.

JOHN BRENNAN, JAMES G. AHEARN, SCOTT SPRING, and DENNIS MORTENSEN,

Intervenors-Appellants-Cross-Appellees,

NEW YORK CITY DEPARTMENT OF EDUCATION; CITY OF NEW YORK; MARTHA K. HIRST, Commissioner, New York City Department of City Administrative Services; NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES,

Defendants-Appellees

No. 08-5149-cv (con)

JOHN BRENNAN, JAMES AHEARN, SCOTT SPRING, DENNIS MORTENSEN, JOHN MITCHELL, and ERIC SCHAUER,

Plaintiffs-Appellants,

v.

ATTORNEY GENERAL OF THE UNITED STATES; ASSISTANT ATTORNEY GENERAL OF THE UNITED STATES FOR CIVIL RIGHTS; U.S. DEPARTMENT OF JUSTICE; NEW YORK CITY DEPARTMENT OF EDUCATION; CITY OF NEW YORK; NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES; MARTHA K. HIRST, Commissioner, New York City Department of City Administrative Services,

Defendants-Appellees,

(For continuation of caption see next page)

(Continuation of caption)

JANET CALDERO, CELIA I. CALDERON, MARTHA CHELLEMI, SALIH CHIOKE, ANDREW CLEMENT, KRISTEN D'ALESSIO, LAURA DANIELE, CHARMAINE DIDONATO, DAWN L. ELLIS, MARCIA P. JARRETT, MARY KACHADOURIAN, KATHLEEN LUEBKERT, ADELE A. McGREAL, MARGARET McMAHON, MARIANNE MANOUSAKIS, SANDRA D. MORTON, MAUREEN QUINN, HARRY SANTANA, CARL D. SMITH, KIM TATUM, FRANK VALDEZ, and IRENE WOLKIEWICZ,

Intervenors-Appellees,

PEDRO ARROYO, JOSE CASADO, CELESTINO FERNANDEZ, KEVIN LaFAYE, STEVEN LOPEZ, ANIBAL MALDONADO, JAMES MARTINEZ, WILBERT McGRAW, SILVIA ORTEGA DE GREEN, and NICHOLAS PANTELIDES,

Intervenors-Appellees

No. 08-4639-cv (con)

RUBEN MIRANDA,

Plaintiff-Appellant

v.

NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendant-Appellee

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For the reasons set forth in the United States' opening brief and in this reply brief, this Court should remand the case and instruct the district court to hold an evidentiary hearing to determine whether the challenged employment examinations and recruitment practices violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*. If the district court determines that the exams or recruitment practices violate Title VII, the court should then decide which of the beneficiaries of the settlement agreement are victims of that discrimination and calculate the seniority each should receive as make-whole relief.

ARGUMENT

A. The United States Intended The Settlement Agreement To Provide Make-Whole Relief To Discrimination Victims

The Arroyo and Caldero intervenors present a distorted picture of the United States' intent in settling with the Board, as well as the circumstances surrounding the government's decision to oppose some of the relief authorized by the settlement agreement. Caldero Opening Br. 26-27, 54-55; Arroyo Opening Br. 19-20. We provide the following information to set the record straight.

The district court found after an evidentiary hearing that the United States never would have entered into the settlement agreement had it believed the seniority awards went beyond make-whole relief to discrimination victims. Special Appendix (S.A.) 134-135. This finding is not clearly erroneous and is

entitled to special deference because it rests on witness credibility. See *United States* v. *Isiofia*, 370 F.3d 226, 232 (2d Cir. 2004) (where "findings are based on credibility determinations, even greater deference is required, 'for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said'") (citation omitted).

In making this finding, the district judge credited the in-court testimony of Katherine Baldwin, who was Chief of the Employment Litigation Section of the Civil Rights Division of the Department of Justice when the parties executed the settlement agreement in 1999. S.A. 133-135. Contrary to the Caldero intervenors' contention (Opening Br. 91-94), the court did not clearly err in relying on Baldwin's testimony. As Section Chief, Baldwin "signed off" on the agreement before it received final approval from the Civil Rights Division. Joint Appendix (J.A.) 4079, 4083. One of Baldwin's duties was to ensure that the settlement agreement conformed to the Division's policies. J.A. 4076. She testified that the Division's policy in 1999 was to limit individual awards in settlement agreements to "[m]ake-whole relief for identified victims of discrimination." J.A. 4080; accord J.A. 4077-4081. She explained that she would not have approved the settlement agreement had she believed that the individual awards went beyond

make-whole relief to victims. J.A. 4095-4096, 4106-4107. She testified that she received assurances from the government's trial team that only discrimination victims would receive individual relief under the agreement. J.A. 4077-4078, 4083, 4095, 4108. Baldwin's testimony was corroborated by Marybeth Martin, a Deputy Chief of the Employment Litigation Section and the direct supervisor of the government trial attorneys at the time of the settlement. J.A. 4156b-4156k; see J.A. 4109-4110 (admitting Martin deposition into evidence).

Baldwin's testimony is consistent with statements the United States made to the magistrate judge in 1999 and to this Court in the previous appeal. See U.S. Opening Br. 12-13. In urging approval of the settlement, the United States explained that the seniority awards were within the "range of appropriate make-whole relief to victims of discrimination," J.A. 496, and emphasized "the Supreme Court's clear and repeated pronouncements that remedial seniority is an integral aspect of make-whole relief." J.A. 505; accord J.A. 484-485, 506-507, 514. A few weeks later, the United States defended the settlement agreement's awards of retroactive seniority as "a key aspect" of "make-whole relief under Title VII." J.A. 412-413.

The Caldero intervenors emphasize (Opening Br. 54-55) that, in seeking approval of the settlement, the United States asserted that it "implements race-

conscious remedies." J.A. 480. But "race-conscious" can have different meanings depending on the context. Although it can refer to race-based affirmative action, it also can describe "individual make-whole relief in the context of race." J.A. 4156*l*-4156*m*. When read in light of the other statements in the government's 1999 pleadings, the term "race-conscious remedies" is most naturally interpreted as referring to relief for victims of racial discrimination. Indeed, the magistrate judge used the term "race conscious remedies" in this sense in approving the settlement agreement. See *United States* v. *New York City Bd. of Educ.*, 85 F. Supp. 2d 130, 155 (E.D.N.Y. 2000) ("[R]ace-conscious remedies are designed only to return employees to the positions they would have been in but for the alleged discrimination."), vacated on other grounds, *Brennan* v. *New York City Bd. of Educ.*, 260 F.3d 123 (2d Cir. 2001).

After this Court remanded the case to allow the Brennan appellants to take discovery on their claims, see *Brennan*, 260 F.3d at 133, the United States uncovered evidence that some of the beneficiaries were not discrimination victims and that other beneficiaries, although victims, had received more than make-whole relief. U.S. Opening Br. 14-15.

The Arroyo and Caldero intervenors assert, however, that the United States attacked the legality of the settlement agreement in 2002, more than six months before post-remand discovery began. Caldero Opening Br. 27; Arroyo Opening Br. 19. That assertion is incorrect.

In April 2002, the United States filed a response to the Brennan appellants' motion for a preliminary injunction. The United States opposed the motion as to the 27 testing-claim beneficiaries, but did not object to the motion as it pertained to the other beneficiaries. J.A. 578. The government's response did not assert, however, that the relief to the recruitment-claim beneficiaries was unlawful.

The United States later explained that it was not attacking the legality of the relief to the recruitment-claim beneficiaries but was merely reserving judgment until completion of post-remand discovery. In April 2002, for example, the United States emphasized that its decision "not to oppose [the Brennan appellants'] motion as it pertains to some [beneficiaries] should not be construed as a decision not to defend relief as to those persons." J.A. 711; see also J.A. 617. Similarly, in June 2002, the United States asserted that relief to recruitment-claim beneficiaries "may be determined to be lawful upon further development of the factual record." J.A. 612-613. In November 2002, the United States further explained that,

because "discovery on the recruitment claim was truncated when the United States and the City entered into the Settlement Agreement in early 1999," the government wanted to take additional discovery "to ensure that there is a sufficient factual predicate for awarding Title VII make-whole relief to each of the [beneficiaries]." J.A. 4423.

In 2003, the parties engaged in extensive discovery, during which the United States served interrogatories and took the depositions of many beneficiaries. J.A. 701; J.A. 1110-1148 (col. D) (citing interrogatory responses and depositions). In September 2003, after completing this discovery, the United States submitted to the parties a chart explaining the government's position on the legality of the seniority awards in the settlement agreement. J.A. 3332, 3338; J.A. 1110-1148. The United States took the position that all 27 testing-claim beneficiaries were discrimination victims entitled to retroactive seniority, but that some had received seniority awards that exceeded make-whole relief. J.A. 1110, 1113, 1115-1116, 1120, 1123-1125, 1128-1130, 1132-1135, 1138-1139, 1141, 1144-1145, 1148. As for the recruitment-claim beneficiaries, the United States took the position that four of them – Salih Chioke, Laura Daniele, Carl Smith, and Gerardo Villegas – were discrimination victims entitled to retroactive, competitive

seniority, but that the remaining beneficiaries were not victims. J.A. 1114, 1118, 1142, 1146.

B. The Decision To Provide Make-Whole Relief To Some Minority Test-Takers, But Not Others, Was Reasonable

The Brennan appellants incorrectly claim (Response/Reply Br. 1-2, 13-18) that the settlement agreement results in a "lottery" that arbitrarily grants retroactive seniority to some minorities who were adversely affected by the exams while denying relief to others who were similarly disadvantaged. In fact, the Board and the United States acted reasonably in deciding which minority test-takers would receive make-whole relief under the settlement. Cf. *Berkman* v. *City of New York*, 705 F.2d 584, 597 (2d Cir. 1983) ("[A] court should normally approve [a Title VII] settlement unless it contains provisions that are unreasonable, unlawful, or against public policy.").

The Board and the United States agreed that the only individuals who would receive make-whole relief were those who had served as provisional custodians or custodian engineers and were still working for the Board as either provisional or permanent custodians or custodian engineers. J.A. 105 (¶ 4), 107-110 (¶¶ 12-16). Of the minority test-takers who were adversely affected by the challenged exams, 27 met these requirements for make-whole relief. J.A. 578 & n.2. The parties had

to select some criteria for narrowing the pool of beneficiaries because the number of potential minority victims of the discriminatory exams exceeded 800[1] – far more than either (1) the 45 additional minorities whom the Board likely would have hired had the exams not had a disparate impact, J.A. 3825-3826 ¶¶ 15, 19, 23; or (2) the 444 individuals whom the Board hired based on the test results, J.A. 3825-3826 ¶¶ 13, 17, 21.

Although the 27 testing-claim beneficiaries were a small fraction of the pool of potential victims, the decision not to include other minority test-takers as beneficiaries was reasonable. First, the minority test-takers who had worked as provisional employees represented a reasonable approximation of the group of minority candidates whom the Board would have hired as permanent custodians or custodian engineers under a non-discriminatory system. The United States contends that the Board's provisional hiring system is an equally effective, less discriminatory alternative to the challenged exams. J.A. 1645-1646 ¶ 104; J.A. 2165-2166. It thus made sense to use the provisional hiring results to predict what would have occurred absent discrimination. J.A. 528-529. Second, by

[1] Of those who failed the exams, 816 were African American or Hispanic. J.A. 2186, 2199, 2212. The number of potential victims likely exceeded 1,000, however, because many African Americans and Hispanics who passed the exams either scored too low to be hired or had their hiring delayed because of low scores. See J.A. 2178, 2180-2184, 2195-2196, 2208-2209, 2221-2222.

successfully performing as provisional employees, these 27 beneficiaries proved they were qualified to be permanent custodians or custodian engineers. The duties and performance standards were identical for the permanent and provisional positions. U.S. Opening Br. 7. Third, by applying for and accepting the provisional jobs, these 27 minority test-takers demonstrated their interest in working as custodians or custodian engineers.

The Brennan appellants also suggest (Response/Reply Br. 13-18) that none of the minority test-takers should receive make-whole relief because it is impossible to know with certainty which of them the Board would have hired (and in which order) had the tests been non-discriminatory. That position is untenable.

Given the inherent difficulty of "recreating the past," the determination of proper make-whole relief "will necessarily involve a degree of approximation and imprecision." *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 372 (1977). As this Court has recognized, "any attempt to reconstruct what would have happened in the absence of discrimination is fraught with considerable difficulty. But the court is called upon to do the best it can with the data available to it." *Rios* v. *Enterprise Ass'n Steamfitters Local 638*, 501 F.2d 622, 632 (2d Cir. 1974). Therefore, the impossibility of knowing exactly what would have happened under a non-discriminatory system does not justify denying relief to all

victims. Instead, courts and parties must make reasonable projections about which potential victims would have received jobs absent discrimination. See *Association Against Discrimination in Employment, Inc.* v. *City of Bridgeport*, 647 F.2d 256, 282 & n.25 (2d Cir. 1981) (recognizing, in a disparate-impact case, that the number of minorities who would receive make-whole relief under a remedial order may be fewer than the number of minority victims), cert. denied, 455 U.S. 988 (1982).

The Brennan appellants' position would undermine Title VII compliance by reducing employers' incentives to develop job-related tests. Under their theory, if a test is used to hire employees but later found to be invalid, the employer could avoid providing make-whole relief to anyone by arguing that it is impossible to know how each applicant would have performed on a valid exam and which of them would have been hired under a non-discriminatory system. Such an outcome cannot be reconciled with the presumption that discrimination victims should receive make-whole relief, including retroactive seniority, under Title VII. See *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 763-780 (1976); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 419-424 (1975).

C. The District Court Erred In Placing The Burden On The United States To Prove That Five Testing-Claim Beneficiaries Were Qualified For The Custodial Positions

As the United States explained in its opening brief (at pp. 34-43), the district court erroneously placed the burden on the government to prove that five beneficiaries of the settlement agreement were qualified for the custodial positions. If the district court concludes on remand (as it should) that the challenged exams violate Title VII, the burden will shift to the Brennan appellants under *Teamsters*, *supra*, to prove that the testing-claim beneficiaries were not discrimination victims. The Brennan appellants make several arguments in defense of the district court's allocation of the burden of proof, but none has merit.[2]

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[2] The Brennan appellants suggest (Response/Reply Br. 75) that Section 707 of Title VII, which gives the Attorney General authority to bring pattern-or-practice actions, 42 U.S.C. 2000e-6, requires proof of disparate treatment. They have waived the issue by failing to adequately brief it. See *Zhang* v. *Gonzales*, 426 F.3d 540, 546 n.7 (2d Cir. 2005). At any rate, their contention is meritless. The word "intended" in Section 707 simply means that the challenged action was not inadvertent. *United States* v. *City of Yonkers*, 609 F. Supp. 1281, 1285 (S.D.N.Y. 1984); cf. *Association Against Discrimination*, 647 F.2d at 280 n.22 (word "intentionally" in Section 706(g) of Title VII "means not that there must have been a discriminatory purpose, but only that the acts must have been deliberate, not accidental"). For decades, the Attorney General has relied on his Section 707 authority to bring disparate-impact claims. See, *e.g.*, *United States* v. *City of Warren*, 138 F.3d 1083 (6th Cir. 1998); *United States* v. *Fairfax County*, 629 F.2d 932 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981); *United States* v. *Lee Way Motor Freight, Inc.*, 625 F.2d 918 (10th Cir. 1979); *Firefighters Inst. for Racial Equality and United States* v. *City of St. Louis*, 549 F.2d 506 (8th Cir.), cert.

