Written Testimony of the American Civil Liberties Union
Before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties
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Oversight Hearing
on the Employment Section of the Civil Rights Division of the
U.S. Department of Justice

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The American Civil Liberties Union (ACLU) is a national, nonpartisan public interest organization of more than 500,000 members, dedicated to protecting the constitutional and civil rights of individuals. Through its Women's Rights Project, founded in 1972 by Ruth Bader Ginsburg, and through its Racial Justice Program, the ACLU has long been a leader in the legal battles to ensure the full equality of women and people of color. This commitment includes fighting for equal employment opportunities and the removal of barriers to entry to employment for women and people of color. For example, the ACLU Women's Rights Project has been a participant, either as *amicus* or direct counsel, in virtually all of the major gender discrimination in employment cases before the Supreme Court.[1] The ACLU Women's Rights Project has also successfully litigated many employment cases in lower courts, most recently winning significant jury verdicts in 2006 in *Espinal v. Ramco Stores* (a sexual harassment case brought on behalf of immigrant women retail store workers) and *Lochren v. Suffolk County Police Department* (a pregnancy discrimination case on behalf of female police officers forced onto unpaid leave for the duration of their pregnancies).

As part of this commitment, since 2002 the ACLU Women's Rights Project has represented a group of 25 African-American, Hispanic, Asian, and female public school custodians in the case *United States v. New York City Board of Education*. The Civil Rights Division of the United States Department of Justice brought this case in 1996, alleging that the New York City Board of Education discriminated on the basis of sex and race in recruiting and hiring public school custodians. In 1999, the Justice Department and the Board of Education entered into a settlement agreement that, among other things, provided permanent jobs and retroactive seniority to approximately 60 female and minority custodians whom the Board of Education had previously employed "provisionally." In 2002, however, in the face of a challenge to the settlement by white

[1] Examples of cases in which the ACLU has participated include *Ledbetter v. Goodyear Tire & Rubber Company, Inc.*, 127 S. Ct. 2162 (2007) (when equal pay claims may be brought; *Burlington Northern & Santa Fe Railway Co., v. White*, 126 S. Ct. 2405 (2006) (whether Title VII's anti-retaliation provision forbids only those employer actions and resulting harms that are related to employment or the workplace and how harmful an act of retaliatory discrimination must be in order to fall within the provision's scope); *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004) (whether an employer is vicariously liable in a sexual harassment claim when the complaint is constructively discharged); *Nevada Dep't. of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (whether the Family and Medical Leave Act binds state employers); *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) (whether plaintiff, in a sex discrimination case, must present direct evidence of sex discrimination to receive a "mixed-motive" jury instruction); *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73 (2002) (whether ADA permits employer to deny employment to disabled individual out of concern for his or her health) ; *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002) (whether plaintiff in a complaint for an employment discrimination claim must present specific facts in order to establish a *prima facie* case); *EEOC v. Waffle House*, 534 U.S. 279 (2002) (whether an agreement between employer and employee to compel arbitration precludes the EEOC from pursuing victim-specific judicial relief); *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989) (what showing is necessary for a Title VII disparate impact case); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (whether exclusion of "macho" woman from partnership in accounting firm violated Title VII); *California Federal Savings and Loan v. Guerra*, 479 U.S. 272 (1987) (whether Title VII prohibits employment practices favoring pregnant workers); *Califano v. Goldfarb*, 430 U.S. 199 (1977) (whether Navy violated Constitution in providing different employment benefits to male and female servicemembers).

male custodians, the Justice Department reversed its position and began to attack the very awards it had won through the settlement as to the majority of these individuals. It has continued this attack to this day. The ACLU intervened in this case on behalf of 25 of the individuals whom the Justice Department abandoned, including Janet Caldero, who is testifying before the committee today.

