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

REPLY BRIEF FOR APPELLANT
BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT
OF THE CITY OF NEW YORK

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PRELIMINARY STATEMENT

In this massive employment class action, the district court's approach to calculating backpay systematically overcompensates the class by failing to properly account for two key aspects of a backpay determination—the probability that class members would not have obtained a position even if they had passed the discriminatory exam (known as the "LAST") and the probability that class members who would have been appointed but for the invalid exam would have left before retirement or judgment. Plaintiffs fail to defend the district court's errors, which constitute an abuse of discretion.

Most fundamentally, plaintiffs do not dispute the key facts that render the district court's approach improper. They identify no error in the Board of Education's showing that fully a quarter of comparators who passed the LAST were never appointed. Nor do they dispute BOE's showing that, over time, significant numbers of comparators who were appointed left BOE employment. And they raise no objection to BOE's characterization of its decentralized, discretionary hiring process, or of the myriad personal and professional circumstances that cause teachers to leave—both of which make it impossible to determine which of the

thousands of class members would have been hired and how long they would have stayed if they had been.

The law makes clear that under those circumstances, the court should have employed a backpay methodology—such as the pro rata adjustments BOE proposed—that would account, in the aggregate, for the known rates of appointment and attrition. But instead the district court ignored the non-appointment probability and applied a standardless, case-by-case approach to attrition that was not aimed at approximating the comparator rates in the aggregate and was inherently skewed against BOE. In so doing, the district court violated the fundamental tenet that a Title VII remedy must recreate the conditions that would have existed but for the challenged discrimination, and its corollary that the award to the class must be tailored to the actual harm suffered by the class as a whole.

Plaintiffs try, but fail, to divert attention from this fundamental failing. They assert that there were sufficient teaching vacancies for all class members, but do not explain how that undercuts data showing that, in all likelihood, a quarter wouldn't have obtained a position anyway. They contend that individual hearings are an adequate

substitute for the application of the comparator-based probabilities of appointment and attrition, but cannot dispute that those probabilities are the sole reliable measure of but-for-discrimination conditions in the aggregate and that the court's approach includes nothing to tether the aggregate results to those benchmarks. Nor can they refute that the court's process will inevitably overcompensate the plaintiffs because it calls for applying skewed evidentiary standards and resolving all uncertainties against BOE.

Ultimately, plaintiffs and the court mistakenly treat Title VII's mandate to make victims of discrimination whole as a license to ignore the law's mandate to recreate the but-for-discrimination conditions. But the latter mandate defines the former. By failing to properly account for known rates of appointment and attrition classwide, the court has granted, and continues to grant, plaintiffs a massive windfall in violation of Title VII. This Court should remand the affected judgments and order that they be recalculated in a manner that fully accounts for the reality that substantially less than every class member would have been appointed a BOE teacher or continued to work as one until judgment.

ARGUMENT

POINT I

THE COURT SHOULD REVISIT THE LIABILITY RULING OR, AT A MINIMUM, REJECT APPLICATION OF THE "WRONGDOER RULE"

BOE showed in its opening brief that it has improperly been held liable in this case for following the mandates of a state law that barred it from hiring teachers who had not passed a test that BOE had no role in developing or validating (Brief for Appellant ("BOE Br.") 37-45). Those unique circumstances, and the staggering financial repercussions of this case, warrant revisiting the erroneous liability ruling. But at a minimum, as BOE showed, those circumstances should have factored heavily in the court's crafting of a just and equitable remedy and should have required the court to avoid rote application of the "wrongdoer rule" to BOE.

Plaintiffs respond by asserting that BOE could have known that the LAST was discriminatory (Brief for Appellees ("Pl. Br.") 8-9, 49). The district court, however, recognized that BOE had no way to know that the test had not been properly validated—a finding that wasn't reached by the court until nearly 20 years after the test was first

required (*see* BOE Br. 40-41). And contrary to plaintiff's unsupported claim that BOE used the LAST improperly and contrary to its "express purpose" (Pl. Br. 8), BOE used the LAST exactly as state law required. Indeed, if BOE had defied the state's mandate, it could have lost billions of dollars in state funding (BOE Br. 43-44).

