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February 22, 2006

Clerk of the Court
U.S. District Court for the
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: United States v. New York City Board of Education, *et al.*,
Eastern District of New York, Civ. No. CV 96-0374 (FB) (RML)

Brennan, *et al.* v. Ashcroft, *et al.*,
Civ. No. 02-0256 (FB) (RML)

Dear Sir or Madam:

We represent John Brennan, *et al.*, in each of the two above-referenced actions, which were consolidated administratively by Judge Block. I am submitting for filing the Brennan Intervenors' Third Amended Complaint in the first of the above-referenced actions. Judge Block granted the motion to file this pleading in an order dated September 26, 2005 (Doc. No. 577).

Very truly yours,

Michael E. Rosman

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, -against- NEW YORK CITY DEPARTMENT OF EDUCATION, *et al.*: Defendants. and JOHN BRENNAN, *et al.*, on behalf of themselves and all others similarly situated, Intervenors, and JANET CALDERO, *et al.* Intervenors. and PEDRO ARROYO, *et al.* Intervenors	96 CV 0374 (FB) (RML) **BRENNAN INTERVENORS' THIRD AMENDED COMPLAINT IN INTERVENTION**
JOHN BRENNAN, *et al.* on behalf of themselves and others similarly situated, Plaintiffs, -against- JOHN ASHCROFT, ALEXANDER ACOSTA, *et al.* Defendants.	02 Civ. 0256 (FB) (RML)

Intervenors John Brennan, James G. Ahearn, Scott Spring, and Dennis Mortensen (the "Brennan Intervenors"), by way of a complaint in intervention in *United States v. New York City Bd of Education*, and seeking to represent a class of similarly-situated individuals, allege as follows:

Jurisdiction

1. This is an action arising under the Constitution and laws of the United States. Jurisdiction is vested in this Court pursuant to 28 U.S.C. §§ 1331 and 1343(3).

Allegations of Fact

2. John Brennan, James G. Ahearn, and Dennis Mortensen are permanently employed as Custodian Engineers, Assignment Level 2, by defendant New York City Department of Education.

3. Scott Spring is permanenty employed as Custodian Engineers, Assignment Level 1, by defendant New York City Department of Education.

4. Each of the Brennan Intervenors is a Caucasian male.

5. Defendant Department of Education utilizes many Custodian Engineers. A Custodian Engineer's compensation depends upon the size of the schools to which (s)he is assigned. Assignment to schools is competitive and determined significantly by the seniority dates of the applicants for the position.

6. With the primary exception of the Offerees described herein, each Custodian Engineer's "seniority date" is related to the date upon which (s)he began working as a permanent employee at his or her current level.

7. The Complaint filed by plaintiff United States of

America ("United States") was based on Section 707 of Title VII, 42 U.S.C. § 2000e-6, which authorizes the Attorney General to bring an action whenever she believes that any person or group of persons is engaged in a pattern or practice of discriminatory behavior in violation of the rights guaranteed by Title VII, 42 U.S.C. § 2000e-2, where "the pattern or practice is of such nature and is *intended* to deny the full exercise of th[ose] rights."

8. The United States has not pursued any theories of intentional discrimination in this litigation.

9. Instead, the United States has relied on two different disparate impact theories (*i.e.*, theories that required no showing of discriminatory intent). First, it claimed that three different civil service exams for the positions of Custodian and Custodian Engineer (now referred to as Custodian Engineer Level 1 and Custodian Engineer Level 2) had a disparate impact against blacks and Hispanics (the "testing claims"). Second, it claimed that the defendants' recruiting practices had a disparate impact against blacks, Hispanics, women, and Asians (the "recruiting claim").

10. The United States has not tried to prove that the examinations challenged in the testing claims had any disparate impact against women or Asians.

11. The Answer filed by intervenors' employer, defendant

New York City Board of Education, among others, denies all allegations of wrongful discrimination.

12. This Court has made no finding that defendants have violated Title VII. Defendants have not violated Title VII.

13. The United States has not alleged that defendants have engaged in intentional employment discrimination. The Court has made no finding that defendants have engaged in intentional employment discrimination. Defendants have not engaged in intentional employment discrimination.

The Settlement Agreement

14. On or about February 11, 1999, the United States and defendants entered into a certain Settlement Agreement, which, subject to Court approval, would resolve all allegations of wrongful discrimination alleged in the Complaint filed by the United States.

15. Defendants continue to deny all allegations that they violated Title VII in the Settlement Agreement.

16. The Settlement Agreement states that the United States and Defendants "agree to the entry of this Settlement Agreement, which resolves all issues that were or could have been raised by the United States in its Complaint."

17. The Settlement Agreement states that it "shall remain

in force for a period of four years from the last date of execution of the Settlement Agreement." Four years from the last date of execution was February 11, 2003.

18. The Agreement also states that the Court shall "retain jurisdiction over this lawsuit during the term of this Settlement Agreement to resolve all disputes that may arise from or relate to Defendants' compliance with this Settlement Agreement," but that such "jurisdiction shall automatically terminate at the expiration of this Settlement Agreement." Accordingly, the Court's stipulated jurisdiction to resolve disputes over defendants' compliance with the Agreement terminated on February 11, 2003.