We appreciate the opportunity to submit this testimony to the Subcommittee describing the positions taken by the Employment Section of the Civil Rights Division in *United States v. New York City Board of Education*. Below, we set out the potential consequences of these positions both for the individuals whose interests are at stake in this case and for civil rights enforcement generally. We also describe necessary safeguards to prevent the Civil Rights Division from harming the individuals that it previously undertook to protect.

The Justice Department's Case Against the New York City Board of Education

While the job title "custodian" may evoke images of a low-wage employee who pushes a broom, custodians actually act as building managers in New York City public schools. Each custodian hires, manages, and supervises a staff of cleaners, handypersons, and boiler operators; in the largest schools in the city, a custodian may oversee between ten and twenty workers. Custodians also are solely responsible for their own significant budgets, overseeing payroll for their employees and contracting with outside vendors. The custodian position has civil service protections and is a highly paid position, with potential for significant raises and increases in managerial responsibility should a custodian successfully seek to transfer to larger schools. Historically, these positions have also been almost exclusively the province of white males.

For example, in 1993, approximately the time the Justice Department began to investigate the New York City Board of Education for discrimination in recruiting and hiring custodians, the Board of Education employed 13 women out of 865 custodians. In other words, the workforce was 98.5 percent male. Only 36 of the 865 custodians were African-American, and only 29 were Hispanic. Four were Asian. In other words, the workforce was over 92 percent white in one of the most diverse cities in the world. Moreover, many of the women and people of color who were employed as custodians were employed "provisionally," meaning that they had no civil service protections, no job security, and no right to seek the transfers and assignments that custodians typically rely on to increase their salary and management authority.

The Board of Education did very little to recruit applicants for the civil service custodian exam. As a result, potential applicants historically learned about the job and the steps necessary to obtain it by word of mouth from incumbent employees. As courts and social scientists alike have recognized, this dependence on word-of-mouth advertising tends to replicate the demographics of the workforce. White male employees are most likely to know and refer opportunities to other white males. In addition, the fact of an overwhelmingly white male workforce itself sends a powerful exclusionary message. Several people of color and women who eventually became custodians testified

that at one point they either believed or were explicitly told that a woman or a minority would never be allowed to do the custodian job. The evidence in the case showed that through the 80s and 90s, women and people of color applied for the custodian civil service exams at far lower rates than would be expected from their representation in the qualified workforce.

Those who did take the examination faced further hurdles. The evidence in the case showed that otherwise qualified African-Americans and Hispanics passed the civil service examination for the job at much lower rates than did white test-takers and that the civil service examination had not been shown to accurately measure the skills needed for effective performance on the job.

Based on these facts, the Department of Justice argued that the Board of Education had discriminated against women, African-Americans, Hispanics, and Asians in recruiting for the custodian position and had discriminated against African-Americans and Hispanics in testing for the job, in violation of Title VII. In 1999, when the Justice Department and the Board of Education settled the case, as part of that settlement the Justice Department sought to remedy the effects of that past discrimination by making sure that more women and people of color were on the job. The settlement thus provided that those women and minorities who had previously worked as provisional custodians—doing the same job as civil service custodians but without the same protections and benefits—would receive permanent employment and retroactive seniority.

These awards began to disrupt what had previously been a closed system by making sure that there were more women and minorities on the job, as there would have been in the absence of discrimination. Because of the awards, women and minorities were permanently on the job and could compete to transfer to larger schools with greater supervisory authority. They were thus better positioned to serve as trailblazers and mentors to women and minorities on their staffs and to recruit women and minorities for the custodian job through their own networks. The closed system not only reflected discrimination; it perpetuated it. Placing the beneficiaries on the job thus not only corrected the effects of past discrimination; it also helped prevent its recurrence.

It is also worth noting what the settlement did not do. It didn't require the Board of Education to meet goals for hiring women or people of color. It didn't require any benefit be given to anyone who wasn't already competently serving as a custodian. And it didn't require that any white male custodian be laid off, or demoted, or disqualified for promotions. The settlement agreement's awards were modest efforts toward leveling the playing field within a system that had long given white men a leg up.