(continued...)

The Brennan appellants assert (Response/Reply Br. 74-76) that, in effect, the district court placed the *Teamsters* burden on them. But the language of the district court's opinion refutes that contention: "[T]he Court assesses actual-victim status based on whether the retroactive seniority they received approximately corresponds to the seniority they would have received but for the discriminatory exams. On that issue, the parties to the Agreement – i.e., the United States and the Board – bear the burden of proof." S.A. 139.

The Brennan appellants also contend (Response/Reply Br. 74, 76-77) that, even under the *Teamsters* standard, they were entitled to summary judgment because the United States allegedly failed to present evidence to rebut the Brennan appellants' evidence about the five beneficiaries. That contention is meritless.

The Brennan appellants fail to recognize that a non-moving party's obligation in responding to a summary judgment motion differs depending on whether the non-movant would have the burden of proof at trial. If the party opposing a summary judgment motion would have the burden of proof, that party "must respond [to the motion] with evidence sufficient to allow a trier of fact to find in its favor." *Albee Tomato, Inc.* v. *A.B. Shalom Produce Corp.*, 155 F.3d

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[2](...continued)
denied, 434 U.S. 819 (1977).

612, 617 (2d Cir. 1998). But this rule "applies only to parties who both oppose the motion for summary judgment and bear the burden of proof." *Ibid.* "Where the movant has the burden [of proof at trial], its own submissions in support of the motion must entitle it to judgment as a matter of law." *Id.* at 618. In other words, "[t]he party who has the burden of proof on a dispositive issue cannot attain summary judgment unless the evidence that he provides on that issue is conclusive," *Torres Vargas* v. *Santiago Cummings*, 149 F.3d 29, 35 (1st Cir. 1998), meaning "that no reasonable trier of fact could find other than for the moving party." *Calderone* v. *United States*, 799 F.2d 254, 259 (6th Cir. 1986).

Under *Teamsters*, the Brennan appellants will bear the burden of proof at trial on the issue of qualifications. Thus, the Brennan appellants are entitled to summary judgment only if their evidence regarding qualifications is conclusive – that is, only if a reasonable factfinder would have no choice but to find the beneficiaries unqualified.

The Brennan appellants' evidence did not meet this stringent test. In opposing summary judgment, the United States produced evidence that the Board's post-hoc review of test failers' qualifications was unreliable, and that the beneficiaries' experience papers were not dispositive. Had those beneficiaries received the opportunity to appeal (a right afforded to test passers), they could

have supplemented the information on their papers to satisfy the reviewers they were qualified. Focusing solely on experience papers in determining qualifications is especially unreliable because a substantial percentage of test passers who were initially deemed unqualified based on their experience papers succeeded in having those determinations overturned on appeal. U.S. Opening Br. 35-38, 42-43.

Contrary to the Brennan appellants' assertion (Response/Reply Br. 78), the United States has not misrepresented the evidence regarding the successful appeal rates of test passers. In its opening brief (at p. 35), the United States explained that 23 (or 41%) of the 56 test passers on Exam 8206 who were initially found unqualified based on their experience papers were ultimately deemed qualified and thus placed on the eligibility list. The district court reached the same conclusion, stating that "of the 56 test-passers initially determined to be unqualified, 23 overturned that determination through the appeals process." S.A. 33 n.29. That conclusion is a reasonable inference from the evidence, which shows that the Board initially determined, based on test passers' experience papers, that 313 were qualified and 56 were unqualified, but that the Board ultimately certified a list of 336 qualified test passers for Exam 8206 (23 more than were deemed qualified before the appeal process). Compare J.A. 3304 and J.A. 870-871, with J.A. 2919 ¶

35. As the non-moving party, the United States is entitled to have this reasonable inference drawn in its favor.

At any rate, even if the experience papers were dispositive on the question of qualifications, the Brennan appellants would not be entitled to summary judgment as to all five beneficiaries. The Brennan appellants neither produced nor discussed the contents of beneficiary Thomas Fields' experience papers, and thus their only evidence regarding his qualifications was the Board's unreliable post-hoc review. J.A. 4187; J.A. 4179-4181; Doc. 650.

For beneficiary Carla Lambert, the Brennan appellants claimed that, prior to 1985 (when she took Exam 5040), her duties "were almost entirely clerical" and that she lacked necessary supervisory experience. J.A. 4180-4181. In fact, as the United States pointed out below, Lambert's experience papers showed that she had considerable supervisory experience and that her duties prior to 1985 included cleaning and making repairs in school buildings. J.A. 4188, 4273-4274. Her experience papers thus support the United States' position that she was qualified.

As for beneficiary Anthony Pantelides, the Brennan appellants claimed that he lacked experience working with boilers and thus would have failed the oral

portion of Exam 5040 had he taken it. Their theory appeared to rest primarily on the purely speculative notion that Pantelides would have failed the oral component because his brother did so. J.A. 4189; J.A. 4181. Although the Brennan appellants also pointed to Pantelides' deposition testimony (J.A. 4181), that testimony showed that, prior to 1985 (when Pantelides failed the written portion of Exam 5040), he had experience working with boilers. J.A. 2524-2529. Thus, the Brennan appellants' own evidence undercut their assertion that Pantelides was unqualified.

Next, the Brennan appellants claim (Response/Reply Br. 5-6, 79-80) that the United States' position would place a nearly impossible burden on them to disprove the qualifications of the beneficiaries. That contention is meritless.

The United States is not advocating an unrealistic burden. A party trying to prove that a beneficiary is unqualified could serve interrogatories and depose the individual to clarify whether, at the relevant time, he or she met the minimum qualifications, including whether additional information existed that the applicant had omitted from his or her experience papers. Indeed, such discovery devices revealed that some of the beneficiaries (other than the five at issue here) were unqualified for the custodial jobs during the relevant period. See, *e.g.*, J.A. 2709-2711 (¶¶ 1-2), 2714-2719 (¶¶ 7, 9, 12), 2721-2722 (¶ 16), 2724 (¶ 19); J.A. 2749.

The Brennan appellants, however, did not introduce deposition testimony or interrogatory responses for any of the five beneficiaries except Pantelides. See J.A. 4180-4181. And, as explained above, Pantelides' deposition undercut the Brennan appellants' assertion that he lacked the necessary qualifications.

D. The District Court Erred In Concluding On Summary Judgment That Sean Rivera Was Not A Discrimination Victim

Sean Rivera is a discrimination victim because his relatively low score on Exam 1074 resulted in his being hired much later than the median hire date for that test. U.S. Opening Br. 44-48. As the United States explained in its opening brief, this Court's decision in *Guardians Ass'n* v. *Civil Service Commission*, 633 F.2d 232, 248 n.30 (2d Cir. 1980), aff'd, 463 U.S. 582 (1983), makes clear that an applicant who takes a test that violates Title VII's disparate-impact prohibitions can be a discrimination victim even if he or she is eventually hired based on the test results.

The Brennan appellants attempt to distinguish *Guardians* (Response/Reply Br. 14-15 n.3) on the ground that the disparate-impact claim in that case challenged only the rank-ordering of those who passed the test, not racial disparities in the pass rates. They contend that, in contrast to Rivera's situation,

Guardians involved no speculation about how victims would have fared in the absence of discrimination.

Their reasoning is flawed. Like the plaintiffs in *Guardians*, the United States contends that the exams in this case are invalid for use in rank-ordering candidates. J.A. 2115-2116, 2165. Moreover, Rivera's situation is no more speculative than that of the plaintiffs in *Guardians*. One cannot know with certainty how each plaintiff in *Guardians* would have fared if the employer had either (1) administered a different exam that was valid for rank-ordering or (2) used the same exam but had randomly selected candidates from among all test passers. See *Guardians Ass'n* v. *Civil Serv. Comm'n*, 630 F.2d 79, 104 (2d Cir. 1980) ("when the test scores afford no job-related basis for making selections from within a group that passed the test, random selection" is permissible), cert. denied, 452 U.S. 940 (1981).

E. The District Court Erred In Holding On Summary Judgment That The United States Failed To Establish A Prima Facie Case Of Recruitment Discrimination

The Brennan appellants make several arguments in support of the district court's holding that the United States failed to establish a prima facie case of recruitment discrimination. None of those arguments is persuasive.

1. Title VII's Disparate-Impact Provisions Prohibit Recruitment Discrimination

The Brennan appellants contend (Response/Reply Br. 44-47) that Title VII's disparate-impact provisions do not cover recruitment discrimination. That contention is meritless.

In *United States* v. *City of Warren*, 138 F.3d 1083 (6th Cir. 1998), the court rejected as "plainly incorrect" an employer's "assertion that disparate impact analysis is inapplicable to its recruiting practices." *Id.* at 1094. As the Sixth Circuit emphasized, "[t]he disparate impact theory subjects any facially neutral policy with a discriminatory effect to Title VII." *Ibid.* Other courts of appeals also have found certain recruitment practices unlawful under Title VII's disparate-impact provisions. See *Thomas* v. *Washington County Sch. Bd.*, 915 F.2d 922, 924-926 (4th Cir. 1990) (nepotism and word-of-mouth recruitment, combined with limited advertising); *Franks* v. *Bowman Transp. Co.*, 495 F.2d 398, 419-420 (5th Cir. 1974) (word-of-mouth recruiting), rev'd on other grounds, 424 U.S. 747 (1976); see also *United States* v. *Georgia Power Co.*, 474 F.2d 906, 925-926 (5th Cir. 1973).

Interpreting Title VII's disparate-impact provisions to cover recruitment discrimination is consistent with Congress's intent "to prohibit all practices in

whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin." *Franks*, 424 U.S. at 763 (citing, *inter alia*, *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971)).

Title VII's language confirms that the disparate-impact provisions cover recruitment discrimination. When Congress amended Title VII in 1991, it used broad language in codifying the disparate-impact prohibitions. The amended statute provides that an "unlawful *employment practice* based on disparate impact" is established if the plaintiff proves that the employer "uses a particular *employment practice* that causes a disparate impact" and the employer "fails to demonstrate that the challenged *practice* is job related for the position in question and consistent with business necessity." 42 U.S.C. 2000e-2(k)(1)(A)(i) (emphasis added). When given its ordinary meaning, the term "employment practice" includes an employer's practice regarding recruitment of potential employees.

The Brennan appellants contend, however, that Section 703(a)(2) of Title VII, 42 U.S.C. 2000e-2(a)(2), does not cover recruitment discrimination. (Section 703(a)(2) is the portion of Title VII that the Supreme Court interpreted as prohibiting disparate-impact discrimination prior to the statute's 1991 amendments. See *Smith* v. *City of Jackson*, 544 U.S. 228, 234-236 & n.6 (2005) (plurality)).

At the outset, we note that the Brennan appellants' argument regarding Section 703(a)(2) is relevant to only one of the four recruitment-claim beneficiaries for whom the United States seeks relief: Chioke, who was subject to discrimination in 1989, prior to the 1991 amendments to Title VII. See J.A. 1114 (col. D). The other three beneficiaries (Daniele, Smith, and Villegas) were adversely affected by the Board's recruitment practices for Exam 1074, which was administered in 1993, after Congress amended Title VII to codify the disparate-impact standards. See J.A. 1118, 1142, 1146.

In any event, the Brennan appellants' interpretation is flawed. Section 703(a)(2) makes it unlawful for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(2). That broad language covers recruitment discrimination, which "limit[s] * * * applicants for employment" (*ibid.*) by preventing or discouraging individuals from applying for jobs. In doing so, the recruitment practices "deprive or tend to deprive * * * individual[s] of employment opportunities." *Ibid.*

The Brennan intervenors claim that the word "applicant" covers only those who actually applied for a job. But that assertion conflicts with the holdings of the Supreme Court and this Circuit that a disparate-impact analysis under Title VII need not be limited to "actual applicants" and can include "potential applicant[s]." *Dothard* v. *Rawlinson*, 433 U.S. 321, 330 (1977); accord *Berkman*, 705 F.2d at 594 (concluding in a disparate-impact case that "[t]hose who have been deterred by a discriminatory practice from applying for employment are as much victims of discrimination as are actual applicants whom the practice has caused to be rejected"). Cf. *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 343 n.3 (1997) (noting that the term "employees" in some portions of Title VII should be interpreted to include "prospective employees").

The Brennan appellants also incorrectly assert that, if Section 703(a)(2) covered recruiting practices, Section 704(b) of Title VII would be superfluous. Section 704(b) prohibits employers from publishing "any notice or advertisement relating to employment * * * indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin." 42 U.S.C. 2000e-3(b). The Brennan appellants claim (Response/Reply Br. 45) that "[a]ny notice prohibited by this provision surely would also be prohibited by a proscription against recruiting practices that have a disparate impact."

In fact, the United States' interpretation of Section 703(a)(2) does not render Section 704(b) superfluous. Disparate-impact claims under Section 703(a)(2) apply to *facially neutral* practices, not to the *facially discriminatory* practices that are the core concern of Section 704(b). Cf. *International Union* v. *Johnson Controls, Inc.*, 499 U.S. 187, 197-200 (1991) (rejecting argument that facially discriminatory policy should be analyzed under a disparate-impact standard). The available defenses also differ under the two provisions. An employment practice that has a disparate impact can nonetheless be lawful if job-related and consistent with business necessity. *Griggs*, 401 U.S. at 431, 433-434; 42 U.S.C. 2000e-2(k)(1)(A)(i). No such defense is available for facially discriminatory advertisements under Section 704(b). See 42 U.S.C. 2000e-2(k)(2) ("A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination."). Although a bona fide occupational qualification (BFOQ) defense is available under Section 704(b) in certain circumstances, see 42 U.S.C. 2000e-3(b), "[t]he business necessity standard [for disparate-impact claims] is more lenient for the employer than the statutory BFOQ defense." *Johnson Controls*, 499 U.S. at 198.

2. The United States Presented Sufficient Evidence To Raise A Genuine Issue Of Material Fact As To Causation

Contrary to the Brennan appellants' argument (Response/Reply Br. 19-21, 47-48, 50-52), Dr. Ashenfelter's statistical analysis raised an inference of causation that precluded summary judgment. U.S. Opening Br. 48-56. Dr. Ashenfelter's statistical model was designed to estimate the pool of individuals in the New York City workforce who were both qualified for and interested in the custodian and custodian engineer positions. As part of the process of estimating the pool of *potential* applicants who were qualified and interested, Dr. Ashenfelter identified the Census occupational groups in which *actual* qualified applicants were working when they applied for the custodian or custodian engineer positions. *Id.* at 49-50. The Brennan appellants criticize this methodology (Response/Reply Br. 19), asserting that Dr. Ashenfelter relied on overly "broad job categories" in estimating the pool of qualified and interested candidates.

In fact, the occupational groups used in Dr. Ashenfelter's analysis were sufficiently narrow to provide a reliable estimate of the pool of individuals likely to be both interested in and qualified for the custodian and custodian engineer jobs. His analysis of Custodian Engineer Exam 8206 illustrates this point. For that exam, he found that the two most common occupational categories from

which actual qualified applicants came were "Stationary Engineers" and "Supervisors [of] Cleaning and Building Service Workers." J.A. 557 (these two categories accounted for about 47% and 20%, respectively, of all actual qualified applicants for Exam 8206). This is hardly surprising. Custodian engineers must have a high-pressure boiler license, commonly known as a "stationary engineer's license," and their primary duties include supervising cleaning and maintenance workers. J.A. 864; J.A. 3540-3541 (pp. 12, 14); J.A. 1274.

Contrary to the Brennan appellants' suggestion (Response/Reply Br. 19-20), Dr. Ashenfelter did *not* assume that women and minorities would "gravitate" to the custodian and custodian engineer positions "in accord with the laws of chance." In fact, his analysis took into account that women and minorities were more heavily represented in some occupational groups than others. For example, Dr. Ashenfelter found that 47% of actual qualified applicants for Exam 8206 worked as "Stationary Engineers" when they applied to the Board, but only 1.7% worked as "Janitors and Cleaners." J.A. 557. He thus assumed that stationary engineers were much more likely than janitors and cleaners to be both qualified for and interested in the custodian engineer position. See J.A. 1952-1953. In New York City, the percentage of stationary engineers who are minorities or women is

much lower than the percentage of janitors and cleaners who are minorities or women. See J.A. 559 (in 1990, women constituted 25% of janitors and cleaners, but only 2% of stationary engineers; almost 74% of janitors and cleaners but only 32% of stationary engineers were either African American or Hispanic). By giving little weight to the "Janitors and Cleaners" category when calculating the shortfall of women and minorities, Dr. Ashenfelter took into account the demographic disparities across occupational groups, and thus avoided overestimating the representation of minorities and women in the pool of qualified and interested potential candidates.

Finally, the Brennan appellants argue (Response/Reply Br. 52) that it was improper for the United States to use anecdotal evidence of discrimination to support an inference of causation on the recruitment claim. They are mistaken. Courts have correctly recognized that anecdotal evidence may bolster the statistical evidence of disparate impact, including evidence of causation. See *Hemmings* v. *Tidyman's Inc.*, 285 F.3d 1174, 1190 (9th Cir. 2002); *Thomas*, 915 F.2d at 926; cf. *EEOC* v. *Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1279 (11th Cir. 2000) (criticizing disparate-impact evidence because it did not include anecdotal testimony); see also *Teamsters*, 431 U.S. at 339 (noting, with approval, that

government bolstered its statistical proof in a disparate treatment case with anecdotal evidence that "brought the cold numbers convincingly to life").

3. The Potential Cost Of Expanding The Board's Advertising Does Not Warrant Summary Judgment In The Brennan Appellants' Favor

The Brennan appellants argue (Response/Reply Br. 54-55) that, even if the United States established a prima facie case of recruitment discrimination, this Court should affirm on the alternative ground that the cost of expanding the Board's advertising justified its reliance on word-of-mouth recruitment. This argument is flawed for at least three reasons.

First, the Brennan appellants do not specify how great the added cost would be or provide any evidence showing that the Board would find the expense burdensome. Nor do they produce evidence showing that the added cost to the Board would outweigh the benefit of having a broader group of qualified candidates from which to select.

Second, cost is rarely determinative on the question of business necessity or legitimate business purpose. See *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 799 & n.8 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971); *United States* v. *N.L. Indus., Inc.*, 479 F.2d 354, 366 (8th Cir. 1973); *Bing* v. *Roadway Express, Inc.*, 444 F.2d 687, 690 (5th Cir. 1971). In this regard, the Brennan appellants' reliance

on *EEOC* v. *Consolidated Service Systems*, 989 F.2d 233 (7th Cir. 1993), is misplaced. The question in that case was whether use of word-of-mouth recruiting, which allegedly was cheaper than alternative forms of advertising, created an inference of *intentional* discrimination. The Seventh Circuit emphasized that it was not deciding whether such cost considerations would provide a defense to a disparate-impact claim. *Id.* at 236.

Finally, even if the Brennan appellants could establish a business necessity for the Board's recruitment practices, the United States would be entitled on remand to try to prove that an equally effective, less discriminatory alternative existed. See 42 U.S.C. 2000e-2(k)(1)(A)(ii) & (C). The United States presented evidence that the Board's recruitment system for the provisional positions was such an alternative, and that the Board's failure to adopt it for the permanent positions violated Title VII. J.A. 1642-1643 ¶ 87; J.A. 1672-1673, 1675-1676.

4. With Regard To The Recruitment Claim, The Brennan Appellants Misstate The United States' Position On The Burdens Of Proof

The Brennan appellants suggest (Response/Reply Br. 57-58) that the United States seeks to impose an unreasonable burden on them to prove that the recruitment-claim beneficiaries would *not* have applied for custodial jobs absent discrimination. This is a misstatement of the United States' position.

If the district court determines on remand that the Board's recruitment practices violated Title VII, the United States would then have the burden of proving that the recruitment-claim beneficiaries would have applied for the custodial positions absent discrimination. Because the recruitment-claim beneficiaries did not apply for those jobs, they are in the same position as the non-applicants in *Teamsters*, 431 U.S. at 367-368. Under *Teamsters*, anyone claiming victim status who did not submit an application has to "show that he was a potential victim of unlawful discrimination" by "proving that he would have applied for the job had it not been for [the discriminatory] practices." *Ibid*. "When this burden is met, the nonapplicant is in a position analogous to that of an applicant and is entitled to the [*Teamsters*] presumption." *Id.* at 368. Therefore, if the United States proves on remand that the recruitment-claim beneficiaries would have applied for the custodial jobs absent discrimination, the burden would then shift to the Brennan appellants to prove that those beneficiaries were not discrimination victims.

F. Ricci *Does Not Affect The United States' Position In This Appeal*

In *Ricci* v. *DeStefano*, 129 S. Ct. 2658 (2009), the Supreme Court held that New Haven engaged in disparate treatment in violation of Title VII by refusing to certify the results of two examinations that had a disparate impact on minorities.

The Court did not decide whether the City violated the Equal Protection Clause. The majority concluded that New Haven's action was "race-based" and could only be justified if the City had a "strong basis in evidence" to believe that it would have been liable under Title VII's disparate-impact provisions had it not discarded the test results. *Id.* at 2673-2676. The Court concluded that New Haven failed to satisfy this standard because it had no strong basis in evidence to believe "that the tests were flawed because they were not job-related or because other, equally valid and less discriminatory tests were available to the City." *Id.* at 2681.

Ricci does not change the United States' analysis in this case. Although *Ricci* found a violation of Title VII, the Supreme Court focused on the factual predicate necessary to justify race-based action under the statute, not on the permissible scope of such remedies if the required factual predicate exists.

The Board clearly had a sufficient factual predicate to satisfy the *Ricci* standard. See U.S. Opening Br. 59, 66. At the time of the settlement, the Board had a strong basis in evidence to believe it would be liable under Title VII's disparate-impact provisions if it did not take remedial action. The United States had presented expert reports to the Board showing that its exams were not job-related. U.S. Opening Br. 29. Moreover, the Board's own experience showed that the selection and recruitment procedures it used for the provisional custodial

positions were equally effective, less discriminatory alternatives to the challenged exams and recruitment practices. See *id.* at 10-11; J.A. 1933-1937, 2162-2166.

The Brennan intervenors incorrectly assert (Supp. Br. 6-7) that an employer must have a strong basis in evidence of *intentional* discrimination "when the purported governmental interest is remedying the present effects of past discrimination," rather than preventing future violations. The Court in *Ricci* specifically rejected the argument that an employer may never take race-based action to avoid disparate-impact liability. 129 S. Ct. at 2674. Nothing in *Ricci* suggests that the necessary factual predicate is more onerous if the goal is remedying a past violation rather than preventing a future one. Indeed, drawing such a distinction would be illogical considering that *Ricci* borrowed the "strong basis in evidence" test from the standard the Court uses to assess the constitutionality of race-based actions designed "to remedy past racial discrimination." *Id.* at 2675.

Instead of challenging the Board's factual predicate, the United States contended in its opening brief (at 63-64, 70-71) that the awards of retroactive, competitive seniority in this case unnecessarily trammel the interests of innocent third parties to the extent those awards exceed make-whole relief. *Ricci* did not

address the unnecessary-trammeling prong of the Title VII analysis or suggest that the Court was altering that standard.

Nor does *Ricci* call into question the propriety of granting make-whole relief to those beneficiaries who are discrimination victims. If, on remand, the district court finds that the challenged exams and recruitment procedures violated Title VII, those beneficiaries who are discrimination victims are entitled to make-whole relief, including retroactive, competitive seniority for all purposes, including layoffs. See *Franks*, 424 U.S. at 763-780; *Albemarle Paper Co.*, 422 U.S. at 419-425.

CONCLUSION

This Court should affirm the district court's judgment with respect to Issue 2 in the United States' opening brief, and should vacate the judgment as to the remaining issues and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation imposed by Rule 28.1(e)(2)(C). The brief was prepared using WordPerfect X4 and contains 6,823 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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August 21, 2009

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