19. The United States and defendants have not extended the terms of the Settlement Agreement.

20. The United States no longer agrees to the entry of all the relief provided to the Offerees (discussed below) as a judgment in this case.

Benefits To The Offerees

21. The Settlement Agreement provides that defendants shall award to a class of persons referred to as Offerees positions as permanent Custodians or Custodian Engineers, with retroactive seniority dates. These benefits are set forth in Paragraphs 13 through 16 of the Agreement.

22. Only black, Hispanic, Asian and female persons were intended to be Offerees.

23. The benefits to the Offerees provided in Paragraphs 13 through 16 of the Agreement were provided in the late winter or early spring of 2000 in exchange for the Offerees' release of liability against the defendants. All but one of the Offerees accepted this bargain and the benefits provided in the Agreement.

24. Some of the Offerees did not take any of the challenged civil service examinations described in paragraph 9.

25. Other Offerees have taken an exam, but are not members of the racial groups against which the United States claims the exams had a disparate impact.

26. As to exam-takers who were members of those racial groups, the Settlement Agreement gave some of them retroactive seniority from a date earlier than the hire date of anyone who actually passed it.

27. Assuming *arguendo* that there were discriminatory testing practices, defendants would not have selected the test-taking Offerees to be permananent Custodians or Custodian Engineers even if there had been different selection procedures.

28. Assuming *arguendo* that there were discriminatory recruiting practices, none of the Offerees were the victims of such practices.

29. The Settlement Agreement does not merely restore the Offerees to positions of seniority they would have held but for alleged discrimination.

Harm to the Brennan Intervenors And The Class

30. The Brennan Intervenors and the class are affected by the provisions of Paragraphs 13 through 16 because the permanent status and retroactive seniority provided to the Offerees may affect their ability to obtain certain job benefits that are competitively awarded.

31. The Agreement does not require defendants to award back pay or money damages to any persons. The burden of the benefits provided in Paragraphs 13 through 16 of the Agreement are primarily borne by the Brennan Intervenors and persons similarly situated.

32. Custodian Engineers compete for assignments to particular schools pursuant to a "rating and transfer plan" set forth in a collective bargaining agreement ("CBA") between the New York City Board of Education (or its successor) and Local 891, International Union of Operating Engineers. Those with more seniority have an advantage in this competition. Under the CBA, seniority is determined by actual length of service in a given position.

33. Each of the Brennan Intervenors and the members of the

class is a third-party beneficiary of the CBA. The rules and provisions of the CBA are part of the contractual relationship between them and the defendants.

34. In addition to filing this Complaint, the Brennan Intervenors filed written objections to the Agreement.

Class Action Allegations

35. The Brennan Intervenors seek to represent a class of similarly situated individuals. The class consists of those current Custodian Engineers who were not Offerees, and who intend to apply for job benefits in the future that are determined in whole or part by relative seniority.

36. The class is so numerous as to make joinder impracticable. There are more than 800 Custodian Engineers.

37. In fact, when the United States and the defendants proposed the agreement in 1999, the defendants received 350 written objections. Most of the objections were from Custodians and Custodian Engineers employed by defendant NYC Board of Education objecting to the benefits received by the Offerees.

38. Plaintiffs' claims have questions of law and fact in common with the claims of the class members.

39. Plaintiffs' claims are typical of the claims of the class.

40. Plaintiffs will adequately represent and protect the interests of the class. They have retained counsel familiar with this matter, and with class litigation in general.

41. Defendants have acted (and are acting) on grounds generally applicable to the class, making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. Accordingly, a class should be certified pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure.

Reasons For Not Entering The Settlement Agreement

42. This court should not enter the provisions of the Settlement Agreement as a consent judgment in this case because there is no current agreement between the parties, and one of the parties to the Agreement does not currently consent to the entry of the relief that is set forth therein.

43. Even if there were consent as to the terms that should be entered, this Court should not enter the provisions of the Paragraphs 13 through 16 of the Agreement as a judgment because, *inter alia,* (1) the United States has not demonstrated a violation of Section 706 of Title VII or any other provision of Title VII, (2) the race-based and sex-based benefits to the Offerees violate the Fourteenth Amendment to the Constitution, 42 U.S.C. § 1981, and Title VII, (3) those benefits are inconsistent with appropriate relief in a Title VII case because they provide

relief to those who were not victims of any practice violative of Title VII and (assuming *arguendo* the recipients had been harmed by such a practice) providing relief that does more than make the recipients whole, and (4) those benefits constitute a breach of the Brennan Intervenors' contractual rights (and the contractual rights of other class members) under a Collective Bargaining Agreement between the Department of Education (or its predecessor) and a union representing Custodian Engineers.

WHEREFORE the Brennan Intervenors demand judgment

(1) denying entry of the "Settlement Agreement" as a consent judgment;

(2) enjoining plaintiff and defendants from discriminating against the class by continuing to implement race-based or sex-based retroactive grants of seniority, permanent positions, or any other impermissibly discriminatory remedy; and

(3) awarding the Brennan Intervenors their attorneys' fees and reasonable expenses, pursuant to 42 U.S.C. §§ 1988 and 2000e-5(k).

Dated: February 22, 2006

Respectfully submitted,

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