Finally, the settlement also explicitly stated, "If any provision of this Settlement Agreement is challenged, the United States and Defendants shall take all reasonable steps to defend fully the lawfulness of any such provision."

The Justice Department's Change of Position

At the time of the settlement agreement's approval by the court, a small group of white male custodians objected to providing permanent employment and retroactive seniority to the settlement beneficiaries, arguing that the awards discriminated against them as white men. They were eventually permitted to intervene in the case to take discovery and make their arguments. In 2002, the white male intervenors asked the court to immediately strip all the beneficiaries of the awards they received under the settlement, pending final resolution of the case.

After six years of hard-fought litigation to place more women and people of color on the job and to protect the awards of the beneficiaries under the settlement, in April 2002 the Bush Administration's Justice Department suddenly replaced the longstanding attorneys on the case with new counsel, radically changing its legal position and the complexion of the case, in violation of its commitment to defend the settlement. In papers filed with the court, in the face of the white males' motion to immediately strip the beneficiaries of their permanent employment status and retroactive seniority, the Justice Department declined to defend the awards for 32 of the 59 beneficiaries under the settlement. It did so without explanation.

Moreover, the Justice Department gave *no* notice to the relevant beneficiaries of its decision to abandon its fight on their behalf. For years, many of individuals who ultimately became beneficiaries had actively assisted the United States in its prosecution of the case, providing Justice Department attorneys with information about the custodian position and Board of Education processes. They thought of the Justice Department attorneys as their attorneys, or at least as attorneys representing their interests.

Yet the affected beneficiaries only learned of the Justice Department's attack on its own settlement when by happenstance the ACLU learned of this development. In August of 2002, the ACLU informed the beneficiaries of the Justice Department's actions and their potential consequences. Indeed, those beneficiaries who called the new Justice Department attorneys to seek further information were initially told that they had been misinformed, that there was no change in the United States' position and that the United States was continuing to fully defend their interests. The beneficiaries were not permitted to speak to the former attorneys on the case, with whom they had long cooperated and communicated.

The ACLU entered the case, representing 25 of the abandoned beneficiaries, in October 2002. In 2003, the Justice Department further modified its position, declining to defend the full awards of an additional 10 beneficiaries. The NAACP Legal Defense and Education Fund intervened in the case on behalf of these individuals (who again, had been given no notice by the Justice Department of the change in position) in 2004. Ever since, in active and contentious litigation that continues to this day, the ACLU and the NAACP Legal Defense and Education Fund have defended the Justice Department's settlement agreement against the Justice Department's attacks that the settlement unlawfully discriminates against white males.

The Potential Consequences of the Justice Department's Change in Position

1. Potential effects on the beneficiaries.

The permanent employment status that beneficiaries received under the settlement provided them with valuable civil service protections and allowed them to remain as long as they wished at a particular school rather than being subject to repeated moves that undermined their authority and their ability to do their jobs. It also allowed them to acquire seniority and thus compete successfully for transfers to larger, higher-paying schools, and to be eligible for temporary assignment to assist in the care of other schools for an increased salary. The retroactive seniority awards enhanced the beneficiaries' ability to compete for transfer to larger schools with the greater authority, visibility, and salaries that such transfers bring.

By arguing that the awards made to the majority of beneficiaries are unlawful, the Justice Department has placed the beneficiaries at risk. The Justice Department eventually acknowledged beneficiaries had purchased houses, made retirement plans, taken on family obligations, and bypassed other employment opportunities based on their expectation of permanent, stable employment. As a result, it does not currently argue that any beneficiary should lose permanent employment. However, its continued attacks on the legality of these awards certainly place beneficiaries at some risk that a court will find the awards of permanent employment unjustifiable. If the beneficiaries lost permanent employment, under current civil service law, they would almost definitely lose their jobs rather than reverting to provisional status.