Plaintiffs also seek to portray the wrongdoer rule as an evidentiary presumption to be applied automatically based on the liability ruling against BOE (Pl. Br. 50-52). But in fact it is an equitable principle requiring the resolution of uncertainties against "the party responsible for the lack of certainty." *Cohen v. W. Haven Bd. of Police Comm'rs*, 638 F.2d 496, 502 (2d Cir. 1980). In this case, BOE is not the party responsible for any uncertainty caused by the use of the LAST. It could not have known the LAST was discriminatory or have refused to use it.[2]

Nor are plaintiffs correct in arguing that this is a run-of-the-mill disparate-impact case, or one that is "fundamentally different" from the

[2] The cases plaintiffs cite are not to the contrary. In one, uncertainties were resolved against a union because its failure to keep records caused the uncertainty. *EEOC v. Enter. Ass'n Steamfitters Local No. 638*, 542 F.2d 579, 586 (2d Cir. 1976). In the other, this Court found the employer's reliance on its "aspirations and intentions" insufficient to deny backpay. *Cohen*, 638 F.2d at 504.

cases where courts have declined to award backpay because the defendant was relying on a state law it did not know violated Title VII (Pl. Br. 52-54). Plaintiffs point to no other disparate-impact case in which the defendant was held liable for obeying a facially neutral state law mandating a test it had no way of knowing was invalid, on pain of losing billions of dollars in funding. And, contrary to plaintiffs' suggestion, those facts render this case quite comparable to the "female protective law" and pension-fund cases that BOE discussed in its opening brief (BOE Br. 41-43). Like those cases, this case presents the rare situation in which the defendant's total lack of knowledge about and control over the discriminatory employment standard warrants significant weight as the court carries out its responsibility to "locate a just result in light of the circumstances peculiar to the case." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424 (1975) (cleaned up).[3]

[3] Plaintiffs' trivial waiver argument (Pl. Br. 43) requires little response. The "Classwide Conclusions of Law," upon which plaintiffs rely, merely lists, as one entry under the header "Damages, Generally, under Title VII," the principle that "uncertainties are resolved against the party responsible for the lack of certainty" (A-2318). But there is no dispute that this is an accurate statement of a general principle under Title VII. BOE never stipulated that the wrongdoer rule is properly applicable to BOE under the circumstances of this case, much less in the manner that the Special Master and district court applied it.

POINT II

THE DISTRICT COURT ERRED BY REJECTING A CLASSWIDE APPROACH TO THE PROBABILITY OF APPOINTMENT

BOE's opening brief established that the district court abused its discretion by failing to reduce damages to account for the significant probability that class members would not have been appointed as regular teachers even if they had passed the LAST on their first attempt. Without a probability-of-appointment reduction, the damage awards fail to "recreate the conditions and relationships that would have been had there been no unlawful discrimination" and "constitute a windfall at the expense of the employer." *Ingram v. Madison Square Garden Ctr., Inc.*, 709 F.2d 807, 811, 812 (2d Cir. 1983) (cleaned up). This is so regardless of the applicability of the wrongdoer rule. Even in circumstances where that rule would come into play, the caselaw requires courts confronting uncertainty across a large class to use an approach tethered to aggregate statistical probabilities, not one that abandons classwide accuracy in favor of a plaintiffs' windfall. Plaintiffs offer no persuasive response.

A. Title VII remedial principles require a probability-of-appointment reduction in this case.

Plaintiffs do not attempt to dispute the basic principles that BOE has identified as governing the damages awards here. In recreating the but-for-discrimination conditions across the class as a whole, a court "must strive for equity to both parties" and craft remedies that, in the aggregate, are "proportionate to the court's best determination of the *actual* compensatory losses of a class." *United States v. City of Miami*, 195 F.3d 1292, 1299, 1301 (11th Cir. 1999). As BOE's opening brief demonstrated (at 48-52), where statistics show that not all class members would have obtained a discriminatorily denied position even absent discrimination and it is not possible to objectively determine which class members would have been hired, a court must use statistical approaches to ensure aggregate accuracy.

Notwithstanding these principles, plaintiffs argue that the damages awards need not account for the probability of appointment on a classwide basis. They rely principally on the district court's mistaken reasoning that the mere existence of large numbers of teacher vacancies precludes any pro rata reduction. But they fail to contend with BOE's showing that, despite these vacancies, 25% of non-class comparators

who passed the LAST never obtained a BOE teaching appointment. