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

FINAL BRIEF FOR PLAINTIFFS-APPELLEES

RACHEL V. STEVENS
DLA PIPER LLP (US)
1251 Avenue of the Americas
New York, New York
(212) 335-4500

JOSHUA S. SOHN
DINA KOLKER
FRANCIS C. HEALY
ROBERT A. MANTEL
STROOCK & STROOCK & LAVAN LLP
180 Maiden Lane
New York, New York 10038
(212) 806-5400

Co-Counsel for Plaintiffs-Appellees

* Additional Docket Numbers are listed on 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, 19-1231, 19-1235, 19-1236, 19-1240, 19-1243, 19-1246, 19-1268, 19-1269, 19-1270, 19-1275, 19-1316, 19-1317, 19-1318, 19-1319, 19-1324, 19-1325, 19-1326, 19-1327, 19-1328, 19-1329, 19-1332, 19-1334, 19-1336, 19-1339, 19-1341, 19-1489, 19-1494, 19-1495, 19-1497, 19-1498, 19-1501, 19-1502, 19-1503, 19-1504, 19-1505, 19-1506, 19-1507, 19-1508, 19-1509, 19-1512, 19-1513, 19-1515, 19-1516, 19-1517, 19-1518, 19-1522, 19-1532, 19-1533, 19-1536, 19-1539, 19-1541, 19-1543, 19-1547, 19-1548, 19-1593, 19-1899, 19-1912, 19-1914, 19-1915, 19-1916, 19-1918, 19-1922, 19-1924, 19-1925, 19-1926, 19-1927, 19-1928, 19-1929, 19-1930, 19-1932, 19-1934, 19-1935, 19-1936, 19-1937, 19-1938, 19-1939, 19-1940, 19-1941, 19-1942, 19-1945, 19-1946, 19-1947, 19-1948, 19-1949, 19-1950, 19-1951, 19-1952, 19-1953, 19-1955, 19-1956, 19-1959, 19-1960, 19-1962, 19-1963, 19-1964, 19-1965, 19-1966, 19-1968, 19-1969, 19-1970, 19-1971, 19-1972, 19-1973, 19-1974, 19-1975, 19-1976, 19-1977, 19-1978, 19-1979, 19-1980, 19-1981, 19-1983, 19-1985, 19-1986, 19-1987, 19-1991, 19-1992, 19-1993, 19-1994, 19-1995, 19-1997, 19-1998, 19-1999, 19-2000, 19-2001, 19-2002, 19-2004, 19-2005, 19-2006, 19-2007, 19-2010, 19-2013, 19-2014, 19-2015, 19-2016, 19-2017, 19-2018, 19-2020, 19-2021, 19-2022, 19-2027, 19-2028, 19-2031, 19-2033, 19-2034, 19-2035, 19-2037, 19-2038, 19-2039, 19-2054, 19-2055, 19-2061, 19-2063, 19-2066, 19-2067, 19-2068, 19-2072, 19-2243, 19-2246, 19-2248, 19-2254, 19-2256, 19-2257, 19-2258, 19-2259, 19-2261, 19-2262, 19-2264, 19-2265, 19-2267, 19-2269, 19-2270, 19-2271, 19-2272, 19-2273, 19-2274, 19-2277, 19-2278, 19-2280, 19-2281, 19-2287, 19-2292, 19-2305, 19-2309, 19-2310, 19-2347, 19-2350, 19-2351, 19-2352, 19-2354, 19-2361, 19-2365, 19-2366, 19-2374, 19-2535, 19-2538, 19-2541, 19-2542, 19-2545, 19-2546, 19-2548, 19-2549, 19-2550, 19-2551, 19-2553, 19-2554, 19-2555, 19-2556, 19-2558, 19-2559, 19-2563, 19-2566, 19-2567, 19-2569, 19-2571, 19-2572, 19-2574, 19-2575, 19-2576, 19-2577, 19-2580, 19-2581, 19-2582, 19-2583, 19-2584, 19-2585, 19-2587, 19-2590, 19-2592, 19-2593, 19-2595, 19-2596, 19-2597, 19-2598, 19-2599, 19-2600, 19-2601, 19-2603, 19-2606, 19-2607, 19-2608, 19-2610, 19-2611, 19-2616, 19-2617, 19-2626, 19-2633, 19-2634, 19-2636, 19-2675, 19-2680, 19-2683, 19-2689, 19-2707, 19-2712, 19-2749, 19-2759, 19-2760, 19-2761, 19-2762, 19-2763, 19-2764, 19-2769, 19-2773, 19-2774, 19-2775, 19-2776, 19-2777, 19-2779, 19-2781, 19-2782, 19-2783, 19-2785, 19-2786, 19-2787, 19-2788, 19-2790, 19-2791, 19-2792, 19-2793, 19-2794, 19-2795, 19-2797, 19-2799, 19-2801, 19-2803, 19-2805, 19-2806, 19-2807, 19-2808, 19-2810, 19-2811, 19-2812, 19-2813, 19-2821, 19-2823, 19-2826, 19-2833

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

PRELIMINARY STATEMENT 1

COUNTERSTATEMENT OF THE CASE 6

I. CRITICAL SHORTAGE OF CERTIFIED NYC PUBLIC SCHOOL TEACHERS AND THE BOE'S USE OF THE LAST 6

II. PROCEDURAL HISTORY 9

1. The BOE Is Held Liable For Violating Title VII By Using The LAST To Make Employment Decisions 10

2. The BOE Argues For Individual Backpay Determinations At Remedy-Phase Class Certification 12

3. Proceedings Before the Special Master Regarding Classwide Backpay Calculations 16

a. *Probability of Appointment* 17

1. The BOE's Approach 17

2. Plaintiffs' Approach 18

b. *Post-Appointment Attrition* 19

1. The BOE's Approach 19

2. Plaintiffs' Approach 20

4. The Special Master's Interim Reports & Recommendations 21

a. *The Special Master held that the BOE may offer evidence in individual hearings that, based on the BOE's hiring practices, particular class members would not have been hired* 22

b. *The Special Master held that post-hiring attrition should be included in the damages Model, but either party could offer evidence in individual hearings to modify that Model* 23

5. Defendant's Limited Objections to the Special Master's IRRs 26

6. The District Court Adopts the Special Master's IRRs 27

7. Plaintiffs Develop a Baseline Damages Model, Which the Special Master and District Court Subsequently Apply 30

a. *Counterfactual Appointment/Damages Start Date* 30

b. *Counterfactual Salary* 31

c. *Counterfactual End Date* 32

d. *Mitigation, Backpay and Pre-Judgment Interest* 32

8. Individual Hearings and Judgments Regarding Remedies 33

9. The BOE's Appeal 39

10. Further Judgments 39

STANDARD OF REVIEW AND SUMMARY OF ARGUMENT 40

ARGUMENT 42

POINT I

THE BOE WAIVED THE ARGUMENTS IT RAISES ON THIS APPEAL 42

POINT II

THE COURT SHOULD NOT REVISIT ITS PRIOR HOLDINGS AS TO LIABILITY 47

POINT III

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY RESOLVING UNCERTAINTIES REGARDING BACKPAY DAMAGES AGAINST THE BOE 48

1. The Resolution of Uncertainties Against the BOE Is Appropriate Because the BOE—Not Its Victims—Is Responsible for the Discrimination 50

2. The Cases Cited by the BOE, in Which Courts Invalidated Longstanding Discriminatory Statutes and Policies in a "Marked Departure" from Past Practice, Are Inapposite 52

POINT IV

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY REJECTING A CLASSWIDE BACKPAY REDUCTION FOR THE PROBABILITY OF APPOINTMENT 55

1. The BOE's Proposed Twenty-Five Percent Reduction Is Hypothetical, Unreliable, and Unsupported 56

2. Title VII Does Not Require a Classwide Reduction of Backpay Damages Based on Probability-of-Appointment..................................57

a. *No Classwide Reduction to Backpay Was Required—or Appropriate—Because There Were Sufficient Vacancies for Class Members* 59

b. *Any Reduction to a Class Member's Damages to Account for the Probability of Being Hired Should Be Determined Through Individual Hearings*..63

3. Any Uncertainty About Whether a Class Member Would Have Been Hired Must Be Resolved Against the BOE, the Discriminating Party 64

POINT V

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY ORDERING THAT POST-APPOINTMENT ATTRITION BE PART OF THE DEFAULT DAMAGES MODEL, SUBJECT TO MODIFICATION BASED ON INDIVIDUAL FACTS 66

1. Title VII Does Not Require the Irrebuttable Application of Attrition Probabilities 67

a. *Application of Post-Hiring Attrition Rates Is Not Required*...............69

b. *The BOE's Cases Do Not Support Its Argument* 72

2. The Model and Individual Hearing Process Conforms to Title VII's Mandate that Victims of Discrimination Be Made Whole 74

a. *The District Court Requires Probabilities of Post-Appointment Attrition to Be the Baseline from Which Adjustments Can Be Made Based on Individual Determinations*..75

b. *The Special Master and District Court's Individualized Rulings Are Reasonable and Consistent*...78

c. *The BOE Mischaracterizes the Results of the Individual Hearing Process* 81

d. *The BOE's Examples Support the District Court's Approach*............86

3. The BOE's Proposed Post-Appointment Attrition Model Is Unworkably Vague 89

POINT VI

PLAINTIFFS SHOULD NOT BEAR THE BURDENOF DELAYS RESULTING FROM BOE STRATEGIES 91

CONCLUSION 933

CERTIFICATE OF COMPLIANCE 94

TABLE OF AUTHORITIES

Page(s)

Cases

Albemarle Paper Co. v. Moody,
422 U.S. 405 (1975)....................*passim*

Anderson v. City of Bessemer City, N.C.,
470 U.S. 564 (1985)....................41, 88

Ass'n Against Discrimination in Employment, Inc. v. City of Bridgeport ("AADE"),
647 F.2d 256 (2d Cir. 1981)....................*passim*

Bd. of Educ. of the City Sch. Dist. of N.Y. v. Gulino,
554 U.S. 917 (2008)....................11

Chin v. Port Auth. of N.Y. & N.J,
685 F.3d 135 (2d Cir. 2012)....................57

City of Los Angeles, Dep't of Water & Power v. Manhart,
435 U.S. 702 (1978)....................53

Claiborne v. Illinois Cent. R. R.,
583 F.2d 143 (5th Cir. 1978)....................59

Cohen v. W. Haven Bd. of Police Comm'rs,
638 F.2d 496 (2d Cir. 1980)....................*passim*

Daubert v. Merrell Dow Pharm., Inc.,
509 U.S. 579 (1993)....................56

Doe v. N.Y. City Dep't of Soc. Servs.,
709 F.2d 782 (2d Cir. 1983)....................48

Dougherty v. Barry,
869 F.2d 605 (D.C. Cir. 1989)....................61, 73

Durham Life Ins. Co. v. Evans,
166 F.3d 139 (3d Cir. 1999)....................48

E.E.O.C. v. Dial Corp.,
469 F.3d 735 (8th Cir. 2006) 58, 70

E.E.O.C. v. Enter. Ass'n Steamfitters Local No. 638 of U. A.,
542 F.2d 579 (2d Cir. 1976) 50, 51, 65

E.E.O.C. v. Joint Apprenticeship Comm. of Joint Indus. Bd. of Elec. Indus.,
186 F.3d 110 (2d Cir. 1999) 52, 53

E.E.O.C. v. Local 638, Local 28 of Sheet Metal Workers' Int'l Ass'n,
532 F.2d 821 (2d Cir. 1976) 58

Eastman Kodak Co. v. AGFA-Gevaert N.V.,
No. CIVA 02-CV-6564-T-F, 2006 WL 1738425 (W.D.N.Y. May 26, 2006) 40

E.E.O.C. v. Joe's Stone Crab, Inc.,
15 F. Supp. 2d 1364 (S.D. Fla. 1998) ....*passim*

E.E.O.C. v. Mike Smith Pontiac GMC, Inc.,
896 F.2d 524 (11th Cir. 1990) 73

Ernst v. City of Chicago,
No. 08 C 4370, 2018 WL 6725866 (N.D. Ill. Dec. 21, 2018) 69

Franks v. Bowman Transp. Co.,
424 U.S. 747 (1976) 68

Greene v. U.S.,
13 F.3d 577 (2d Cir. 1994) 40

Griggs v. Duke Power Co.,
401 U.S. 424 (1971) 54

Gulino et al. v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y.,
201 F.R.D. 326 (S.D.N.Y. 2001) 9

Gulino v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y.,
No. 96 Civ. 8414 (CBM), 2003 WL 25764041 (S.D.N.Y. Sept. 4, 2003) 10

Gulino v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y.,
907 F. Supp. 2d 492 (S.D.N.Y. 2012) 6, 11

Gulino, et al. v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y.,
460 F.3d 361 (2d Cir. 2006) 6, 8, 10, 41

Gulino, et al. v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y.,
555 Fed. App'x 37 (2d Cir. 2014) 11, 12, 43

Hameed v. Int'l Ass'n of Bridge, Structural, & Ornamental Iron Workers, Local Union No. 396,
637 F.2d 506 (8th Cir. 1980) 61, 73

Ingram v. Madison Square Garden Ctr., Inc.,
709 F.2d 807 (2d Cir. 1983) 61, 72, 73, 91

Kober v. Westinghouse Elec. Corp.,
480 F.2d 240 (3d Cir. 1973) 52

Kumho Tire Co., Ltd. v. Carmichael,
526 U.S. 137 (1999)...56

LeBlanc v. S. Bell Tel. & Tel. Co.,
333 F. Supp. 602 (E.D. La. 1971), *aff'd*, 460 F.2d 1228 (5th Cir. 1972) 53

Manning v. Int'l Union,
466 F.2d 812 (6th Cir. 1972) 52

McClain v. Lufkin Indus., Inc.,
519 F.3d 264 (5th Cir. 2008) 61, 73

Milanese v. Rust–Oleum Corp.,
244 F.3d 104 (2d Cir. 2001) 41

Pettway v. Am. Cast Iron Pipe Co.,
494 F.2d 211 (5th Cir. 1974) 61, 73

Rios v. Enter. Ass'n Steamfitters Local Union 638 of U.A.,
860 F.2d 1168 (2d Cir. 1988) 41

Robinson v. Metro-N. Commuter R.R. Co.,
267 F.3d 147 (2d Cir. 2001) 60

Sands v. Runyon,
28 F.3d 1323 (2d Cir. 1994) 41, 92

Schaeffer v. San Diego Yellow Cabs,
462 F.2d 1002 (9th Cir. 1972) 52

Segar v. Smith,
738 F.2d 1249 (D.C. Cir. 1984)...48, 89

Small v. Sec'y of Health & Human Servs.,
892 F.2d 15 (2d Cir. 1989) 40

Smith v. Frank,
923 F.2d 139 (9th Cir. 1991) 40

Sprague & Rhodes Commodity Corp. v. Instituto Mexicano Del Cafe,
566 F.2d 861 (2d Cir. 1977) 85

Stewart v. General Motors Corp.,
542 F.2d 445 (7th Cir. 1976) 73, 74

United States v. City of Miami,
195 F.3d 1292 (11th Cir. 1999) 61, 72, 73

United States v. City of New York,
847 F. Supp. 2d 395 (E.D.N.Y. 2012)..54

United States v. Gordon,
723 F. App'x 30 (2d Cir. 2018)...85

United States v. Quintieri,
306 F.3d 1217 (2d Cir. 2002) 47

United States v. United States Gypsum Co.,
333 U.S. 364 (1948)..41

Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.,
396 F.3d 96 (2d Cir. 2005) 45

Wooldridge v. Marlene Indus. Corp.,
875 F.2d 540 (6th Cir. 1989) 48

Statutes

42 U.S.C. § 2000e. 1

Other Authorities

30 Fed. Reg. 14926-01 (1965) 53

Fed. R. Civ. P. 23(b)(2)..9

Fed. R. Civ. P. 52(a)(6)..41

Fed. R. Civ. P. 53(f)(2) 40

Fed. R. Evid. 702 56

PRELIMINARY STATEMENT

Appellees respectfully submit this brief in opposition to the appeals filed by Appellant The Board of Education of the New York City School District of the City of New York (the "BOE") from the first 347 individual class-member judgments of the United States District Court (Wood, K.) (the "Judgments"). These appeals represent the BOE's latest attempt to delay and avoid liability for its decades-old violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e *et seq*.

Due to the BOE's use of the discriminatory Liberal Arts and Sciences Test (the "LAST") for almost two decades after this case was filed, Appellees' careers have been ruined and their lives upended. This Court first affirmed that the BOE could be liable for this harm more than a decade ago. It is now time to bring finality and much deserved relief to the Plaintiff class.

The BOE does not contest that the LAST is invalid. It does not argue that the Plaintiff class was not discriminated against. Instead, the BOE asks this Court to find that the class members have no remedy to redress the unlawful discrimination that they suffered. In making this argument, the BOE concedes that this Court has *twice* held that it can be liable for discriminating against African-American and Latino teachers who sought to remain or become regularly appointed classroom teachers in New York City's public schools because they had

not passed the LAST.[1] Similarly, the BOE did not seek review of this Court's second decision in 2014 affirming the BOE's liability, or of the myriad classwide damages model decisions made years ago, including those at issue here.

Instead, when this case was filed in 1996, seeking to hold both the BOE and the New York State Education Department ("SED") liable for the discriminatory LAST, the BOE took a backseat to the SED. That choice—to allow the SED to take the lead in defending its illegal exam—set the BOE on a course it continues to follow today: attempting to shirk all responsibility for its discriminatory employment practices that destroyed the careers of thousands of dedicated New York City public school teachers. Twenty-five years later, having long failed to take this case seriously, the BOE is now faced with final Judgments requiring it to pay hundreds of millions of dollars in backpay, pension, and other relief to make its victims financially whole.

This relatively straightforward Title VII case has a staggering financial cost for the BOE because of the pervasiveness and duration of its unlawful discrimination. The law at issue here has been well-settled since at least 2014, when this Court affirmed the BOE's liability for its discriminatory use of the

---

[1] *See* BOE Page-Proof Brief, dated November 8, 2019 ("Brief") at 37-38, citing *Gulino, et al. v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y.*, 460 F.3d 361, 379-80 (2d Cir. 2006) and *Gulino, et al. v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y.*, 555 Fed. App'x 37, 38-40 (2d Cir. 2014).

LAST to make employment decisions. None of the facts that form the basis of this Court's 2014 liability ruling have changed, and there is therefore no basis to reconsider that decision.

But, since the parties were last before this Court, the facts required to determine individual damages awards have resulted in a complex factual record, which the BOE's brief does not acknowledge. Over the last five years, the parties have worked closely with the Special Master and district court to devise a highly technical damages model to determine individual monetary and non-monetary relief for over 4,500 class members whose damages periods range from a few weeks to upwards of twenty years.

The BOE has not challenged the specific backpay damage award for a single class member. Instead, it attempts to gloss over the remarkably individualized facts of this case that the Special Master and district court have diligently considered as part of the damages phase. Both the Special Master and district court have painstakingly learned about and considered the detailed facts about particular class members' hiring, salaries, career advancement, attrition probabilities, and post-employment behavior to effect the damages process about which the BOE now complains. It was the BOE that originally demanded this individualized approach and, other than its request that this Court reverse its 2014

affirmance, the BOE does not seek to eliminate the individual hearing process through this appeal. It only seeks to modify two elements of it.

As a result of the BOE's failure to address in any detail the work that has gone into the damages process resulting in the Judgments, Appellees are compelled to correct and clarify the record for this Court, which necessitates not only elucidating the complexities of the damages model, but also exposing the myriad examples of the BOE's waiver of the overwhelming majority of the arguments raised before this Court. This Court should not mistake the level of detail in what follows for any concession by Appellees that the BOE's positions have any merit. They do not.

The BOE's appeal raises the following three questions relating to the proper measure of backpay damages:

> (1) whether the district court properly followed well-established Title VII law by resolving various uncertainties against the BOE, the party responsible for the uncertainty (the BOE has renamed this fundamental Title VII remedial principle the "wrongdoer rule");
>
> (2) whether the district court properly refused to apply a proposed 25% classwide reduction to backpay damages based on the BOE's expert's unexplained, unsubstantiated, and unreliable calculation that each class member had only a 75% chance of appointment even if she[2] had passed the LAST; and

[2] "She" and "her" are used as generic terms to refer to class members.

> (3) whether the district court properly affirmed the individual factual determinations made by the Special Master based upon both post-appointment attrition statistics and individual facts, which were largely not objected to by the BOE, concerning how long individual class members would have worked for the BOE had it not unlawfully discriminated against them.

In each instance, the answer is yes. The district court acted correctly and its decisions should be affirmed.

Finally, despite asserting in its application to stay enforcement of the Judgments that New York City, with an annual budget of $90 billion, has ample financial resources to pay the Judgments, the BOE now claims that the financial burden it faces as a result of the district court's decisions threatens vital City services.[3] As a result, the BOE "invites" the Court to revisit its liability decision and asks the Court to find that the district court abused its discretion in failing to make classwide reductions of damages which it asserts would save the City tens of millions of dollars. The reality is that the City faces a significant aggregate judgment in this case because of the scope of its unlawful employment practices and its refusal to take responsibility for their impact on the thousands of individuals against whom it discriminated. The ultimate price tag for the City's destruction of the careers of a generation of African-American and Latino teachers is a function of the breadth and length of this discrimination and not any abuses of

---

[3] Brief, 38.

discretion by the district court. This Court should reject the positions advocated by the BOE, and instead affirm the findings of the district court and allow class members to finally be made whole.

COUNTERSTATEMENT OF THE CASE

CRITICAL SHORTAGE OF CERTIFIED NYC PUBLIC SCHOOL TEACHERS AND THE BOE'S USE OF THE LAST

For a full description of the history regarding the certification of NYC public school teachers, including the BOE's implementation of the LAST, Appellees respectfully refer the Court to its prior decisions in this case, as well as those of the district court.[4]

Beginning in 1991, the BOE lacked sufficient certified teacher applicants for full-time teaching positions, requiring the BOE to request and renew state temporary licenses to fill those vacancies with uncertified teachers.[5] To remedy this, the SED and BOE created a temporary state license for a new category of teachers: Preparatory Provisional Teachers ("PPTs").[6] By the mid-1990s, the

[4] *See Gulino v. N.Y. State Educ. Dept.*, 460 F.3d 361, 364-68 (2d Cir. 2006); *Gulino v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y.*, 907 F. Supp. 2d 492, 498-500 (S.D.N.Y. 2012).

[5] A-1249-50.

[6] A-2325. PPTs are also referred to in the record as "regular substitute teachers."

number of annual applications for and renewals of these state temporary licenses was "somewhere around 8,000" and eventually reached as high as 13,000.[7]

Due to this widespread shortage of certified teachers, the BOE hired many uncertified teachers and allowed them to remain in their classrooms as full-time teachers despite not having passed the LAST.[8] Thus, many PPTs who never passed the LAST were hired and retained by the BOE to teach the same students and same subjects as regularly appointed certified teachers, albeit at reduced salaries and with reduced benefits.[9] PPT licenses could be renewed yearly, so long as the PPT teacher met other requirements.[10] Despite performing essentially the same work as appointed teachers, PPTs continued to teach full time without accruing seniority and at lower salary and benefit levels than appointed teachers.[11]

Many previously credentialed full-time BOE teachers were also subject to the LAST testing requirement, and when they could not pass the exam, the BOE

---

[7] A-1250.

[8] *Id.*

[9] A-2325-2327.

[10] A-2326-2327.

[11] A-1102; A-2325-2326.

demoted them to regular substitute teachers.[12] These teachers remained in their same classrooms, but with reduced salaries and benefits.[13]

In 2003, SED abruptly stopped renewing temporary licenses, and the BOE terminated the majority of PPTs due to their inability to pass the LAST. These individuals could only continue teaching as day-to-day ("per diem") substitutes, and suffered more significant reductions in compensation and benefits even though they continued to teach with the BOE.[14] In practice then, the BOE used the LAST not to determine whether these teachers should be allowed to teach (because they continued to teach), but to reduce their compensation and benefits.

Further, despite its assertions that it had "no way to know the [LAST] was unlawful,"[15] the BOE has been aware for decades that the LAST had a disparate impact on African-American and Latino applicants and did not measure a teacher's ability, yet continued to use it to make employment decisions in a manner contrary to the LAST's express purpose.[16] By early 1996, teachers had begun filing complaints against the BOE before the Equal Employment Opportunity

[12] A-1611.

[13] *Id.*

[14] *Id.*

[15] Brief, 2.

[16] *Gulino*, 460 F.3d at 368.

Commission, and in November 1996, this Complaint was filed, alleging, in part, that "white test-takers have passed the LAST at an average rate of 93%, while African American and Latino test-takers have passed at rates of only 54% and 50%, respectively."[17]

For the last twenty-five years, the BOE has been on notice of statistics that objectively evidence the LAST's disparate impact on minority applicants, yet it continued to use LAST results to make employment decisions until the district court entered its first injunction in 2014.

PROCEDURAL HISTORY

In November 1996, the Complaint was filed on behalf of a putative class of African-American and Latino public school teachers employed by the BOE who, on or after June 29, 1995, failed to receive, or were demoted from, a permanent teaching appointment as a result of their failure to pass the LAST.

In a July 13, 2001 decision and order, Judge Motley certified a plaintiff class under Fed. R. Civ. P. 23(b)(2).[18]

---

[17] A-488.

[18] *Gulino, et al. v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y.,* 201 F.R.D. 326, 330 (S.D.N.Y. 2001)

1. The BOE Is Held Liable For Violating Title VII By Using The LAST To Make Employment Decisions

After a bench trial that concluded in 2003, the district court held that although the plaintiffs pled a prima facie case of disparate impact, the BOE and SED established that the LAST, and another test not relevant here, were job related.[19]

Plaintiffs appealed, and in 2006, this Court affirmed the application of Title VII and overturned the district court's finding of job relatedness because, *inter alia*, it applied the wrong legal standard.[20] This Court also explained that, consistent with its prior holdings, "'Title VII explicitly relieves employers from any duty to observe a state hiring provision which purports to require or permit any discriminating employment practice.'"[21] While acknowledging the "difficult situation that this creates for the BOE," this Court nevertheless held that "Title VII requires this result."[22]

---

[19] *See Gulino v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y.*, No. 96 Civ. 8414 (CBM), 2003 WL 25764041, at *31 (S.D.N.Y. Sept. 4, 2003).

[20] *Gulino*, 460 F.3d at 385-86.

[21] *Id.* at 380 (*quoting Guardians Ass'n v. Civil Serv. Comm'n of N.Y.*, 630 F.2d 79, 105 (2d Cir. 1980)).

[22] *Id.* at 381.

Following that decision, the BOE filed a petition for certiorari with the United States Supreme Court, which declined to hear the case.[23] Instead, this case was remanded to the district court for further proceedings consistent with this Court's decision.

On remand, in December 2012, the district court concluded that the BOE violated Title VII by requiring passage of the LAST, which was never properly validated.[24] In its Order, the district court also held that because of the Supreme Court's holding in *Wal-Mart Stores, Inc. v. Dukes*, the previously certified class could not seek classwide backpay and other forms of individualized relief.[25] As a result, the district court maintained the class for injunctive purposes, but decertified the class for the damages phase, with leave to seek certification of an appropriate remedial-phase class.

The BOE once again appealed the district court's ruling, this time on an interlocutory basis, asking this Court to revisit the question of, *inter alia*, whether the BOE should be liable "for complying with a facially neutral state licensing requirement."[26]

---

[23] *Bd. of Educ. of the City Sch. Dist. of N.Y. v. Gulino*, 554 U.S. 917 (2008).

[24] *Gulino*, 907 F. Supp. 2d at 503.

[25] *Id.*

[26] *Gulino*, 555 Fed. Appx. at 39.

In early 2014, this Court, by summary order, again rejected the BOE's contention that it could not be held liable for complying with a facially neutral state certification requirement because, among other reasons, it was "the law of the case" that "the mandates of state law are no defense to Title VII liability."[27] In that appeal, like here, the BOE presented "no new evidence or any relevant intervening change in the law," and this Court saw "no injustice—let alone manifest injustice—in adhering to [its] prior decision."[28] The BOE did not seek Supreme Court review of this Court's 2014 Order.

2. The BOE Argues For Individual Backpay Determinations At Remedy-Phase Class Certification

While the BOE's second appeal was pending, on August 29, 2013, the district court certified a "remedy-phase class" for the purpose of determining classwide backpay and other relief.[29] This determination was to occur in two stages: a first stage addressing "classwide issues, including calculation of backpay,

[27] *Id.* at 37, 39.

[28] *Id.* at 40.

[29] A-1631. On June 17, 2014, the district court expanded the remedy-phase class to include all African-American and Latino individuals employed as NYC public school teachers, on or after June 29, 1995, who failed to achieve a qualifying score on LAST-1 given on or before February 13, 2004, at which time the BOE stopped administering the initial version of the LAST. A-1665. Subsequently, after the district court determined that a subsequent version of the LAST, the LAST-2, also had a disparate impact, the remedy-phase class definition was revised to read: "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.

pension benefits, and seniority;" and a second phase addressing "individual issues, including mitigation and the amount of backpay to which each class member is entitled."[30]

In certifying the class, the district court relied on the testimony of BOE witness Gary Barton, the BOE's former First Executive Director, Office of Field and Information Services, Division of Human Resources and Talent, who testified that, beginning in 1991, there were not enough certified teacher applicants for full-time teaching positions, requiring the BOE to fill vacancies with uncertified teachers.[31] Ultimately, the BOE sought as many as 13,000 state temporary licenses annually to fill the vacancies.[32]

Significantly, throughout the class-remedy certification phase, the BOE never raised or provided evidence to support what it now claims to be an entirely unpredictable hiring process; instead, it argued against *any* backpay determination using a classwide approach.[33]

In October 2010, the BOE argued that, because Plaintiffs' employment histories will vary, the BOE "is entitled to discovery and individualized

---

[30] A-1619.

[31] *Id.*; A-1249-50.

[32] A-1250.

[33] A-1084.

determinations concerning the actual behavior of each plaintiff, including whether they have engaged in different careers, retired, become disabled and unable to work, died, or remained in the work force."[34] Subsequently, in its opposition to certification of the remedy-phase class, the BOE again argued *against* classwide determinations of backpay damages because "[i]n reality, the determination of back pay is highly individualized."[35] The BOE again argued that individualized determinations were required to calculate backpay for putative class members because "a host of necessarily *individualized determinations*, related to his or her particular life circumstances will be required . . .."[36]

In its 2013 remedy-phase certification decision, the district court agreed with the BOE's position, and ruled that any "proposal to use an expert to adjust the backpay calculation to account for the probability that a teacher would have earned more or less money throughout their career as a result of various opportunities and circumstances . . . is not suitable for classwide resolution" because "[t]hese issues are not susceptible to common proof for the class as a whole and are better addressed individually at the second stage of the proceedings."[37]

---

[34] *Id.*

[35] A-1571.

[36] A-1584 (emphasis added).

[37] A-1620-21 (quotations omitted).

In May 2014, the district court appointed a Special Master to oversee the two-stage remedial phase and "render decisions regarding classwide damages and relief issues and preside over the process of individual class member hearings and issue decisions following those hearings."[38]

In his first Interim Recommendation and Interim Report, dated October 24, 2014, the Special Master provided guidance as to factual issues and burdens of proof that would apply in the damages phase of the case. He specifically noted that the BOE would be able to obtain discovery and present evidence at individual hearings concerning whether any class member was not entitled to backpay damages because she would not have been hired by the BOE absent the discriminatory LAST.[39]

Later in 2014, the district court issued an injunction prohibiting the BOE from continuing to use the LAST to make employment decisions, and permitting class members to be deemed certified solely for purposes of employment with BOE, despite failing the LAST.[40] To be "deemed certified," class members must establish that they satisfied the current or former certification requirements, other than passing the LAST, after which the class member could apply to be hired by

[38] A-2016.

[39] A-1697-1715.

[40] A-1719-1721.

the BOE for permanent employment as an appointed teacher. As of April 1, 2020, 205 class members have been deemed certified by the Court.

3. Proceedings Before the Special Master Regarding Classwide Backpay Calculations

From the beginning of 2015 through the summer of 2016, the parties and their experts submitted letter briefs and expert reports to the Special Master, who held multiple conferences and hearings regarding the parties' proposed methodologies for computing class members' damages.[41] The Special Master addressed numerous disputes as to the categories of individuals potentially eligible for damages, the categories of damages to be calculated, and how a damages model should determine the scope of class members' "counterfactual" BOE service.[42] Two of these disputes—and the only issues the BOE raises on this appeal—concerned the likelihood that class members would have become regularly appointed BOE teachers absent discrimination, and how to determine an end date for class members' counterfactual service.[43]

Completely reversing its prior position that damages calculations required individualized determinations, the BOE now argues that class members' monetary

---

[41] A-1726-1752; A-1755-1991; A-2054-2148.

[42] "Counterfactual service" refers to the service a class member would have had, absent discrimination.

[43] A-2017.

damages should be reduced "on a classwide basis to reflect the possibilities: (a) that some class members would not have been hired even if they had passed the LAST-1; and (b) that some class members would have voluntarily left the [BOE's] employ or taken early retirement even if they had passed the LAST-1 and were hired."[44] The BOE refers to these two categories of proposed reductions as "probability of appointment" and "post-appointment attrition," respectively.[45]

a. Probability of Appointment

1. The BOE's Approach

Despite its previous arguments to the district court that individual hearings were required to determine each class member's likelihood of appointment, the BOE argued that damage awards should automatically be reduced by 25% "to reflect the average hiring rate during the class period."[46]

The BOE's expert, Dr. Christopher Erath, submitted a report in which he hypothesized that "approximately 25 percent of non-black/Hispanic teachers did not obtain a permanent position even after passing the LAST."[47] The BOE did not offer any caselaw to support the application of its proposed reduction. Dr. Erath

---

[44] A-2028.

[45] Brief, 19.

[46] A-2029; A-1729.

[47] A-1729.

provided no data to support his proposed reduction, nor that his approach was generally accepted by the relevant professional community, or how he chose his comparator population.[48] Nor did Dr. Erath explain whether or how this proposed reduction in damages would impact the determination of "counterfactual" service credits for individual class members, which both parties understood would determine class members' non-monetary relief, including pension benefits.[49] Ultimately, neither the BOE nor Dr. Erath submitted *any* evidence establishing that their methodology was based on sufficient facts or data, was the product of reliable principles and methodologies, or applied reliably to the facts of the case.

2. Plaintiffs' Approach

Plaintiffs' expert, Dr. Thomas DiPrete, submitted a report proposing that the model not include classwide reduction in damages based on any alleged "probability of appointment."[50] Dr. DiPrete's approach was based on the district court's finding that it "is not suitable for classwide resolution" to "use an expert to adjust the backpay calculation 'to account for the probability that a teacher would have earned more or less money throughout their career as a result of various

---

[48] A-1728, 1731-1732.

[49] A-1726.

[50] A-1740-1752.

opportunities and circumstances …'[.]"[51] Dr. DiPrete proposed that his damages model would be the "starting point for the determination of the individual monetary relief of each class member" and that the actual amount of damages for each class member would be determined by using the information in his damages model "along with all the other information that is relevant to the specific history and circumstances of that individual class member."[52]

b. Post-Appointment Attrition

1. The BOE's Approach

The BOE also argued that classwide reductions to backpay were necessary to account for "the possibility that the class member might have left [the BOE's] employ had they been appointed."[53] To calculate post-appointment attrition probabilities, Dr. Erath merely stated that he examined the "experiences of non-black/Hispanic teachers who were appointed permanent teachers" and the proportions of them who left BOE employment.[54] Dr. Erath proposed applying these attrition probabilities to reduce damages only in years after a class member

---

[51] A-1620-1621.

[52] A-1740.

[53] A-1731.

[54] *Id.*

"left [BOE] service."[55] Importantly, Dr. Erath did not propose applying these attrition probabilities to class members who were demoted or terminated from permanent teaching positions—even if those class members later left BOE service.[56]

Dr. Erath did not state whether he considered the age of non-class comparators or class members when determining post-appointment attrition probabilities. In fact, Dr. Erath again provided no facts or data supporting his selection of the comparator population or his post-hire attrition probabilities.[57] As with his proposed probability of appointment reduction, Dr. Erath failed to establish that his methodology was based on sufficient facts or data, the product of reliable principles and methodologies, or applied reliably to the facts of the case.

2. Plaintiffs' Approach

Plaintiffs, by contrast, did not propose including a reduction for post-appointment attrition because, consistent with the district court's prior decision, "pre-retirement attrition may be relevant at particular individual hearings and in those situations the Model's computation may or may not be revised downward to

---

[55] A-1731. The BOE now claims that Dr. Erath only proposed applying these probabilities to the years after a class member was actually working "as a BOE teacher." Brief, 22.

[56] *See* A-1734. Dr. Erath proposed a different approach to account for a population of demoted teachers who were not re-appointed, but the BOE has not sought or otherwise raised that approach in this appeal.

[57] A-1731.

account for possible attrition depending on individual circumstances….”[58] Plaintiffs argued that no classwide reduction to backpay damages was appropriate because individual circumstances and facts concerning whether an individual class member would “attrit,” prior to retirement, would be presented at individual hearings.

4. The Special Master's Interim Reports & Recommendations

The Special Master issued two Interim Reports and Recommendations (the “IRRs”), dated July 17, 2015 and June 13, 2016, regarding the calculation of class members' damages.[59] In the IRRs, the Special Master explained that he would not categorically reduce damages based on statistical probabilities of appointment or post-appointment attrition. Instead, because the individual hearings were necessarily required regardless of how these issues were resolved, the parties would have the opportunity to present evidence related to these issues for each class member.[60] The Special Master found that statistical evidence “may be admissible to show what a class member would have done, but … is not dispositive.”[61]

---

[58] A-1746.

[59] A-2014-53, 2191-2224.

[60] A-2018.

[61] *Id.* at A-2028

a. The Special Master held that the BOE may offer evidence in individual hearings that, based on the BOE's hiring practices, particular class members would not have been hired

The Special Master found the BOE's proposed 25% classwide reduction of damages based on the probability of appointment to be inconsistent with the Court's finding that a surplus of positions existed throughout the class period.[62] The Special Master rejected the BOE's assertion that it would be "unjust" to ignore the hiring statistics, and reiterated that this question "remains a matter for individual determinations, subject to the limitations the parties agreed to in their March 23, 2015 Stipulation and Order."[63] In that Stipulation and Order, the BOE agreed that it would not raise certain employment factors as a defense or offset to monetary relief at any individual hearings, unless those factors "were actually the basis of (1) a for-cause termination; or (2) the initiation of a termination proceeding or a disciplinary or investigatory proceeding that allegedly would have resulted in the class member's inevitable termination."[64]

The Special Master noted that, under his prior recommendations, the BOE could challenge any class member's entitlement to backpay during individual hearings on the ground that he or she would not have been hired, and if a 25%

[62] A-2029.

[63] A-2030.

[64] *Id.*; A-1723-1725.

reduction in backpay was also applied, the BOE would enjoy a windfall from the reduction in damages across the class.[65]

b. The Special Master held that post-hiring attrition should be included in the damages Model, but either party could offer evidence in individual hearings to modify that Model

The Special Master also rejected the BOE's proposed irrebuttable classwide reduction of backpay based on post-appointment attrition because, while the BOE "is correct that teachers often leave early (or 'attrit') for a variety of reasons," "a class member's end date should be determined at individual hearings, unless the parties stipulate otherwise."[66] The Special Master recognized that "classwide calculations would undercompensate some class members, and overcompensate others," but found that individualized determinations were necessary "to provide the most complete relief possible and to best recreate what would have transpired absent any discrimination."[67]

The Special Master also recognized that the BOE had changed its previous position during the class-certification process, noting that the BOE's resistance to individualized hearings on backpay was "undercut" by its prior argument that "the end date for any backpay is individualized . . . . We suspect that some individuals

[65] A-2029-2030.

[66] A-2031.

[67] *Id.* at A-2033 (citing *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 372 (1977)).

will have left the workforce as the result of retirement, disability, incarceration, raising a family or other personal reasons."[68]

Nevertheless, and contrary to the BOE's mischaracterization on appeal, the Special Master directed that "statistical evidence of how similarly situated non-class comparators attrited will be considered *in the first instance*."[69] He did *not,* as the BOE's brief suggests, recommend an evidentiary presumption that all class members would have remained employed at the BOE through the date of judgment. Instead, the Special Master imposed—and has followed—the opposite presumption. Individualized determinations of class members' backpay begin with baseline calculations that incorporate attrition rates of similarly-situated, non-class comparators. Plaintiffs, however, may seek damages through the date of judgment, but must submit evidence to support the removal of attrition probabilities from a class member's backpay calculation.

The Special Master noted that, for certain populations, there was little-to-no uncertainty as to their counterfactual service period. Specifically, "[n]o uncertainty will exist for class members who are still working at the BOE as of the date of judgment or who worked at the BOE until their retirement" or death, and "little uncertainty will exist for class members who later passed the LAST-1 and

[68] A-2037.

[69] A-2035 (emphasis added).

achieved a full time teaching position before leaving the Defendant's employ," which ends those class members' damages periods.[70]

The Special Master advised that he "will have the opportunity to assess the evidence at the individual hearings,"[71] and explained that both parties "will be free to offer evidence to establish why the statistical baseline should not be the 'duration [*i.e.*, damages] period' in the case of any individual class member," including evidence of intent, proof of continued employment or actual cessation of employment, disability, personal needs or other probative evidence.[72] The BOE had, and continues to have, the opportunity to establish that any class member's damages period should be shorter than the baseline by presenting "proof specific to the individual class member, including that he or she was convicted of a crime, ceased working altogether, or moved out of state to aid an ailing relative."[73] The Special Master made clear that the BOE would be able to articulate its need for specified discovery concerning the class member's proposed counterfactual end date, and, upon a proper showing, cross-examine the class member.[74]

---

[70] A-2036.

[71] *Id.*

[72] A-2035.

[73] A-2036-2037.

[74] A-2037.

Finally, the Special Master found "no merit" in the BOE's complaint that it may end up paying more to certain class members than it otherwise would have paid had it never discriminated because 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."[75]

5. Defendant's Limited Objections to the Special Master's IRRs

The BOE filed objections to the Special Master's IRRs, including objections to the recommendations regarding attrition.[76] In its objections, the BOE acknowledged that "the global application of an attrition rate might result in a given alleged discrimination victim being undercompensated."[77] The BOE also made clear that its argument for the classwide application of post-appointment attrition was based on its concern that discovery would be limited if a class member sought to depart from comparator-based post-appointment attrition probabilities.[78] The BOE then conceded, however, that "[t]o the extent the Interim Report and Recommendation's intent is to permit the described discovery

---

[75] A-2038 (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-19 (1975)).

[76] A-2043-2053; A-2247-2251.

[77] A-2052.

[78] A-2052-2053.

whenever 'a claimant intends to prove that he or she would have worked longer than the 'duration period' prediction by the attrition statistics for non-class comparators,' ***defendant has no objection***."[79] The Special Master has expressly provided for, and the BOE has had access to, this kind of discovery throughout the individual hearing process.

The BOE made a limited objection to the Special Master's assertion that there was no dispute that class members who "remained at the BOE despite its discriminatory conduct would have remained at least as long absent the discrimination."[80] The BOE stated that it "does not accept this proposition as it relates to per diems."[81] The BOE did not object to the Special Master's finding as it applied to class members who remained at the BOE in other positions.

6. <u>The District Court Adopts the Special Master's IRRs</u>

The district court "agree[d] with the Special Master's recommendations," denied the BOE's motion for classwide reductions, and held that disputes concerning hiring decisions and attrition should be resolved by individual hearings.[82]

---

[79] *Id.* at A-2052 (emphasis added).

[80] A-2250.

[81] *Id.*

[82] SPA-3, 14.

With regard to the probability of appointment, the district court cited its 2013 decision, in which "the Court has found that qualified class members would have gone on to be permanent teachers," and found "no reason" to apply the BOE's proposed classwide 25% reduction based on hiring decisions.[83] The district court reasoned that if the BOE believes that a particular class member would not have been hired for some non-discriminatory reason, it "will have the opportunity to raise its arguments at that class member's individual hearing."[84]

The district court also agreed with the Special Master's recommendation that a classwide application of post-appointment attrition probabilities, without the opportunity for individual hearings, "is inappropriate."[85] Noting that "[c]lasswide calculations would undercompensate some class members, and overcompensate others," the district court found that individualized determinations—the approach the BOE had previously advocated—"will best recreate what would have occurred absent discrimination."[86] The district court took special note of the fact that the BOE "once agreed with this position" when it argued for individualized damages

---

[83] SPA-11-12.

[84] SPA-12.

[85] *Id.*

[86] *Id.*

hearings in opposition to the certification of a remedy-phase class.[87] Moreover, "[a]ny 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."[88] The district court further held that it must, "as nearly as possible, recreate the conditions and relationships that would have been had there been no unlawful discrimination."[89] Thus, "[e]ach plaintiff must have the opportunity to offer evidence that will establish, as closely as possible, his/her own damages" and the BOE "will be free to offer evidence concerning the correct award for each class member."[90] The district court advised that the "Defendant[] should not underestimate its ability to show or the Special Master's ability to fairly discern the validity of claims and the nuances of different cases during individual hearings."[91]

The BOE did not seek interlocutory appeal of the district court's decision, instead waiting three years and 347 Judgments to raise these issues before this Court.

---

[87] SPA-13, n. 9.

[88] SPA-13.

[89] SPA-13-14 (citing *Int'l Broth. of Teamsters*, 431 U.S. at 372).

[90] SPA-14.

[91] *Id.*, n. 10.

7. Plaintiffs Develop a Baseline Damages Model, Which the Special Master and District Court Subsequently Apply

Pursuant to the Special Master's recommendations, adopted by the district court, and in accordance with other agreements between the parties, Plaintiffs' expert developed a damages model that applied the following baseline rules to the calculation of each class member's damages (the "Model"). The BOE's expert never created a damages model that incorporated the Special Master's rulings, instead relying on Plaintiffs' Model when reviewing individual damage demands.[92]

a. Counterfactual Appointment/Damages Start Date

The beginning of a class member's counterfactual service as a BOE teacher depends on whether the class member was demoted from a regularly appointed BOE teacher position ("Demoted Class Members"), or was unable to obtain or delayed in obtaining a regularly appointed position due to the LAST ("Non-Demoted Class Members").

The Model assumes that Demoted Class Members would not have been demoted, and their damages and counterfactual service begin on the date of their demotion.[93] The Model assumes that, pursuant to the parties' agreement, Non-Demoted Class Members would have been hired as regularly appointed BOE

[92] CA-172.

[93] A-2319.

teachers eighteen months after they first failed the LAST (the "Counterfactual Appointment Date").[94]

b. Counterfactual Salary

Regularly appointed BOE teacher salaries, pursuant to collective bargaining agreements, depend on two factors: (1) "salary step" based on years of service; and (2) educational differential based on further education attained.[95] The Model continues to advance Demoted Class Members through the BOE's salary steps counterfactually from their demotion dates onwards as though the demotions never occurred.[96] Non-Demoted Class Members are given counterfactual salary steps on their Counterfactual Appointment Dates based on their prior actual service history with the BOE, and then advance a half-step every six months.[97] The Model determines counterfactual educational attainment for both Demoted Class Members and Non-Demoted Class Members based on the educational advancement of non-class comparators.[98]

---

[94] *Id.* Non-Demoted Class Members are not eligible for damages, however, until they work as a BOE teacher after first failing the LAST. A-2022.

[95] A-2201.

[96] A-2204.

[97] A-2209.

[98] A-2208.

c. Counterfactual End Date

The Model applies comparator-based probabilities of post-appointment attrition, beginning at a class member's last date of BOE employment and, for class members currently employed by the BOE, presumes that backpay damages accrue through the date of judgment.[99] The Model ends a class member's damages period upon: (1) actual termination for cause based on a list of terminations-for-cause provided by the BOE; (2) passage of LAST prior to February 1, 2002 and subsequent termination for failure to meet other requirements; (3) passage of LAST, regular appointment, and then departure from BOE service; and (4) retirement from BOE service according to BOE service records.[100]

d. Mitigation, Backpay and Pre-Judgment Interest

The Model computes each class member's mitigation on a monthly basis, based on a class member's BOE earnings, if any, or SSA earnings in each month during that class member's damages period.[101] Also on a monthly basis, the Model computes each class member's backpay damages as the difference between counterfactual salary and mitigation. Where post-appointment attrition applies, the

---

[99] A-2035.

[100] *See* A-2091; CA-1.

[101] A-2201; A-2223; CA-99; CA-142-145; CA-160; A-2320.

Model reduces monthly damages by the probability the class member would not have remained a regularly appointed teacher during the relevant month.

Per the parties' agreement, class members receive pre-judgment interest on backpay damages at the Treasury Bill rate.[102]

The parties also stipulated to certain Classwide Conclusions of Law, applied to damages calculations for all class members.[103] For example, *inter alia,* the parties expressly stipulated that "[u]ncertainties are resolved against the party responsible for the lack of certainty," that the district court will assume "an 18-month lag period between a class member's first failure of the LAST and the class member's counterfactual appointment as a permanent regularly appointed teacher," and that "[b]ackpay will ordinarily run until the date of judgment."[104]

8. <u>Individual Hearings and Judgments Regarding Remedies</u>

In October 2016, Plaintiffs began submitting individual damages demands for class members (the "Demands") in biweekly batches.[105] The parties, with the Special Master's oversight, agreed to the form of the Demands, as well as the

---

[102] A-2200 at fn.9.

[103] A-2317-2324.

[104] A-2318-2320.

[105] *See* CA-2.

procedure for their resolution.[106] This procedure contemplates a response by the BOE, discovery, prehearing submissions, and, if necessary, in-person hearings.

In each Demand, Plaintiffs detail the results of the Model (*i.e.*, the baseline damages for that class member) and any requested adjustments to those damages.[107] Plaintiffs also articulate the factual basis for deviating from the Model, often in the form of affidavits from class members or record citations.[108]

Based on information collected from class members in their damages Demands, Plaintiffs often *shorten* class members' counterfactual service periods, remove probabilities of post-appointment attrition, and end the accrual of backpay damages prior to the date of judgment thereby reducing the damages sought for those class members to amounts that are lower than predicted using attrition.[109]

---

[106] *See id.*

[107] *See id.*

[108] *See, e.g.*, B. Abraham (MS-CA-3559-67) (attaching affidavit, in support of removal of post-appointment attrition, detailing teaching career outside the BOE after LAST-related termination); R. Gonzalez (MS-CA-6201-09) (same). Appellees use "MS-CA-" to refer to the Confidential Joint Appendix of Class Member-Specific Documents and "MS-A-" to refer to the Joint Appendix of Class Member-Specific Documents, which were filed May 21, 2020 as deferred appendices.

[109] *See, e.g.*, J. Caraballo (MS-CA-2036-41) (accounting for majority of a $400,000 reduction in backpay); B. Moorning (MS-CA-3355-59) (accounting for approximately $270,000 reduction in backpay); A. Burgos (MS-CA-3197-200) (accounting for over $60,000 reduction in backpay); A. Flores (MS-CA-2928-32) (accounting for approximately $180,000 reduction in backpay); E. Oesterreicher (MS-CA-2551-55) (accounting for majority of a $100,000 reduction in backpay); A. Miller (MS-CA-3674-78) (accounting for majority of approximately $260,000 reduction in backpay); P. Feist (MS-CA-6312-17) (accounting for portion of over $70,000 reduction in backpay); V. Frye (MS-CA-2056-61) (accounting for majority of over $450,000 reduction in backpay); B. Gonzalez (MS-CA-4067-72) (accounting for majority of over $400,000 reduction in backpay); D. Mancebo (MS-CA-2912-14) (accounting for over $300,000 reduction in

In its responses to Demands, the BOE was obligated to raise objections to each class member's damages calculation, including its own requested deviations from the Model.[110] The Special Master also repeatedly instructed the BOE to include any objections to the Special Master's prior rulings, as they applied to the particular class member, that the BOE sought to preserve for appeal.[111] Where the BOE lodged an objection to a particular Demand, the BOE had the opportunity to seek relevant discovery.[112] In no Demand response did the BOE object to the removal of attrition and an earlier counterfactual end date where the application of the baseline Model (*i.e.*, damages through the date of judgment reduced by post-appointment attrition) would have entitled the class member to higher backpay

backpay); S. McCaskill (MS-CA-1734-40) (accounting for part of over $500,000 reduction in backpay); P. Olaya (MS-CA-4757-62) (accounting for portion of approximately $300,000 reduction in backpay); C. Williams (MS-CA-4107-12) (accounting for over $180,000 reduction in backpay); S. Williams (MS-CA-5655-59) (accounting for over $240,000 reduction in backpay); E. Capers (MS-CA-5175-79) (accounting for approximately $100,000 reduction in backpay). In certain cases, Demands reduced damages by imposing a counterfactual end without the need to remove attrition probabilities, as the class member was still employed at the BOE as of the end date. *See, e.g.*, J. Goodson (MS-CA-5255-60) (end date accounting for portion of approximately $300,000 reduction in backpay); M. Keys (MS-CA-2946-50) (accounting for approximately $120,000 reduction in backpay); H. Locke (MS-CA-4411-15) (accounting for approximately $170,000 reduction in backpay); S. Louison (MS-CA-3519-23) (accounting for approximately $90,000 reduction in backpay); K. Marcus (MS-CA-1716-20) (accounting for over $330,000 reduction in backpay); M. Paul (MS-CA-5469-73) (accounting for over $300,000 reduction in backpay).

[110] *See* A-2149-2168; CA-8.

[111] *See*, *e.g*., CA-12 (December 8, 2016 Conference Summary), CA-50 (January 4, 2017 Conference Summary), CA-88-89 (January 18, 2017 Conference Summary) (Special Master instructing the BOE that "any objection must be contained on the first page in the column titled 'Def.'s Objections to Pls.' Demands'").

[112] *See* A-2149-2168.

damages. The BOE, however, did occasionally object that an even earlier counterfactual end date should apply based on individualized facts.[113]

In addition to seeking discovery regarding class members' Demands, the BOE may also contest a class member's credibility and cross-examine that class member before the Special Master.[114] But the BOE neither questioned the credibility of, nor requested live testimony from, a single class member whose judgment is at issue on this appeal.

The BOE's objections, if any, to a class member's Demand were resolved in one of the following ways:

(1) withdrawal of the objection;

(2) Plaintiffs accepted the objection;

(3) the parties reached a resolution; or

(4) the Special Master ruled on the objection.

In all circumstances where a class member was eligible for non-monetary relief in addition to monetary damages (*e.g.*, counterfactual seniority and pension benefits),

[113] *See, e.g.,* E. Capers (MS-CA-5193) (BOE objection—ultimately accepted—that damages should end earlier than stated in Demand and further reduce backpay by approximately $180,000).

[114] *See* CA-5-6.

individualized counterfactual start dates and counterfactual end dates were determined.[115]

If the damages sought by a Demand were subsequently modified to incorporate the BOE's objections, the Model was used to recalculate damages.[116] The BOE's expert, in every instance, reviewed the subsequent calculations and disputed those he believed were incorrect.[117] Demands were finally resolved only after the BOE's expert agreed that the calculations were correct.

After resolving each Demand, the Special Master issued a report and recommendation ("R&R") regarding the class member's damages, which was comprised of, among other categories, backpay, a tax-component, fees incurred in taking the LAST, pre-judgment interest, and pension relief.[118] The Special Master also submitted to the district court a proposed judgment and Proposed Findings of Fact and Conclusions of Law ("FOFCOL") for each class member, in which he

---

[115] *See*, *e.g.*, R. Davis FOFCOL (MS-A-4717-18, MS-A-4724) (applying counterfactual end date prior to date of judgment based on parties' resolution of scope of class member's backpay damages); A. Cruz FOFCOL (MS-A-9073, MS-A-9079-80) (same); E. Dezonie FOFCOL (MS-A-8986-89, MS-A-8987) (applying counterfactual end date prior to date of judgment based on Special Master ruling); J. Staley FOFCOL (MS-A-6900, MS-A-6907) (applying date of judgment as counterfactual end date after Defendant withdrew objection that post-appointment attrition should apply); *see also* A-2353-2404, 2367-68 (Stipulation & Order concerning pension relief, requiring BOE to provide for each class member eligible for a pension benefit "counterfactual service and salary information in accordance with the class member's individual judgment award such as is necessary for the Affected System to determine the pension benefits the class member would have received absent the BOE's discrimination").

[116] CA-172.

[117] CA-172-173.

[118] *See*, *e.g.*, MS-A-1-24 (V. Munoz R&R with FOFCOL).

detailed the factual support for the calculation of backpay based on the individual facts and evidence presented by the parties.[119] The FOFCOLs also described the Special Master's determinations regarding the appropriate end date for each class member's backpay, including how the BOE's objections, if any, were resolved.[120]

The district court adopted each of the Special Master's R&Rs, entered the Judgments in favor of each of the 347 Appellees, and certified each Judgment as final pursuant to Federal Rule of Civil Procedure 54(b).

On April 29, 2019, the BOE moved to stay enforcement of all Judgments pending the resolution of this appeal.[121] In support of its request to stay enforcement of the monetary portion of the Judgments, the BOE affirmed that the "annual budget of the City of New York is in excess of $90 billion" and that the "financial resources of the City of New York are sufficient that if the [J]udgments presently entered against the [BOE], and any future judgments that may be entered in this case, are upheld on appeal, the City would be able to pay those judgments."[122] The district court granted the BOE's unopposed motion with respect to the monetary relief granted in the Judgments; however, the motion was

---

[119] *Id.*

[120] *Id.*

[121] *See* ECF.1473-1475.

[122] ECF.1475 (Declaration of Preston Niblack, Deputy Comptroller for Budget) at ¶ 2; *see also* ECF.1474, at p. 4 (same).

denied to the extent it pertains to the non-monetary, injunctive relief granted in the Judgments, including health benefits, pension relief, and seniority adjustments.[123]

9. The BOE's Appeal

The BOE now appeals from each of the 347 Judgments entered by the district court. These Judgments represent a small portion—less than 8%—of the entire class.

The BOE does not raise each of its issues on appeal with regard to all 347 Judgments. Rather, the BOE challenges only its liability for certain Judgments, post-appointment attrition and liability for other Judgments, and all issues for others still.[124] In *not one* instance, however, has the BOE appealed a specific class member's calculation of damages based on the individual facts and circumstances underlying her particular FOFCOL.

10. Further Judgments

As of the date of this brief, in addition to the 347 Judgments at issue here, the district court has entered an additional 859 judgments, 226 of which were not

[123] *See* ECF.1839, at pp. 3, 8-9.

[124] *See* Addendum to BOE brief.

appealed.[125] The Special Master has also resolved hundreds more Demands through the individual hearing process described above.[126]

STANDARD OF REVIEW AND SUMMARY OF ARGUMENT

It is "a well-established rule that an appellate court will not consider an issue raised for the first time on appeal."[127] Further, the BOE's failure to timely object to any of the Special Master's recommendations operates as a waiver of this Court's review of those recommendations.[128]

To the extent there are issues properly before this Court, the BOE acknowledges that the issues it raises on appeal fall within the district court's broad discretion to fashion appropriate backpay relief in accordance with Title VII's

---

[125] *See generally* docket in *Gulino v. Bd. Of Educ.,*96-cv-8414 (KMW). All appealed Judgments subsequent to the 347 at issue have been remanded to the district court pending resolution of this appeal.

[126] *See* CA-1-618 (Special Master Conference Summaries, September 16, 2016 through March 1, 2019); ECF.2810 (Special Master Conference Summaries, April 3, 2019 through July 30, 2019); ECF.3970 (Special Master Conference Summaries, August 7, 2019 through October 3, 2019); ECF.4645 (Special Master Conference Summaries, October 7, 2019 through December 19, 2019); ECF.4950 (Special Master Conference Summaries, January 7, 2020 through March 19, 2020).

[127] *Greene v. U.S.*, 13 F.3d 577, 586 (2d Cir. 1994).

[128] *See* Fed. R. Civ. P. 53(f)(2) ("A party may file objections to—or a motion to adopt or modify—the master's order, report, or recommendation. . ."); *Small v. Sec'y of Health & Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989) ("We have adopted the rule that failure to object timely to a magistrate's report operates as a waiver of any further judicial review of the magistrate's decision."); *Eastman Kodak Co. v. AGFA-Gevaert N.V.*, No. CIVA 02-CV-6564-T-F, 2006 WL 1738425, at *1 (W.D.N.Y. May 26, 2006) ("Neither party has filed objections to [the Special Master's] Reports One and Three, and accordingly, the parties have waived their rights to *de novo* review of those Reports") (citing *Small*, 892 F.2d at 16); *see also Smith v. Frank*, 923 F.2d 139, 141 n.1 (9th Cir. 1991) ("Failure to object to special master's findings and conclusions is treated identically to failure to object to magistrate's findings and conclusions.").

statutory aim of making victims whole.[129] The applicable standard of review is whether the district court abused that discretion.[130] "A district court abuses its discretion if it bases its ruling on a mistaken application of the law or a clearly erroneous finding of fact."[131]

To the extent that the BOE challenges the nature or sufficiency of the evidence supporting any particular Judgment, the BOE must establish that the factual determinations in those Judgments were clearly erroneous.[132] This Court can only reverse the district court's factual finding if "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."[133]

---

[129] *See* Brief, 31–34.

[130] *See Rios v. Enter. Ass'n Steamfitters Local Union 638 of U.A.*, 860 F.2d 1168, 1175 (2d Cir. 1988).

[131] *Milanese v. Rust–Oleum Corp.*, 244 F.3d 104, 110 (2d Cir. 2001). *Accord Sands v. Runyon*, 28 F.3d 1323, 1327 (2d Cir. 1994) ("We generally review [Title VII] remedial relief on an abuse of discretion basis. . . . However, when the district court is sitting as a factfinder, as for example when computing the measure of money damages, we will reverse the computation of damages only if clearly erroneous.") (internal citations omitted).

[132] *See* Fed. R. Civ. P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility."). *Accord Gulino v. N.Y. State Educ. Dep't*, 460 F.3d 361, 381 (2d Cir. 2006) ("'We review the district court's findings of fact for clear error'") (quoting *Wilson v. Nomura Sec. Int'l, Inc.*, 361 F.3d 86, 89 (2d Cir.2004)).

[133] *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). *Accord Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 565, 573–74 (1985) ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.").

The district court did not abuse its discretion by resolving uncertainties against the BOE, the discriminating party, rather than resolving them against the victims of the BOE's discrimination. The district court's decisions were entirely consistent with Second Circuit precedent, and the BOE presents no basis for finding that the district court mistakenly applied the law.

The district court similarly did not abuse its discretion by adopting the Special Master's recommendations to reject both a classwide 25% reduction in damages based on the probability of appointment, and classwide irrebuttable probabilities of post-appointment attrition. The district court's decisions adhere to Title VII's principle of make-whole relief, and the BOE failed to present actual reliable evidence that the individualized approach to computing damages, which the BOE originally supported, would be unreasonable.

ARGUMENT

POINT I

THE BOE WAIVED THE ARGUMENTS IT RAISES ON THIS APPEAL

As a threshold matter, the BOE asks this Court to consider arguments that it waived or forfeited either by not raising them before the Special Master and/or district court, or by failing to preserve them, despite express and repeated instructions from the Special Master.

As this Court properly determined in affirming the district court's liability ruling in 2014, the BOE already forfeited its argument that it should not be liable for complying with a state certification requirement when it purportedly "had no basis to know that the LAST was discriminatory."[134]

With regard to the so called "wrongdoer rule," the BOE stipulated that any "[u]ncertainties are resolved against the party responsible for the lack of certainty."[135] Having already agreed that these uncertainties *must* be resolved against the party responsible for the discrimination, the BOE has waived this issue for appeal.

The BOE also failed to preserve its arguments regarding probability of hire by failing to properly object to any of the 347 Judgments on that ground. Further, to the extent the BOE had or has a good-faith basis to believe that any particular class member, absent the BOE's discrimination, would not have been appointed, it had the ability, and the obligation, to raise that issue at individual hearings.[136] It has failed to do so, and that issue cannot be raised on this appeal. Similarly, the BOE did not raise any argument regarding what it now claims to be an

---

[134] Brief, 40. *See Gulino v. Bd. of Educ.*, 555 Fed. Appx. 37, 39 (2014) (holding that the BOE "forfeited this argument by initially raising it before the district court—which rejected the argument—and then abandoning it in the first appeal to this Court").

[135] A-2318-2320.

[136] SPA-12. (The BOE "will have the opportunity to raise its arguments at that class member's individual hearing").

unpredictable hiring process. Instead, it consistently argued against any classwide backpay determinations, because it would lead to "inaccurate payments to plaintiffs and undue financial harm to the City."[137]

Regarding post-appointment attrition, the BOE conceded to the district court that it *had no objection* to the Special Master's approach to post-appointment attrition as long as the BOE had access to relevant discovery.[138] The BOE has always had such access. Accordingly, this Court should not entertain the BOE's efforts to overturn a process to which it agreed.

Additionally, not only did the BOE originally argue that backpay calculations be done on an individualized basis; it also never requested that the Special Master or district court apply post-appointment attrition probabilities to reduce backpay for class members who left BOE service after being *demoted* from regularly appointed teacher positions due to the LAST. The BOE also never asked the Special Master to reduce damages based on the probability of attrition during years in which class members remained in BOE service.[139] Now, however, the BOE asks this Court to do so in both circumstances—even to class members who

---

[137] A-1084.

[138] A-2052.

[139] *See supra* § II.3.b.1.

continued working as PPTs—in an effort to further decrease the BOE's liability.[140] This Court should not consider the substance of an attrition model whose scope was never before the Special Master or district court.[141]

Finally, the Special Master repeatedly directed the BOE to specify in its responses to Demands the objections it sought to preserve with regard to any ruling on the Model as applied to any class member.[142] The BOE failed to preserve probability of appointment-related objections for any class members and did not request a hearing in connection with a single one of the 347 Judgments.

The BOE failed to preserve post-hiring attrition-related objections for the majority of the 223 individuals identified in BOE Table A. The six class members the BOE cites as examples of an inequitable process merely confirm that it failed to properly preserve the objections on which it now bases this appeal. Of those six, the BOE affirmatively objected to the removal of attrition for only three of them,

---

[140] *See, e.g.*, G. Elrod FOFCOL (MS-A-6316-18, MS-A-6322) (worked as BOE regular substitute until counterfactual end date); E. Hughes FOFCOL (MS-A-9371-73, MS-A-9377) (same); L. Girault FOFCOL (MS-A-7013-22, MS-A-7025-26) (demoted due to LAST, then worked outside BOE and as BOE per diem teacher until counterfactual end date); M. Keys FOFCOL (MS-A-4636-38, MS-A-4642) (demoted due to LAST, then worked as BOE regular substitute until counterfactual end date).

[141] *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 124 n.29 (2d Cir. 2005) ("The law in this Circuit is clear that where a party has shifted his position on appeal and advances arguments available but not pressed below, . . . waiver will bar raising the issue on appeal.") (internal quotations omitted).

[142] *See*, *e.g*., CA-12 (December 8, 2016 Conference Summary), CA-50 (January 4, 2017 Conference Summary), CA-88-89 (January 18, 2017 Conference Summary) (Special Master instructing the BOE that "any objection must be contained on the first page in the column titled 'Def.'s Objections to Pls.' Demands'").

and failed to raise the issue before the Special Master with regard to the others.[143] The BOE never contested (or requested a hearing regarding) the removal of attrition probabilities, and thus an award of unreduced backpay damages through the date of judgment, for Virginie Casimir or Maritza Mateo-Sencion,[144] and the BOE voluntarily withdrew its attrition objection to Carole Gustama's demand.[145] In fact, the BOE failed to present record evidence to this Court that it preserved objections to any of the Judgments with regard to attrition assumptions.

At every step, the BOE waived or withdrew its objections, and/or stipulated to much of the process it now seeks to challenge. Now, years later, with Plaintiffs, the Special Master and the district court having relied upon the BOE's conduct and positions, the BOE seeks to upend their efforts to finally conclude this decades-old case. The BOE should not be allowed to play fast and loose with preservation requirements by inviting the Court to view these issues abstractly, rather than as they arose at the time and were painstakingly resolved by the Special Master and

---

[143] *See infra* at § VII.2.d.

[144] *See* V. Casimir FOFCOL (MS-A-524-25 p. 2); M. Mateo-Sencion FOFCOL (MS-A-3702-04). Casimir was employed by the BOE as a PPT. After taking and failing the LAST a few times, she left education and worked as a fraud investigator for 16 years. (MS-A-525-27). Mateo-Sencion was employed by the BOE as a PPT prior to failing the LAST. She then worked as a BOE per diem teacher before undertaking non-education work. She ultimately passed the LAST, but by that point the BOE's hiring requirements had changed and, as a result, she still was not hired for a regularly appointed teacher position. (MS-A-3704-06 p. 6).

[145] *See* C. Gustama FOFCOL (MS-A-3029-31). Gustama was employed by the BOE as a PPT, was terminated for failing to pass the LAST, and worked consistently in non-BOE professional positions through the date of judgment. (MS-A-3032-33).

district court. Accordingly, the Court should decline to reconsider any of these waived issues. Even if considered, the BOE's arguments are without merit.

POINT II

THE COURT SHOULD NOT REVISIT ITS PRIOR HOLDINGS AS TO LIABILITY

The BOE acknowledges that this Court has twice held that the BOE can be, and is, liable for violating Title VII by using the LAST to make employment decisions.[146] Nevertheless, despite admitting that these rulings are "the law of the case," the BOE "invites the Court" to reconsider. But the BOE provides no cognizable basis to do so, because none exists.

This Court has repeatedly held that "when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case."[147] Only in the face of "'cogent' or 'compelling' reasons" will this Court depart from this "sound policy" and the "major grounds justifying reconsideration are 'an intervening change of controlling law, the availability of

[146] Brief, 37.

[147] *United States v. Quintieri*, 306 F.3d 1217, 1225 (2d Cir. 2002) (citing *United States v. Uccio*, 940 F.2d 753, 757 (2d Cir. 1991)).

new evidence, or the need to correct a clear error or prevent manifest injustice.'"[148]

None of these grounds exists here.

POINT III

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY RESOLVING UNCERTAINTIES REGARDING BACKPAY DAMAGES AGAINST THE BOE

Well-established law provides that uncertainties in Title VII cases should be resolved against the party responsible for the uncertainty—typically, the discriminating party.[149] Despite this clear legal principle, the unanimity of its application by courts, and its proper application by both the Special Master and the abuse of discretion.[150]

---

[148] *Doe v. N.Y. City Dep't of Soc. Servs.*, 709 F.2d 782, 789 (2d Cir. 1983) (citing 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4478, at 790 (1981)) (citations omitted).

[149] *See*, *e.g.*, *Ass'n Against Discrimination in Emp't, Inc. v. City of Bridgeport ("AADE")*, 647 F.2d 256, 289 (2d Cir. 1981) ("[T]o the extent that it is uncertain whether a candidate would have met the [defendant's] nondiscriminatory requirements, the uncertainty 'should be resolved against the defendant, the party responsible for the lack of certainty.'") (citations omitted). *See also Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 156 (3d Cir. 1999) ("The court may estimate what a class member's earnings would have been without discrimination, and uncertainties are resolved against a discriminating employer.") (citations omitted); *Wooldridge v. Marlene Indus. Corp.*, 875 F.2d 540, 546 (6th Cir. 1989) ("[V]ictims of discrimination are entitled to a presumption in favor of relief; because 'recreating the past will necessarily involve a degree of approximation and imprecision,' . . . all doubts are to be resolved against the proven discriminator rather than the innocent employee.") (citation omitted); *Segar v. Smith*, 738 F.2d 1249, 1291 (D.C. Cir. 1984) ("If effective relief for the *victims* of discrimination necessarily entails the risk that a few nonvictims might also benefit from the relief, then the employer, as a proven discriminator, must bear that risk.").

[150] Brief, 44-45.

When the rhetoric and pleas for sympathy because the BOE failed to take this case seriously twenty years ago are swept aside, it is unclear what the BOE is asking this Court to do. Regardless of the BOE's intent, its argument fails for at least two reasons: one legal and one pragmatic. *First*, while the BOE recasts this evidentiary presumption as a punitive rule flowing from its liability, the BOE obfuscates the practical consequences of its request. The only alternative for addressing the uncertainty inherent in class members' counterfactual careers would be to resolve it ***against the BOE's victims***, penalizing them for the harm they suffered because of the BOE's discriminatory practices. This perverse result is contrary to Title VII's "twin statutory goals of eliminating the effects of discrimination and compensating its victims,"[151] and it is no wonder that courts have refused to adopt the reasoning urged by the BOE.

Second, the BOE repeatedly claims that it did not know the LAST was discriminatory. This is not true. Moreover, Congress and the courts have made it clear that intent is irrelevant in a disparate impact case. As the Supreme Court stated in *Albemarle Paper Co. v. Moody*, "Title VII is not concerned with the employer's 'good intent or absence of discriminatory intent.'"[152]

---

[151] *Cohen v. W. Haven Bd. of Police Comm'rs*, 638 F.2d 496, 504 (2d Cir. 1980).

[152] *Albemarle*, 422 U.S. at 422–23 (quoting *Griggs*, 401 U.S. at 432).

1. The Resolution of Uncertainties Against the BOE Is Appropriate Because the BOE—Not Its Victims—Is Responsible for the Discrimination

The BOE does not cite to any cases where a district court's resolution of uncertainties against the discriminating party was reversed as an abuse of discretion. To the contrary, there are numerous cases where this Court has found the *failure* to apply the rule to be an abuse of discretion.[153] The application of this rule is simple: the BOE has discriminated, there is uncertainty caused by that discrimination, that uncertainty is resolved against the BOE.

In *Equal Employment Opportunity Comm'n v. Enter. Ass'n Steamfitters Local No. 638 of U.A.*, the district court denied backpay to plaintiffs because of uncertainty due to the absence of certain documents.[154] On appeal, this Court acknowledged it was "reluctant to reverse" the district court's "exercise of remedial discretion."[155] Nonetheless, it found that the court had abused that discretion by resolving the uncertainty caused by the lack of paperwork against the employees, because doing so "would serve to 'frustrate the central statutory purposes' of Title VII" and "'reward the [defendants] … for their record-keeping failures,'" "since one reason that there may be no documentary proof is that the

[153] *See*, *e.g.*, *E.E.O.C. v. Enter. Ass'n Steamfitters Local No. 638 of U.A.*, 542 F.2d 579, 583 (2d Cir. 1976); *Cohen*, 638 F.2d at 502.

[154] 542 F.2d at 583.

[155] *Id*.

[defendants] kept incomplete records of their membership applications."[156] This Court reached that conclusion, notwithstanding a finding that the discriminatory test at issue was adopted in good faith and upon the recommendation of experts.[157]

Similarly, in *Cohen v. W. Haven Bd. of Police Comm'rs*, this Court reversed the district court's finding that the defendant had satisfied its burden of establishing that the plaintiffs would not have been hired absent discrimination.[158] There, the defendant offered evidence that, after failing a discriminatory test, the plaintiffs also failed to subsequently pass a newly designed non-discriminatory test. While this Court acknowledged that the situation was unclear as to one plaintiff, it reversed the district court's decision as an abuse of discretion, holding that "any uncertainty in either case must be laid to the [defendant]."[159] Again, this Court reached its conclusion despite the district court's finding that the defendant had acted in good faith.[160]

---

[156] *Id.* at 586 (quoting *E.E.O.C. v. Local 638, Local 28 of Sheet Metal Workers' Int'l Ass'n*, 532 F.2d 821, 832 (2d Cir. 1976)).

[157] *Id.* at 584.

[158] *Cohen*, 638 F.2d at 502 (explaining that when "it remains uncertain whether the plaintiff would have been hired in the absence of the discriminatory practice, and the uncertainty flows from that practice, the issue should be resolved against the defendant, the party responsible for the lack of certainty").

[159] *Id.* at 503.

[160] *Id.* at 504.

Despite these clear precedents and without any basis in caselaw, the BOE wrongly attempts to recast this mandated approach for resolving uncertainties as punishment for only intentional discrimination. This Court has made clear that only the defendant's "employment practices are at issue, not any notion of bad faith or intent."[161] All that matters is that the employer's actions "are the source of the uncertainty."[162]

2. The Cases Cited by the BOE, in Which Courts Invalidated Longstanding Discriminatory Statutes and Policies in a "Marked Departure" from Past Practice, Are Inapposite

In an attempt to rewrite Title VII law, the BOE relies on two inapposite categories of cases that also found Title VII violations, but limited damages for reasons that do not apply here. The first category invalidated state "female protective" statutes, which were common during the twentieth century and typically limited the number of hours that female employees could work.[163] The

---

[161] *See, e.g.*, *E.E.O.C. v. Joint Apprenticeship Comm. of Joint Indus. Bd. of Elec. Indus.*, 186 F.3d 110, 122 (2d Cir. 1999) ("[a]ny uncertainty as to whether the plaintiff would have been hired is resolved against the defendant, since it is the defendant's discriminatory employment practices which are the source of the uncertainty").

[162] *Id.*

[163] *See* Brief, 42 (citing *Le Beau v. Libby-Owens-Ford Co.*, 727 F.2d 141, 149-50 (7th Cir. 1984) (finding Title VII liability for complying with Illinois criminal law limiting hours for female employees); *Kober v. Westinghouse Elec. Corp.*, 480 F.2d 240, 248 (3d Cir. 1973) (finding Title VII liability for not promoting female employee to a position which would conflict with Pennsylvania laws limiting hours for female employees); *Manning v. Int'l Union*, 466 F.2d 812, 815-16 (6th Cir. 1972) (invalidating Ohio female protective statutes under Title VII); *Schaeffer v. San Diego Yellow Cabs*, 462 F.2d 1002, 1006 (9th Cir. 1972) (finding Title VII liability for complying with California law limiting hours for female employees and awarding partial

second category invalidated retirement benefit plans that discriminated on the basis of sex. In overturning these statutes and policies, the courts uniformly recognized that doing so constituted a significant constitutional development and a "marked departure from past practice."[164]

All of the cases cited by the BOE involved facially discriminatory statutes/policies that had been considered lawful.[165] These decisions are fundamentally different from disparate impact cases, which typically involve policies or practices that are facially non-discriminatory, but reveal discrimination over time.[166] That the LAST's discriminatory impact may not have been immediately apparent to the BOE is far from unique. Adopting the BOE's reasoning that its claimed lack of intent to discriminate somehow reduces the scope

---

backpay); *Le Blanc v. S. Bell Tel. & Tel. Co.*, 460 F.2d 1228, 1229 (5th Cir. 1972) (invalidating Louisiana female protective statutes under Title VII)).

[164] *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 722 (1978).

[165] *See*, *e.g.*, *LeBlanc v. S. Bell Tel. & Tel. Co.*, 333 F. Supp. 602, 606 (E.D. La. 1971), *aff''d*, 460 F.2d 1228 (5th Cir. 1972) ("No *female* shall be employed in any . . . telephone or telegraph . . . company, . . . for more than eight hours in any one day and not more than forty-eight hours or six days in any consecutive seven day period.") (quoting La. Rev. Stat. § 23:332) (emphasis added) (other alterations in original); Equal Employment Opportunity Commission, Part 1604: Guidelines on Discrimination Because of Sex, 30 Fed. Reg. 14926-01 (1965) ("Probably the most difficult area considered in these guidelines is the relation of Title VII to state legislation designed originally to protect women workers. The Commission cannot assume that Congress intended to strike down such legislation." The guidelines ultimately determined such statutes to be "a basis for application of the bona fide occupational qualification exception.").

[166] *See Joint Apprenticeship Comm.*, 186 F.3d at 117 ("[The plaintiff's] claims fall within . . . the so-called 'disparate impact' theory of employment discrimination, the archetype of which involves a facially-neutral hiring or promotion policy which disproportionately impacts a protected group.") (citation omitted).

of its liability would impermissibly eliminate awards of backpay in disparate impact cases.[167] The BOE's approach is contrary to the long line of cases awarding damages in disparate impact cases.[168]

Also, contrary to the cases cited by the BOE, the district court's decision to hold the BOE accountable for its discrimination does not constitute a shift in law.[169] Therefore, unlike in the female protective statute and employee retirement benefit plan cases cited by the BOE, there is no fundamental constitutional shift resulting from holding the BOE liable for its discrimination and awarding its victims backpay damages. The only change in the law at issue here is the one advanced by the BOE, which this Court should summarily reject.

---

[167] *See Albemarle*, 422 U.S. at 421 ("[G]iven a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination . . . and making persons whole."). *Accord Schaeffer*, 462 F.2d at 1006 ("We agree with the Fifth, Seventh, and Tenth Circuits, and adopt a broad interpretation of the term "intentionally" to include all employment practices engaged in deliberately rather than accidentally.") (citations omitted).

[168] *See*, *e.g.*, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Cohen*, 638 F.2d at 496; *AADE*, 647 F.2d at 256; *United States v. City of New York*, 847 F. Supp. 2d 395 (E.D.N.Y. 2012).

[169] *See*, *e.g.*, *AADE*, 647 F.2d at 256 (awarding backpay to African-American and Hispanic class disparately impacted by firefighter exam); *Cohen*, 638 F.2d at 496 (awarding backpay to female class disparately impacted by physical agility test); *United States v. City of New York*, 847 F. Supp. at 395 (awarding backpay to African-American and Hispanic plaintiffs disparately impacted by firefighter exams).

POINT IV

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY REJECTING A CLASSWIDE BACKPAY REDUCTION FOR THE PROBABILITY OF APPOINTMENT

The district court correctly held that there was "no reason to grant Defendant's motion for a classwide reduction based on hiring decisions" because it had already determined that there were sufficient vacancies for all class members.[170] According to the BOE, however, the Special Master and district court ignored comparator-based statistical evidence demonstrating that 25% of class members who worked as regular substitute teachers would *not* have been appointed as permanent BOE teachers even had they passed the LAST. And, given the "complex, decentralized, and discretional nature of BOE's appointment process," it would have been "[im]possible to identify which of the more than 4,500 class members" would have been appointed.[171] On this basis, the BOE argues that the district court was required to apply a "classwide pro rata damages reduction to account for the less-than-full probability of appointment," and its failure to do so was an abuse of discretion.[172]

---

[170] SPA 11-12.

[171] Brief, 45-46. According to the BOE, this argument would "not apply to those class members who actually had and lost, or eventually attained regular appointed BOE teaching positions," as identified in the addendum to its brief. *Id.* at 46, n. 12.

[172] *Id.* at 46.

The BOE failed to present the Special Master or district court with competent evidence to satisfy even threshold evidentiary standards to support *any* reduction in backpay damages, let alone the unsupported 25% discount it now seeks. Further, the district court had before it evidence that the number of appointed teacher vacancies during the class period *far exceeded* the number of class members.[173] Thus, Title VII requires that class members be fully compensated for their injuries.[174]

1. The BOE's Proposed Twenty-Five Percent Reduction Is Hypothetical, Unreliable, and Unsupported

The BOE failed to present any evidence establishing that its expert's proposed reduction was supported by sufficient facts or data; was the product of reliable, generally accepted principles and methodologies; or was applied reliably to the facts of this case.[175]

Dr. Erath provided not one shred of data supporting his conclusory findings that "approximately 25 percent of non-black/Hispanic teachers did not obtain a

[173] A-1250. To the extent that the BOE complains that the district court failed to consider evidence that the BOE had not presented (Brief, 60), this is a basis for a finding of waiver, not abuse of discretion by the district court.

[174] *Albemarle*, 422 U.S. at 421.

[175] *See generally*, Fed. R. Evid. 702; *see also Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593-94, 597 (1993) (holding that an expert's testimony must rest "on a reliable foundation and [be] relevant to the task at hand," with testing, peer review, error rates and "acceptability in the relevant scientific community as factors to help determine reliability"); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999) (holding that *Daubert*'s reliability standard applies to all expert testimony "based on 'technical' and 'other specialized' knowledge").

permanent position even after passing the LAST," nor did he identify the criteria for his comparator group of "non-black/Hispanic teachers who passed the LAST." The record on appeal is similarly devoid of any back-up corroborating the 25% calculation or the rationale for choosing his comparator pool.

As evidenced by this record, the BOE failed to present a scientifically reasonable and verifiable method by which to calculate its proposed classwide reduction of backpay damages. There is no way to confirm or validate the BOE's proposed calculation, and the district court did not abuse its discretion by rejecting the BOE's unsupported 25% discount.[176] The BOE's complete failure of proof at the classwide damages phase almost five years ago should not be used now to justify setting aside not only the 347 Judgments on appeal, but also the thousands of other judgments that have since been, or will be, entered, based on a hypothetical and unsupported theory of probability of appointment.

2. Title VII Does Not Require a Classwide Reduction of Backpay Damages Based on Probability-of-Appointment

Additionally, the BOE misstates Title VII law and mischaracterizes the factual record when it claims that "Title VII remedial principles require classwide pro rata adjustments to backpay and related relief where data show[s] that each

---

[176] *See Chin v. Port Auth. of N.Y. & N.J*, 685 F.3d 135, 161 (2d Cir. 2012) (holding the district court "did not abuse its discretion in concluding that it lacked evidence that [defendant's expert]'s testimony was based on established principles and methods" where the expert's analysis "was both brief and simple").

class member in a Title VII class action had less than a 100% probability of obtaining one of the jobs that were discriminatorily denied."[177]

Courts fashioning remedies in Title VII cases are guided by the fundamental principle that victims of discrimination should be compensated *completely* for their injuries.[178] As the Supreme Court recognized, "making persons whole for injuries suffered through past discrimination" is one of the "central statutory purposes" of Title VII.[179] Accordingly, "once an employer is found liable for a Title VII violation, the district court is *obligated* to grant 'the most complete relief possible.'"[180]

An essential aspect of this mandated make-whole relief is to award backpay for *all* wages that plaintiffs would have earned but for their employer's discriminatory acts.[181] This Court has rejected relief orders that fail to do this.[182]

---

[177] Brief, 47.

[178] *Albemarle*, 422 U.S. at 421.

[179] *Id.* (recognizing that one of Congress' intentions for Title VII was to "make possible the 'fashion[ing] [of] the most complete relief possible'") (citation omitted); *AADE*, 647 F.2d at 279 (recognizing that "a primary purpose of Title VII is to make whole the past victims of discrimination").

[180] *E.E.O.C. v. Dial Corp.*, 469 F.3d 735, 743 (8th Cir. 2006) (emphasis added).

[181] *See, e.g., Local 638*, 532 F.2d at 832 (recognizing that "back pay is to be awarded whenever possible so as to deter Title VII violations and so as to 'make whole' the victims of past discrimination").

[182] *See AADE*, 647 F.2d at 288 (remanding district court's backpay order and instructing the district court to ensure that it incorporated seniority benefits into the backpay award, because without those benefits the plaintiffs would not have received "complete" relief).

a. *No Classwide Reduction to Backpay Was Required—or Appropriate—Because There Were Sufficient Vacancies for Class Members*

Where the record establishes that there were sufficient job vacancies for every victim of the employer's discrimination, a full award of backpay is appropriate.[183] In *Claiborne v. Illinois Cent. R. R.*, for example, the district court calculated backpay based on the difference between a given plaintiff's wages and his counterfactual wages, beginning either one year prior to the date of the complaint being filed or his date of qualifying for promotion, whichever came later.[184] The employer challenged this backpay calculation, arguing that a limited number of vacancies existed during the period at issue.[185] In rejecting the employer's argument, the Fifth Circuit found "abundant evidence" to support the district court's conclusion that there were enough counterfactual vacancies for all class members, thereby upholding the district court's methodology.[186]

Here, the undisputed record establishes that a surplus of teaching positions existed throughout the class period (ranging from approximately 8,000 to 13,000 annually), enough that all class members who failed the LAST could have been

---

[183] *Claiborne v. Illinois Cent. R. R.*, 583 F.2d 143, 147 (5th Cir. 1978) (upholding the district court's award of full backpay where "abundant evidence" demonstrated there were enough counterfactual vacancies for all class members).

[184] *Id.* at 147.

[185] *Id.* at 148-49.

[186] *Id.*

hired as full-time teachers.[187] The BOE does not dispute that there were sufficient vacancies to allow all class members to become fully appointed teachers.[188]

As this Court observed, a classwide assessment of monetary relief where the number of class members "exceeds the number of openings lost to the class through discrimination" is the "*exception not the rule*: Where possible, 'there should be . . . a determination on an individual basis as to which class members are entitled to [recovery] and the amount of such recovery.'"[189] The district court, therefore, properly determined that the abundance of full-time-teaching-position vacancies during the class period "precludes any claim for a classwide reduction of 25%."[190]

While the BOE contends that the district court's decision "would lead to an aggregate backpay award . . . that exceeds the harm suffered as a result of the discrimination," the authorities on which it relies are inapposite.[191] Each decision

---

[187] A-1250; A-1620 ("The Court agrees 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.").

[188] *See* A-1250 (BOE's witness testified that it sought as many as 13,000 state temporary licenses annually to fill its shortage of teachers); Brief, 60 (acknowledging "existence of vacancies").

[189] *Robinson v. Metro-N. Commuter R.R. Co*., 267 F.3d 147, 161 n. 6 (2d Cir. 2001) (quoting *Catlett v. Mo. Highway & Transp. Comm'n*, 828 F.2d 1260, 1267 (8th Cir. 1987) and *Shipes v. Trinity Indus*., 987 F.2d 311, 318 (5th Cir. 1993)) (emphasis added).

[190] SPA-12.

[191] Brief, 47.

cited by the BOE involved discriminatory employment practices in which it was *not possible* for all members of the class to have received the employment benefit because the number of class members exceeded the number of potential vacancies.[192] In each of those cases, it was a *certainty* that not every class member could have received the denied benefit even absent discrimination, requiring the courts to calculate backpay damages based on the limited number of vacancies and distribute those damages pro rata across the class of plaintiffs who would have competed for those few positions.[193] This is not the situation here.

Contrary to the BOE's arguments, there is a material difference between showing probability of appointment based upon insufficient positions as opposed

[192] A-2029; SPA-11.

[193] *See, e.g., United States v. City of Miami*, 195 F.3d 1292 (11th Cir. 1999) (reversing award of full backpay to *thirty-five* class members where only *two* of them would have received a promotion); *Ingram v. Madison Square Garden Ctr., Inc.*, 709 F.2d 807, 812 (2d Cir. 1983) (explaining pro-rata distribution where, "in view of the *limited number of vacancies* that occurred" during the relevant time period, "to the extent that back pay was awarded to more than 7 class members, it constituted an unwarranted windfall and did not recreate the conditions that would have existed in the absence of discrimination") (emphasis added); *Dougherty v. Barry*, 869 F.2d 605, 614-15 (D.C. Cir. 1989) (reversing award of full backpay to *eight* plaintiffs where only *two* promotion positions available). *Cf. McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 281 (5th Cir. 2008) (using formula to calculate backpay damages not abuse of discretion where more than 700 "class members outnumber promotion vacancies" attributable to "127 lost promotions in hourly pay grades and nine lost salaried employment promotions"); *Hameed v. Int'l Ass'n of Bridge, Structural, & Ornamental Iron Workers, Local Union No. 396*, 637 F.2d 506, 520 (8th Cir. 1980) (determining that "classwide back pay remedy is appropriate" because class members outnumbered estimated 45 apprentice positions); *Pettway v. Am. Cast Iron Pipe Co*., 494 F.2d 211, 260 (5th Cir. 1974) (where there was "no way of determining which jobs the class members would have bid on and have obtained" because "Class members outnumber promotion vacancies").

to the supposed unpredictable hiring decisions.[194] The difference is *critical* here, as the undisputed factual evidence demonstrates that there were sufficient vacancies for each class member to have been appointed. Statistical evidence is not necessary "to determine the number of positions or promotions that have been discriminatorily denied."[195]

Finally, the district court's rejection of a classwide reduction of backpay does not result in a "plaintiffs' class windfall."[196] The district court's award of backpay here does no more than compensate the victims of the BOE's discrimination by placing them in a position they would have been in absent discrimination.[197] As the Special Master determined, an award of backpay without the BOE's proposed pro rata reduction based on hiring decisions "would not be punitive because, absent any discrimination, all of the class members could have been hired and placed in permanent teaching positions."[198] Moreover, the BOE "can still challenge any class member's entitlement to backpay" if it has a fact-based reason for why she would not have been hired.[199] In fact, as the Special

---

[194] Brief, 54.

[195] *Id.* at 55.

[196] Brief, 58.

[197] *Albemarle*, 422 U.S. at 421 (citation omitted).

[198] A-2030, n. 12.

[199] *Id.*

Master noted, a classwide reduction in backpay damages would result in a windfall for the BOE: "if Defendant was entitled to both challenge the eligibility of individual claimants on the ground they would not have been hired *and* reduce the total backpay award by 25% to reflect the possibility that certain individuals would not have been hired, arguably it is the Defendant that would enjoy a windfall . . . ." The BOE cannot have it both ways.

b. Any Reduction to a Class Member's Damages to Account for the Probability of Being Hired Should Be Determined Through Individual Hearings

In opposition to certification of the remedy-phase class, the BOE previously argued that determinations of backpay, particularly damages start dates, are highly individualized.[200] Adopting that reasoning, the Special Master ruled that "[w]hether a class member would have been hired remains a matter for individualized determinations."[201] The district court agreed, holding that "[t]o the extent that Defendant believes that a specific class member would not have been hired for some non-discriminatory reason, Defendant will have the opportunity to raise its arguments at that class member's individual hearing."[202]

---

[200] A-1571.

[201] A-2030.

[202] SPA-12.

The BOE concedes that whether an applicant would have obtained a teaching position depended on numerous individual factors.[203] Significantly, each of the Appellees, as well as every class member, was, by definition, employed by the BOE as a New York City public school teacher at some point.[204] Therefore, the BOE had in its possession all the information it needs, including personnel records and evaluations, to challenge the counterfactual appointment of any class member. It just chose not to. These records necessarily include the very same information the BOE argues would factor into the likelihood that a fully-qualified applicant would have been appointed.[205]

The BOE should not be permitted to rely on its complete failure of proof with respect to the 347 Appellees, who represent less than 8% of the class, as justification for the reduction of backpay damages for a class exceeding 4,500.

3. Any Uncertainty About Whether a Class Member Would Have Been Hired Must Be Resolved Against the BOE, the Discriminating Party

Finally, to the extent there is any uncertainty regarding whether a class member would have been appointed, the district court was correct to resolve this

[203] *See, e.g.,* Brief, 70-71.

[204] A-2300.

[205] Brief, 52-53.

uncertainty against the BOE as the party responsible for the uncertainty.[206] On appeal, however, the BOE argues that, despite having sufficient vacancies for all class members, it would be too difficult to demonstrate precisely which class members would have been hired. Accordingly, the BOE argues that backpay damages for *all* class members should be reduced for this uncertainty (caused both by the BOE's discrimination and its hiring practices). This is not what Title VII law provides.

According to this Court's binding precedential authority in *Cohen*, where "it remains uncertain whether the plaintiff would have been hired in the absence of the discriminatory practice, and the uncertainty flows from that practice, *the issue should be resolved against the defendant*, the party responsible for the lack of certainty."[207]

For these reasons, this Court should find that the district court did not abuse its discretion by rejecting a classwide reduction of backpay damages based on the probability of appointment.

---

[206] *See Supra* § III.1.

[207] *Cohen*, 638 F.2d at 502 (emphasis added); *see also Enter. Ass'n Steamfitters Local No. 638*, 542 F.2d at 587.

POINT V

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY ORDERING THAT POST-APPOINTMENT ATTRITION BE PART OF THE DEFAULT DAMAGES MODEL, SUBJECT TO MODIFICATION BASED ON INDIVIDUAL FACTS

The BOE makes nearly the same argument regarding post-appointment attrition: that the failure to resolve uncertainties *against* class members will result in an aggregate "windfall" to Plaintiffs.[208] This argument fails not only for the reasons articulated above, but also because the BOE mischaracterizes how post-appointment attrition is applied by the Special Master and district court. Contrary to the BOE's argument, and over the Plaintiffs' objections, the Special Master and district court *did* order that comparator-based statistical attrition rates be used as the baseline for determining class members' backpay damages.[209] Either party then has the opportunity to present unique facts to depart from the baseline for any class member, as well as the right to discovery.

The BOE does not contend that any of the 347 Judgments at issue were wrongly decided based on the particular facts regarding the application of post-

---

[208] Brief, 65.

[209] A-2035; SPA-12.

appointment attrition.[210] Instead, the BOE asks this Court to assume, as a matter of law, that the process put in place by the district court, permitting individual evidence regarding attrition, will necessarily lead to improperly high aggregate damages. The BOE's position has no legal basis and runs counter to the make-whole relief to which class members are entitled.

1. Title VII Does Not Require the Irrebuttable Application of Attrition Probabilities

Title VII caselaw does not require universal application of attrition without the possibility for either party to develop and present individual facts. As the BOE originally argued, the end date for backpay is individualized, and adjustments to backpay for attrition require individualized hearings, not classwide rules.[211] The determinations made by the Special Master confirm that: (1) facts relevant to post-appointment attrition were adduced at the hearings, including baseline statistics where appropriate, and (2) in many instances, the BOE failed to avail itself of the opportunity to challenge those facts or otherwise satisfy its burden of proof.

The district court did not, as the BOE suggests, reject the use of a statistical attrition model. Rather, the district court rejected the BOE's request to forbid the Special Master from considering individual facts for class members who were not

[210] *See* Brief, 83 ("The purpose of recounting these examples is not to show that the Special Master necessarily got it wrong in each of these cases.").

[211] A-1084; A-1571.

employed by the BOE as regularly appointed teachers at the time of judgment. The BOE argues that this failure to apply classwide irrebuttable attrition statistics results in either a windfall to Plaintiffs or a penalty to Defendant.

An award is neither a windfall nor a penalty when it compensates victims of discrimination by placing them, as well as can reasonably be done, in the position they would have been in absent discrimination.[212] The Special Master recognized this in denying the BOE's application in the first instance.[213] That determination is well within the wide discretion granted to district courts in fashioning the best possible relief.[214] Moreover, the use of individualized facts to shorten damages periods for certain class members resulted in an aggregate reduction of millions of dollars.

Finally, as explained, the BOE won its argument before the Special Master and district court regarding the application of attrition.[215] Post-appointment statistics serve as the baseline for individual hearings. Accordingly, the BOE

[212] *See supra* at 62.

[213] A-2030, fn. 12.

[214] *Albemarle*, 422 U.S. at 421. *Accord Franks v. Bowman Transp. Co.*, 424 U.S. 747, 770–71 (1976) ("Discretion is vested . . . to allow the most complete achievement of the objectives of Title VII that is attainable under the facts and circumstances of the specific case.").

[215] *See supra* at § II.6.

solely contests Plaintiffs' ability to present individual facts to deviate from those baselines.

a. Application of Post-Hiring Attrition Rates Is Not Required

Not only have other courts not required an across-the-board statistical reduction for post-hire attrition, some courts have also properly exercised their discretion by declining to apply attrition at all, placing the burden on the defendant to demonstrate with individual facts that a plaintiff would have attrited. In *Ernst v. City of Chicago*, a failure-to-hire disparate impact case, the employer argued that plaintiffs' backpay calculations should have been reduced by the rate of attrition among plaintiffs' comparators.[216] The court found that the defendant bore the burden of proving that any plaintiff would have left employment before her pension vested, noting that the reasons individuals attrit were known and that defendant failed to demonstrate that those reasons applied to any of the plaintiffs.[217] While the court noted that the use of statistics *may* be appropriate in some class actions, it was not a requirement.

Similarly, in *E.E.O.C. v. Dial Corporation*, the district court found the defendant liable under Title VII for administering a preemployment test that had a

[216] *Ernst v. City of Chicago*, No. 08 C 4370, 2018 WL 6725866, at *20 (N.D. Ill. Dec. 21, 2018).
[217] *Id.*

disparate impact on female applicants.[218] The employer appealed on various grounds, including the district court's failure to reduce backpay by applying the plant's high turnover rate. The Eighth Circuit affirmed the district court's calculation of damages, holding that the district court had employed a "well established rule for calculating backpay" by calculating the difference between what class members actually earned and what they would have earned absent discrimination.[219]

E.E.O.C. v. Joe's Stone Crab, Inc., is particularly analogous to this case. There, the employer unsuccessfully made the same argument regarding attrition as the BOE makes here. In rejecting that approach, the district court held that absolute application of attrition statistics was "too mechanistic and impersonal, and in contravention of the well-settled principle that a successful Title VII plaintiff is entitled to be made whole."[220] The Court explained that:

> Title VII damage awards are meant to compensate real people with individual characteristics, documented work histories and identifiable injuries. While statistical evidence has long been admissible in Title VII actions … it must be weighed against credible evidence which

[218] *Dial Corp.*, 469 F.3d at 738.

[219] *Id.* at 744 (providing for backpay from time applicant should have been hired until Dial made an unconditional offer of employment to plaintiffs).

[220] *E.E.O.C. v. Joe's Stone Crab, Inc.*, 15 F. Supp. 2d 1364, 1371 n.8 (S.D. Fla. 1998) (citations omitted).

> distinguishes an individual claimant. . . . In an industry where high attrition is the norm, a claimant's history of long-term employment is highly significant and, in the court's judgment, outweighs the value of a cohort's profile which, after all, is nothing more than a composite of other peoples' work histories.[221]

The court's damages awards did not all run through the date of judgment, as individual facts suggested earlier appropriate end dates.[222]

As in *Joe's Stone Crab*, the Special Master considered factual evidence for each class member and made determinations setting individual end dates for damages. And, as in *Joe's Stone Crab*, the district court's rejection of "mechanistic" attrition probabilities did not result in all awards running through the date of judgment. A review of the tables presented by the BOE demonstrates that numerous class members' end dates were set *prior* to the date of judgment based upon evidence of retirement, disability, resignation, termination (*i.e.*, attrition) or by agreement of the parties.[223]

---

[221] *Id.* (internal citations omitted).

[222] *Id.* at 1376 ("Back pay damages normally are awarded through the date of judgment. The case at bar, however, presents an exception to the general rule. Here, the court has found that each of the claimants would have voluntarily terminated her employment at Joe's prior to the date of judgment.") (quoting *Pettway v. Am. Cast Iron Pipe Co*., 494 F.2d 211, 260-61 (5th Cir. 1974)).

[223] Brief, 92-111, Counterfactual ("CF") Career Findings Table, Part A: Findings for Appellees to Whom BOE's Post-Appointment Attrition Argument Applies (223 Appellees) ("BOE Table A"). *See also supra*, fn.109.

These results are consistent with the two overarching principles guiding backpay in Title VII cases: "(1) unrealistic exactitude is not required, [and] (2) uncertainties in determining what an employee would have earned but for the discrimination should be resolved against the discriminating employer."[224] The BOE's repeated plea that it is not the typical Title VII "wrongdoer" does not obviate these principles. For the same reasons fully discussed *supra* at Point III.1, the district court, when faced with competing imperfect approaches, properly resolved uncertainties against the BOE, not the victims of discrimination. This was not an abuse of discretion.

b. The BOE's Cases Do Not Support Its Argument

The cases upon which the BOE relies are not to the contrary. As already explained, these cases involved discriminatory employment practices in which it was a certainty that every class member could not have been appointed because the number of class members exceeded the number of potential vacancies.[225] Each of those cases pertained to the probability of hire/promotion, not application of

[224] *Joe's Stone Crab,* 15 F. Supp. 2d at 1376.

[225] A-2029; SPA-11. *See, e.g., United States v. City of Miami*, 195 F.3d at 1292; *Ingram*, 709 F.2d at 807.

attrition or some other methodology to determine an end date to counterfactual careers.[226]

The only two cases cited by the BOE that generally pertain to backpay are equally unavailing. In *E.E.O.C. v. Mike Smith Pontiac GMC, Inc.*,[227] the Eleventh Circuit affirmed the district court's exercise of discretion in basing backpay upon the average tenure of other employees where no countervailing evidence was presented regarding the individual plaintiff. This approach is consistent with the Model here, which provides for a statistical baseline from which deviation is permitted based upon the presentation of the very individualized evidence that was absent in *Mike Smith Pontiac GMC, Inc.*

Stewart v. General Motors Corp.[228] is even less applicable, as the Seventh Circuit there took the unusual step, not of reversing a methodology constructed by the district court, but of setting its own methodology for determining damages where the district court failed to address the issue entirely.[229] The *Stewart* court's

---

[226] *See Ingram*, 709 F.2d at 812 (allocating damages for seven available positions); *McClain*, 519 F.3d at 281 (allocating 136 position to more than 700 class members utilizing a formula); *United States v. City of Miami*, 195 F.3d at 1300 (allocating two promotional positions among 35 class members); *Dougherty*, 869 F.2d at 614-15 (allocating two promotional positions among eight plaintiffs); *Hameed,* 637 F.2d at 520 (classwide relief appropriate where class members outnumbered 45 apprentice positions); *Pettway,* 494 F.2d at 260 (where class members outnumbered vacancies).

[227] *E.E.O.C. v. Mike Smith Pontiac GMC, Inc.,* 896 F.2d 524, 526 (11th Cir. 1990).

[228] *Stewart v. General Motors Corp.,* 542 F.2d 445, 449 (7th Cir. 1976).

[229] *Id.* at 452–54 & n.7.

invitation that the parties avoid further litigation by agreeing to settlement based upon the circuit court's detailed methodology may explain this unusual decision.[230] In any event, the decision recommends an individualized damages calculation for some class members and classwide calculation for others, recognizing that case-specific approaches are appropriate.[231]

Finally, to the extent the BOE attempts to present its attrition statistics as a certainty, that is far from the case. *First*, as noted by other courts, attrition statistics are nothing more than a composite of other people's work history,[232] the applicability of which to class members is never certain. *Second*, as explained *supra* at § II.4.b, the district court takes attrition statistics into account when making individual determinations.

2. The Model and Individual Hearing Process Conforms to Title VII's Mandate that Victims of Discrimination Be Made Whole

The BOE's argument regarding post-appointment attrition also fails because it misleads as to how post-appointment attrition was determined by the district court, is unworkably vague as to what process should be imposed, and is unclear as to whom that new process would apply.

---

[230] *Id.* at 454 ("We would urge the parties to avoid the need for appointment of a special master, however, by negotiating an agreement pursuant to the principles we have outlined.").

[231] *Id.*.

[232] *Joe's Stone Crab*, 15 F. Supp. 2d at 1371 n.8 (citations omitted).

a. The District Court Requires Probabilities of Post-Appointment Attrition to Be the Baseline from Which Adjustments Can Be Made Based on Individual Determinations

The Special Master and district court devised an individual hearing process that applies post-appointment attrition probabilities in the first instance to reduce class members' damages; but, consistent with the BOE's original position, permits the parties to seek adjustments to the Model based on individualized facts relevant to class members' damages end dates.

Without acknowledging that the Model incorporates post-appointment attrition, the BOE now takes the position that all individualized end date determinations are "inherently unreliable and uncertain" because "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."[233] The BOE's argument pits the so-called certainty of its attrition statistics (of which it only presents a few), against what it describes as the uncertainty of individualized facts. But mechanistic application of statistical evidence does not predict facts with certainty and contravenes well-

[233] Brief, 29.

settled principles of compensation under Title VII.[234] Statistics provide nothing more than another category of evidence that should be considered, as the district court and the Special Master found, together with individual facts.

For this reason, individualized determinations of a class member's backpay damages begin with a baseline of how similar non-class comparators attrited.[235] Each party must satisfy an evidentiary burden to deviate from this baseline. Rather than exclude any evidence, the Special Master determined (and the district court agreed) that a combination of all available evidence would achieve the most accurate result. The district court took special note of the fact that the BOE "once agreed with this position" when it argued for individualized damages hearings in opposition to the certification of a remedy-phase class.[236]

While this process contains inherent uncertainty, it is not, as the BOE implies, uncertain as to all class members. The Special Master determined that the number of instances where an end date will be contested should be small because:

---

[234] *See Joe's Stone Crab*, 15 F. Supp. 2d at 1371 n.8. *See also* A-2033 ("The experts acknowledged that classwide calculations would undercompensate some class members, and overcompensate others.").

[235] A-2036 (the Model, which takes into account statistical evidence of how non-class comparators attrited, only applies post-appointment attrition to class members who failed to pass the LAST and no longer worked at the BOE).

[236] SPA-13, n. 9.

> No uncertainty will exist for class members who are still working at the BOE as of the date of judgment or who worked at the BOE until their retirement. Moreover, little uncertainty will exist for class members who later passed the LAST-1 and achieved a full time teaching position before leaving the Defendant's employ.[237]

As described *infra* at § V.2.c, those predictions have proven true.

For class members where the end date carries some uncertainty, individual hearings fill the gap. As the Special Master explained:

> Defendant will have the opportunity to submit evidence to rebut a claimant's proposed end date. *In addition to statistical evidence of non-class comparator attrition rates, Defendant will have the opportunity to adduce proof specific to the individual claimant, including that he or she was convicted of a crime, ceased working altogether, or moved out of state to aid an ailing relative.*[238]

Moreover, the district court advised that "Defendant should not underestimate its ability to show or the Special Master's ability to fairly discern the validity of claims and the nuances of different cases during individual hearings."[239]

The BOE, however, chose not to meaningfully participate in the individual hearing process by electing not to contest the overwhelming majority of the class

---

[237] A- 2036.

[238] A-2036-37 (emphasis added). Unlike with regard to probability of appointment, the BOE's ability to present facts regarding the circumstances under which a class member would have left BOE employ is not limited by the March 23, 2015 Stipulation & Order. *See* A-1723-25.

[239] SPA-14, n 10.

member requests to remove post-appointment attrition probabilities. Instead, the BOE now asks this Court to find, without detailed review, that none of the evidence adduced in the 347 Judgments (and no evidence that was or would be adduced in the thousands more judgments to come) could be probative in determining that a class member would have remained employed until the judgment date, had s/he not been discriminated against. Because Title VII demands that class members be made whole, the district court correctly allowed individual determinations regarding the application of post-hiring attrition.

b. The Special Master and District Court's Individualized Rulings Are Reasonable and Consistent

Although the BOE does not challenge any particular Judgment, it criticizes certain reasoning the Special Master adopted in an effort to cast doubt on the individual hearing process writ large.[240] That the BOE has not identified any specific concerns with individual rulings demonstrates that the individual hearing process was reasonable and not an abuse of discretion.

The BOE agreed in the Classwide Conclusions of Law to the calculation of backpay as applied by the Special Master, stipulating that "Backpay ordinarily will run until the date of judgment provided that Plaintiffs have adduced evidence that,

[240] Brief, 80, n. 21, 84-85.

absent discrimination, their employment would have continued until that date."[241] Having agreed to the procedure for the determination of backpay end dates, the BOE now complains that in evaluating attrition-related facts, the Special Master erred in applying the accepted concept that evidence of actions taken *after* discrimination has occurred are not necessarily probative of what would have happened absent discrimination.[242] The logic of this evidentiary principle is the same as that underpinning Title VII: discrimination derails the careers and limits the choices of its victims. Therefore, the Special Master correctly found that evidence of a class member's actions and perseverance *despite* discrimination—*i.e.* repeatedly taking, and failing, the LAST despite the monetary and emotional cost—demonstrates an unwavering dedication to becoming a BOE teacher, and demonstrates that, in the absence of discrimination, a class member would have remained at the BOE through her date of judgment.

In support of its argument that the Special Master erred, the BOE offers a string of record citations to summaries of Special Master hearings. A review of those materials demonstrates the danger in urging a broad overview of highly contextualized individual factual findings. More than half of the cited references

---

[241] A-2320.

[242] Brief, 80, n. 21, 84-85.

do *not* pertain to the application of attrition probabilities.[243] And those that do relate to attrition probabilities exemplify the care taken by the Special Master in evaluating all the available evidence and being guided by Title VII's goal of redressing discrimination.[244] The BOE's main argument for the mechanical application of attrition probabilities was that the class member found employment outside the BOE or outside education at some point following the BOE's unlawful discrimination. While the Special Master considered those facts, as well as the impact of the Model application of attrition, he viewed the evidence within the context of the class member's thwarted efforts to remain at the BOE.

For example, some of the class members took and failed the LAST between five and twelve times, eventually seeking other educational positions within the BOE, outside the BOE, and outside New York.[245] One obtained a position in a university registrar's office while studying to obtain a master's degree in education

---

[243] *See* CA-13 (ruling concerning educational advancement); CA-15 (same); CA-22 (ruling concerning time to appointment); CA-24-26 (educational advancement and time to appointment); CA-30 (educational advancement and gap period); CA-36 (educational advancement); CA-68 (time to appointment); and CA-122 (certification through the case).

[244] *See, e.g.,* CA-217-223 (overruling Defendant's attrition objections to M. Todd and M. Abel Demands); CA-267-270 (same for M. Bello); CA-265-267 (same for K. Alves); CA-277-281 (same for R. Alvarado).

[245] *See* CA-218-220 (failed LAST twelve times in eleven years); CA-220-223 (failed LAST eleven times and pursued alternate educational position at BOE, in charter schools and at day cares); and CA-267-270 (failed LAST at least five times and worked as per diem).

to enhance her ability to obtain a teaching position.[246] These examples show that individualized considerations are necessary to achieve fairness and accuracy.

The BOE also complains that the counterfactual damages periods for certain class members were exceedingly long.[247] This is not surprising given the extended period during which the BOE engaged in unlawful employment practices and failed to resolve this case. The length of the damages period cannot render the Model an abuse of discretion.

c. *The BOE Mischaracterizes the Results of the Individual Hearing Process*

Contrary to BOE claims, the district court did not "assume that nobody in the population left."[248] A close look at the Judgments reveals that damages for many class members end significantly before their dates of judgment based upon individualized facts.[249] Moreover, to the extent that the BOE's complaint is that the district court should have required an ongoing monitoring of the classwide

---

[246] *See* CA-223-225 (pursued other educational positions and completed master's degree in education).

[247] Brief, 66-67.

[248] Brief, 68.

[249] *See supra* n.109.

damages but didn't, the BOE never raised this before the Special Master or district court.[250]

Any such analysis, however, would necessarily include the numerous class members' Demands—and Judgments—that deviated from the Model's baseline attrition probabilities in amounts that were materially beneficial to the BOE by ending the accrual of backpay damages *long before* the dates of judgment.[251] In the aggregate, these class members *sought millions of dollars less* in backpay damages than they would have received through the reflexive application of attrition statistics. This reduction in damages was a result of Plaintiffs' ability to present individualized evidence that permitted relief tailored to particular class members' facts and ended damages well before the attrition model predicted. The BOE does not account for the increase in backpay awards that would result if these facts were ignored to offset the BOE's hoped-for savings from the rote application of attrition statistics.

The BOE concedes that its post-appointment attrition arguments do not apply to 124 of the Judgments because those class members were employed by the BOE as regularly appointed teachers at their dates of judgment or earlier damages

[250] Brief, 77.

[251] *See supra* n.109.

end date.[252] The logic there is that if a class member was in fact still employed by the BOE, there could be no uncertainty as to whether that individual would have remained employed by the BOE absent discrimination.

The BOE inexplicably fails to apply this same logic, however, to class members who left or were denied employment as regularly appointed teachers *as a result of discrimination,* but continued to work at the BOE in other capacities.[253] This would mean that a class member who worked for the BOE, as a paraprofessional, a parent coordinator, a substitute teacher, or another BOE position other than a permanent teacher through the date of judgment *because she was denied a permanent BOE teacher position,* should, the BOE argues, have her damages reduced because she may not have remained a permanent teacher during this period absent the discrimination. Of the 223 class members listed in BOE Table A (for whom the BOE asserts post-appointment attrition should have applied), 105 fall within this category.[254]

The BOE has not attempted to establish why these class members that continued to work at the BOE—including *as teachers*—have not offered sufficient

---

[252] Brief, 113 (Counterfactual ("CF") Career Findings Table, Part B, hereinafter "Table B").

[253] *See* Brief, 63, n.17 and Table A. As noted above, Dr. Erath did not propose such a wide-ranging application of post-appointment attrition. *See supra* § II.3.b.1.

[254] Employment status at the time of judgment or damages end dates is described in Appellees' Demands or in section II.C.4 of their FOFCOL (included in the Joint Appendix of Class Member-Specific Documents).

evidence that they would have remained employed by the BOE at the typically better-compensated position of regularly appointed teacher. Instead, the BOE asks this Court to hold that the evidence of their continued employment with the BOE is, as a matter of law, not probative of whether they would have remained at the BOE as a permanent teacher. There is no rational basis for the BOE's position, and it has not shown that the end date determinations for these class members were either an abuse of discretion or clearly erroneous.

Of the remaining class members on BOE Table A, only 76 were not employed by the BOE and yet their damages ran through the date of judgment without post-appointment attrition applied. In those instances, both Plaintiffs and the BOE had the opportunity to present evidence to the Special Master who found based on that evidence that they would have worked at the BOE through their date of judgment absent the BOE's discrimination. The other class members on Table A either had counterfactual end dates applied during the individual hearing process based on facts regarding retirement, disability, or dismissal or resignation from BOE service, among other things; had damages end prior to the date of judgment as a result of mitigation; or had no backpay damages at all.[255] Nonetheless, the

[255] *See* Brief, 92-112, Table A.

BOE seeks the mechanical application of attrition to all class members without regard to their individual facts.

If the BOE seeks to challenge the factual findings for these class members as unsubstantiated, it has the burden of showing that the Special Master and the district court made determinations that, in light of the full record, were clearly erroneous. It has not done so.

This Court need not speculate as to what Plaintiffs and the BOE already know: both early end dates and attrition statistics have been applied to numerous class members, either by agreement of the parties or recommendations of the Special Master (with more judgments being finalized each month).[256]

---

[256] *See, e.g.*, C. Justin FOFCOL (ECF.4466-1 pp. 14-15) (attrition applied per Special Master ruling); D. Barrios FOFCOL (ECF.4446-1 p.6) (attrition applied per agreement between the parties); A. Alonzo FOFCOL (ECF.2653.1 p. 13) (same); J. Ferguson FOFCOL (ECF.3221-1 p.7) (same); D. Pitre FOFCOL (ECF.3233-1 p. 6) (same); A. Coleman FOFCOL (ECF.3281-1 pp. 6-7) (same); B. Togans FOFCOL (ECF.3444-1 pp. 6-7) (same); M. Hago FOFCOL (ECF.3451-1 p.6) (same); C. Rhome FOFCOL (ECF.3954-1 pp. 6-7) (same); H. Tavares FOFCOL (ECF.3956-1 p. 6) (same); S. Grant FOFCOL (ECF.3964-1 p. 8) (same); L. George FOFCOL (ECF.4682-1 p.6) (same); P. Nieves FOFCOL (ECF.4673-1 p.6) (same); A. Sanquintin FOFCOL (ECF.4445-1 p. 6) (same); D. Tracey FOFCOL (ECF.4556-1 pp. 6-7) (same); M. Heredia-Calderon FOFCOL (ECF.2990-1 pp. 8-9) (same); I. Pilgrim FOFCOL (ECF.4667-1 p.5) (same). Either post-appointment attrition or individually-determined counterfactual end dates have been applied to hundreds of class members since the district court entered the 347 Judgments at issue on this appeal. While subsequent Judgments are not presently before this Court, the Court is authorized to take judicial notice that the Judgment was entered and the content thereof. *United States v. Gordon*, 723 F. App'x 30, 32, n.1 (2d Cir. 2018) (taking judicial notice of state court judgments of conviction pursuant to Federal Rule of Evidence 201); *Sprague & Rhodes Commodity Corp. v. Instituto Mexicano Del Cafe*, 566 F.2d 861, 862 (2d Cir. 1977) ("Rule 201 of the Federal Rules of Evidence permits this court to take judicial notice of judgments of courts of record even though the fact is presented for the first time on appeal.") (citation omitted).

d. The BOE's Examples Support the District Court's Approach

Although the BOE does not appeal any particular factual determination made by the Special Master and the district court, it identifies six class members to argue that the removal of attrition probabilities during individualized hearings will produce inaccurate results in the aggregate.[257] Defendant's six examples, however, fail to suggest or establish that these individual determinations were wrongly decided or that their results justify overturning the Special Master's determination of the other 341 Judgments or the hundreds of other judgments that have since been entered.

A review of these six examples shows that: (i) despite explicit direction from the Special Master and district court, the BOE repeatedly failed to meaningfully participate in the individualized damages determination process; and (ii) the Special Master correctly rejected Defendant's attrition objections, to the extent any were made, where Plaintiffs presented objective, contemporaneous evidence showing that—absent discrimination—the class member would have continued working as a full-time BOE teacher through the date of judgment.

For each of the six class members identified, the BOE failed to challenge the credibility of the class member's testimony, call him or her to testify, or present its

[257] Brief, 80-82.

own witnesses. The BOE's selected examples are not outliers. A review of the 223 Judgments to which the BOE seeks to apply post-appointment attrition probabilities reveals the BOE failed to call or cross-examine a single class member at issue on this appeal.

In fact, the BOE affirmatively objected to the removal of attrition for only three of the six individuals it highlights in its brief, failing to raise the issue with regard to the others.[258] To the extent the BOE did object to the removal of attrition probabilities, the Special Master overruled those objections based on objective, contemporaneous evidence corroborating each class member's uncontested affidavit testimony, which the BOE has not challenged here. Specifically, the Special Master found that the removal of attrition was appropriate where class members provided credible and uncontested written testimony asserting their commitment to teaching at the BOE and: (i) took the LAST numerous times; (ii) continued taking the LAST many years after they were terminated by the BOE; and/or (iii) remained fully employed as of the date the Special Master resolved their claim. Based on the factual record viewed in its entirety, the BOE cannot

---

[258] *See supra* at pp. 45-46.

demonstrate that the Special Master's individual factual determinations were clearly erroneous.[259]

For each of these class members, the BOE argued that attrition probabilities should apply to reduce damages because these class members were no longer working in the education field. The Special Master rejected this argument because it would produce a perverse result. Namely, that class members who took the LAST numerous times, continued taking the LAST for many years, or were employed full time as of their resolution date, would have their damages significantly reduced because—as a result of the BOE's discrimination—they were no longer working as teachers. Rather than apply this flawed proposition, the Special Master found that employment in other sectors does not alone demonstrate that a class member would not have continued to work full time as a BOE teacher.[260] The Special Master's findings and the district court's adoption of those findings comport with Title VII's remedial scheme.[261]

---

[259] *See Anderson*, 470 U.S. at 573–74 ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

[260] *See, e.g.*, M. Bello FOFCOL (MS-A-4489) ("Ms. Bello's employment in other sectors does not alone demonstrate that she did not intend to become a teacher and would not have continued to work as a full-time teacher at the BOE, particularly in light of the fact that she took and failed the LAST at least five times before she left the BOE, avers in her affidavit (the credibility of which Defendant does not dispute) that she left her work as a per diem at the BOE only because

Accordingly, the BOE should not be permitted to cast doubt on the validity of the Special Master's findings or the effectiveness of the individualized process when it both failed to avail itself of the opportunity to challenge the issue of attrition before the Special Master and failed to demonstrate any error.

3. The BOE's Proposed Post-Appointment Attrition Model Is Unworkably Vague

Even if the BOE could successfully assert some basis for reversing the district court's approach, it is unclear what attrition model the BOE proposes should replace the existing Model or to whom it would apply. This failure alone is reason to reject the BOE's argument.

As noted, the BOE includes class members in Table A who are either still employed by the BOE (counter to its expert's original proposed approach) or who already have end dates prior to their dates of judgment for individually-determined reasons. The BOE appears to be asking this Court to ignore these known facts, and to apply attrition probabilities in precisely the manner rejected by *Joe's Stone*

---

she could not pass the LAST and found working as a per diem to be insecure and unsustainable, and today continues to work.").

[261] *See Albemarle*, 422 U.S. at 418–19; *see also Segar*, 738 F.2d at 1291 (holding that employer, as "proven discriminator," bears risk that effective relief requires overcompensating some individuals).

Crab.[262] Because the BOE has never explained its alternative attrition calculations, it is impossible to know what the BOE proposes.

The BOE's remand request also fails to explain how to account for class members whose awards are based on end dates prior to the dates of judgment, and for whom attrition probabilities were not applied, based on individualized facts determined during the individual hearing process. If no individualized facts are permitted, the application of attrition statistics would likely result in longer counterfactual work histories, and increased backpay damages. On the other hand, if the BOE is seeking to benefit by keeping the early end dates determined by individual facts while also applying attrition probabilities as an additional layer, aside from there being nothing in either the BOE's brief or the record to indicate how that might be accomplished, it would impermissibly provide the BOE with a windfall by reducing a class member's backpay twice.

Because the BOE ignores the reductions in backpay resulting from the imposition of fact-based counterfactual end dates for certain class members, the BOE's claims that the application of post-appointment attrition results in a "40% reduction to the aggregate monetary award" for class members on Table A, and that there was an alleged "windfall" of $50 million for class members, are both

---

[262] *Joe's Stone Crab*, 15 F. Supp. 2d at 1371 n.8.

dubious and hyperbolic. Ultimately, the BOE has presented no evidence—in the district court, or here—that the aggregate backpay damages across the relevant Judgments is greater than it would have been had its undefined post-appointment attrition curve applied.

POINT VI

PLAINTIFFS SHOULD NOT BEAR THE BURDEN OF DELAYS RESULTING FROM BOE STRATEGIES

The BOE has asked that assuming remand is appropriate, this Court preclude the district court from setting a new date of judgment upon remand.[263] In so arguing, it relies exclusively on this Court's decision in *Ingram v. Madison Square Garden Ctr., Inc.* There, this Court modified various aspects of the district court's award of backpay, but did not remand for recalculations. Rather, it affirmed the district court as modified by the appellate decision and made no mention of the date of judgment.[264] *Ingram* does not support the BOE's argument. If this Court remands the Judgments to the district court for a recalculation of damages (which

[263] Brief, 88-90.

[264] *Ingram*, 709 F.2d at 813.

would potentially necessitate recalculation of all Judgments), those damages should extend until the new date of judgment, where appropriate.[265]

The BOE further argues that it would be inequitable to extend the class members' entitlement to backpay because they "have long had the opportunity to be deemed certified under the court's injunction and thus to seek BOE teaching positions."[266] However, Title VII does not require victims of discrimination to continue seeking employment from the discriminating employer decades after suffering discrimination. Rather, Title VII requires that the discriminating employer make the victims of discrimination whole for *all* of the harm they have suffered, which in this case continues throughout the pendency of this appeal. Class members suffered discrimination decades ago and have already waited too long for the justice to which they are entitled; to compound that delay by prematurely ending damages if the Judgments are remanded for recalculation would add further injury to victimized class members.

---

[265] *Sands*, 28 F.3d at 1327 (victims of discrimination are "'ordinarily [ ] entitled to an award of back pay from the date of [the discriminatory action] until the date of judgment.'") (quoting *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 144 (2d Cir.1993)).

[266] Brief, 90.

CONCLUSION

For all the reasons discussed above, Appellees respectfully request that the Court affirm the Judgments.

Dated: June 4, 2020
New York, New York

STROOCK & STROOCK & LAVAN LLP

/s/ Joshua S. Sohn
Joshua S. Sohn
Dina Kolker
Francis C. Healy
Robert A. Mantel
180 Maiden Lane
New York, New York 10038
(212) 806-5400

and

DLA PIPER LLP (US)
Rachel V. Stevens
1251 Avenue of the Americas
New York, New York 10020
(212) 335-4500

Co-counsel for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 20,904 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the Court's Oder, dated March 5, 2020, granting leave to file an oversized brief. This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times Roman 14-point font.

Dated: June 4, 2020
New York, New York

STROOCK & STROOCK & LAVAN LLP

/s/ Joshua S. Sohn
Joshua S. Sohn
Dina Kolker
Francis C. Healy
Robert A. Mantel
180 Maiden Lane
New York, New York 10038
(212) 806-5400

and

DLA PIPER LLP (US)
Rachel V. Stevens
1251 Avenue of the Americas
New York, New York 10020
(212) 335-4500

Co-counsel for Plaintiffs-Appellees