

19-1162*

**United States Court of Appeals
for the Second Circuit**

IN RE: NEW YORK CITY BOARD OF EDUCATION APPEALS

On Appeal from the United States District Court
for the Southern District of New York

**PAGE-PROOF BRIEF FOR APPELLANT
BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT
OF THE CITY OF NEW YORK**

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PRELIMINARY STATEMENT

The Board of Education of the City School District of the City of New York (BOE) appeals from the first 347 individual class-member judgments of the U.S. District Court for the Southern District of New York (Wood, J.) in this long-running Title VII class action comprising more than 4,500 class members. This set of judgments, covering less than a tenth of class members, alone totals over \$170 million in backpay and related relief, plus corresponding pension liability.

In these appeals, consolidated for briefing and ordered to be heard in tandem, BOE will show that the district court's approach to backpay will yield a large and unjustified windfall to the class in the aggregate. This windfall—which will amount to many hundreds of millions of dollars in overcompensation to the class—violates Title VII's fundamental remedial goal of making victims of discrimination whole by recreating the circumstances that would have existed but for the challenged discrimination. Title VII serves a vital public purpose. Preserving that purpose requires the statute's powerful remedies to be wielded with a level of care that the district court did not exhibit here.

The State mandated BOE to appoint as regular teachers only those who passed a certification test—the Liberal Arts and Sciences Test (LAST)—that was designed entirely by the State and that was ultimately held to have an unlawful disparate impact on this class of African American and Latino test-takers. The BOE has been held liable for simply following that state mandate, despite having no way to know the test was unlawful. The Court has twice previously upheld this liability theory. Although BOE urges the Court to revisit and reverse those rulings, it recognizes they are law of the case, and reserves the right to challenge them through a petition for certiorari.

The Court has not before addressed the proper measure of backpay. The district court's approach failed to properly account for two key and common-sense factors bearing on backpay: (1) *the probability of appointment*—the likelihood that class members would have received appointment as BOE teachers if they had passed the discriminatory test, and (2) *post-appointment attrition*—the likelihood that those who received appointment would not have continued to work for BOE through their judgment date, a period averaging over two decades for the class members in these appeals. Statistical evidence presented by

BOE confirms the common-sense intuition that substantial numbers of teachers who passed the LAST nonetheless did not receive appointments or did not remain with BOE over time. Indeed, 25% of comparators who passed the LAST were never appointed, and 50% of those appointed left within 10 years. The court's failure to account for these two factors, and instead to proceed in the teeth of both data and common sense, effectively doubled backpay amounts for many class members and has led to an aggregate windfall to the class.

The sound step was, as BOE proposed, to reduce backpay awards on a classwide basis to reflect known rates of appointment and attrition. This is because identifying which class members would have been hired, or when class members would have left BOE's employ, cannot plausibly be done on an individualized basis, as teachers get hired in a decentralized process based on numerous and discretionary factors, and they end up leaving BOE for any number of personal and professional reasons. But the district court instead held that the probability of appointment should not be taken into account at all, and directed that attrition be addressed case-by-case in individual hearings, which experience has confirmed to be an impossible task.

In endorsing systematic overcompensation of the class in the aggregate, the court relied in part on the notion that BOE must bear the risk of all uncertainties under the equitable “wrongdoer rule.” This too was error, both because the rule does not justify demonstrable overcompensation, and because BOE’s act of complying with a facially neutral state mandate does not justify treating it as a “wrongdoer” for the purpose of that rule.

For these reasons, and more shown below, the Court should vacate the affected judgments at issue (identified in the separate Addendum filed with this brief) and remand for the awards to be recalculated, and for the thousands of other claimants’ awards to be calculated, in a manner that accounts for the reality that substantially less than every class member would have been appointed as a BOE teacher or continued to work as one until the date of judgment.

JURISDICTIONAL STATEMENT

In this class action brought under Title VII of the Civil Rights Act of 1964, the district court certified individual judgments for each class member as immediately appealable under Federal Rule of Civil Procedure 54(b), and BOE timely filed a notice of appeal from each

judgment. This Court has jurisdiction under 28 U.S.C § 1291 because BOE appeals from final judgments that resolve all claims for an individual claimant.

ISSUES PRESENTED FOR REVIEW

(1) Should this Court revisit its prior holding that BOE can be held liable for the LAST's disparate impact, where BOE had no reason or ability to know that the test was discriminatory and could not have refused to comply with the state law mandate requiring it to appoint only teachers who passed the test; or, alternatively, should these considerations have led the district court to reject application of the wrongdoer rule in the remedial phase and take care to avoid an aggregate windfall at BOE's expense in calculating the appropriate remedies?

(2) Did the district court abuse its discretion by refusing to make a classwide reduction to backpay to reflect comparator-based proof that approximately 25% of similarly situated teachers who passed the LAST never received appointment as a BOE teacher?

(3) Did the district court abuse its discretion by refusing to make a classwide reduction to backpay to reflect comparator-based

proof that significant percentages of those receiving appointment as a New York City public school teacher leave that job before retirement?

STATEMENT OF THE CASE

This case arises from BOE's compliance with a state-law requirement that no teacher be appointed who had not passed a state-developed standardized test, known as the LAST (or its successor the LAST-2), between 1993 and 2014. The case has a long and complex history. Over the past two decades, this Court has issued two decisions. *See Gulino v. N.Y. State Educ. Dep't*, 460 F.3d 361 (2d Cir. 2006); *Gulino v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y.*, 555 F. App'x 37 (2d Cir. 2014). Several district court opinions detail the facts of the case (A-632-42, 898-931, 1098-1148). The facts relevant to this appeal are summarized below.

A. Teacher certification in New York City, and the state law prohibiting BOE from appointing anyone to a regular teaching position who had not passed the LAST

BOE is the largest school district in the United States, with more than 1.1 million students currently enrolled. *See* DOE Data at a Glance, NYC Dep't of Education, <https://on.nyc.gov/2vg4s43> (last visited Nov. 7, 2019). By state law, the thousands of appointed BOE teachers who

instruct these students must be certified by the New York State Education Department (SED), which supervises public schools throughout the state (A-1099). *See* N.Y. Educ. Law § 3001(2). Before 1991, New York law authorized BOE to certify New York City school teachers, but required BOE to apply standards that were substantially equivalent to state certification standards (A-1099-1100). In practice, this meant that SED dictated the certification requirements that BOE would apply (*id.*). In 1991, the state law changed to expressly require that all public school teachers in the state—including those in New York City—obtain SED certification (A-1102). *See* N.Y. Educ. Law § 3001(2).

Teacher certification entailed, among other things, passage of certain standardized tests. In 1984, SED imposed a regulation requiring teachers to pass a set of standardized tests called the “Core Battery” (A-1101). SED required New York City teachers to pass the Core Battery, but, due to a teacher shortage in the City, permitted BOE to phase in this requirement over several years (*id.*). This meant that BOE teachers could obtain a conditional license from BOE and could be appointed as regular teachers without passing the Core Battery, subject

to the condition that they pass the Core Battery within a certain number of years (*id.*). A teacher with a conditional license could obtain a regular BOE teaching appointment (*id.*).

In 1991, when New York law changed to require that all teachers, including those in New York City, obtain state certification, BOE could no longer issue even conditional licenses to individuals who had not passed the Core Battery (A-1102). In order to ensure compliance with the 1991 law, SED pressured BOE to revoke the conditional licenses of teachers who had previously obtained those licenses without passing the Core Battery, unless the teachers passed it within five years (*id.*).

In 1993, SED began to replace the Core Battery with a new test, the Liberal Arts and Sciences Test, which SED had developed with a private test-developer (*id.*). BOE had no involvement in the creation of the LAST, nor was it involved in or aware of how the LAST had been validated (A918-927; A-1126-29). *See Gulino v. Bd. of Educ.*, 122 F. Supp. 3d 115, 142 n.25 (S.D.N.Y. 2015).

By 1996, SED had eliminated the Core Battery and required all teachers instead to pass the LAST (A-1103). Thus, SED would not grant state certification to individuals without a passing score on the LAST,

and BOE was prohibited under state law from appointing anyone to a regular teaching position unless they had passed that test (A-1103). The potential consequences of violating this provision were severe. If BOE were to hire teachers who had not passed the LAST, and were thus not state-certified, BOE stood to lose billions of dollars in state education funding (ECF 515, at 2-3). *See Gulino v Bd. of Educ.*, 113 F. Supp. 3d 663, 667 (S.D.N.Y. 2015); *Gulino*, 122 F. Supp. 3d at 142 n.25.

Passing the LAST, or (earlier) the Core Battery, was not the only requirement for state certification. To obtain initial (“provisional”) state certification, individuals had to pass the LAST or Core Battery, and also possess a bachelor’s degree; meet certain coursework requirements; have a passing score on another exam, the Assessment of Teaching Skills-Written (ATS-W); and complete a student-teaching period (A-1239-40, 1243). In addition, to achieve permanent state certification, the teacher was required to obtain, within five years of appointment:

- a master’s degree;
- two years of satisfactory teaching experience; and
- a passing score on any relevant content-specialty tests

(A-1102-03, 1245-46). These requirements for permanent state certification were sometimes referred to as the “maximum requirements” (A-1245-46). To obtain tenure, a BOE teacher had to satisfy the maximum requirements and complete a three-year probationary teaching period (*id.*).

Despite these requirements, SED granted one-year “state temporary licenses” to certain teachers who did not meet the requirements for provisional state certification (A-1102; A-2326-27). Such teachers were referred to, in the New York City School system, as preparatory provisional teachers or “PPTs.” (A-2325-27). PPTs were full-time teachers and they earned the same salary as regularly appointed teachers with the same years of service—up to a certain salary step, at which point their salaries were capped while regular teachers continued to advance (A-2325-26).

To obtain and renew the one-year state temporary licenses, PPTs had to make progress toward achieving state certification, and BOE had to certify to SED that there were no certified teachers available to fill the PPTs’ positions (A-907, 2325-27). Some PPTs’ licenses were renewed up to six or seven times (A-2327). Due to shortages of certified teachers,

BOE employed many PPTs and often sought renewals (A-906-07). SED stopped issuing state temporary licenses in September 2003, effectively ending the PPT program (A-2327). PPTs who had not passed the LAST and obtained state certification by that point could no longer serve as full-time teachers. They, and others who had not passed the LAST, could instead serve as “per diem” substitutes, available on call.

The LAST (sometimes referred to as the LAST-1) remained a state-mandated certification requirement until February 2004, when it was replaced by the LAST-2. *Gulino*, 113 F. Supp. 3d at 667. The LAST-2 was used, and remained a state-certification requirement, until May 2014. *Gulino*, 122 F. Supp. 3d at 120.

B. The complex BOE teacher-appointment process and high rates of attrition among appointed BOE teachers

While state law requires BOE to appoint only state-certified teachers, a teacher who obtains state certification does not automatically receive a BOE teaching appointment. The BOE appointment process is highly individualized and discretionary, as “the ultimate hiring decision for [BOE] teachers is made on a school by

school basis, by individual school principals, at nearly the 1,700 schools operated by the [BOE]” (A-1544).

Principals consider an applicant’s teaching and professional experience, academic history, and three professional references (A-1544-45). Principals interested in applicants based on their credentials can contact the applicants; similarly, applicants can also reach out directly to principals to indicate an interest in being hired (A-1545). Principals or assistant principals then conduct interviews, and applicants are often invited to present a sample lesson (A-1546). The decision to appoint an applicant to a particular full-time teaching position belongs solely to the principal (*id.*).

Accordingly, a significant proportion of teaching applicants do not receive appointments. An analysis of nearly 20 years of BOE service data shows that approximately 25% of non-African American, non-Latino PPTs, who are similarly situated to the class members in this case, never obtained a BOE teaching appointment after passing the LAST (A-1729).

If and when appointed, BOE teachers do not uniformly remain in their positions until retirement. The reasons that they leave are varied

and subjective; some may eventually decide that the rewarding but demanding job of classroom teaching is not the right fit for them; others may fail to meet requirements for tenure; and others still may leave for any number of personal or professional reasons. But regardless of the reasons, data shows that BOE teachers leave, or “attrit,” at significant rates. Again, an analysis of nearly two decades of data shows that, for example, eight percent of non-African American, non-Latino appointed BOE teachers left their jobs within the first year, and nearly 50% left by the end of the tenth year, all for reasons other than retirement (A-1730-31, 2055).

C. The present litigation

In November 1996, four African American or Latino BOE teachers sued BOE and SED in the U.S. District Court for the Southern District of New York, alleging, on behalf of themselves and others similarly situated, that the use of the Core Battery and LAST as criteria for teacher appointment was discriminatory because the tests had a racially disparate impact and were not properly validated as job-related (A-632, 634-36). The plaintiffs claimed that use of these tests violated

their rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

In 2001, the district court (Motley, J.) granted plaintiffs' motion to certify a class under Federal Rule of Civil Procedure 23(b)(2) defined as "All African-American and Latino individuals employed as New York City public school teachers by Defendants, on or after June 29, 1995, who failed to achieve a qualifying score on either the [Core Battery] or the LAST, and as a result either lost or were denied a permanent teaching appointment" (A-636). The litigation has continued since then, in both the district court and in two prior appeals to this Court, as to both liability and remedies.

1. The liability finding against BOE based on its mandatory compliance with state law requiring teachers to pass a test that BOE played no role in choosing, creating, or validating

Contending that it could not be held liable under Title VII for simply following the mandates of a neutral state teacher-certification law, BOE moved for summary judgment. SED also moved for summary judgment on the ground that it was not plaintiffs' employer. But the district court denied those motions, holding that BOE could be liable

regardless of the mandates of state law because “Title VII preempts any state laws in conflict with it,” and that the SED qualified as an employer. *Gulino v. Bd. of Educ.*, 236 F. Supp. 2d 314, 333, 335 (S.D.N.Y. 2002). The case proceeded to an eight-week bench trial held in late 2002 and early 2003 (A-1611; A-899). Ultimately, the district court found that SED and BOE had not violated Title VII by requiring teachers to pass the Core Battery exam or the LAST because, while plaintiffs had established a prima facie case of disparate impact, both exams were job-related (A-1104-05). The district court nonetheless criticized SED and the test-developer for failing to retain sufficient documentary evidence regarding the development of the LAST, noting a “pervasive lack of documentation” (A-1105).

On appeal, the plaintiffs argued that the LAST was not job-related, and BOE and SED argued that they could not be held liable under Title VII (A-1106). In 2006, this Court issued an opinion reversing the district court’s finding that the LAST was job-related, and remanding for further proceedings on that issue. *Gulino*, 460 F.3d at 364. Regarding BOE’s potential liability, the Court recognized that BOE was “merely following the mandates of state law,” but held that “it was

nevertheless subject to Title VII liability” because “the mandates of state law are no defense to Title VII liability.” *Id.* at 380 (cleaned up).¹ The Court dismissed all claims against SED on ground that it was not plaintiffs’ employer under Title VII. *Id.* at 379. This Court “acknowledge[d] the difficult situation that this creates for [BOE],” which was at the mercy of SED teacher-certification requirements, but held that Title VII nonetheless “requires this result” *Id.* at 381.

2. Certification of the remedy-phase class, appointment of a special master, and the “deemed certified” injunction

While the issue of liability was still pending before the district court (now Wood, J.) on remand, the Supreme Court decided *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360-61 (2011), which held that a class seeking individualized backpay may not be certified under Rule 23(b)(2). Based on *Wal-Mart*, the district court in December 2012 decertified the class except for declaratory and classwide injunctive relief, but indicated that it would consider a motion to recertify a remedy-phase class (A-1115-1120).

¹ This brief uses “cleaned up” to indicate that internal quotation marks, alterations, or citations have been omitted from quotations.

Having previously asked the parties to brief the remanded liability issues, the district court rejected BOE's renewed arguments that it should not be held liable for simply following the mandates of a neutral state law requiring teachers to pass a licensing exam, and held that because the LAST was not job-related, BOE had violated Title VII by following the state-law requirement (A-1123-45). Again, the court's findings focused solely on the failure of test-developer to properly develop and validate the LAST—a process that was completely out of BOE's hands (*id.*).²

In 2013, the district court granted plaintiffs' motion to certify a remedy-phase class under Rule 23(b)(3) (A-1631). The class definition remained essentially the same as for the originally certified class, but without the reference to the Core Battery (which had previously been

² In June 2015, the Court determined that the LAST-2 (the successor to the LAST) also had a disparate impact and was not job-related. *Gulino*, 113 F. Supp. 3d at 666. BOE had no role in the development or validation of the LAST-2 and had no choice but to follow state law mandating that all full-time teachers be state certified, a requirement for which was a passing score on the LAST-2. *See id.* at 668 n.5, 672-75; *Gulino*, 122 F. Supp. 3d at 142 n.25. None of the class members whose judgments are consolidated in this appeal premise their claims on the LAST-2.

found non-discriminatory).³ In addition to approving a damages class, the district court endorsed a two-stage remedial phase, with the first stage addressing “classwide issues, including calculation of backpay, pension benefits, and seniority” and the second addressing “individual issues, including mitigation and the amount of backpay to which each claimant is entitled” (A-1619).

In May 2014, the court appointed a special master to “render decisions regarding classwide damages and relief issues and preside over the process of individual claimant hearings and issue decisions following those hearings” (ECF 435). And in September 2014, plaintiffs mailed claim forms to potential claimants who had taken the LAST (A-1992-2001).⁴

Later that year, the district court issued an injunction providing class members with an avenue to be “deemed” state certified for the

³ After the court’s 2015 decision finding that the LAST-2 also had an unlawful disparate impact, the class definition was amended to reflect that development and now reads: “All African-American and Latino individuals employed as New York City public school teachers by Defendant, on or after June 29, 1995, who failed to achieve a qualifying score on any administration of the LAST, and as a result either lost or were denied a permanent teaching appointment” (A-2300).

⁴ See <http://gulinolitigation.com/> (last accessed Nov. 7, 2019). Additional claim forms were mailed after the decision finding that the LAST-2 also had an unlawful disparate impact (A-2002-08).

purpose of BOE employment, notwithstanding their failure to pass the LAST (A-1720). This order provided class members with a period in which to demonstrate that they met the current or former certification requirements other than the LAST, after which the court, if satisfied with that showing, would deem the class member state certified so that the member could apply to be hired by BOE as a regularly appointed teacher (A-1720-21).

3. Proceedings before the Special Master regarding classwide backpay adjustments

As part of the first stage of the remedial phase of the case, dedicated to addressing “classwide issues,” BOE sought to reduce backpay awards on a classwide basis to reflect two known factors affecting relief that would be impossible to determine through individualized hearings: (1) the fact that not all class members would have been appointed to BOE teaching positions even if they had passed the LAST (the “probability of appointment”); and (2) the fact that even if they had been appointed to BOE teaching positions, many class members would not have remained BOE teachers through retirement or judgment (“post-appointment attrition”).

a. BOE's expert report proposing classwide reductions to account for the probability of appointment and attrition

In support of its proposed reductions, BOE submitted the report of its retained expert, Dr. Christopher Erath. To assess the probability that a class member would have been appointed had he or she passed the LAST, Dr. Erath analyzed the actual outcomes of similarly situated teachers who had passed the LAST (A-1728-29). Because the class consisted nearly exclusively of former PPTs, Dr. Erath used as the comparator group non-African American, non-Latino PPTs—which he referred to as “regular substitutes” (A-1727-29)—who had actually passed the LAST. Analyzing nearly 20 years of BOE service data, Dr. Erath found that, as noted above, approximately 25% of the comparator group never obtained a regular BOE teaching appointment after passing the LAST (A-1729). Accordingly, to account for the probability of appointment, Dr. Erath proposed a classwide 25% reduction in damages for all class members who never passed the LAST (*id.*). For class members who later passed the LAST, Dr. Erath proposed no reduction for those who actually obtained regular BOE teaching

appointments; for those who never obtained an appointment despite passing the LAST, he proposed an award of no damages (A-1728-29).

Dr. Erath also analyzed comparator-group data with respect to post-appointment attrition. For this analysis, he examined the actual experiences of non-African American, non-Latino appointed BOE teachers, to determine what proportion left their jobs within the first year, within the second year, and so on (A-1730-31). Dr. Erath excluded from his analysis comparators who retired because he proposed to analyze retirement separately (A-1731-32). His analysis of pre-retirement, post-appointment attrition in the comparator group revealed the statistics noted above: “eight percent of teachers left during their first year of teaching,” and “[b]y the tenth year [of teaching], that proportion is nearly 50 percent” (A-2055).⁵

Accordingly, Dr. Erath proposed that in calculating class members’ relief, the backpay award attributable to each year of the class member’s counterfactual career be reduced by the corresponding

⁵ These figures do not account for the age of the particular class member. Actual attrition adjustments under Dr. Erath’s model would vary based on the class member’s age.

comparator-based attrition rate (A-1731).⁶ Dr. Erath did not propose to apply a reduction for any years during which the class member was actually working as a BOE teacher (*id.*).

Plaintiffs' retained expert, Dr. Thomas DiPrete, also submitted a report proposing a method for calculating class members' damages (A-1740). His method, however, did not provide for any reduction for the probability of appointment. And with regard to post-appointment attrition, Dr. DiPrete noted that he had "been instructed not to include any adjustment for possible attrition by claimants during the period of counterfactual employment at the BOE other than concerning retirement age" (A-1746).⁷

⁶ If these rates were applied over ten counterfactual years (even assuming no increase in salary), the overall cumulative reduction to backpay would be roughly 32%. Over the course of 15 years, the cumulative reduction would be nearly 40%. And with periodic salary increases, which BOE teachers received and which were presumed in the damages model, those percentage reductions would be even greater (as greater yearly reductions would apply to years with a greater counterfactual salary).

⁷ Plaintiffs' model proposed to account for retirement by applying comparator-based retirement rates for any years of a class member's counterfactual career in which they would have been 55 or older (A-1745).

b. The Special Master's conference with the experts and his conclusion that it would be fair to employ an approach to attrition resulting in aggregate BOE overpayment

After receiving the experts' reports and the parties' legal positions, the Special Master convened a hearing with the experts in May 2015 that addressed (among other things) the issue of post-appointment attrition (A-1756, 1798-1812). At the hearing, Plaintiffs' expert, Dr. DiPrete, noted that plaintiffs were proposing an individualized, rather than classwide, approach to attrition issues (A-1799 at 44:12-23). But he did not contend that such an approach would produce aggregate accuracy across the class. To the contrary, Dr. DiPrete conceded that "we know in the population, people leave," so "if you assume that nobody in the population left, you are going to get an over estimate" in the aggregate (A-1799-800 at 44:25-45:3).

The choice, as Dr. DiPrete saw it, was between aggregate accuracy across the class (*i.e.*, "mak[ing] sure [BOE] wouldn't pay more than" the data suggests it should for the class as a whole) and ensuring that no class member "end[s] up taking a discount because somebody else would have left" (A-1811 at 56:7-12). Statistics provided those parameters, but

Dr. DiPrete conceded that “[i]t’s the judge that has to decide what the fair thing to do is, given those two realities” (A-1810 at 55:21-24).

Dr. Erath, BOE’s expert, agreed that classwide application of the comparator-based attrition probabilities was necessary to ensure aggregate accuracy, but did not view that method as any less accurate than individual hearings, even on an individual level. With counterfactual attrition, he noted, “you’re necessarily dealing with something that is ... unknowable” even by “the individual,” and “that’s why you take a probabilistic approach” (A-1803 at 48:16-20).

The Special Master noted that accounting for attrition appeared to present him with a “Hobson’s choice,” but only “until you say ... one of these parties caused the discrimination. And the fact that that party has to pay more than it otherwise would have paid had it not discriminated, that is really not such a bad thing to do, as a matter of fairness” (A-1804 at 49:9-15).

c. The Special Master’s and district court’s rejection of a classwide approach to the probability of appointment and attrition

In an Interim Report & Recommendation (IR&R), the Special Master recommended that the district court reject both of BOE’s

arguments for classwide backpay reductions. Although plaintiffs never controverted Dr. Erath's comparator-based statistics, the Special Master disapproved of BOE's classwide probability-of-appointment reduction because the district court had previously found, in the 2013 class-certification decision, that "given the large number of vacancies for full-time teachers ... class members who failed LAST-1, but satisfied all other requirements, would have received a full teaching license and would have been hired as a full-time teacher" (A-2029). The Special Master deemed inapt the precedent BOE cited requiring pro rata reductions and posited that it was not "unjust to impose damages without regard to the hiring experience of the non-class" comparators, because "the legal consequences of any uncertainty about whether a claimant would have been hired must be borne by the Defendant precisely because the uncertainty arises from Defendant's discriminatory policy" (A-2030).

The Special Master also rejected BOE's position on post-appointment attrition. The Special Master recognized that "teachers often leave early (or 'attrit') for a variety of reasons, including relocation, illness, a change in profession, or a change in school system"

(A-2031). And he acknowledged that the “[s]tatistics cited by the defendant appear to bear this out” (A-2033). But he recommended against any classwide application of attrition probabilities, asserting that “[i]ndividualized determinations are necessary to provide the most complete relief possible and to best recreate what would have transpired absent any discrimination” (*id.*). With no defined standards to discipline his judgment, the Special Master noted that “statistical evidence on how similarly situated non-class comparators left employment would be considered in the first instance” in the individualized hearings, and “the parties will be free to offer evidence to establish why the statistical baseline should not be the duration period in the case of any individual claimant” (A-2035).

Rejecting BOE’s objection that it would be forced to overpay across the class in the aggregate if attrition probabilities were not applied on a classwide basis, the Special Master stated that the “purpose of Title VII’s remedial scheme is to ensure that the *victims* of discrimination are made whole and not that the perpetrator of discrimination is no worse off than it otherwise would have been” (A-2038). Thus, there was “no undue hardship” if BOE “must pay more damages to victims than it

would have had it not discriminated” (*id.*). In effect, the Special Master decided that it was fair for the class to be paid more, perhaps vastly more, than that to which it was entitled.

BOE submitted objections to the Special Master’s recommendations regarding the classwide backpay reductions. In a September 2015 decision, the district court adopted the Special Master’s IR&R in full (SPA-2). Based on the court’s 2013 finding cited by the Special Master, the court rejected a probability-of-appointment reduction (SPA-11-12). And the court rejected BOE’s request for a classwide post-appointment-attrition reduction, holding that individualized attrition determinations would best recreate “what would have occurred absent discrimination” (SPA-12). Like the Special Master, the court dismissed any concern that individual attrition determinations would require BOE to overpay plaintiffs in the aggregate, holding that “any unfairness to a defendant that may result is viewed as tolerable, in light of the principle that any uncertainties should be construed against the wrongdoer” (SPA-13).

4. The individualized remedy determinations, in which the Special Master never applied attrition probabilities

In late 2016, the parties and the Special Master began the “second stage” of the remedy phase: individualized determinations for the more than 4,500 members of the class (ECF.1049.R&R.Munoz.p.2-4). Per the district court’s September 2015 decision, BOE could not raise the probability-of-appointment statistics during these proceedings. The proceedings determined various other issues, including counterfactual BOE-appointment dates, counterfactual educational-advancement dates, and mitigation. Relevant to this appeal, the Special Master determined in these proceedings whether or not to apply comparator-based “attrition probabilities” to each class member and what counterfactual end-of-BOE-career date to use.

Working in batches, plaintiffs submitted damages demands for class members, quite often attaching an affidavit in which the class members described their test-taking efforts and post-BOE career or job searches, and affirmed that if they had passed the LAST and become a regularly appointed BOE teacher, they would still be a teacher with BOE to that day (*see, e.g.*, ECF.1499-2.M.Todd.Affidavit; ECF1345-

2.M.Bello.Affidavit). None of the class members in this consolidated appeal testified in person.

BOE maintained its position that attrition probabilities should apply because individualized counterfactual attrition determinations were inherently unreliable and uncertain; neither the class member nor BOE could supply meaningful evidence about whether and when the class member would make the inherently subjective and contingent decision to leave in a counterfactual career. But the Special Master struck such objections as having been already rejected by the court's 2015 decision (*see, e.g.*, Confidential Appendix ["CA"]-15-16, 18, 20, 34).

Based on the affidavits, evidence, and arguments of the parties, the Special Master decided for each class member whether to apply the yearly attrition probabilities to the class member's counterfactual career. Of the 347 class members whose judgments are consolidated for briefing here, the Special Master failed to apply attrition probabilities to a single one.⁸

⁸ See Section II.C.4 of each class member's Findings of Fact and Conclusions of Law, all of which are found in the Joint Appendix of Class Member-Specific Documents.

In addition, the Special Master determined when each class member's counterfactual career, and thus backpay period, should end.⁹ In the majority of cases, the Special Master ordered the member's counterfactual career to last through the date of judgment (*see* Counterfactual Career Findings Table ("Table"), *infra* at 112, 123). And in most of the remaining cases, the Special Master deemed the counterfactual career to continue through the claimant's retirement date when that date preceded the date of judgment. *See id.* The Special Master made no effort to reconstruct through the individualized proceedings the fact that a teacher in a counterfactual career may have left BOE for any of numerous personal and professional reasons, which might not have been evinced by specific events in the teacher's actual life not serving as a BOE teacher.

5. The district court's judgments giving rise to the instant appeals

The Special Master set forth his determinations as to each class member's backpay and other relief (including a tax-component award,

⁹ For some class members, backpay ended before the counterfactual career end date because, at a certain point, all further counterfactual earnings were fully negated by mitigation earnings.

pre-judgment interest, seniority adjustment, and pension relief) in Findings of Fact and Conclusions of Law, and proposed judgments, which the Special Master forwarded to the district court along with a Report and Recommendation recommending adoption of the findings and certification of the judgment as final pursuant to Federal Rule of Civil Procedure 54(b) (*See, e.g.*, ECF.1049).

The district court has adopted each of these recommendations and has entered each proposed judgment. BOE has appealed from the judgments and, under this Court's Case Management Order, is submitting a consolidated brief addressing the 347 appeals it noticed as of September 3, 2019. The district court continues to enter judgments for the more than 4,000 additional class members.

STANDARD OF REVIEW AND SUMMARY OF ARGUMENT

While recognizing that the liability ruling against BOE is the law of the case, BOE urges the Court to revisit it and hold that BOE cannot be liable for the LAST's discriminatory effect. BOE had no information regarding the creation or validation of the LAST, nor any ability to uncover it. BOE also was under state-law compulsion not to appoint teachers who had not passed the LAST, and faced untenable fiscal

repercussions if it failed to do so. As the district court has recognized, these circumstances make it an “enormous inequity” to hold BOE solely liable for the massive potential legal exposure here. *Gulino*, 122 F. Supp. 3d at 142 n.25.

Even if BOE were properly held liable, however, the district court’s backpay determinations were fundamentally flawed. The district court erred by failing to account at the remedy stage for BOE’s lack of knowledge or control with regard to the LAST. In both broad methodological rulings and in individualized determinations, the court frequently invoked the so-called wrongdoer rule to resolve uncertainties regarding backpay against BOE and to justify awarding far greater relief to the class in the aggregate than would have been due in the absence of discrimination. The wrongdoer rule would not excuse granting a windfall to the class in *any* case. But in the unusual circumstances of this case, the court should have taken particularly care to balance the equities. It was unjust and unreasonable to consistently apply a heavy weight on the scale against BOE.

This Court reviews for an abuse of discretion a district court’s decisions about awarding of backpay under Title VII. *Rios v. Enter.*

Ass’n Steamfitters Local Union 638 of U.A., 860 F.2d 1168, 1175 (2d Cir. 1988). “A district court abuses or exceeds the discretion accorded to it when (1) its decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision—though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions.” *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 169 (2d Cir. 2001) (cleaned up). A factual finding is clearly erroneous when, “although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *Wu Lin v. Lynch*, 813 F.3d 122, 126 (2d Cir. 2016).

In determining whether a district court has abused its discretion in fashioning backpay relief, this Court is “guided by general principles pertinent to Title VII backpay awards.” *Rios*, 860 F.2d at 1175. These principles hold that backpay calculations must aim to recreate, as nearly as possible, the conditions that would have existed in the absence of discrimination. In a class action, these principles further

require that backpay for the class as a whole not exceed the actual, non-speculative scope of the harm to the class.

As numerous courts have recognized, these principles require that, where making case-by-case backpay determinations would require highly speculative and standardless judgments, classwide statistical approaches are the proper means to afford class members adequate relief while avoiding overcompensation of the class at the defendant's expense. The district court here abused its discretion by violating these principles in addressing the probability of appointment and post-appointment attrition.

First, the district court failed to adjust class members' backpay awards *at all* to reflect the fact that not all class members would have been appointed as regular teachers even if they had passed the LAST. Data submitted by BOE showed that only 75% of similarly situated teachers ever obtained a regular BOE teaching appointment after passing the LAST. BOE's complex, decentralized, and discretionary teacher-appointment process meant that it would be impossible to non-speculatively determine which class members would have been among those hired. It is well settled under Title VII precedent that the proper

approach in circumstances like these is to impose a classwide backpay adjustment to reflect the probability of hire. The district court erred by refusing to follow this precedent, relying on a far-too-cramped reading of the caselaw that missed its animating principle.

The court further erred by refusing to even consider BOE's comparator-based probability-of-hire data based on its unsupported and inapt prior finding that every teacher who passed the LAST would have been appointed. The court made this statement at the class-certification stage, when damages were not in issue, without the benefit of BOE's comparator-based evidence, and in reliance on plaintiffs' overly generous representations about the qualifications of the then-still-prospective members of the class. By rejecting BOE's proposed classwide approach to probability of appointment, the court ensured that the class would be overcompensated in the aggregate.

Second, the district court abused its discretion in failing to apply a classwide adjustment to class members' backpay awards to reflect known rates of pre-retirement attrition from BOE teaching positions. Given the impossibility of accurately determining when particular individuals would have left BOE teaching positions if they had obtained

them a decade or more earlier—a hypothetical choice that could be based on uncountably many unknown personal and professional circumstances and contingencies—Title VII principles likewise require a classwide approach to attrition, using the comparator-based statistics.

By adopting a procedure that could not properly account for attrition, the court failed to recreate the but-for-discrimination conditions and ensured that the class would be overcompensated in the aggregate. Indeed, the individual attrition determinations made under the district court's chosen approach bear out that prognosis. In none of the 347 judgments at issue here did the Special Master or the district court apply the comparator-based attrition statistics. Rather, they made standardless determinations, based on information—such as repeated attempts to pass the LAST, or employment in non-teaching careers—that offered no particular insight into the question of whether the claimant would likely have had a longer career with BOE than actual teachers did. Predictably, the outcomes do not adequately account for attrition, resulting in a windfall to the class at BOE's, and taxpayers', expense.

This Court should remand the affected judgments—which, in accordance with the Court’s Case Management Order, are identified in the separate Addendum filed with this brief—for redetermination of backpay and the related relief that flows from it.

ARGUMENT

POINT I

THE COURT SHOULD REVISIT THE LIABILITY RULING AGAINST BOE OR, AT A MINIMUM, REJECT APPLICATION OF THE “WRONGDOER RULE” FOR RESOLVING REMEDIAL ISSUES

This Court has held that BOE can be liable for adhering to the state law that barred it from hiring teachers who had not passed the state-mandated, state-designed LAST, and that SED bears no legal responsibility for creating and requiring the exam. *Gulino*, 460 F.3d at 379-80; *see also Gulino*, 555 F. App’x at 38-40. BOE maintains that this liability ruling was mistaken, reflecting an erroneous application of Title VII’s preemption provision, among other errors, and a failure to fully consider, in the words of the district court, the “enormous inequity” that the ruling would create. *Gulino*, 122 F. Supp. 3d at 142 n.25 (S.D.N.Y. 2015). Indeed, BOE’s potential exposure in this case is staggering. It has been ordered to pay \$170 million in backpay, in

addition to significant corresponding pension relief, on the 347 judgments at issue here, which involve less than 10% of the members of the class. The financial burden of this undue liability will limit programs for the City's schoolchildren, impair other public services, or fall on the City's taxpayers.

For the reasons BOE asserted in the prior appeals, BOE invites the Court to reconsider the liability ruling, although it recognizes that the ruling is the law of the case, and reserves the right to seek Supreme Court review in due course. Regardless of the ruling's correctness, however, the highly unusual circumstances underlying it should have informed, but did not, the district court's resolution of the remedy-stage issues raised in this appeal. The remedies at issue here—backpay and related relief—are equitable in nature, and in awarding them a court must be guided by the need to “locate ‘a just result’ in light of the circumstances peculiar to the case.” *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418, 424 (1975) (quoting *Langnes v. Green*, 282 U.S. 531, 541 (1931)). Indeed, “[a] court that finds unlawful discrimination is not required to grant retroactive relief” at all. *Ingram v. Madison Square Garden Ctr., Inc.*, 709 F.2d 807, 812 (2d Cir. 1983).

In fashioning a backpay remedy, a court “must, as nearly as possible, recreate the conditions and relationships that would have been had there been no unlawful discrimination.” *Id.* at 811 (cleaned up). Further, it is a “cardinal, albeit frequently unarticulated assumption, that a back pay remedy must be sufficiently tailored to expunge only the actual, and not merely speculative, consequences of the [discrimination].” *E.E.O.C. v. Joint Apprenticeship Comm. of Joint Indus. Bd. of Elec. Indus.*, 186 F.3d 110, 124 (2d Cir. 1999) (quoting *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 900 (1984)). The backpay remedy should not provide an aggregate “windfall at the expense of the employer.” *Ingram*, 709 F.2d at 812.

But as will be explained below, the district court, when faced with questions regarding the proper methodology for assessing backpay and other relief to the class, or when addressing remedy issues raised in individual hearings, repeatedly ignored those fundamental principles, often justifying inequity to BOE by relying on the so-called wrongdoer rule. That equitable principle holds that uncertainties as to damages should be resolved against the discriminating employer when it is the

“defendant’s discriminatory employment practices which are the source of the uncertainty.” *Joint Apprenticeship Comm.*, 186 F.3d at 122.

The court’s resort to the wrongdoer rule to excuse granting a windfall to the class would violate Title VII remedial principles in *any* case. But given the circumstances and equities peculiar to this case, the district court should have been especially careful to balance the equities, making it all the more clear that the remedial approaches challenged here were unjust and an abuse of discretion.

Most significantly, BOE had no basis to know that the LAST was discriminatory. As the district court observed, “BOE had no role in the decision to develop and implement” the versions of the LAST at issue, and “had no way of determining, when the tests were being used by the SED, whether any of these tests were properly or improperly validated, and therefore, whether they were discriminatory.” *Gulino*, 122 F. Supp. 3d at 142 n.25. SED provided BOE with no information about the exam’s development. And even if BOE had received this information, “it would have been difficult for [BOE] to determine whether the exams were actually discriminatory.” *Id.* Indeed, as the district court noted, discovery on that issue “took approximately six years,” and the two-

month liability trial turned on “massive expert testimony.” *Id.*¹⁰ Further, that trial led to a ruling that the LAST was *not* discriminatory. It was not until December 2012, nearly 20 years after the LAST was first used as a state certification requirement, that any court ruled that the LAST was discriminatory.

This lack of knowledge is particularly important to the equitable assessment of backpay. In some contexts, courts have held that it is permissible even to award *no* backpay for a period when a defendant complied with a law that it lacked reason to know violated Title VII. So, for example, the Supreme Court held that it was “inequitable,” and thus erroneous, to award retroactive relief under Title VII against government pension funds for periods when their sex-differentiated policies “might reasonably have been assumed to be lawful.” *Ariz. Governing Comm. for Tax Deferred Annuity and Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1094-95 (1983); *see also City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 719-21 (1978).

¹⁰ Not only did BOE lack involvement in this process, but SED and the private test-developer were unable at trial to adequately document the test-development process. The district court noted a “pervasive lack of documentation” that made it impossible to “reconstruct the process of developing” the test’s objectives or to “recreate the company’s validation results” (A-925-26). *See Gulino*, 460 F.3d at 387.

So too, numerous courts of appeals have held that a defendant's compliance with erstwhile state laws that imposed gender-based restrictions on hours and work conditions, referred to as "female protective" statutes, did not warrant an award of backpay under Title VII.¹¹ Given that "state statutes are entitled to the presumption of constitutionality," *Le Beau v. Libbey-Owens-Ford Co.*, 727 F.2d 141, 149 (7th Cir. 1984) (cleaned up), the courts concluded that Title VII defendants should not be penalized for acting on the reasonable assumption that state statutes are valid and enforceable, *see, e.g., Kober v. Westinghouse Elec. Corp.*, 480 F.2d 240, 248 (3d Cir. 1973).

While these cases are not analogous to this one in every respect, they affirm a principle that is squarely applicable here: A court, to satisfy its "duty to determine" that a Title VII equitable remedy "is appropriate," must give significant weight to circumstances showing that the defendant was entitled to presume that its conduct was lawful. *Manhart*, 435 U.S. at 719-20; *see Norris*, 463 U.S. at 1094-95. Indeed,

¹¹ *See Le Beau v. Libbey-Owens-Ford Co.*, 727 F.2d 141, 149-50 (7th Cir. 1984); *Kober v. Westinghouse Elec. Corp.*, 480 F.2d 240, 248 (3d Cir. 1973); *Manning v. Int'l Union*, 466 F.2d 812, 815-16 (6th Cir. 1972); *Schaeffer v. San Diego Yellow Cabs*, 462 F.2d 1002, 1006 (9th Cir. 1972); *Le Blanc v. Southern Bell Tel. & Tel. Co.*, 460 F.2d 1228, 1229 (5th Cir. 1972).

the logic of these cases is particularly relevant here, where the law in question was facially neutral, and the exam that the law mandated was not found to be invalid until nearly two decades after it was first used.

Lack of knowledge is not the only factor here requiring the court to carefully balance the equities and eschew reliance on the wrongdoer rule. Even if there had been some way for BOE to know about the LAST's discriminatory effect, it would have been no small matter for BOE to refuse to use the exam. State law required BOE to hire only certified teachers, who under state law could be certified only if they passed the LAST. Failure to comply with the state's mandate could have caused BOE to lose billions of dollars in state funding, "a result that would have crippled New York City's ability to educate its children." *Gulino*, 122 F. Supp. 3d at 142 n.25. Indeed, SED's willingness to enforce its teacher-certification requirements is not in doubt. In another, contemporaneous context, SED sued BOE for employing uncertified teachers in certain struggling schools, leading, in 2000, to a court-ordered settlement. *See Mills v. Levy*, Index No. 26196/00 (Sup. Ct., Kings Cty.) (ECF 302 at 13-14; ECF 305 at 3-7). As

a practical matter, then, choosing to disregard state requirements for certification would have been untenable.

In the first appeal, this Court held that BOE could be liable despite the state-law requirement to use the LAST because “the mandates of state law are no defense to Title VII liability.” *Gulino*, 460 F.3d at 380. But that general proposition does not speak to the situation presented here, in which a facially neutral state law compelled the use of an exam that was found to have an unlawful disparate impact only decades after its use was first required. Nor does the proposition clearly justify imposing the purely retrospective remedy of backpay based on conduct that BOE had no reason to know was discriminatory and had no realistic ability to avoid. At a minimum, the district court was required to weigh these unusual circumstances heavily in arriving at a just outcome for both plaintiffs and BOE.

The district court’s failure to do so was itself an abuse of discretion, and its resulting frequent resort to the wrongdoer rule played a decisive role in both of the fundamental methodological errors at issue in this appeal. BOE thus was thrice penalized for its tenuous connection to plaintiffs’ injury—first by being held solely liable for it,

next by having its liability serve as justification for rejecting the classwide approaches to backpay that BOE proposed, and yet again by having its liability justify the court's consistent resolution of case-by-case determinations against it.

POINT II

THE DISTRICT COURT ABUSED ITS DISCRETION BY REJECTING A CLASSWIDE BACKPAY REDUCTION FOR THE PROBABILITY OF APPOINTMENT

The district court abused its discretion by failing to apply an adjustment to class members' damages awards to reflect the fact that not all class members would have been appointed as regular teachers even if they had passed the LAST. BOE presented comparator-based evidence showing that substantially less than every class member—just 75%—would have been appointed as regular BOE teachers had those individuals passed the LAST. Given the complex, decentralized, and discretionary nature of BOE's appointment process, however, it would

not be possible to identify *which* of the more than 4,500 class members would have been among the group that would have been appointed.¹²

Under these circumstances, Title VII remedial principles, well established in this Court's precedent and the precedent of other circuits, required a classwide pro rata damages reduction to account for the less-than-full probability of appointment. The district court wrongly disregarded that precedent based on an untenably narrow reading of the caselaw and an improper application of the wrongdoer rule. The court also erroneously refused to consider BOE's statistical evidence in reliance on its previous statement, made in a different and inapt context, when damages were not at issue, BOE's evidence was not before it, and the class was presumed to be more uniformly qualified than it actually is.

¹² This argument does not apply to those class members who actually had and lost, or eventually attained regular appointed BOE teaching positions. Those class members are identified in the separate Addendum filed with this brief.

A. Title VII remedial principles required a classwide probability-of-appointment reduction here.

- 1. A classwide approach is necessary where the court cannot non-speculatively determine which class members would have been hired but for discrimination.**

Title VII remedial principles require classwide pro rata adjustments to backpay and related relief where data show that each class member in a Title VII class action had less than a 100% probability of obtaining one of the jobs that were discriminatorily denied, and it is infeasible to determine, without speculation, which of the class members would have been hired. In such a situation, a court abuses its discretion by awarding full backpay to each class member as if they would surely have been hired.

An assumption of full employment for the class, despite known lesser probabilities of employment, would lead to an aggregate backpay award to the class that exceeds the harm suffered as a result of the discrimination. This would plainly violate the principle that a Title VII remedy must as nearly as possible “recreate the conditions and relationships that would have been had there been no unlawful discrimination,” *Ingram*, 709 F.2d at 811 (cleaned up), and its corollary

that Title VII class action remedies “must strive for equity to both parties” and “be proportionate to the court’s best determination of the *actual* compensatory losses of a class,” *United States v. City of Miami*, 195 F.3d 1292, 1299-1302 (11th Cir. 1999).

Applying these key principles in a situation where statistics estimated that only seven hires were denied due to discrimination, this Court held that it would be an “unwarranted windfall” to award full backpay to “more than 7 class members.” *Ingram*, 709 F.2d at 812. Similarly, in a decision by then-Chief Judge Ruth Bader Ginsburg, the D.C. Circuit reversed a remedial order that granted full backpay to eight plaintiffs, even though each plaintiff “enjoyed less than a one hundred percent chance” of obtaining one of the promotions affected by discrimination. *Dougherty v. Barry*, 869 F.2d 605, 615 (D.C. Cir. 1989); *see also City of Miami*, 195 F.3d. at 1299-1302 (reversing award of full backpay to each class member where most would not have been hired even absent the discrimination).

Instead, in these situations, a court has two choices: either (1) determine which of the class members would have been hired (up to the number predicted by statistics) and award backpay only to those

class members, or (2) where that determination cannot non-speculatively be made, prorate all class members' awards to account for their probability of being hired. Which of these two options is appropriate depends on the "complexity of the case." *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 261 (5th Cir. 1974); see *Robinson v. Metro-N. Commuter R.R. Co.*, 267 F.3d 147, 161 n.6 (2d Cir. 2001) (noting certain complex cases may require "class-wide, rather than individualized, assessments" of backpay). Where "the class is small, or the time period short, or the effect of the discrimination straightforward, a fairly precise ... individual-by-individual determination" may be possible. *Pettway*, 494 F.2d at 261. But "when the class size or the ambiguity of promotion or hiring practices or the multiple effects of discriminatory practices or ... an extended period of time calls forth [a] quagmire of hypothetical judgment[s]" in order to recreate counterfactual careers, "a class-wide approach to the measure of back pay is necessitated." *Id.*

So, for example, the Fifth Circuit held that it would be impossible to non-speculatively determine on an individualized basis which jobs each of the 623 class members would have obtained over a six-to-ten-

year period, but for discrimination, where such counterfactual determinations would have to be premised on “seniority and ability at that time.” *Pettway*, 494 F.2d at 223 n.30, 258, 260-62; *see also McClain v. Lufkin Indus.*, 519 F.3d at 264, 271, 281 (5th Cir. 2008) (same conclusion, for a class of 700, a roughly ten-year backpay period, and determinations that would have likewise been premised on “seniority and ability at that time”).¹³

Similarly, the Seventh Circuit held that because there were no “objective standards” to determine whether a given employee would have received a promotion, it was impossible to make individualized counterfactual promotion determinations for roughly 120 class members covering a time period of a few years. *Stewart v. General Motors Corp.*, 542 F.2d 445, 450-51 (7th Cir. 1976).¹⁴ And the Eighth Circuit held that it would be impossible to determine which 45 African American

¹³ *See McClain v. Lufkin Indus.*, No. 9:97-CV-063, 2005 U.S. Dist. LEXIS 42545, at *56 (E.D. Tex. Jan. 13, 2005) (describing backpay period).

¹⁴ *See Stewart*, 542 F.2d at 449 (noting June 1972 EEOC charges); *Stewart v. Gen. Motors Corp.*, No. 73 C 2263, 1975 U.S. Dist. LEXIS 14829, at *1, 11-12 (N.D. Ill. Dec. 15, 1975) (enjoining discriminatory practices, describing class as all black hourly (non-salaried) employees as of or after December 1973, and noting that the 12 salaried black employees in 1974 constituted 9% of the total black workforce of the plant, indicating that there were roughly 120 black hourly employees).

apprenticeship applicants would have been selected, given “the apparent complexity and uncertainty” of such determinations. *Hameed v. Int’l Ass’n of Bridge, Structural & Ornamental Iron Workers, Local Union No. 396*, 637 F.2d 506, 520 (8th Cir. 1980). In all of these cases, the courts found that classwide, pro rata approaches were necessary.

And even in cases involving smaller classes and shorter time periods, courts have required a pro rata approach where individual-by-individual counterfactual hiring or promotion determinations were too speculative to reliably make due to the subjective nature of the hypothetical determinations that would have to be reconstructed. Thus, the Eleventh Circuit held that the inherent subjectivity of the promotion decisions rendered it overly speculative to determine which two of 35 applicants would have received promotions during a single promotion period. *City of Miami*, 195 F.3d at 1299-1301. Instead, a pro rata reduction of each class member’s award was required. *Id.* Likewise, this Court held that because it could not “accurately” be determined which seven of the 18 potentially injured class members would have been hired, the backpay value of the seven lost job referrals should be prorated across the 18. *Ingram*, 709 F.2d at 812. And similarly, the D.C.

Circuit held that because the district was unable “to determine with certainty which two of the [eight] appellees would have received the promotions,” the court should have awarded “each appellee a fraction of the promotions’ value commensurate with the likelihood of his receiving one of [them].” *Dougherty*, 869 F.2d at 615.

2. The complex, decentralized, and discretionary nature of BOE’s teacher-appointment process made individualized counterfactual appointment determinations impossible.

This case, like the cases discussed above, requires a classwide, pro rata approach to backpay because it was not feasible to determine with any reasonable degree of accuracy which class members would have been among the 75% that would have been hired had they passed the LAST. BOE appointment decisions were made by individual school principals at nearly 1,700 schools, based on experience, academics, references, interviews, and sample lessons, among other factors (*see supra* at 11-12).

Thus, in BOE’s hiring process, the likelihood that a fully qualified applicant would obtain a regular teaching appointment turned on numerous factors, including the applicant’s efforts to obtain

employment, information from reference checks, the strength and number of competing applicants for a given position, the specific schools with which an individual sought employment (and the number and type of vacancies at that school), an applicant's specialization in a subject matter and the school's need for a specialist in that subject matter, the quality of the applicant's interview and sample lesson, and the correlation between the principal's hiring criteria and the applicant's credentials, experience, and teaching methodology. Moreover, there is further subjectivity in the process at the points where a school principal assesses a candidate's application, determines whether a candidate will be given an interview and hiring consideration, and ultimately decides whether a candidate receives an offer of employment.

Given the complex and discretionary nature of this decentralized appointment process, it is not possible to recreate hiring decisions with any degree of confidence. To attempt such a task, for thousands of class members who failed the LAST at various times over the course of decades, where there were no "objective standards" that would accurately establish which applicants would have been appointed, required the court to step "into a quagmire of hypothetical judgments in

which any supposed accuracy in result would be purely imaginary.” *Stewart*, 542 F.2d at 452 (cleaned up). Indeed, the class here is far larger, the time period at issue far longer, and the factors that affect the appointment decision at least as subjective and unknowable, as those in *Pettway*, *McClain*, *Hameed*, *City of Miami*, *Ingram*, and *Dougherty* where this Court and others found an individual-by-individual approach infeasible and directed the use of a classwide approach.

3. The district court refused to apply these Title VII remedial principles based on an untenably narrow reading of the caselaw.

The Special Master, in a ruling adopted by the district court, refused to follow this caselaw because it “involved situations where the number of claimants exceeded the number of potential vacancies,” rendering it “not possible for all the claimants to have received the employment benefit denied on account of race” (A-2029; SPA-2, 11 (adopting IR&R)). But it makes no difference that this probability is shown in this case through comparator-based statistics, as opposed to a comparison of the number of class members and available slots. The bottom line of both scenarios is this: there is complete certainty that not everyone in the class would have been hired absent discrimination. *See*,

e.g., *McClain*, 519 F.3d at 282 (error to “come close to compensating each class member for the full value of the lost promotions, where plainly each member had at best a possibility of progressing up the ladder”). Indeed, in many of the cases discussed above, statistical evidence helped to determine the number of positions or promotions that have been discriminatorily denied.

For example, in *Ingram*, although there were 27 hires affected by the defendant’s racially discriminatory policy,¹⁵ this Court used statistical evidence—comparing actual hiring data to metropolitan area demographics—to determine that only seven of those 27 openings likely would have gone to a racial-minority candidate absent discrimination. 709 F.2d at 810-12. The Court then limited the overall backpay award to the amount attributable to those seven hires (which it estimated using a sampling approach). *Id.* at 812. The Court found that amount to be 52% of the total amount the district court had awarded to the 18

¹⁵ See *Ingram*, 709 F.2d at 811 (noting there were 33 hires during the discriminatory period, of which six were “black or Hispanic,” leaving 27 hires where discrimination could have prevented a black or Hispanic applicant from being hired).

eligible class members, and thus reduced each of those class members' awards by 48%. *Id.* at 812-13.

Likewise, in *Hameed*, the Eighth Circuit looked to statistics comparing the percentage of applicants to admittees to determine the number of apprentice positions that were discriminatorily denied, and then used a random sampling approach to determine the backpay attributable to those positions, ultimately ordering that the total backpay award be distributed among the class members. 637 F.2d at 520-21.

Thus, both cases effectively determined the probability that any of the larger pool of backpay-eligible class members would have been hired and used that probability of hire to reduce the backpay awards pro rata. That is no different from what BOE requested, and the court rejected, here.

Courts have also endorsed the use of comparator studies of the very sort BOE used here to aid in the calculation of backpay in the face of inherent uncertainty about class members' counterfactual careers. In *Stewart*, for example, the Seventh Circuit ordered the district court to analyze, over a "test period," a "control group" of similarly situated

white employees equal in number to the number of class members who were qualified for promotions. 542 F.2d at 453. Presuming that only some of the control group would have received promotions during the test period, the Seventh Circuit directed the district court to use the total additional earnings attributable to those few promotions to determine the total amount of backpay that the class as a whole could receive, which was to be distributed pro rata among them. *Id.* at 453, 454 n.7. Thus, it ordered the district court to calculate the probability of promotion based on a comparator study, and to cap damages to the class to account for that probability.

This Court, along with others, have proposed similar approaches. *See Joint Apprenticeship Comm.*, 186 F.3d at 124 (noting that, to calculate backpay in non-speculative manner, “[i]t would be helpful to ascertain ... what percentage of successful applicants became full journey workers”); *Pettway*, 494 F.2d at 263 (suggesting that district court use a formula based on career advancement of a comparable group of employees who did not suffer discrimination in order to determine a fair overall “gross award” to class). The district court’s decision not to

apply this caselaw here thus rested on a basic misunderstanding of the principle that the caselaw espoused.

The Special Master and district court further justified their refusal to follow this precedent because of the wrongdoer rule (A-2030; SPA-2 (adopting IR&R)). The court reasoned that rejecting a classwide probability-of-appointment reduction was not “unjust” because “[t]he legal consequences of any uncertainty about whether a claimant would have been hired must be borne” by BOE (A-2030; SPA-2 (adopting IR&R)). But the caselaw discussed above directly contradicts the court’s reasoning: in the face of uncertainty, a classwide, statistical approach was required, not one that abandoned aggregate accuracy in favor of a plaintiffs’ class windfall.

B. The district court’s basis for disregarding BOE’s comparator-based evidence was factually unsupported and premised on mistaken assumptions about the class.

In addition to applying an erroneous reading of the caselaw, the district court rejected BOE’s proposal to apply a probability-of-appointment adjustment in reliance on the court’s previous statement, in the 2013 remedy-phase class-certification decision, “that qualified

class members would have gone on to be permanent teachers” (SPA-11-12). But the court made this finding at a stage of the case when damages were not yet at issue, without the benefit of BOE’s evidence of similarly situated comparators who actually passed the LAST. The court also made this finding in reliance on plaintiffs’ representations about the composition of the class that turned out to be inaccurate.

1. There is no factual basis for the district court’s 2013 finding that all class members would have been appointed if they had passed the LAST.

In rejecting BOE’s argument for a 25% probability-of-appointment reduction, the district court relied on its 2013 finding, made as part of the “commonality” analysis in the Rule 23(b)(3) class-certification decision, that “given the large number of vacancies for full-time teachers during the time period at issue, class members who failed LAST-1, but satisfied all other requirements, would have received a full teaching license and would have been hired as a full-time teacher” if they had passed the test (SPA-11-12 (quoting A-1620)).

However, evidence regarding BOE vacancies and the dearth of certified teachers to fill them does not support this conclusion. To the contrary, 25% of all non-class comparators who actually passed the

LAST during the same time period never obtained a teaching appointment (A-1729).¹⁶ This makes sense. BOE's appointment process was complex, decentralized, and discretionary, and an applicant who passed the LAST thus might not have been appointed for any of the myriad reasons discussed above. Accordingly, while many class members would have been appointed to regular teaching positions had they passed the LAST, the existence of vacancies does not guarantee that each class member would have filled one.

BOE's comparator-based evidence confirmed that reality. But that evidence was not before the court at the time of its 2013 decision, nor should it have been. The 2013 decision addressed class certification; the court had not yet confirmed that there even would be a remedy phase of this class action. The parties were still a ways off from developing comparator-based models for calculating backpay.

Accordingly, the 2013 decision provided no basis for disregarding BOE's comparator-based evidence, and the district court abused its discretion by failing to consider it. *See Fisher v. Vassar Coll.*, 70 F.3d

¹⁶ The comparator data was drawn from PPTs who passed the LAST-1, which was administered from 1993 through February 13, 2004.

1420, 1445-46 (2d Cir. 1995) (holding that “it was an abuse of discretion for the district court to fail to consider the university-wide statistics” and that the “court’s decision to base its analysis solely” on more limited information “was error”). The result was a factual finding that lacks support in, and is contradicted by, the record. *See Krizek v. CIGNA Grp. Ins.*, 345 F.3d 91, 100-01 (2d Cir. 2003) (clear error where record did not permit district court’s factual inferences); *Sygma Photo News, Inc. v. High Soc. Mag., Inc.*, 778 F.2d 89, 96 (2d Cir. 1985) (clear error where district court’s findings were “radically inconsistent with the expert testimony” and failed to weigh other evidence).

2. The district court’s 2013 finding was premised on assumptions that are not applicable to the class as a whole.

The district court’s reliance on its 2013 finding was also erroneous because that finding was premised on inaccurate assumptions about the characteristics of prospective class members. Class members had yet to be identified at the time of that finding, and the court was relying on the criteria for class membership that plaintiffs had supplied. But those criteria led the court to assume that the class members were far more uniformly qualified than they are.

Plaintiffs’ 2013 remedy-phase class-certification brief declared: “The class here comprises individuals who attained maximum requirements except for their failure to pass the LAST” (A-1188). To define “maximum requirements,” the plaintiffs cited to a passage from the 2002-2003 trial transcript referring to certain qualifications that included a master’s degree and two years of satisfactory teaching experience (A-1188 n.58 (citing A-1243-46)). Thus, plaintiffs informed the court that all class members had a master’s degree and at least two years of satisfactory teaching experience (and had also passed the ATS-W, one of the so-called minimum requirements for licensure).

Plaintiffs characterized the class similarly in letter briefing just prior to the 2013 certification motion, declaring that all class members “had satisfied all other prerequisites to obtain their regular license and receive a permanent appointment [besides passing the LAST], including receiving a Master[']s Degree in education, completing field work, and other requirements” (A-1069). Plaintiffs emphasized that “[t]hese aspects of the class definition are important because ... there are no additional subjective determinations class members would face before receiving their regular license and permanent appointment” (*id.*).

Thus, at the time of its finding that all class members would have been appointed, the court would have been under the impression that those members all possessed a master's degree and the qualifications for becoming full-time, appointed BOE teachers. But plaintiffs later made clear that class members did not all possess those requirements, positing instead that (as summarized by the Special Master) "*if the BOE had never required claimants to pass the LAST-1, then these claimants would have fulfilled all the requirements in place while the teacher shortage was ongoing*" (A-2040 (emphasis added); see ECF 2864-14 at 12-15).¹⁷ And, confirming that not all class members possess a master's degree, the Special Master devoted a section of the June 2016 Interim Report and Recommendation to addressing how the court would project when class members *would have* obtained a master's degree in their counterfactual careers (A-2207-08). This discrepancy between the proposed class as the district court understood it in 2013

¹⁷ See also CA-474 (Special Master quoting with approval class member affidavit stating, "[o]nce I learned that I had passed the LAST, I shifted all of my attention to the remaining requirements for a regularly appointed BOE teacher position").

and the class that exists further confirms that the court abused its discretion by failing to consider BOE's evidence.

POINT III

THE DISTRICT COURT ALSO ABUSED ITS DISCRETION BY REJECTING A CLASSWIDE BACKPAY REDUCTION FOR POST-APPOINTMENT ATTRITION

The district court further abused its discretion by refusing to reduce backpay awards on a classwide basis to reflect post-appointment attrition. To recreate the conditions that would have existed but for discrimination, it was necessary to appropriately account for the significant pre-retirement attrition rates that BOE's comparator-based evidence showed would be expected across a large population like the class here. But the court rejected a classwide approach that would have applied such data, and instead purported to address attrition through standardless case-by-case determinations of this inherently uncertain and contingent occurrence in an entirely hypothetical counterfactual

career—determinations in which all uncertainties were to be resolved against BOE under the wrongdoer rule.¹⁸

The case-by-case attrition determinations that have ensued only confirm the fundamental flaws of the court's approach. Although the court claimed that it would look to the comparator-based attrition rates in making individualized determinations, in fact the court ignored them in every case. The result has been a windfall to the class that will only increase as the claims of the remaining 4,000-plus class members are determined. Fundamental Title VII remedial principles bar such a result.

¹⁸ Resort to comparator-based attrition probabilities is unnecessary as to those class members who later actually obtained full-time BOE teaching positions (whose departure date from BOE teaching, if any, can be drawn from their actual careers). Those individuals are identified in the separate Addendum filed with this brief.

A. Title VII remedial principles required classwide attrition reductions because counterfactual case-by-case attrition determinations would be impermissibly speculative.

1. Accounting for attrition was necessary to fulfill Title VII's mandate to accurately recreate but-for-discrimination conditions.

Fundamental Title VII remedial principles require courts to “as nearly as possible, recreate the conditions and relationships that would have been had there been no unlawful discrimination.” *Ingram*, 709 F.2d at 811 (cleaned up); *see also E.E.O.C. v. Mike Smith Pontiac GMC, Inc.*, 896 F.2d 524, 530 (11th Cir. 1990) (district court “properly exercised its discretion” by limiting Title VII backpay award to “average tenure” of comparable employees). It therefore was incumbent on the district court here to ensure that its backpay awards properly accounted for attrition, particularly in the circumstances of this case.

The class here is defined to include individuals who were BOE teachers “on or after June 29, 1995” (A-2303). Thus, for many class members, including 329 (over 90%) of the 347 whose judgments are consolidated in this appeal, their potential counterfactual careers for purposes of calculating backpay stretched for more than 15 years, and for 158 (or nearly half) of the 347, their potential counterfactual careers

stretched two decades or more (*see* Table, *infra*, at 92-123). Indeed, the *average* time from counterfactual appointment to the date of judgment for the class members here was more than 20 years (*see id.* at 124).

It is undeniable, and undisputed, that New York City public-school teachers do not uniformly remain BOE teachers for that long. As the Special Master recognized, “[BOE] is correct that teachers often leave early (or ‘attrit’) for a variety of reasons, including relocation, illness, a change in profession, or a change in school system” (A-2031).

By using data from comparators (actual, appointed BOE teachers), BOE’s expert, Dr. Erath, was able to determine average yearly rates of pre-retirement attrition from BOE teaching appointments (A-1726-34, 1755).¹⁹ These rates are significant. For example, Dr. Erath explained that “for the comparison group, eight percent of teachers left during their first year of teaching” and “[b]y the tenth year, that proportion is nearly 50 percent” (A-2055).

It is undisputed that counterfactual career projections for a large group of claimants, spanning years or decades, are guaranteed to

¹⁹ Dr. Erath excluded from his calculation of these rates teachers who retired, because he proposed to account for projected retirement in a different manner.

distort reality if they fail to account for this significant degree of attrition. Indeed, plaintiffs' expert, Dr. Thomas DiPrete, testified that "we know in the population, people leave," so "if you assume that nobody in the population left, you are going to get an over estimate" (A-1799-800 at 44:25-45:3).

That overestimate is significant. Indeed, if one applied Dr. Erath's pre-retirement attrition rates to proportionately reduce yearly damages over the course of a decade (even assuming no increase in salary), the overall cumulative reduction to damages would total roughly 32% (*see supra*, at 22 n.6).²⁰ That cumulative reduction would be nearly 40% over the course of 15 years. *Id.* And if one assumes periodic salary increases, which BOE teachers received and which the backpay calculations included, those percentage reductions would be even greater (as greater yearly reductions would apply to years with a greater counterfactual salary). *Id.* Given the extremely lengthy potential counterfactual careers of the class members here, failing to account for attrition clearly

²⁰ As previously noted (*see supra*, at 21 n.5), these estimates do not account for the age of the particular class member. Actual attrition adjustments under Dr. Erath's model would vary based on the class member's age.

would significantly overcompensate the class at BOE's expense, likely resulting in a windfall of hundreds of millions of dollars across the class as a whole (*see infra*, at 86-87).

2. A classwide approach was necessary because case-by-case determinations could not properly account for counterfactual attrition.

BOE contended that the proper way to account for pre-retirement attrition across the class was to reduce class members' damages using the comparator-based attrition rates. It was not possible for the court to make case-by-case attrition determinations, given the factually contingent nature of attrition, and thus the inherent uncertainty of determining it counterfactually. That uncertainty is multiplied across the thousands of class members and decades during which decisions to leave BOE employment could have been made. But the district court rejected BOE's argument and instead held that attrition should be determined in individualized hearings (SPA-13). In so holding, the court assumed that rational, non-speculative attrition determinations could be made through thousands of individual hearings, and that those determinations would "best recreate what would have occurred absent discrimination" (SPA-12).

But there was no sound basis for that assumption. In constructing a class member's counterfactual career, the circumstances that would have caused the class member to depart are often hypothetical and uncertain, resting on unknown contingencies and affected by yet other hypothetical prior choices and circumstances. For example, a class member's counterfactual choice of whether and when to leave a BOE teaching appointment prior to retirement would be affected by his or her experiences with and performance at the particular, unknown job that he or she would have hypothetically been appointed to. Those experiences would be affected by numerous factors, including the school's leadership, work culture, and distance from the teacher's home. The collective effect on a teacher's job satisfaction and success, and thus the teacher's willingness to remain in the demanding position of classroom teacher, is unknowable, and these circumstances could also change over time.

Some teachers, too, might not have attained tenure after their three-year probationary period, or might not have met the additional requirements to obtain a permanent teaching certificate, including a master's degree, and thus would have been unable to continue BOE

teaching after a short number of years (*see supra* at 9-10). Others may have decided, after a year, or two, or ten, that teaching simply was not right for them. Moreover, even if a teacher was satisfied with his or her job and met all of the criteria for continued employment, other career opportunities may have presented themselves, whether in teaching or otherwise, that might have led to attrition.

In addition, personal circumstances—residence, finances, family, and health, among others—affect career choices. And while some personal circumstances might have been the same regardless of whether the individual had passed the LAST and obtained a BOE teaching appointment, other circumstances might have been different, in unpredictable ways. Indeed, the Special Master and district court recognized as much during the individualized hearing process, repeatedly holding that “subsequent behavior after suffering adverse employment consequences that flowed from unlawful discrimination cannot be said to predict with any reliability how a Claimant would have behaved absent the discrimination” (*e.g.*, ECF.1499-1.[FOFCOL.p.6]). Although the court applied this principle inconsistently—using it to reject BOE’s arguments, but not plaintiffs’,

even when equally applicable (*see infra* at 84-85)—the court’s acknowledgment of the impossibility of making complicated hypothetical judgments about counterfactual careers “with any reliability” undermines its choice to require such determinations in lieu of a classwide approach to attrition.

Further compounding the error, the district court never explained how 4,500 individualized attrition determinations could recreate in the aggregate “what would have occurred absent discrimination” over the class members’ decade-plus counterfactual careers, much less how such hearings could do so more accurately and fairly than applying a comparator-based attrition reduction to all class members for whom counterfactual attrition determinations needed to be made. Yet without a clear sense of any objective factors and standards that could rationally guide a counterfactual determination of when each class member would have made the highly personal decision to leave BOE teaching, the court was stepping blindly “into a quagmire of hypothetical judgments in which any supposed accuracy in result would be purely imaginary.” *Stewart*, 542 F.2d at 452 (cleaned up).

That quagmire was at least as deep as those that the courts, in the cases discussed in section II.A.1 above, found it necessary to avoid. Indeed, those courts found that accurate individualized recreations would be impossible, imprudent, and overly speculative even with far fewer class members than the 4,500 here, and over a much shorter period than the two decades here.

Further, the counterfactual attrition determinations to be made here are massively more complex, contingent, and fundamentally unknowable than the counterfactual hiring and promotion decisions deemed hopelessly uncertain in the caselaw. Those courts found that recreating a hiring or promotion decision was too speculative because there were no “objective standards” to apply or because the decision would turn on “seniority and ability at th[e] time” of the hypothetical job application. *Stewart*, 542 F.2d at 452; *Pettway*, 494 F.2d at 262. But here, determining when an employee might have chosen to leave a BOE teaching position over the course of a decades long hypothetical career is not only a standardless inquiry, but an entirely subjective one, contingent on countless unknowable personal and professional circumstances that might have occurred in the counterfactual reality.

3. The court ignored the essential question of whether the awards generated by the case-by-case approach would accurately account for attrition in the aggregate.

The district court paid no heed to whether case-by-case determinations, made in seriatim and with uncertainties resolved against BOE, would result in outcomes that, on a classwide basis, matched the known comparator-based attrition rates. In doing so, the court contravened the key Title VII principle that a court must strive to recreate the but-for-discrimination conditions and take care to tailor any award to the actual harm suffered by the class as a whole. *See Ingram*, 709 F.2d at 811-12. The court instead approached the issue of attrition as if the only concern were fairness to the single individual claimant before it, and thus blinded itself to the need to ensure accuracy with regard to the class as a whole (SPA-12-14).

Plaintiffs' own expert, Dr. DiPrete, acknowledged that a case-by-case approach to attrition could produce accurate results only if one conducted the hearings in an impossibly omniscient manner, and only if one assumed that fully probative information could reliably be gleaned through the hearing process. He testified that if the court were to try to "create the [attrition] variance in the hearings themselves"—that is, use

individual hearings to try to determine when class members would have left, while still staying true to the comparator-based rates of attrition when viewed across the entire class—then the court would need to review multiple class members at once and judge their attrition rates on a curve (A-1802 at 47:2-16).

But plaintiffs' expert was not proposing to employ such a complex, impractical approach, which would effectively require the court to find some method to allocate attrition determinations among the class members, based on information from those hearings, in a manner that reproduced the overall results from the comparator data. Instead, his proposed approach would have ignored attrition altogether prior to age 55, and then would have applied comparator-based retirement rates from age 55 onward (A-1745, 1747). Dr. DiPrete acknowledged that his approach would ensure that BOE overpaid the plaintiffs in the aggregate (A-1810-11 at 55:14-56:15; *see* A-1810 at 55:18-21 (stating, "[W]e know with high probability that if we don't apply an attrition adjustment, in the aggregate, the City will pay out more money than it would have paid" in the counterfactual reality)). He asserted that the

court would have to choose between classwide accuracy and ensuring that no individual was even theoretically undercompensated (*id.*).

The court answered this question by resort to the wrongdoer rule, concluding that “[a]ny unfairness to [BOE] that may result, is viewed as tolerable, in light of the principle that uncertainties should be construed against the wrongdoer” (SPA-13; *see also* A-1804 at 49:9-15 (Special Master noting that accounting for attrition presented him with a “Hobson’s choice,” but only “until you say ... one of these parties caused the discrimination,” which meant that forcing BOE to overpay “is really not such a bad thing to do”)).

But, as demonstrated above, that reasoning misses the important Title VII goals of classwide accuracy and fairness to both parties and reflects an untenable view of what it means to undercompensate individual class members. Indeed, in the cases discussed above (*see supra* Section II.A.1), some of the class members who received a pro rata discounted recovery would have gotten the limited number of jobs in the absence of discrimination, and thus were “undercompensated” per the district court’s formulation here. That fact did not prevent the courts from concluding that the pro rata awards satisfied Title VII’s

compensatory ends. Contrary to the district court's and Special Master's reasoning, using the wrongdoer rule to justify a plaintiffs' windfall that runs contrary to statistical evidence is, to use the Special Master's phrase, "a bad thing to do" (A-1804 at 49:14).

The district court here gave no attention to the question of whether case-by-case attrition determinations could create accurate results, in the aggregate, across a more-than-4,500-member class. The court set no standards for the determinations aimed at producing such results. Nor did it require that attrition determinations be monitored and calibrated over time to produce overall results proportionate to the comparator statistics, as Dr. DiPrete noted would theoretically be a way to ensure that aggregate results matched reality. To the contrary, by instructing the Special Master to resolve all uncertainties in the hearing process against BOE under the wrongdoer rule, the district court ensured that the overall results of its individualized hearing process would be dramatically skewed in favor of the plaintiffs.

B. The results of the district court’s case-by-case approach confirm its fundamental flaws.

1. The individualized attrition determinations uniformly ignored the comparator-based attrition rates, resulting in a process untethered to classwide accuracy.

The individualized attrition determinations in the appeals at issue here confirm that any individualized process for making attrition determinations is necessarily a standardless foray into hypothetical judgments that cannot feasibly be targeted to achieving an accurate aggregate backpay award across the class. The only guidepost the Special Master articulated was that “statistical evidence on how similarly situated non-class comparators attrited will be considered in the first instance ... for the length of time that a claimant would have remained a teacher at the BOE in a counterfactual ... world” (A-2035). The parties would then “be free to offer evidence ... to establish that a claimant would have departed from the statistical norm” (*id.*).

This statement held out the theoretical possibility for aggregate accuracy and fairness through application of the attrition probabilities in all or nearly all cases. But the Special Master did not apply those probabilities to even a single one of the 347 class members included in

the present appeals (*see supra* at 29). Rather, in each case, he deemed attrition probabilities inapplicable and awarded undiscounted backpay up to an end date set by the court, which was most often the date of judgment (*see* Table, *infra*, at 112, 123). Thus, the comparator-based attrition probabilities ultimately played no role in the final attrition determinations and resulting awards that the Special Master recommended to the district court and that the court uniformly adopted.

The attrition-probabilities data, however, were the sole reliable evidence of what sort of pre-retirement attrition would have occurred absent discrimination. Indeed, the Special Master and the district court admittedly had nothing else reliable to work with nor any standards by which to assess the unreliable evidence they had. The Special Master had concluded that class members' mere "say-so" would not satisfy their "burden of establishing that [they] would have worked longer than the counterfactual model predicts" (ECF.1499-1.Todd.FOFCOL.at.3). He had further recognized that "subsequent behavior after suffering adverse employment consequences that flowed from unlawful discrimination cannot be said to predict with any reliability how a Claimant would have behaved absent the discrimination" (ECF.1499-

1.Todd.FOFCOL.at.6).²¹ So, by uniformly rejecting application of the comparator-based attrition probabilities, the Special Master and the court were discarding the sole tether to an accurate measure of attrition.

A few examples help to illustrate the impossibility of the task that the Special Master and district court took on, and the illusory nature of any accuracy their approach claimed to produce. For one, claimant Maria Bello, after failing the LAST several times and losing her PPT position, worked for part of one year as a per diem substitute teacher and then switched to a non-education career ((ECF1345-1.FOFCOL.p.6-8). The Special Master determined (and the district court found) that Bello's non-education-related employment, together with her multiple attempts at the LAST, corroborated her stated belief that if she had been appointed to a BOE teaching position when she originally failed the LAST, she would still be a BOE teacher today (ECF1345-1.FOFCOL.p.11-12). She was awarded backpay through judgment—a

²¹ The Special Master repeated this same sentiment in numerous other contexts as well during the individualized hearings (CA-13, 15, 22, 24, 25, 26, 30, 36, 68, 122, 218, 220, 223, 266, 269, 323, 473).

counterfactual career of nearly 17 years—without any attrition discount, resulting in an award of nearly \$1 million (ECF1345-1.FOFCOL.p.11-12; Bello.Judgment).

In another example, after Michelle Todd lost her PPT position in 2003, she worked only sporadically (and only in non-education-related jobs) and failed the LAST numerous times (ECF.1499-1.FOFCOL.p.7-8). Here too, the court awarded backpay running through the date of judgment—a counterfactual career of 16 years—without any attrition reduction, reasoning that Todd’s multiple attempts to pass the LAST showed continued interest in teaching (ECF 1499-1.FOFCOL.p.12). The judgment for Todd exceeded \$1.25 million (Todd.Judgment).

In neither of these cases did the Special Master or court attempt to assess what these facts had to say, if anything, about whether Bello or Todd was more or less likely than the comparators to have been influenced by any of the innumerable factors that might cause a teacher to decide to leave BOE employment. Nor did the Special Master or court attempt to pick some end date that approximated an overall judgment as to how such unpredictable factors might have affected either class member’s career. The Special Master simply decided—with no objective

standards to discipline his sympathies and intuitions—that these class members would have worked through the date of judgment in their counterfactual careers.

Other examples paint a similar picture:

- After resigning from her PPT position, Virginie Casimir pursued a non-education career. She was awarded backpay through the date of judgment (a 19-year counterfactual career), without any reduction for attrition probabilities, resulting in a \$528,381 judgment (ECF.1050-1.FOFCOL p.5, 9; Casimir.Judgment).
- Maryse Abel worked in customer service after losing her PPT position. She was awarded backpay running through judgment (a 20-year counterfactual career) with no reduction for attrition, resulting in a \$729,098 judgment (ECF.1465-1.FOFCOL.p.5, 12; Abel.Judgment).
- Carole Gustama worked in non-education fields after losing her PPT position. She was awarded backpay running through judgment (a 17-year counterfactual career) with no reduction for attrition, resulting in a \$916,383 judgment (ECF.1529-1.FOFCOL.p.5-6, 10; Gustama.Judgment).
- Maritza Mateo-Sencion worked in non-education jobs after losing her PPT position. After many failed attempts, she passed the LAST, but did not obtain a full-time BOE teaching position. She worked temporarily as a per diem substitute teacher before returning to non-education jobs. She was awarded backpay running through judgment (a 20-year counterfactual career) with no reduction for attrition, resulting in a \$1,092,889 judgment (ECF.1464-1.FOFCOL.p.5-6, 10-11; Mateo-Sencion.Judgment).

The purpose of recounting these examples is not to show that the Special Master necessarily got it wrong in each of these cases. Perhaps some or all of these class members would have taught for decades in BOE's employ without experiencing personal or professional circumstances that would have caused them to leave.

But whatever the listed facts may suggest about these individuals' interest in obtaining BOE employment as an initial matter, or their general work ethic, they offered no particular insight into the relevant question here: whether the claimant would likely have had a longer career with BOE than actual teachers, many of whom left well before retirement. While the details of individual claimants' careers may evoke sympathy, such feelings cannot obviate the need to make the judgment that Title VII requires, and thus to ensure that awards are tailored to the actual, not speculative, harm to the class. Here, there simply were no objective standards for making that judgment on a case-by-case basis.

This merely confirms that the case-by-case approach was doomed from the outset to produce unreliable determinations based on speculation, untethered to aggregate accuracy. While some of the

Special Master's assessments may have been more plausible than others, the fact remains that they were objectively standardless, rendering "any supposed accuracy in result ... purely imaginary." *Stewart*, 542 F.2d at 452.

2. Application of the wrongdoer rule further ensured that the standardless case-by-case attrition determinations would fail to recreate reality.

The hearings also illustrated how the application of the wrongdoer rule further precluded any chance of accurately recreating but-for-discrimination conditions, in the aggregate, through individualized attrition determinations.

As noted above, the district court consistently disregarded real-world evidence that BOE pointed to in an attempt to show that a class member would not have had a long counterfactual career with BOE, reasoning that this evidence was the product of the discrimination the claimant had experienced and thus would not have existed in the counterfactual world the court was summoning (*see supra* at 71, 79-80, 80 n.21). But at the same time, the Special Master and the court credited precisely such real-world "subsequent behavior" when proffered

by claimants (*e.g.*, number of times LAST taken after initial failure, evidence of post-LAST-failure employment) as proof that they would have stayed BOE teachers throughout their counterfactual careers if they had passed the LAST and been appointed.

In so doing, the Special Master and the court appear to have been relying once again on the wrongdoer rule, which they had previously announced would be applicable in these hearings (SPA-13-14, 25, A-2038). Faced with the inherent uncertainty of constructing a counterfactual career, and the doubly uncertain—indeed unknowable—nature of assessing counterfactual attrition on a case-by-case basis, the Special Master and court consistently invoked the wrongdoer rule to justify answering those unanswerable questions in a way that favored the plaintiffs. This approach—like the individualized approach in general—ensured that the results would be skewed in favor of the plaintiffs and that an accurate, and equitable, classwide award could not be generated.

3. The individualized process failed to adequately account for pre-retirement attrition in the aggregate.

Unsurprisingly, the counterfactual employment end dates that the Special Master selected for each class member through the individualized proceedings fail to even remotely track the comparator-based evidence. Indeed, among the 223 class members to whom BOE's pre-retirement-attrition argument on this appeal applies²²—*i.e.*, those who did not later become full-time BOE teachers—the vast majority of the end dates failed to account for pre-retirement attrition in any way.

Of these class members, 133 were granted counterfactual careers running through judgment and another 48 were afforded counterfactual careers that ended at retirement (*see* Table, *infra*, at 112). Thus out of the 223 attrition-eligible class members in this appeal, the counterfactual career end dates for 181 (or 81%) of them took no account for any possibility of pre-retirement attrition. The average counterfactual career of these 181 class members, as determined by the Special Master, lasted more than 17 years (*see id.*). Yet BOE's attrition

²² These class members are listed in Part A of the Table, *infra*, at 92-111. They are also identified in the separate Addendum filed with this brief.

statistics showed that, in reality, approximately half of all actual appointed BOE teachers had left by the end of just their tenth year (A-2055).

The total monetary award granted to these 181 class members exceeded \$130 million (*see* Table, *infra*, at 112). Based on the rough estimate that the application of BOE's attrition probabilities over the course of 15 years would result in an approximately 40% reduction (*see supra* at 22 n.6), the failure to account for attrition just among these 181 class members likely resulted in a more than \$50 million aggregate windfall—a windfall that will only multiply as awards are calculated for the well more than 4,000 members of the class who are not included in this consolidated appeal.

The results of the individualized hearing process thus are dramatically skewed against BOE. This deviation from the known rates of attrition, and the resulting overcompensation of the class members, was the predictable result of a process that took an inherently hypothetical, uncertainty-laden question and attempted to answer it separately for hundreds (and ultimately it will be for thousands) of individuals without using statistical evidence, and in reliance instead

on individual facts of dubious probative value as filtered through the lens of the wrongdoer rule.

POINT IV

THIS COURT SHOULD REMAND THE AFFECTED JUDGMENTS WITH INSTRUCTIONS TO APPLY PROBABILITY- OF-APPOINTMENT AND POST- APPOINTMENT ATTRITION REDUCTIONS

The district court abused its discretion in rejecting classwide reductions for the probability of appointment and for post-appointment, pre-retirement attrition. Accordingly, if the Court does not revisit and reverse its prior liability ruling, it should remand all affected judgments to the district court with instructions to apply appropriate adjustments.

With regard to probability of appointment, this Court should remand the judgments of all class members other than those who lost regular appointed BOE teaching positions that they previously had or those members who were actually appointed to regular BOE teaching positions after becoming or being deemed state-certified. The district court should be instructed to apply a probability-of-appointment reduction to the backpay awards, and related relief, afforded to these

class members, who are identified in the separate Addendum filed with this brief, as required by the Case Management Order.

With regard to post-appointment attrition, this Court should remand the judgments of all class members other than those who actually obtained full-time, non-PPT BOE teaching positions after failing the LAST. The district court should be instructed to recalculate backpay, and related relief, for these class members in a manner that accounts for attrition through the application of comparator-based attrition probabilities. These class members are identified in the separate Addendum filed with this brief, as required by the Case Management Order.

The court should also be instructed to apply the same approach to probability-of-appointment and post-appointment attrition for all similarly situated class members whose judgments were appealed but not consolidated for briefing here or who have yet to receive judgments.

Finally, in recalculating the backpay awards and related relief, the district court should continue to use the original judgment date. To allow BOE's success on appeal to result in an extended backpay period would undermine the ability of defendants to appeal from improper

backpay awards. Indeed, when reducing backpay damages, this Court has not required application of a new judgment date with an extended backpay period. *See Ingram*, 709 F.2d at 813. Because the district court's award overcompensated the plaintiff class, and class members have long had the opportunity to be deemed certified under the court's injunction and thus to seek BOE teaching positions (with retroactively adjusted seniority and salary) despite lacking a passing score on the LAST (*see supra* at 18-19), plaintiffs should not receive a new judgment date on remand that could extend their entitlement to backpay. In the alternative, this Court should instruct the district court that, regardless of the date of judgment on remand, entitlement to backpay should not extend beyond the original date of judgment.

CONCLUSION

The Court should reverse the judgments on the ground that BOE is not liable; alternatively, the Court should vacate the affected judgments identified in the separate Addendum filed with this brief and remand the judgments to the district court for redetermination of remedies.

Dated: New York, NY
November 8, 2019

Respectfully submitted,

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COUNTERFACTUAL (“CF”) CAREER FINDINGS TABLE

Part A: Findings for Appellees to Whom BOE’s Post-Appointment Attrition Argument Applies (223 Appellees)

Name(Docket No.)	CF Start Date (A)	CF End Date (B)	CF Career Years	Reason for CF End Date (C)	Date of Judgment (“DOJ”) (E)	Years from CF Start Date to Date of Judgment	Total Judgment Award (F)
Abel,M(19-1973)	4/1/1999	5/30/2019	20.18	Judgment	5/30/2019	20.18	\$729,098
Acosta,M(19-1191)	11/1/1998	3/20/2019	20.39	Judgment	3/20/2019	20.39	\$1,218,844
Adighibe,C(19-2810)	1/1/2002	8/28/2019	17.67	Judgment	8/28/2019	17.67	\$947,775
Alexis,B(19-1494)	8/1/1997	4/25/2019	21.75	Judgment	4/25/2019	21.75	\$926,746
Alvarez,A(19-2000)	11/1/1998	6/6/2019	20.61	Judgment	6/6/2019	20.61	\$942,341
Alves,K(19-1974)	1/1/2005	5/30/2019	14.42	Judgment	5/30/2019	14.42	\$979,096

Name(Docket No.)	CF-Start	CF-End	CF-Years	Reason	DOJ	CF-Start to DOJ	Award
Anderson,E(19-1503)	11/1/2003	4/24/2019	15.49	Judgment	4/24/2019	15.49	\$349,856
Arenas,P(19-2347)	9/1/1998	7/1/2019	20.84	Judgment	7/1/2019	20.84	\$147,642
Artiles,F(19-1164)	12/1/2004	3/13/2019	14.29	Judgment	3/13/2019	14.29	\$545,430
Bastien,M(19-2593)	4/1/2002	7/30/2019	17.34	Judgment	7/30/2019	17.34	\$707,477
Bell,A(19-2773)	4/1/2000	8/22/2019	19.40	Judgment	8/22/2019	19.40	\$1,211,058
Bello,M(19-1980)	10/1/2002	6/10/2019	16.70	Judgment	6/10/2019	16.70	\$917,789
Bernard,M(19-1243)	7/1/2001	3/20/2019	17.73	Judgment	3/20/2019	17.73	\$815,050
Bernard,Y(19-1924)	1/1/2003	5/30/2019	16.42	Judgment	5/30/2019	16.42	\$742,699
Bigord,M(19-2256)	9/1/2007	6/28/2019	11.83	Judgment	6/28/2019	11.83	\$593,756
Bland,B(19-2775)	4/1/1996	8/28/2019	23.42	Judgment	8/28/2019	23.42	\$1,078,830
Brady,B(19-1502)	8/1/1997	4/24/2019	21.74	Judgment	4/24/2019	21.74	\$862,937
Bustamante,V(19-2352)	12/1/1996	7/1/2019	22.59	Judgment	7/1/2019	22.59	\$1,108,989
Cabrera,L(19-1951)	7/1/2000	5/30/2019	18.92	Judgment	5/30/2019	18.92	\$1,060,139

Name(Docket No.)	CF-Start	CF-End	CF-Years	Reason	DOJ	CF-Start to DOJ	Award
Cabrera,S(19-1939)	7/1/1999	5/30/2019	19.93	Judgment	5/30/2019	19.93	\$822,085
Cajuste,R(19-2763)	8/1/1998	8/27/2019	21.08	Judgment	8/27/2019	21.08	\$1,073,725
Cambry,P(19-1950)	8/1/2004	5/30/2019	14.84	Judgment	5/30/2019	14.84	\$1,185,599
Cantres,R(19-2261)	1/1/2004	6/27/2019	15.50	Judgment	6/27/2019	15.50	\$762,808
Casillas,M(19-1181)	12/1/1997	3/13/2019	21.29	Judgment	3/13/2019	21.29	\$944,942
Casimir,V(19-1186)	1/1/2000	3/13/2019	19.21	Judgment	3/13/2019	19.21	\$528,381
Coles,C(19-1979)	11/1/1998	6/10/2019	20.62	Judgment	6/10/2019	20.62	\$938,411
Cook,C(19-2031)	11/1/2002	6/5/2019	16.60	Judgment	6/5/2019	16.60	\$1,052,717
Cruz,C(19-2783)	1/1/2001	8/22/2019	18.65	Judgment	8/22/2019	18.65	\$748,302
Cruz,L(19-2033)	11/1/1998	6/7/2019	20.61	Judgment	6/7/2019	20.61	\$914,380
Dais,S(19-1975)	10/1/2000	6/10/2019	18.70	Judgment	6/10/2019	18.70	\$745,910
Davis,D(19-1930)	10/1/2001	5/30/2019	17.67	Judgment	5/30/2019	17.67	\$1,008,913
Dawkins,E(19-2785)	2/1/2007	8/29/2019	12.58	Judgment	8/29/2019	12.58	\$587,335

Name(Docket No.)	CF-Start	CF-End	CF-Years	Reason	DOJ	CF-Start to DOJ	Award
Delancer,R(19-1505)	11/1/2003	4/24/2019	15.49	Judgment	4/24/2019	15.49	\$813,829
Diaz,A(19-2799)	10/1/2000	8/28/2019	18.92	Judgment	8/28/2019	18.92	\$654,962
Domenech,I(19-2781)	11/1/1998	8/22/2019	20.82	Judgment	8/22/2019	20.82	\$1,506,554
Escobar,E(19-1934)	7/1/2001	5/30/2019	17.92	Judgment	5/30/2019	17.92	\$1,117,152
Fabre,K(19-1246)	12/1/1997	3/20/2019	21.31	Judgment	3/20/2019	21.31	\$1,239,910
Falconer,P(19-2803)	4/1/2002	8/27/2019	17.42	Judgment	8/27/2019	17.42	\$434,092
Fasack,M(19-2262)	12/1/1997	6/28/2019	21.59	Judgment	6/28/2019	21.59	\$115,920
Faust,D(19-2808)	11/1/2004	8/28/2019	14.83	Judgment	8/28/2019	14.83	\$232,919
Ferreira,M(19-2764)	10/1/2002	8/30/2019	16.92	Judgment	8/30/2019	16.92	\$1,055,713
Ford,S(19-1971)	4/1/2002	6/6/2019	17.19	Judgment	6/6/2019	17.19	\$560,106
Fortune,M(19-1198)	1/1/2003	3/13/2019	16.21	Judgment	3/13/2019	16.21	\$713,296
Frias,A(19-1962)	1/1/2000	5/30/2019	19.42	Judgment	5/30/2019	19.42	\$1,046,951
Girault,L(19-2546)	9/1/1997	7/28/2019	21.92	Judgment	7/28/2019	21.92	\$1,537,169

Name(Docket No.)	CF-Start	CF-End	CF-Years	Reason	DOJ	CF-Start to DOJ	Award
Gonzalez,R(19-2806)	8/1/1997	8/27/2019	22.08	Judgment	8/27/2019	22.08	\$235,100
Grant,R(19-2805)	7/1/2002	8/27/2019	17.17	Judgment	8/27/2019	17.17	\$673,369
Graydon,S(19-2066)	1/1/2004	5/30/2019	15.42	Judgment	5/30/2019	15.42	\$984,637
Green,A(19-1968)	12/1/1995	6/11/2019	23.54	Judgment	6/11/2019	23.54	\$1,339,880
Green,C(19-1964)	9/1/2000	5/30/2019	18.75	Judgment	5/30/2019	18.75	\$521,467
Green,D(19-2068)	11/1/1998	5/30/2019	20.59	Judgment	5/30/2019	20.59	\$704,742
Greene,P(19-2793)	10/1/1999	8/29/2019	19.92	Judgment	8/29/2019	19.92	\$971,260
Grey,B(19-2305)	1/1/2005	6/27/2019	14.49	Judgment	6/27/2019	14.49	\$928,171
Griffin-Johnson,J(19-2267)	10/1/1999	6/27/2019	19.75	Judgment	6/27/2019	19.75	\$866,068
Guerrero,S(19-2310)	4/1/2000	6/27/2019	19.25	Judgment	6/27/2019	19.25	\$988,698
Gustama,C(19-1914)	10/1/2001	5/30/2019	17.67	Judgment	5/30/2019	17.67	\$916,383
Hamilton,A(19-1533)	11/1/1998	4/24/2019	20.49	Judgment	4/24/2019	20.49	\$1,130,695
Harrison,J(19-2535)	7/1/2002	7/28/2019	17.08	Judgment	7/28/2019	17.08	\$629,876

Name(Docket No.)	CF-Start	CF-End	CF-Years	Reason	DOJ	CF-Start to DOJ	Award
Havercome,V(19-1929)	7/1/1999	5/30/2019	19.93	Judgment	5/30/2019	19.93	\$857,531
Haynes,L(19-2281)	9/1/2000	6/28/2019	18.83	Judgment	6/28/2019	18.83	\$813,274
Haynes,M(19-1959)	12/1/1995	6/5/2019	23.53	Judgment	6/5/2019	23.53	\$1,500,493
Hewitt,N(19-1941)	7/1/1999	5/30/2019	19.93	Judgment	5/30/2019	19.93	\$1,265,196
Jean,M(19-2807)	9/1/1998	8/27/2019	21.00	Judgment	8/27/2019	21.00	\$824,473
Jenkins-Thompson,T(19-1972)	10/1/1999	6/6/2019	19.69	Judgment	6/6/2019	19.69	\$863,777
Jennings,C(19-2569)	8/1/1996	7/28/2019	23.00	Judgment	7/28/2019	23.00	\$1,243,346
Jimenez,M(19-1172)	4/1/2001	3/20/2019	17.98	Judgment	3/20/2019	17.98	\$967,099
Jones,D(19-2582)	9/1/2003	7/28/2019	15.92	Judgment	7/28/2019	15.92	\$985,250
Lajara,D(19-2769)	4/1/1999	8/29/2019	20.42	Judgment	8/29/2019	20.42	\$1,512,370
Leacock,C(19-2243)	10/1/2002	6/27/2019	16.75	Judgment	6/27/2019	16.75	\$952,716
Lopez,H(19-2361)	9/1/2003	7/1/2019	15.84	Judgment	7/1/2019	15.84	\$38,375

Name(Docket No.)	CF-Start	CF-End	CF-Years	Reason	DOJ	CF-Start to DOJ	Award
Lopez-Feliciano,F(19-1915)	10/1/2000	5/30/2019	18.67	Judgment	5/30/2019	18.67	\$214,675
Lovinsky,M(19-2787)	11/1/2003	8/24/2019	15.82	Judgment	8/24/2019	15.82	\$872,120
Massaquoi,S(19-2583)	1/1/2004	8/1/2019	15.59	Judgment	8/1/2019	15.59	\$695,242
Mateo-Sencion,S(19-1947)	8/1/1998	5/30/2019	20.84	Judgment	5/30/2019	20.84	\$1,092,889
Mathieu,M(19-2004)	6/1/2004	5/30/2019	15.00	Judgment	5/30/2019	15.00	\$831,075
Medina,A(19-1925)	10/1/1999	5/30/2019	19.67	Judgment	5/30/2019	19.67	\$536,750
Mendoza,J(19-2035)	4/1/2005	6/7/2019	14.19	Judgment	6/7/2019	14.19	\$547,135
Mera,C(19-2777)	7/1/2002	8/24/2019	17.16	Judgment	8/24/2019	17.16	\$844,608
Montas,A(19-1200)	12/1/1995	3/20/2019	23.32	Judgment	3/20/2019	23.32	\$1,142,242
Moreno-Disla,D(19-1222)	12/1/1996	3/13/2019	22.29	Judgment	3/13/2019	22.29	\$1,223,005
Morris,B(19-2774)	11/1/1998	8/24/2019	20.82	Judgment	8/24/2019	20.82	\$1,083,777
Morrison,N(19-1516)	3/1/2003	4/24/2019	16.16	Judgment	4/24/2019	16.16	\$1,131,166

Name(Docket No.)	CF-Start	CF-End	CF-Years	Reason	DOJ	CF-Start to DOJ	Award
Muhammad,R(19-1329)	11/1/2004	4/2/2019	14.42	Judgment	4/2/2019	14.42	\$748,984
Munoz,L(19-2712)	12/1/1996	7/30/2019	22.67	Judgment	7/30/2019	22.67	\$1,244,684
Muriel,G(19-1935)	8/1/1996	5/30/2019	22.84	Judgment	5/30/2019	22.84	\$346,179
Noble,C(19-1518)	4/1/2005	4/25/2019	14.07	Judgment	4/25/2019	14.07	\$893,554
Noriega,V(19-1899)	4/1/2001	5/30/2019	18.17	Judgment	5/30/2019	18.17	\$457,317
Norman,B(19-2563)	1/1/2001	7/28/2019	18.58	Judgment	7/28/2019	18.58	\$1,080,821
Nunez,O(19-1177)	4/1/1996	3/13/2019	22.96	Judgment	3/13/2019	22.96	\$1,263,542
Panora,P(19-1983)	9/1/2002	5/30/2019	16.75	Judgment	5/30/2019	16.75	\$1,044,515
Parker,A(19-1199)	11/1/1998	3/20/2019	20.39	Judgment	3/20/2019	20.39	\$1,282,254
Paulau-Robotis,R(19-1994)	7/1/2001	5/30/2019	17.92	Judgment	5/30/2019	17.92	\$848,073
Pearson,D(19-1217)	10/1/2000	3/20/2019	18.48	Judgment	3/20/2019	18.48	\$831,764
Pena,Y(19-2016)	4/1/2002	6/9/2019	17.20	Judgment	6/9/2019	17.20	\$180,378
Peralta,A(19-1341)	11/1/1998	4/2/2019	20.43	Judgment	4/2/2019	20.43	\$912,790

Name(Docket No.)	CF-Start	CF-End	CF-Years	Reason	DOJ	CF-Start to DOJ	Award
Pimentel,M(19-2254)	9/1/1997	6/28/2019	21.84	Judgment	6/28/2019	21.84	\$1,340,233
Pineda,A(19-1976)	9/1/1998	5/30/2019	20.76	Judgment	5/30/2019	20.76	\$1,074,520
Pollas,R(19-2572)	1/1/2002	7/30/2019	17.59	Judgment	7/30/2019	17.59	\$729,700
Powell,R(19-2580)	12/1/1996	8/1/2019	22.68	Judgment	8/1/2019	22.68	\$907,991
Preptit-Nestor,N(19-2001)	10/1/2002	5/30/2019	16.67	Judgment	5/30/2019	16.67	\$456,189
Rodriguez,D(19-2551)	9/1/1998	8/1/2019	20.93	Judgment	8/1/2019	20.93	\$674,526
Rodriguez,M(19-1225)	9/1/1995	3/20/2019	23.56	Judgment	3/20/2019	23.56	\$1,073,971
Rodriguez,M(19-2022)	9/1/1995	6/10/2019	23.79	Judgment	6/10/2019	23.79	\$1,241,919
Ruiz,C(19-2005)	4/1/2001	5/30/2019	18.17	Judgment	5/30/2019	18.17	\$982,846
Russell,M(19-1517)	7/1/2002	4/24/2019	16.82	Judgment	4/24/2019	16.82	\$797,098
Santana,P(19-1224)	9/1/1997	3/20/2019	21.56	Judgment	3/20/2019	21.56	\$1,033,233
Scott,E(19-2248)	10/1/1999	6/27/2019	19.75	Judgment	6/27/2019	19.75	\$926,388

Name(Docket No.)	CF-Start	CF-End	CF-Years	Reason	DOJ	CF-Start to DOJ	Award
Sena,D(19-1593)	4/1/2000	4/24/2019	19.07	Judgment	4/24/2019	19.07	\$1,008,945
Simmons,G(19-2280)	12/1/1995	6/27/2019	23.59	Judgment	6/27/2019	23.59	\$1,303,975
Small,M(19-2597)	1/1/2004	7/30/2019	15.59	Judgment	7/30/2019	15.59	\$504,068
Smith,L(19-2545)	8/1/1997	7/28/2019	22.00	Judgment	7/28/2019	22.00	\$192,902
Smith,P(19-2633)	1/1/2002	7/29/2019	17.58	Judgment	7/29/2019	17.58	\$633,453
Staley,J(19-2538)	1/1/2003	7/28/2019	16.58	Judgment	7/28/2019	16.58	\$895,807
Sutton,S(19-2055)	9/1/1995	6/7/2019	23.78	Judgment	6/7/2019	23.78	\$929,474
Taraf,E(19-1183)	7/1/2002	3/20/2019	16.73	Judgment	3/20/2019	16.73	\$797,231
Theodore,D(19-2277)	4/1/2001	6/27/2019	18.25	Judgment	6/27/2019	18.25	\$1,107,202
Thompson,S(19-2028)	3/1/2004	6/4/2019	15.27	Judgment	6/4/2019	15.27	\$791,240
Titus,M(19-2017)	6/1/2004	6/9/2019	15.03	Judgment	6/9/2019	15.03	\$861,968
Todd,M(19-1916)	6/1/2003	5/30/2019	16.01	Judgment	5/30/2019	16.01	\$1,252,642
Torres,M(19-1332)	3/1/2004	4/2/2019	15.10	Judgment	4/2/2019	15.10	\$502,561

Name(Docket No.)	CF-Start	CF-End	CF-Years	Reason	DOJ	CF-Start to DOJ	Award
Trought,O(19-1336)	1/1/2002	4/2/2019	17.26	Judgment	4/2/2019	17.26	\$510,409
Vargas,L(19-1219)	5/1/1995	3/13/2019	23.88	Judgment	3/13/2019	23.88	\$1,116,687
Villalona,Y(19-2542)	9/1/2003	7/28/2019	15.92	Judgment	7/28/2019	15.92	\$315,788
Waddell,S(19-2598)	9/1/1998	7/29/2019	20.92	Judgment	7/29/2019	20.92	\$1,296,028
Watkins,D(19-2018)	1/1/2001	6/9/2019	18.45	Judgment	6/9/2019	18.45	\$903,766
Wright,P(19-1317)	1/1/2002	4/2/2019	17.26	Judgment	4/2/2019	17.26	\$814,192
Carter,J(19-1168)	7/1/1999	3/13/2019	19.71	Judgment*	3/13/2019	19.71	\$52,088
Fraguada,D(19-2759)	8/1/1997	8/26/2019	22.08	Judgment*	8/26/2019	22.08	\$97,841
Jordan,D(19-2287)	11/1/1998	6/27/2019	20.65	Judgment*	6/27/2019	20.65	\$1,821
Mateo-Duff,D(19-2013)	7/1/2000	6/7/2019	18.95	Judgment*	6/7/2019	18.95	\$155,992
Mostafa,O(19-1991)	12/1/1995	5/30/2019	23.51	Judgment*	5/30/2019	23.51	\$28,812
Nuñez,R(19-1966)	11/1/2003	6/5/2019	15.60	Judgment*	6/5/2019	15.60	\$55,488

Name(Docket No.)	CF-Start	CF-End	CF-Years	Reason	DOJ	CF-Start to DOJ	Award
Talley,Y(19-1174)	6/1/2002	3/13/2019	16.79	Judgment*	3/13/2019	16.79	\$167,978
Alvarado,R(19-2061)	11/1/2004	6/30/2017	12.59	Agreement	5/30/2019	14.50	\$470,082
Cruz,A(19-2786)	7/1/2000	5/1/2003	2.83	Agreement	8/22/2019	19.15	\$51,202
Davis,R(19-1993)	10/1/2000	1/1/2011	10.26	Agreement	6/6/2019	18.69	\$492,099
Madera,C(19-2779)	5/1/1995	2/28/1997	1.83	Agreement	8/24/2019	24.33	\$7,044
Olaya,P(19-2567)	11/1/1998	12/31/2012	14.18	Agreement	7/29/2019	20.75	\$514,300
Strawter-Merritt,M(19-2707)	9/1/2001	9/2/2002	1.00	Agreement	7/30/2019	17.92	\$4,959
Toussaint,P(19-1955)	11/1/1998	12/10/2003	5.11	Disability	5/30/2019	20.59	\$19,555
Tineo,G(19-2603)	7/1/1999	7/21/2007	8.06	Discontinue	7/28/2019	20.09	\$168,253
Dezonie,E(19-2782)	7/1/1999	5/31/2015	15.93	Estimate	8/22/2019	20.16	\$840,486
Caraballo,A(19-1325)	12/1/1997	4/12/2007	9.37	Ineligibility	4/2/2019	21.35	\$475,595

Name(Docket No.)	CF-Start	CF-End	CF-Years	Reason	DOJ	CF-Start to DOJ	Award
Lajara,E(19-2034)	12/1/1996	5/23/2002	5.48	Ineligibility	6/7/2019	22.53	\$103,655
Lewis,W(19-1184)	1/1/2000	8/12/2008	8.62	Ineligibility	3/13/2019	19.21	\$134,424
Eason,T(19-1328)			0.00	No-Backpay	4/2/2019	119.33	\$386
Fletcher,C(19-1508)			0.00	No-Backpay	4/24/2019	119.39	\$187
Staley,N(19-1509)			0.00	No-Backpay	4/25/2019	119.40	\$455
Alleyne,G(19-1269)	10/1/2000	8/31/2006	5.92	Resignation	3/13/2019	18.46	\$68,549
Aviles,J(19-1176)	8/1/2003	1/1/2005	1.42	Resignation	3/13/2019	15.62	\$60,286
Bishop,C(19-2015)	1/1/2001	10/31/2015	14.84	Resignation	6/4/2019	18.43	\$723,498
Capers,E(19-2599)	9/1/1994	9/7/1999	5.02	Resignation	8/1/2019	24.93	\$90,765
Flores,A(19-1986)	4/1/2002	7/1/2014	12.26	Resignation	6/7/2019	17.19	\$722,570
Louison,S(19-2037)	12/1/1996	5/28/2008	11.50	Resignation	6/7/2019	22.53	\$634,401

Name(Docket No.)	CF-Start	CF-End	CF-Years	Reason	DOJ	CF-Start to DOJ	Award
Abraham,B(19-2039)	12/1/1996	11/30/2015	19.01	Retire- ment	6/5/2019	22.52	\$458,943
Acevedo,V(19-2257)	4/1/1996	1/31/2016	19.85	Retire- ment	6/27/2019	23.25	\$459,463
Beard,M(19-2072)	9/1/1999	6/1/2002	2.75	Retire- ment	5/30/2019	19.76	\$12,505
Burgos,A(19-2006)	9/1/1995	7/1/2016	20.85	Retire- ment	6/7/2019	23.78	\$1,160,550
Caraballo,J(19-1927)	12/1/1997	5/27/2004	6.49	Retire- ment	5/30/2019	21.51	\$255,914
Decena,A(19-1969)	11/1/2002	1/10/2017	14.20	Retire- ment	5/30/2019	16.59	\$520,250
Delgado,R(19-1978)	9/1/1995	6/30/2011	15.84	Retire- ment	6/10/2019	23.79	\$822,759
Dennis,M(19-1214)	11/1/1996	7/1/2011	14.67	Retire- ment	3/13/2019	22.38	\$287,908
Elrod,G(19-2273)	10/1/1996	7/1/2004	7.75	Retire- ment	6/27/2019	22.75	\$196,636
Feist,P(19-2813)	9/1/2000	7/21/2014	13.89	Retire- ment	8/24/2019	18.99	\$445,330
Frye,V(19-1928)	12/1/1996	6/1/2006	9.50	Retire- ment	5/30/2019	22.51	\$349,464

Name(Docket No.)	CF-Start	CF-End	CF-Years	Reason	DOJ	CF-Start to DOJ	Award
Gonzalez,B(19-2274)	7/1/2000	2/1/2011	10.59	Retire-ment	6/27/2019	19.00	\$372,701
Graham,M(19-2610)	1/1/2003 1/1/2003	7/1/2012	9.50	Retire-ment	7/28/2019	16.58	\$303,605
Henry,C(19-2826)	10/1/2002	6/1/2014	11.67	Retire-ment	8/24/2019	16.91	\$516,869
Hughes,E(19-2801)	4/1/1999	6/5/2005	6.18	Retire-ment	8/27/2019	20.42	\$157,272
Joly,E(19-2821)	6/1/2004	9/1/2014	10.26	Retire-ment	8/24/2019	15.24	\$390,619
Keys,M(19-1987)	9/1/1997	7/1/2002	4.83	Retire-ment	5/30/2019	21.76	\$116,126
Locke,H(19-2374)	7/1/2002	7/1/2011	9.01	Retire-ment	7/1/2019	17.01	\$248,270
Luna,M(19-1912)	4/1/2000	11/1/2016	16.60	Retire-ment	5/30/2019	19.17	\$883,029
Maduakolam,E(19-1178)	12/1/1997	12/1/2012	15.01	Retire-ment	3/20/2019	21.31	\$633,534
Mancebo,D(19-1985)	4/1/1998	11/1/2011	13.59	Retire-ment	5/30/2019	21.18	\$209,653
Manning,M(19-1334)	4/1/2000	3/1/2016	15.93	Retire-ment	4/2/2019	19.01	\$849,452

Name(Docket No.)	CF-Start	CF-End	CF-Years	Reason	DOJ	CF-Start to DOJ	Award
Marcus,K(19-1536)	12/1/1996	12/6/2011	15.02	Retire-ment	4/24/2019	22.41	\$576,955
McCaskill,C(19-1539)	4/1/2002	6/1/2009	7.17	Retire-ment	4/24/2019	17.07	\$265,786
Miller,A(19-2067)	1/1/2000	9/25/2009	9.74	Retire-ment	5/30/2019	19.42	\$79,597
Moorning,B(19-2020)	8/1/1997	4/30/2005	7.75	Retire-ment	6/4/2019	21.85	\$300,999
Morris-Bretto,B(19-1960)	9/1/1994	7/1/2005	10.84	Retire-ment	6/11/2019	24.79	\$416,790
Natal,C(19-1956)	12/1/1997	12/1/2016	19.01	Retire-ment	6/11/2019	21.54	\$721,021
Oesterreicher,E(19-1963)	11/1/1998	7/1/2008	9.67	Retire-ment	6/5/2019	20.61	\$312,392
Pagan,Y(19-2590)	11/1/2003	6/1/2016	12.59	Retire-ment	7/29/2019	15.75	\$418,680
Paul,M(19-2675)	12/1/1995	6/30/2010	14.59	Retire-ment	7/30/2019	23.68	\$667,664
Perdue,E(19-1548)	4/1/1999	7/1/2005	6.25	Retire-ment	4/25/2019	20.08	\$246,591
Phifer,C(19-2760)	1/1/2002	6/1/2010	8.42	Retire-ment	8/26/2019	17.66	\$420,254

Name(Docket No.)	CF-Start	CF-End	CF-Years	Reason	DOJ	CF-Start to DOJ	Award
Rexach-Galarza,G(19-2354)	1/1/2001	4/18/2017	16.30	Retirement	7/1/2019	18.51	\$578,227
Robinson,E(19-1926)	10/1/1999	6/28/2016	16.75	Retirement	5/30/2019	19.67	\$1,188,702
Rosado,R(19-1196)	8/1/1996	6/27/2013	16.92	Retirement	3/13/2019	22.63	\$592,966
Rossy,J(19-2365)	11/1/2003	6/1/2017	13.59	Retirement	7/1/2019	15.67	\$521,851
Rugel,A(19-1999)	1/1/2001	1/1/17	16.01	Retirement	5/30/2019	18.42	\$1,077,108
Stanford,Y(19-1937)	4/1/1999	2/4/2012	12.85	Retirement	5/30/2019	20.18	\$689,713
Tello,H(19-2794)	12/1/1996	1/28/2013	16.17	Retirement	8/28/2019	22.75	\$724,858
Torres,D(19-1326)	8/1/1998	8/14/2014	16.05	Retirement	4/2/2019	20.68	\$1,122,899
Triblet,G(19-1218)	7/1/1999	4/30/2001	1.83	Retirement	3/13/2019	19.71	\$28,629
Williams,C(19-2278)	1/1/2002	1/1/2014	12.01	Retirement	6/27/2019	17.50	\$394,565
Williams,S(19-2762)	1/1/2004	12/1/2012	8.92	Retirement	8/27/2019	15.66	\$525,096

Name(Docket No.)	CF-Start	CF-End	CF-Years	Reason	DOJ	CF-Start to DOJ	Award
Felix,A(19-2792)	12/1/1996	10/16/2016	19.89	Retire-ment*	8/28/2019	22.75	\$10,012
Hernandez,C(19-2823)	9/1/1995	10/10/2010	15.12	Retire-ment*	8/24/2019	23.99	\$63,223
Johnson,T(19-2063)	9/1/1994	7/31/2005	10.92	Retire-ment	5/30/2019	24.76	\$321,947
Lee,J(19-2351)	12/1/1996	10/30/2017	20.93	Retire-ment	7/1/2019	22.59	\$1,045,433
Allen,F(19-1936)	10/1/2000	9/3/2002	1.92	Termina-tion	5/30/2019	18.67	\$5,469
Bejarano,B(19-2680)	12/1/1996	5/27/1998	1.48	Termina-tion	7/30/2019	22.67	\$7,254
Bennett,T(19-2592)	8/1/1998	3/19/2013	14.64	Termina-tion	7/30/2019	21.01	\$383,476
Cineus,A(19-2272)	9/1/1997	6/26/2002	4.82	Termina-tion	6/27/2019	21.83	\$13,999
Dominguez(Caro),C(19-2559)	9/1/1998	9/3/2001	3.01	Termina-tion	7/30/2019	20.92	\$6,490
Jones,M(19-1938)	11/1/1998	9/1/2002	3.84	Termina-tion	5/30/2019	20.59	\$15,979
Knowles,W(19-1948)	10/1/2002	10/14/2002	0.04	Termina-tion	5/30/2019	16.67	\$250

Name(Docket No.)	CF-Start	CF-End	CF-Years	Reason	DOJ	CF-Start to DOJ	Award
Mills,D(19-1541)	11/1/2004	1/19/2005	0.22	Termination	4/24/2019	14.48	\$5,765
Milord,M(19-1506)	12/1/1996	5/13/1997	0.45	Termination	4/25/2019	22.41	\$18,199
Moore-Sykes,S(19-2797)	8/1/1997	7/1/1999	1.92	Termination	7/30/2019	22.01	\$34,522
Orsini,A(19-1339)	10/1/2000	6/30/2003	2.75	Termination	4/2/2019	18.51	\$4,307
Strong,Y(19-2584)	12/1/1997	6/29/2006	8.58	Termination	7/29/2019	21.67	\$263,765
Zamble,D(19-2601)	11/1/2004	2/16/2006	1.29	Termination	7/28/2019	14.75	\$52,988
Charlton,Y(19-1918)	7/1/2001	11/1/2002	1.34	18-Months	5/30/2019	17.92	\$12,449
Cox,R(19-2577)	10/1/2000	1/1/2004	3.25	18-Months	7/30/2019	18.84	\$48,067
Dopwell,D(19-2246)	7/1/2001	11/1/2001	0.34	18-Months	6/27/2019	18.00	\$344
Goodson,J(19-2606)	12/1/1996	1/1/2001	4.09	18-Months	7/28/2019	22.67	\$94,721
Guerra,L(19-1922)	11/1/1998	1/14/2003	4.21	18-Months	5/30/2019	20.59	\$86,877
Pena,M(19-1194)	12/1/1996	1/18/2000	3.13	18-Months	3/13/2019	22.29	\$4,306

Name(Docket No.)	CF-Start	CF-End	CF-Years	Reason	DOJ	CF-Start to DOJ	Award
Phillips,G(19-2554)	1/1/2002	7/1/2002	0.50	18-Months	7/30/2019	17.59	\$10,926
Rivera,V(19-2309)	9/1/1995	1/1/1998	2.34	18-Months	6/28/2019	23.84	\$19,474
					Total	\$139,463,578	

NOTES (Part A):

1. BOE is appealing 223 plaintiffs' judgments on the issue of post-appointment attrition.
2. Summary of reasons for counterfactual end date for these plaintiffs:

Reason	Number of Plaintiffs
Judgment	133
Retirement	48
Other	42

2. For the plaintiffs whose judgments BOE is appealing on the issue of post-appointment attrition and whose counterfactual end date was the result of judgment or retirement (181 plaintiffs):
 - a. total monetary award is \$132,791,200; and
 - b. average years of counterfactual career is 17.16 years.

COUNTERFACTUAL (“CF”) CAREER FINDINGS TABLE**Part B: Findings for Appellees to Whom BOE’s Post-Appointment
Attrition Argument Does Not Apply (124 Appellees)**

Name(Docket No.)	CF Start Date (A)	CF End Date (B)	CF Career Years	Reason for CF End Date (C)	Date of Judgment (“DOJ”) (E)	Years from CF Start Date to Date of Judgment	Total Judgment Award (F)
Aurelien,A(19-1240)	4/1/2001	3/20/2019	17.98	Judgment	3/20/2019	17.98	\$513,079
Ayala,E(19-2795)	1/1/2000	8/27/2019	19.67	Judgment	8/27/2019	19.67	\$857,566
Baksh,B(19-2549)	10/1/2000	8/1/2019	18.84	Judgment	8/1/2019	18.84	\$914,334
Betancourt,A(19-2002)	10/1/2001	6/7/2019	17.69	Judgment	6/7/2019	17.69	\$187,203
Brito,A(19-1942)	10/1/2002	5/30/2019	16.67	Judgment	5/30/2019	16.67	\$562,407
Brito,M(19-1495)	11/1/1998	4/25/2019	20.49	Judgment	4/25/2019	20.49	\$74,988

Name(Docket No.)	CF-Start	CF-End	CF-Years	Reason	DOJ	CF-Start to DOJ	Award
Brown,D(19-1522)	10/1/2001	4/25/2019	17.58	Judgment	4/25/2019	17.58	\$175,804
Butler,S(19-1270)	7/1/2000	3/13/2019	18.71	Judgment	3/13/2019	18.71	\$55,608
Castelluccio,S(19-2626)	11/1/2004	7/28/2019	14.75	Judgment	7/28/2019	14.75	\$272,876
Desire,F(19-1489)	10/1/2000	4/25/2019	18.58	Judgment	4/25/2019	18.58	\$678,508
Espinal,J(19-2833)	10/1/2002	8/24/2019	16.91	Judgment	8/24/2019	16.91	\$395,197
Estevez,X(19-2576)	7/1/2001	7/30/2019	18.09	Judgment	7/30/2019	18.09	\$153,667
Gomez,A(19-2683)	9/1/2004	7/30/2019	14.92	Judgment	7/30/2019	14.92	\$42,467
Gomez,D(19-1275)	10/1/2000	3/13/2019	18.46	Judgment	3/13/2019	18.46	\$150,278
Gonzalez,R(19-1202)	8/1/1997	3/13/2019	21.63	Judgment	3/13/2019	21.63	\$14,219
Grant,C(19-1532)	10/1/2002	4/25/2019	16.58	Judgment	4/25/2019	16.58	\$462,469
Guzman,L(19-2014)	12/1/1995	6/7/2019	23.53	Judgment	6/7/2019	23.53	\$425,570
Hernandez,M(19-2010)	6/1/2003	6/7/2019	16.03	Judgment	6/7/2019	16.03	\$30,372
Jaime,J(19-1216)	1/1/2000	3/13/2019	19.21	Judgment	3/13/2019	19.21	\$219,825

Name(Docket No.)	CF-Start	CF-End	CF-Years	Reason	DOJ	CF-Start to DOJ	Award
Jennings,M(19-1165)	10/1/2001	3/20/2019	17.48	Judgment	3/20/2019	17.48	\$871,199
Jerez,C(19-2270)	1/1/2003	6/27/2019	16.50	Judgment	6/27/2019	16.50	\$640,441
Johnson,D(19-1192)	9/1/2003	3/20/2019	15.56	Judgment	3/20/2019	15.56	\$637,699
Liverpool,S(19-1195)	8/1/2007	3/20/2019	11.64	Judgment	3/20/2019	11.64	\$174,887
Lopez,M(19-2611)	3/1/2003	8/1/2019	16.43	Judgment	8/1/2019	16.43	\$821,024
Luna,A(19-1946)	11/1/1998	5/30/2019	20.59	Judgment	5/30/2019	20.59	\$607,320
Madera,A(19-1992)	1/1/2000	6/6/2019	19.44	Judgment	6/6/2019	19.44	\$376,760
Maselli,J(19-1997)	1/1/2004	6/6/2019	15.44	Judgment	6/6/2019	15.44	\$33,784
Matos,L(19-1981)	7/1/2001	6/10/2019	17.95	Judgment	6/10/2019	17.95	\$251,626
Michel,J(19-1547)	11/1/2001	4/25/2019	17.49	Judgment	4/25/2019	17.49	\$694,325
Michel,J(19-1970)	1/1/2000	6/11/2019	19.45	Judgment	6/11/2019	19.45	\$23,129
Mingot,C(19-1197)	1/1/2004	3/20/2019	15.22	Judgment	3/20/2019	15.22	\$99,139
Morse,M(19-1193)	10/1/2000	3/20/2019	18.48	Judgment	3/20/2019	18.48	\$438,464

Name(Docket No.)	CF-Start	CF-End	CF-Years	Reason	DOJ	CF-Start to DOJ	Award
Munoz,V(19-1162)	11/1/1998	3/13/2019	20.38	Judgment	3/13/2019	20.38	\$234,683
Oneil,D(19-1187)	7/1/2002	3/13/2019	16.71	Judgment	3/13/2019	16.71	\$745,679
Osorio,M(19-2788)	11/1/1998	8/29/2019	20.84	Judgment	8/29/2019	20.84	\$692,711
Paredes,A(19-1189)	8/1/1998	3/20/2019	20.65	Judgment	3/20/2019	20.65	\$703,686
Payne,J(19-1180)	4/1/2002	3/13/2019	16.96	Judgment	3/13/2019	16.96	\$576,242
Pearson,A(19-2054)	9/1/1997	6/7/2019	21.78	Judgment	6/7/2019	21.78	\$551,798
Porter,K(19-1220)	8/1/2004	3/20/2019	14.64	Judgment	3/20/2019	14.64	\$609,957
Reda,E(19-1223)	4/1/2001	3/20/2019	17.98	Judgment	3/20/2019	17.98	\$955,649
Rodriguez,M(19-2258)	7/1/2001	6/28/2019	18.00	Judgment	6/28/2019	18.00	\$657,833
Rodriguez,S(19-2761)	4/1/2002	8/27/2019	17.42	Judgment	8/27/2019	17.42	\$870,596
Rosa,J(19-1185)	12/1/1996	3/13/2019	22.29	Judgment	3/13/2019	22.29	\$1,338,933
Rosario,L(19-1235)	8/1/1998	3/20/2019	20.65	Judgment	3/20/2019	20.65	\$561,462
Rutledge,P(19-1209)	12/1/1995	3/13/2019	23.30	Judgment	3/13/2019	23.30	\$74,246

Name(Docket No.)	CF-Start	CF-End	CF-Years	Reason	DOJ	CF-Start to DOJ	Award
Seaborn,S(19-1995)	8/1/1996	5/30/2019	22.84	Judgment	5/30/2019	22.84	\$1,190,264
Shedrick,L(19-1188)	4/1/1999	3/20/2019	19.98	Judgment	3/20/2019	19.98	\$87,495
Velardez,E(19-1201)	7/1/2000	3/13/2019	18.71	Judgment	3/13/2019	18.71	\$92,994
Velez,S(19-1205)	12/1/1995	3/13/2019	23.30	Judgment	3/13/2019	23.30	\$52,236
White-Perry,P(19-1268)	10/1/2001	3/20/2019	17.48	Judgment	3/20/2019	17.48	\$400,140
Williams,L(19-2607)	8/1/1998	7/28/2019	21.00	Judgment	7/28/2019	21.00	\$756,809
Wyche,L(19-1236)	11/1/2003	3/20/2019	15.39	Judgment	3/20/2019	15.39	\$398,949
Young-Brown,B(19-1221)	9/1/1995	3/13/2019	23.55	Judgment	3/13/2019	23.55	\$1,075,032
Anderson,S(19-2350)	12/1/1997	7/1/2019	21.59	Judgment*	7/1/2019	21.59	\$2,708
Canty,R(19-2600)	7/1/2000	7/30/2019	19.09	Judgment*	7/30/2019	19.09	\$146,444
Carter-Richards,R(19-1327)	12/1/1996	4/2/2019	22.35	Judgment*	4/2/2019	22.35	\$11,336
Deleon,M(19-2558)	1/1/2002	7/30/2019	17.59	Judgment*	7/30/2019	17.59	\$64,542

Name(Docket No.)	CF-Start	CF-End	CF-Years	Reason	DOJ	CF-Start to DOJ	Award
Dixon,R(19-2749)	1/1/2004	8/22/2019	15.65	Judgment*	8/22/2019	15.65	\$54,614
Garnett,J(19-2007)	9/1/1997	6/7/2019	21.78	Judgment*	6/7/2019	21.78	\$22,408
Gonzalez,E(19-1512)	8/1/1997	4/25/2019	21.75	Judgment*	4/25/2019	21.75	\$78,483
Guerrero,M(19-2366)	4/1/2002	7/1/2019	17.26	Judgment*	7/1/2019	17.26	\$59,586
Hathorn-Parker,P(19-2548)	12/1/1996	8/1/2019	22.68	Judgment*	8/1/2019	22.68	\$54,081
Mejia,A(19-2271)	12/1/1997	6/27/2019	21.58	Judgment*	6/27/2019	21.58	\$33,886
Negron,Y(19-1497)	9/1/1995	4/25/2019	23.66	Judgment*	4/25/2019	23.66	\$43,965
Paul,A(19-2292)	12/1/1997	6/27/2019	21.58	Judgment*	6/27/2019	21.58	\$25,905
Quezada,A(19-1318)	7/1/2001	4/2/2019	17.76	Judgment*	4/2/2019	17.76	\$10,974
Rubio-Lopez,L(19-2689)	9/1/1998	10/1/2010	12.12	Judgment*	7/30/2019	20.92	\$3,170
Salamanca,L(19-1513)	5/1/1995	4/24/2019	24.00	Judgment*	4/24/2019	24.00	\$62,835
Salcedo,C(19-2550)	12/1/1997	8/1/2019	21.68	Judgment*	8/1/2019	21.68	\$16,876

Name(Docket No.)	CF-Start	CF-End	CF-Years	Reason	DOJ	CF-Start to DOJ	Award
Solis,B(19-2566)	11/1/1998	7/30/2019	20.76	Judgment*	7/30/2019	20.76	\$52,163
Tejada,A(19-2587)	8/1/1997	7/28/2019	22.00	Judgment*	7/28/2019	22.00	\$22,278
Valentin,W(19-2541)	11/1/2003	7/28/2019	15.75	Judgment*	7/28/2019	15.75	\$11,998
Wheeler,V(19-2585)	8/1/1997	7/29/2019	22.01	Judgment*	7/29/2019	22.01	\$41,553
Boyce,D(19-2812)			0.00	Agreement	8/26/2019		\$7,500
Montoute,M(19-2617)	12/1/1997	9/1/1999	1.75	Agreement	8/1/2019	21.68	\$21,502
Bido,M(19-1932)	10/1/2002	9/5/2016	13.94	Resignation	5/30/2019	16.67	\$609,394
Caraballo,B(19-1231)	4/1/1998	9/7/1999	1.44	Resignation	3/13/2019	20.96	\$20,130
Dominique,K(19-2574)	1/1/2000	8/31/2006	6.67	Resignation	7/29/2019	19.59	\$53,253
Ackie,D(19-2596)	9/1/2002	6/29/2016	13.84	Retirement	7/28/2019	16.92	\$441,395
Castillo,P(19-2021)	10/1/1999	7/1/2017	17.76	Retirement	6/10/2019	19.70	\$538,084
Gomez,J(19-1504)	12/1/1997	10/17/2015	17.89	Retirement	4/25/2019	21.41	\$28,431

Name(Docket No.)	CF-Start	CF-End	CF-Years	Reason	DOJ	CF-Start to DOJ	Award
Gonzalez,C(19-2269)	4/1/1996	7/1/2003	7.25	Retirement	6/27/2019	23.25	\$62,125
Heath,S(19-2265)	7/1/2000	6/30/2014	14.01	Retirement	6/28/2019	19.00	\$151,574
Henderson,J(19-1179)	4/1/1999	9/6/2004	5.44	Retirement	3/13/2019	19.96	\$30,290
Jones,E(19-1175)	10/1/1999	8/31/2017	17.93	Retirement	3/20/2019	19.48	\$122,059
Morris,S(19-2027)	9/1/1995	7/1/2017	21.85	Retirement	6/4/2019	23.77	\$799,520
Neuendorf,F(19-1998)	9/1/1995	7/1/2009	13.84	Retirement	5/30/2019	23.76	\$121,650
Pena,D(19-1182)	5/1/1995	7/1/2016	21.18	Retirement	3/13/2019	23.88	\$18,355
Pinto,J(19-1977)	9/1/1997	4/1/1999	1.58	Retirement	6/10/2019	21.79	\$26,168
Rangel,A(19-1945)	7/1/1999	6/30/2014	15.01	Retirement	5/30/2019	19.93	\$166,468
Sandoval,C(19-1316)	10/1/1999	7/1/2013	13.76	Retirement	4/2/2019	19.52	\$225,096
Santos,M(19-1952)	4/1/2002	7/24/2013	11.32	Retirement	6/10/2019	17.20	\$88,130
Valcin,H(19-1203)	10/1/1999	9/5/2014	14.94	Retirement	3/13/2019	19.46	\$50,700

Name(Docket No.)	CF-Start	CF-End	CF-Years	Reason	DOJ	CF-Start to DOJ	Award
Cotto-Collazo,C(19-2811)	5/1/1997	9/1/2012	15.35	Retirement*	8/28/2019	22.34	\$8,198
Holland,C(19-1965)	12/1/1996	8/10/2010	13.70	Retirement*	5/30/2019	22.51	\$15,442
Lewis,C(19-1953)	9/1/1995	7/13/2013	17.88	Retirement*	5/30/2019	23.76	\$240,493
Martinez,P(19-2555)	9/1/1997	7/1/2003	5.83	Retirement*	7/30/2019	21.92	\$28,156
McCray,L(19-1324)	9/1/1994	10/22/2012	18.15	Retirement*	4/2/2019	24.60	\$73,907
Medina,I(19-1949)	4/1/1996	1/16/2016	19.81	Retirement*	6/10/2019	23.21	\$28,622
Osoria,N(19-2264)	9/1/1995	2/1/2014	18.43	Retirement*	6/28/2019	23.84	\$69,054
Paulino,R(19-1501)	9/1/1999	7/1/2017	17.84	Retirement*	4/25/2019	19.66	\$87,370
Quinones,N(19-2776)	4/1/1996	7/7/2010	14.27	Retirement*	8/28/2019	23.42	\$53,056
Rivera,B(19-2553)	9/1/1994	7/4/2004	9.85	Retirement*	8/1/2019	24.93	\$84,396
Thomas,D(19-2595)	9/1/1995	8/9/2009	13.95	Retirement*	7/28/2019	23.92	\$46,177
Torres,G(19-2571)	4/1/1998	7/9/2009	11.28	Retirement*	7/29/2019	21.34	\$14,670
Addison,H(19-1208)	8/1/1996	7/1/2010	13.92	Termination	3/13/2019	22.63	\$19,213

Name(Docket No.)	CF-Start	CF-End	CF-Years	Reason	DOJ	CF-Start to DOJ	Award
Ashmeade,S(19-1319)	1/1/2004	8/28/2008	4.66	Termination	4/2/2019	15.26	\$53,132
Booker,C(19-2259)	8/1/1997	6/30/1999	1.91	Termination	6/27/2019	21.92	\$4,297
Bouzaglou,L(19-1507)	1/1/2001	7/1/2005	4.50	Termination	4/24/2019	18.32	\$4,949
Bradley,T(19-2038)	4/1/2001	9/4/2012	11.44	Termination	6/7/2019	18.19	\$24,411
Clarke,J(19-1190)	8/1/1997	7/1/2008	10.92	Termination	3/13/2019	21.63	\$51,896
Jones,A(19-1175)	4/1/1998	7/1/2007	9.25	Termination	8/28/2019	21.42	\$46,288
Mosquera,J(19-2581)	12/1/1995	7/1/2008	12.59	Termination	8/1/2019	23.68	\$284,400
Reyes,R(19-2636)	12/1/1997	7/1/2005	7.59	Termination	7/29/2019	21.67	\$122,169
Rivera,J(19-1515)	10/1/2000	6/27/2017	16.75	Termination	4/24/2019	18.57	\$522,236
Sanon,J(19-2575)	4/1/1998	8/30/07	9.42	Termination	8/1/2019	21.35	\$36,042
Silver,S(19-2608)	3/1/2005	9/2/2013	8.51	Termination	7/30/2019	14.42	\$128,595
Lee,N(19-2791)	8/1/1998	8/7/2007	9.02	Resignation*	8/27/2019	21.08	\$2,222

Name(Docket No.)	CF-Start	CF-End	CF-Years	Reason	DOJ	CF-Start to DOJ	Award
Whichard,R(19-1498)	10/1/2000	7/1/2010	9.75	Terminated*	4/24/2019	18.57	\$820
Pena,M(19-2616)	9/1/1995	3/1/2013	17.54	Termination*	7/28/2019	23.92	\$57,802
Jacques,J(19-1940)	12/1/1997	3/1/2004	6.25	Voluntary Leave	5/30/2019	21.51	\$44,781
Cabrera,L(19-2556)	7/1/2000	1/1/2001	0.50	18-Months	7/28/2019	19.08	\$15,455
Knemoller,M(19-2634)	7/1/2000	6/1/2003	3.00	18-Months	7/29/2019	19.09	\$9,966
Marin,V(19-1543)	10/1/1999	1/1/2003	3.25	18-Months	4/25/2019	19.58	\$88,950
					Total		\$31,152,422

NOTES (Part B):

1. BOE is not appealing 124 plaintiffs' judgments on the issue of post-appointment attrition.
2. Summary of reasons for counterfactual end date for these plaintiffs:

Reason	Number of Plaintiffs
Judgment	73
Retirement	27
Other	24

COUNTERFACTUAL (“CF”) CAREER FINDINGS TABLE**Part C: Average Counterfactual Career Findings**

Average Number of Years from Counterfactual Start Date to Counterfactual End Date (“Counterfactual Career Years”)		Average Number of Years from Counterfactual Start Date to Date of Judgment	
PART A (Post-Appointment Attrition Argument Applies)	14.87	PART A (Post-Appointment Attrition Argument Applies)	20.67
PART B (Post-Appointment Attrition Argument Does Not Apply)	15.75	PART B (Post-Appointment Attrition Argument Does Not Apply)	19.83
OVERALL	15.23	OVERALL	20.37

NOTE: Averages exclude plaintiff Boyce,D(19-2812) because no counterfactual career findings were made.

<u>LEGEND FOR TABLE</u>	
Agreement	Parties agreed to backpay end date or judgment amount
Disability	Plaintiff became permanently disabled
Discontinue	Probationary discontinuance of full-time teacher under conditional certificate
Estimate	End date predicted by model
Ineligibility	Plaintiff placed on ineligibility or “do not call” list
No-Backpay	No backpay awarded
Resignation	Plaintiff resigned
Retirement	Plaintiff retired
Termination	BOE terminated plaintiff’s employment.
Voluntary-Leave	Plaintiff went on voluntary leave.
18-Months	Backpay damages cut off 18-months after passing the LAST.
*	Mitigation earnings exceeded counterfactual earnings, resulting in damages cutoff date earlier than counterfactual end date.

SOURCES:

- Counterfactual Start Date (A), Counterfactual End Date (B) and Reason for Counterfactual End Date (C) are found at §§ 2.C.1 and 2.C.4 of each respective appellee's Findings of Fact and Conclusions of Law (which are included in the Joint Appendix of Class Member-Specific Documents).
- Date of Judgment (E) and Judgment Award Amounts (F) are found in each respective appellee's Judgment (which are included in the Joint Appendix of Class Member-Specific Documents).

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word 2010, and according to that software, it contains 20,326 words, including the Counterfactual Career Findings Table, but not including the table of contents, table of authorities, this certificate, and the cover.

/s/ Aaron M. Bloom

AARON M. BLOOM

19-1162*

**United States Court of Appeals
for the Second Circuit**

IN RE: NEW YORK CITY BOARD OF EDUCATION APPEALS

On Appeal from the United States District Court
for the Southern District of New York

**ADDENDUM TO BRIEF FOR APPELLANT
BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT
OF THE CITY OF NEW YORK**

RICHARD DEARING
CLAUDE PLATTON
AARON M. BLOOM
KEVIN OSOWSKI
of Counsel

November 8, 2019

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* Additional Docket Numbers are listed in Inside Cover.

19-1164, 19-1165, 19-1168, 19-1172, 19-1174, 19-1175, 19-1176, 19-1177,
19-1178, 19-1179, 19-1180, 19-1181, 19-1182, 19-1183, 19-1184, 19-1185,
19-1186, 19-1187, 19-1188, 19-1189, 19-1190, 19-1191, 19-1192, 19-1193,
19-1194, 19-1195, 19-1196, 19-1197, 19-1198, 19-1199, 19-1200, 19-1201,
19-1202, 19-1203, 19-1205, 19-1208, 19-1209, 19-1214, 19-1216, 19-1217,
19-1218, 19-1219, 19-1220, 19-1221, 19-1222, 19-1223, 19-1224, 19-1225,
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19-2807, 19-2808, 19-2810, 19-2811, 19-2812, 19-2813, 19-2821, 19-2823,
19-2826, 19-2833

**Addendum to Brief for Appellant
Board of Education of the City School District
of the City of New York**

This Addendum indicates those appellee plaintiffs who BOE contends are affected by its arguments on appeal regarding (Issue 1) liability; (Issue 2) the failure to apply a classwide backpay reduction for the probability of appointment; and (Issue 3) the failure to apply a class-wide backpay reduction for post-appointment attrition. In addition, this addendum indicates the total judgment amount awarded to each plaintiff.

Counsel for the appellant in all cases listed below is James E. Johnson, Corporation Counsel of the City of New York, 100 Church Street, New York, New York 10007 (212) 356-2274, abloom@law.nyc.gov (of counsel: Richard Dearing, Claude S. Platton, Aaron M. Bloom, and Kevin Osowski).

Counsel for the appellee plaintiffs in all cases listed below is Stroock & Stroock & Lavan LLP, 180 Maiden Lane, New York, New York 10038, (212) 806-5400, jsohn@stroock.com (of counsel: Joshua Sohn).

1. Total judgment amount for appellees affected by argument on appeal regarding liability (Issue 1): **\$170,616,000**.
2. Total judgment amount for appellees affected by argument on appeal regarding probability of appointment (Issue 2): **\$127,733,973**.
3. Total judgment amount for appellees affected by argument on appeal regarding post-appointment attrition (Issue 3): **\$139,463,578**.

Docket No.	Plaintiff	Issue 1	Issue 2	Issue 3	Judgment Amount
19-1973	Abel, Maryse	X	X	X	\$729,098
19-2039	Abraham, Barbara C.	X	X	X	\$458,943
19-2257	Acevedo, Victor	X		X	\$459,463
19-2596	Ackie, David D.	X			\$441,395

Docket No.	Plaintiff	Issue 1	Issue 2	Issue 3	Judgment Amount
19-1191	Acosta, Margarita	X	X	X	\$1,218,844
19-1208	Addison, Helen	X			\$19,213
19-2810	Adighibe, Comfort	X	X	X	\$947,775
19-1494	Alexis, Betty	X	X	X	\$926,746
19-1936	Allen, Forest	X	X	X	\$5,469
19-1269	Alleyne, Guillermo	X	X	X	\$68,549
19-2061	Alvarado, Rolando	X	X	X	\$470,082
19-2000	Alvarez, Altagracia	X	X	X	\$942,341
19-1974	Alves, Kalifa	X	X	X	\$979,096
19-1503	Anderson, Elmer	X	X	X	\$349,856
19-2350	Anderson, Sharon	X			\$2,708
19-2347	Arenas, Pamala	X		X	\$147,642
19-1164	Artiles, Federico	X	X	X	\$545,430
19-1319	Ashmeade, Semonia	X			\$53,132
19-1240	Aurelien, Angela	X			\$513,079
19-1176	Aviles, Jean	X	X	X	\$60,286
19-2795	Ayala, Evelyn	X			\$857,566
19-2549	Baksh, Bibi F.	X			\$914,334
19-2593	Bastien, Miguel	X	X	X	\$707,477
19-2072	Beard, Mattie	X	X	X	\$12,505
19-2680	Bejarano, Benny	X	X	X	\$7,254
19-2773	Bell, Annetta Smith	X		X	\$1,211,058
19-1980	Bello, Maria	X	X	X	\$917,789
19-2592	Bennett, Tangi	X	X	X	\$383,476
19-1243	Bernard, Marie	X	X	X	\$815,050
19-1924	Bernard, Yva	X	X	X	\$742,699
19-2002	Betancourt, Anna M.	X			\$187,203
19-1932	Bido, Mirtha	X			\$609,394
19-2256	Bigord, Marie	X	X	X	\$593,756
19-2015	Bishop, Christabel Norma	X	X	X	\$723,498
19-2775	Bland, Belinda	X	X	X	\$1,078,830
19-2259	Booker, Carolyn	X			\$4,297
19-1507	Bouzagloul, Lamina	X			\$4,949

Docket No.	Plaintiff	Issue 1	Issue 2	Issue 3	Judgment Amount
19-2812	Boyce, Denise	X			\$7,500
19-2038	Bradley, Thelma	X			\$24,411
19-1502	Brady, Beverly Orinthia	X	X	X	\$862,937
19-1942	Brito, Ana Edimela	X			\$562,407
19-1495	Brito, Marlene Romero	X			\$74,988
19-1522	Brown, Dachka	X			\$175,804
19-2006	Burgos, Ana	X	X	X	\$1,160,550
19-2352	Bustamante, Vilma	X	X	X	\$1,108,989
19-1270	Butler, Shernita	X			\$55,608
19-2556	Cabrera, Leotilde Peguero	X			\$15,455
19-1951	Cabrera, Lucina	X	X	X	\$1,060,139
19-1939	Cabrera, Sandra	X	X	X	\$822,085
19-2763	Cajuste, Ruth	X	X	X	\$1,073,725
19-1950	Cambry, Pierre	X	X	X	\$1,185,599
19-2261	Cantres, Ramiro	X	X	X	\$762,808
19-2600	Canty, Rhonda	X			\$146,444
19-2599	Capers, Ernestine P.	X		X	\$90,765
19-1325	Caraballo, Antonia	X	X	X	\$475,595
19-1231	Caraballo, Beatrice	X			\$20,130
19-1927	Caraballo, Juana	X	X	X	\$255,914
19-1168	Carter, Janice	X		X	\$52,088
19-1327	Carter-Richards, Cynthia	X			\$11,336
19-1181	Casillas, Milagros	X	X	X	\$944,942
19-1186	Casimir, Virginie	X	X	X	\$528,381
19-2626	Castelluccio, Shirley	X			\$272,876
19-2021	Castillo, Pedro	X			\$538,084
19-1918	Charlton, Yvonne Joy	X	X	X	\$12,449
19-2272	Cineus, Alphonse Max	X	X	X	\$13,999

Docket No.	Plaintiff	Issue 1	Issue 2	Issue 3	Judgment Amount
19-1190	Clarke, Juliana	X			\$51,896
19-1979	Coles, Cynthia	X	X	X	\$938,411
19-2031	Cook, Corlinda	X	X	X	\$1,052,717
19-2811	Cotto-Collazo, Olga	X			\$8,198
19-2577	Cox, Randall	X	X	X	\$48,067
19-2786	Cruz, Argentina	X	X	X	\$51,202
19-2783	Cruz, Cynthia	X	X	X	\$748,302
19-2033	Cruz, Lucia	X	X	X	\$914,380
19-1975	Dais, Sherri	X	X	X	\$745,910
19-1930	Davis, Diana Elizabeth	X	X	X	\$1,008,913
19-1993	Davis, Rupert	X	X	X	\$492,099
19-2785	Dawkins, Elaine	X	X	X	\$587,335
19-1969	Decena, Andrea Margarita	X	X	X	\$520,250
19-1505	Delancer, Ramon	X	X	X	\$813,829
19-2558	Deleon, Martha	X			\$64,542
19-1978	Delgado, Rosita	X	X	X	\$822,759
19-1214	Dennis, Mildred	X	X	X	\$287,908
19-1489	Desire, Florence	X			\$678,508
19-2782	Dezonie, Ethel Ruth	X	X	X	\$840,486
19-2799	Diaz, Ana	X	X	X	\$654,962
19-2749	Dixon, Redell	X			\$54,614
19-2781	Domenech, Ingrid	X	X	X	\$1,506,554
19-2559	Dominguez (Caro), Martha Ivonne	X	X	X	\$6,490
19-2574	Dominique, Kathleen	X			\$53,253
19-2246	Dopwell, Dionne	X	X	X	\$344
19-1328	Eason, Theresa	X	X	X	\$386
19-2273	Elrod, Gloria Ann	X		X	\$196,636
19-1934	Escobar, Evelisse	X	X	X	\$1,117,152
19-2833	Espinal, Jackie	X			\$395,197
19-2576	Estevez, Xiomara C.	X			\$153,667
19-1246	Fabre, Katia	X	X	X	\$1,239,910

Docket No.	Plaintiff	Issue 1	Issue 2	Issue 3	Judgment Amount
19-2803	Falconer, Paula	X	X	X	\$434,092
19-2262	Fasack, Maritza Carmen	X	X	X	\$115,920
19-2808	Faust, Denise	X	X	X	\$232,919
19-2813	Feist, Pauline	X	X	X	\$445,330
19-2792	Felix, Alberto	X	X	X	\$10,012
19-2764	Ferreira, Maria C.	X	X	X	\$1,055,713
19-1508	Fletcher, Carmen	X	X	X	\$187
19-1986	Flores, Adriana	X	X	X	\$722,570
19-1971	Ford, Sharlene	X	X	X	\$560,106
19-1198	Fortune, Margaret	X	X	X	\$713,296
19-2759	Fraguada, Daisy	X	X	X	\$97,841
19-1962	Frias, Ana Rosa	X	X	X	\$1,046,951
19-1928	Frye, Vera	X		X	\$349,464
19-2007	Garnett, Jacqueline	X			\$22,408
19-2546	Girault, Lillian Emily	X		X	\$1,537,169
19-2683	Gomez, Adan	X			\$42,467
19-1275	Gomez, Dreidy	X			\$150,278
19-1504	Gomez, Jose	X			\$28,431
19-2274	Gonzalez, Barbara	X	X	X	\$372,701
19-2269	Gonzalez, Carmen	X			\$62,125
19-1512	Gonzalez, Esther	X			\$78,483
19-2806	Gonzalez, Rafael	X	X	X	\$235,100
19-1202	Gonzalez, Reyna	X			\$14,219
19-2606	Goodson, Joyce	X	X	X	\$94,721
19-2610	Graham, Margaret Ella	X	X	X	\$303,605
19-1532	Grant, Cecilia Marie	X			\$462,469
19-2805	Grant, Robin	X	X	X	\$673,369
19-2066	Graydon, Sheri	X	X	X	\$984,637
19-1968	Green, Ana	X	X	X	\$1,339,880
19-1964	Green, Catherine	X	X	X	\$521,467
19-2068	Green, Deborah A.	X	X	X	\$704,742

Docket No.	Plaintiff	Issue 1	Issue 2	Issue 3	Judgment Amount
19-2793	Greene, Pamela	X	X	X	\$971,260
19-2305	Grey, Barbara	X	X	X	\$928,171
19-2267	Griffin-Johnson, Alfreda	X	X	X	\$866,068
19-1922	Guerra, Leonel Ivan	X	X	X	\$86,877
19-2366	Guerrero, Mary	X			\$59,586
19-2310	Guerrero, Silfida	X	X	X	\$988,698
19-1914	Gustama, Carole	X	X	X	\$916,383
19-2014	Guzman, Lisandra	X			\$425,570
19-1533	Hamilton, Andrea	X	X	X	\$1,130,695
19-2535	Harrison, Jacqueline	X	X	X	\$629,876
19-2548	Hathorn-Parker, Annette	X			\$54,081
19-1929	Havercome, Van	X	X	X	\$857,531
19-2281	Haynes, Linda	X	X	X	\$813,274
19-1959	Haynes, Maria	X	X	X	\$1,500,493
19-2265	Heath, Shelley Kiwana	X			\$151,574
19-1179	Henderson, Joyce	X			\$30,290
19-2826	Henry, Charlotte C.	X	X	X	\$516,869
19-2823	Hernandez, Charles	X	X	X	\$63,223
19-2010	Hernandez, Mari-belle	X			\$30,372
19-1941	Hewitt, Naomi	X	X	X	\$1,265,196
19-1965	Holland, Carolyn	X			\$15,442
19-2801	Hughes, Eslin	X		X	\$157,272
19-1940	Jacques, Jude	X			\$44,781
19-1216	Jaime, Juana	X			\$219,825
19-2807	Jean, Marcelle	X	X	X	\$824,473
19-1972	Jenkins-Thompson, Denise	X	X	X	\$863,777
19-2569	Jennings, Cheryl	X	X	X	\$1,243,346
19-1165	Jennings, Michelle	X			\$871,199
19-2270	Jerez, Carmen	X			\$640,441

Docket No.	Plaintiff	Issue 1	Issue 2	Issue 3	Judgment Amount
19-1172	Jimenez, Myriam	X	X	X	\$967,099
19-1192	Johnson, Debra	X			\$637,699
19-2063	Johnson, Thelma	X		X	\$321,947
19-2821	Joly, Elienne	X	X	X	\$390,619
19-1175	Jones, Alvin	X			\$46,288
19-2582	Jones, Darlene	X	X	X	\$985,250
19-1175	Jones, Ellen	X			\$122,059
19-1938	Jones, Maggie	X	X	X	\$15,979
19-2287	Jordan, Dulce Esperanza	X	X	X	\$1,821
19-1987	Keys, Mozella	X		X	\$116,126
19-2634	Knemoller, Marcia	X			\$9,966
19-1948	Knowles, William	X	X	X	\$250
19-2769	Lajara, Dulce Maria Deleon	X	X	X	\$1,512,370
19-2034	Lajara, Edy	X	X	X	\$103,655
19-2243	Leacock, Colleen Andrea	X	X	X	\$952,716
19-2351	Lee, Jane	X	X	X	\$1,045,433
19-2791	Lee, Natacha	X			\$2,222
19-1953	Lewis, Corey	X			\$240,493
19-1184	Lewis, Winifred	X	X	X	\$134,424
19-1195	Liverpool, Steve	X			\$174,887
19-2374	Locke, Hyacinth	X	X	X	\$248,270
19-2361	Lopez, Humberto	X	X	X	\$38,375
19-2611	Lopez, Mabel	X			\$821,024
19-1915	Lopez-Feliciano, Edna	X	X	X	\$214,675
19-2037	Louison, Shirley	X	X	X	\$634,401
19-2787	Lovinsky, Marie	X	X	X	\$872,120
19-1946	Luna, Ada	X			\$607,320
19-1912	Luna, Melania	X	X	X	\$883,029
19-1992	Madera, Asia	X			\$376,760
19-2779	Madera, Carlos M.	X	X	X	\$7,044
19-1178	Maduakolam, Edith	X	X	X	\$633,534

Docket No.	Plaintiff	Issue 1	Issue 2	Issue 3	Judgment Amount
19-1985	Mancebo, Diana	X	X	X	\$209,653
19-1334	Manning, Margaret	X	X	X	\$849,452
19-1536	Marcus, Kim	X		X	\$576,955
19-1543	Marin, Violeta Altagracia	X			\$88,950
19-2555	Martinez, Percilia	X			\$28,156
19-1997	Maselli, Josephine	X			\$33,784
19-2583	Massaquoi, Satara	X	X	X	\$695,242
19-2013	Mateo-Duff, Amina	X	X	X	\$155,992
19-1947	Mateo-Sencion, Maritza	X	X	X	\$1,092,889
19-2004	Mathieu, Marie Gasline	X	X	X	\$831,075
19-1981	Matos, Linda	X			\$251,626
19-1539	McCaskill, Sabrina	X	X	X	\$265,786
19-1324	McCray, Louise	X			\$73,907
19-1925	Medina, Ana	X	X	X	\$536,750
19-1949	Medina, Iris	X			\$28,622
19-2271	Mejia, Agustin	X			\$33,886
19-2035	Mendoza, Jose	X	X	X	\$547,135
19-2777	Mera, Carlos	X	X	X	\$844,608
19-1970	Michel, Jeff	X			\$23,129
19-1547	Michel, Josy	X			\$694,325
19-2067	Miller, Antoinette	X	X	X	\$79,597
19-1541	Mills, Denise Yvonne	X	X	X	\$5,765
19-1506	Milord, Marceau	X	X	X	\$18,199
19-1197	Mingot, Cherley	X			\$99,139
19-1200	Montas, Altagracia	X	X	X	\$1,142,242
19-2617	Montoute, Marcella	X			\$21,502
19-2797	Moore-Sykes, Yvonne	X		X	\$34,522
19-2020	Moorning, Betty J.	X		X	\$300,999
19-1222	Moreno-Disla, Lourdes	X	X	X	\$1,223,005

Docket No.	Plaintiff	Issue 1	Issue 2	Issue 3	Judgment Amount
19-2774	Morris, Brenda	X	X	X	\$1,083,777
19-2027	Morris, Sheila	X			\$799,520
19-1960	Morris-Bretto, Christine	X		X	\$416,790
19-1516	Morrison, Noel	X	X	X	\$1,131,166
19-1193	Morse, Mark	X			\$438,464
19-2581	Mosquera, Jorge	X			\$284,400
19-1991	Mostafa, Osama	X	X	X	\$28,812
19-1329	Muhammad, Ruby Kariymah	X	X	X	\$748,984
19-2712	Munoz, Luis	X	X	X	\$1,244,684
19-1162	Munoz, Victoria	X			\$234,683
19-1935	Muriel, Gregory	X		X	\$346,179
19-1956	Natal, Carmen	X	X	X	\$721,021
19-1497	Negron, Yolanda	X			\$43,965
19-1998	Neuendorf, Francisca	X			\$121,650
19-1518	Noble, Christine	X	X	X	\$893,554
19-1899	Noriega, Victoria	X	X	X	\$457,317
19-2563	Norman, Bernice	X	X	X	\$1,080,821
19-1177	Nunez, Olga	X	X	X	\$1,263,542
19-1966	Nuñez, Romelina	X	X	X	\$55,488
19-1963	Oesterreicher, Elena	X	X	X	\$312,392
19-2567	Olaya, Petra	X	X	X	\$514,300
19-1187	Oneil, Deborah	X			\$745,679
19-1339	Orsini, Asuncion	X	X	X	\$4,307
19-2264	Osoria, Nat	X			\$69,054
19-2788	Osorio, Maritza	X			\$692,711
19-2590	Pagan, Yolanda	X	X	X	\$418,680
19-1983	Panora, Piedad	X	X	X	\$1,044,515
19-1189	Paredes, Adriana	X			\$703,686
19-1199	Parker, Annette	X	X	X	\$1,282,254
19-2292	Paul, Adriana	X			\$25,905
19-2675	Paul, Mary	X	X	X	\$667,664

Docket No.	Plaintiff	Issue 1	Issue 2	Issue 3	Judgment Amount
19-1994	Paulau-Robotis, Maria Elena	X	X	X	\$848,073
19-1501	Paulino, Rosa	X			\$87,370
19-1180	Payne, Jacqueline	X			\$576,242
19-2054	Pearson, Antonia	X			\$551,798
19-1217	Pearson, Diane	X	X	X	\$831,764
19-1182	Pena, Dionicia	X			\$18,355
19-1194	Pena, Maritza Antonia	X	X	X	\$4,306
19-2616	Pena, Mateo Pina	X			\$57,802
19-2016	Pena, Xenia Margarita	X	X	X	\$180,378
19-1341	Peralta, Amarilis Ramirez	X	X	X	\$912,790
19-1548	Perdue, Eunice	X		X	\$246,591
19-2760	Phifer, Cynthia	X	X	X	\$420,254
19-2554	Phillips, Guillermo	X	X	X	\$10,926
19-2254	Pimentel, Maribel A.	X		X	\$1,340,233
19-1976	Pineda, Argentina Sanchez	X	X	X	\$1,074,520
19-1977	Pinto, Juana Yolanda	X			\$26,168
19-2572	Pollas, Rachelle	X	X	X	\$729,700
19-1220	Porter, Kia	X			\$609,957
19-2580	Powell, Regina	X	X	X	\$907,991
19-2001	Preptit-Nestor, Aline	X	X	X	\$456,189
19-1318	Quezada, Ana	X			\$10,974
19-2776	Quinones, Norma	X			\$53,056
19-1945	Rangel, Angel	X			\$166,468
19-1223	Reda, Emanuel	X			\$955,649
19-2354	Rexach-Galarza, Loyda	X	X	X	\$578,227
19-2636	Reyes, Robinson	X			\$122,169

Docket No.	Plaintiff	Issue 1	Issue 2	Issue 3	Judgment Amount
19-2553	Rivera, Blanche	X			\$84,396
19-1515	Rivera, Jenny	X			\$522,236
19-2309	Rivera, Vivian Enid	X	X	X	\$19,474
19-1926	Robinson, Ella	X	X	X	\$1,188,702
19-2551	Rodriguez, Denia	X	X	X	\$674,526
19-2258	Rodriguez, Margari- ta	X			\$657,833
19-1225	Rodriguez, Marina	X	X	X	\$1,073,971
19-2022	Rodriguez, Myriam	X	X	X	\$1,241,919
19-2761	Rodriguez, Stella	X			\$870,596
19-1185	Rosa, Jose	X			\$1,338,933
19-1196	Rosado, Ramonita	X	X	X	\$592,966
19-1235	Rosario, Lisette	X			\$561,462
19-2365	Rossy, Jacqueline	X	X	X	\$521,851
19-2689	Rubio-Lopez, Maria	X			\$3,170
19-1999	Rugel, Axa	X		X	\$1,077,108
19-2005	Ruiz, Carmen	X	X	X	\$982,846
19-1517	Russell, Michelle	X	X	X	\$797,098
19-1209	Rutledge, Pamela	X			\$74,246
19-1513	Salamanca, Luz	X			\$62,835
19-2550	Salcedo, Carlos	X			\$16,876
19-1316	Sandoval, Carmen	X			\$225,096
19-2575	Sanon, Jessica	X			\$36,042
19-1224	Santana, Perfecto	X	X	X	\$1,033,233
19-1952	Santos, Miriam	X			\$88,130
19-2248	Scott, Elizabeth	X	X	X	\$926,388
19-1995	Seaborn, Sheron	X			\$1,190,264
19-1593	Sena, Dierde M.	X	X	X	\$1,008,945
19-1188	Shedrick, Louise	X			\$87,495
19-2608	Silver, Silvia	X			\$128,595
19-2280	Simmons, Gina	X	X	X	\$1,303,975
19-2597	Small, Miranda	X	X	X	\$504,068
19-2545	Smith, Lakeisha	X	X	X	\$192,902
19-2633	Smith, Pamela	X	X	X	\$633,453
19-2566	Solis, Betty	X			\$52,163

Docket No.	Plaintiff	Issue 1	Issue 2	Issue 3	Judgment Amount
19-2538	Staley, Jeannette	X	X	X	\$895,807
19-1509	Staley, Norma E.	X	X	X	\$455
19-1937	Stanford, Yinka	X	X	X	\$689,713
19-2707	Strawter-Merritt, Mary	X	X	X	\$4,959
19-2584	Strong, Yolanda	X	X	X	\$263,765
19-2055	Sutton, Sandra	X		X	\$929,474
19-1174	Talley, Yvette	X	X	X	\$167,978
19-1183	Taraf, Elsie	X	X	X	\$797,231
19-2587	Tejada, Ana Maria	X			\$22,278
19-2794	Tello, Haydee	X	X	X	\$724,858
19-2277	Theodore, David	X	X	X	\$1,107,202
19-2595	Thomas, Delores	X			\$46,177
19-2028	Thompson, Sandra Grace	X	X	X	\$791,240
19-2603	Tineo, Gladys	X	X	X	\$168,253
19-2017	Titus, Marc Anthony	X	X	X	\$861,968
19-1916	Todd, Michelle	X	X	X	\$1,252,642
19-1326	Torres, Dalys	X	X	X	\$1,122,899
19-2571	Torres, Gloria N.	X			\$14,670
19-1332	Torres, Melissa	X	X	X	\$502,561
19-1955	Toussaint, Parphine	X	X	X	\$19,555
19-1218	Triblet, Gloria	X	X	X	\$28,629
19-1336	Trought, Olive	X	X	X	\$510,409
19-1203	Valcin, Herno	X			\$50,700
19-2541	Valentin, Wilfredo	X			\$11,998
19-1219	Vargas, Luz	X	X	X	\$1,116,687
19-1201	Velardez, Elba	X			\$92,994
19-1205	Velez, Sonia	X			\$52,236
19-2542	Villalona, Yeudy	X	X	X	\$315,788
19-2598	Waddell, Sheryl	X		X	\$1,296,028
19-2018	Watkins, Denise	X	X	X	\$903,766
19-2585	Wheeler, Veneta Rhonda	X			\$41,553

Docket No.	Plaintiff	Issue 1	Issue 2	Issue 3	Judgment Amount
19-1498	Whichard, Rochelle	X			\$820
19-1268	White-Perry, Dora	X			\$400,140
19-2278	Williams, Cassandra	X	X	X	\$394,565
19-2607	Williams, Lorraine	X			\$756,809
19-2762	Williams, Shirley	X		X	\$525,096
19-1317	Wright, Patricia	X	X	X	\$814,192
19-1236	Wyche, Latoya	X			\$398,949
19-1221	Young-Brown, Sherry	X			\$1,075,032
19-2601	Zamble, Dje Bi	X	X	X	\$52,988