Moreover, the Justice Department has directly attacked the beneficiaries' seniority and sought to strip the beneficiaries of these awards. Were the Justice Department to succeed in its arguments that the awards discriminate against white male employees, presumably a court would be obligated reconstruct circumstances as they existed in 1999, removing beneficiaries from the higher-salaried schools to which they had transferred by dint of their seniority and placing them in smaller, lower-paying buildings. Again, beneficiaries who have taken on financial obligations based on their current salaries, such as house payments or family care obligations, or who have bypassed other opportunities based on reasonable expectations that they would continue to earn their present salaries, would be placed in untenable positions.

Had the ACLU and the NAACP Legal Defense and Education Fund not intervened, the beneficiaries in this case may well have lost salary, supervisory authority, and perhaps even their jobs, with significant consequences for their financial stability and their careers. While we have been successful at holding these consequences at bay so far in the litigation, as set out below non-profits such as the ACLU are not an adequate substitute for the Civil Rights Division of the Justice Department.

2. Potential effects on civil rights law and civil rights enforcement.

Not only does the Justice Department's reversal of position have the potential to work harsh effects on the beneficiaries in this case, the arguments that it today presses

have serious implications for civil rights enforcement. As the Board of Education has argued in its continued defense of the awards to beneficiaries, the Justice Department has taken "positions so inimical to its responsibilities as the enforcer of Title VII as to amount to a voluntary self-emasculation and a virtual evisceration of Title VII in pattern-or-practice, disparate impact, and other suits on behalf of disadvantaged classes."

First, the Justice Department has argued and continues to strenuously argue today that in order to be lawful, the settlement agreement must be shown only to benefit individuals who are proven to be direct victims of the Board of Education's hiring discrimination or recruitment discrimination. In so doing, the Justice Department has in effect declared affirmative action, which by its nature focuses on a disadvantaged class rather than narrowly limiting its benefits to specific disadvantaged individuals, as an unlawful means to break down past patterns of job segregation.

The settlement in this case reflects just such an affirmative action remedy. By ensuring that women and people of color were represented in the custodian workforce, with seniority that allowed them to compete for larger, higher profile schools, the settlement partially remedied the effects of the past discrimination that had resulted in disproportionately low numbers of women and people of color on the job. Equally importantly, these provisions helped to prevent future discrimination, by opening the closed system that had perpetuated the overwhelmingly white, male demographics of the workforce and showing by example that women and minorities could successfully hold these jobs, thus enabling more effective recruitment of women and minorities in the future. While the settlement beneficiaries included individuals who were victims of the Board of Education's discriminatory practices, as the Board of Education stated at the time the settlement was approved, "[t]he Agreement [did] not [specifically] seek to identify potential victims of discrimination from among minority and female takers of the challenged examinations or from other sources for the purposes of granting relief." In other words, while the affirmative action measures of the settlement agreement overlapped to some extent with compensatory relief for individual victims of discrimination, it had a broader purpose and function. The Justice Department today rejects this purpose and function as a form of discrimination against the white males who even after entry of the settlement continued to hold the vast majority of custodian positions in New York City schools.

Second, the law has long treated affirmative action measures adopted by public employers through settlement the same as any voluntary affirmative action measure adopted by an employer to attempt to remedy past discrimination or segregation in the workforce. That is, if it is lawful for an employer to undertake such a measure on its own, it is also lawful for a settlement agreement to fashion such measures. Employers have also long been granted a measure of discretion in crafting and adopting these measures, in order to encourage voluntary compliance with antidiscrimination mandates and in recognition of employers' prerogatives to fashion solutions to past discrimination within their own workforce. As a result, employers' voluntary affirmative action measures have been a vitally important method of removing obstacles to the full participation of women and people of color in the workforce.

In this case, however, the Justice Department has argued that for an employer to adopt voluntary attempts to cure its own discrimination, its prior discrimination must be proved by the same standards used to prove discrimination in the courtroom. That is, it has argued that in order for the settlement's awards to beneficiaries to be lawful, (1) the inital allegations of discrimination must be proven; (2) each beneficiary's status as a victim of this precise form of discrimination must be proven; and (3) each award must be proven to precisely remedy the exact scope of each beneficiary's injury. Yet this has never been the law. The Supreme Court and federal courts of appeal have repeatedly held that formal findings of discrimination are not a prerequisite to voluntary affirmative action under either Title VII or the Constitution, precisely because requiring a finding or admission of liability would impose a heavy disincentive on employers otherwise motivated to remedy the effects of their own past discrimination.[2] Moreover, in the context of a settlement, it makes no sense to impose such demanding standards of proof. The purpose of settlement is to resolve claims and avoid litigation. If employers must engage in lengthy post-settlement litigation (eight years and counting in the current case) and justify their actions in entering into a settlement by proving their own past discrimination and the precise injuries suffered by victims of that discrimination, Title VII settlements will quickly become a thing of the past. Moreover, employers will quickly give up undertaking voluntary measures to correct discrimination or segregation in their workforce, as such measures under law are subject to the same scrutiny as Title VII agreements. The Justice Department's actions in this case thus directly conflict with the long-recognized Title VII policy of promoting voluntary measures to ensure equal opportunity in the workplace and promoting settlement of discrimination cases. If successful, its arguments will have the effect of shutting down employers' own vitally important efforts to break down patterns of race and sex segregation on the job.

Again, in the present case, the ACLU has thus far been largely successful in stemming the impact of the Justice Department's arguments. In this case, the beneficiaries were lucky in that they attracted the attention and assistance of non-profits willing to devote significant resources to this litigation. However, non-profits lack the resources and capacity to step into the place of the Civil Rights Division with any regularity or to enter into multiple cases of this type. The Justice Department plays a crucial rule in making real the promise of civil rights laws, a role that the Department has abandoned in this case and threatens to abandon far more broadly.

Appropriate Congressional Responses

The Justice Department's actions in *United States v. New York City Board of Education* serve as a reminder of the need for close scrutiny of Justice Department

[2] *See, e.g.*, *Johnson v. Santa Clara Transp. Agency*, 480 U.S. 616, 630 (1987); *Wygant v. Jackson v. Board of Education*, 476 U.S. 267, 289-90 (1986) (O'Connor, J., concurring); *United Steelworkers v. Weber*, 443 U.S. 193, 210 (1979) (Blackmun, J., concurring); *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950, 958 (10th Cir. 2003); *Ensley Branch NAACP v. Seibels*, 31 F.3d 1548, 1565 (11th Cir. 1994); *Stuart v. Roache*, 951 F.2d 446, 450 (1st Cir. 1991); *Barhold v. Rodriguez*, 863 F.2d 233, 236 (2d Cir. 1988); *Janowiak v. Corporate City of South Bend*, 836 F.2d 1034, 1041 (7th Cir. 1987).

nominees in the confirmation process, including probing inquiries addressing their commitment to civil rights enforcement. Those individuals entrusted with the responsibility of upholding the United States' commitment to equality must be held to a demanding standard by Congress.

More specifically and narrowly, one of the most troubling aspects of the Justice Department's actions in *United States v. New York City Board of Education* has been its failure to notify those individuals potentially affected by its abrupt shift in legal positions of its abandonment of these individuals' interests. Had ACLU attorneys not learned about the case and taken it upon themselves to contact the affected individuals, it is not clear whether or when the beneficiaries would have learned of the Justice Department's shift, nor would they have had an opportunity to appear in this ongoing litigation centered on their employment status. Recent conversations with the Justice Department attorneys in this case confirm that they continue to believe they have no obligation to contact affected beneficiaries before entering into agreements or stipulations that specifically compromise these individuals' interests.

A statutory provision requiring the Justice Department, should it seek to amend or revise an executed settlement or consent decree to which it is a party, to give full and complete notice to any third-party who would be directly affected by such an amendment or revision, would ensure that this pattern is not repeated. Such notice would also permit affected individuals to appear and be heard on questions going to the heart of their livelihood, should they desire. Basic fairness requires such notice.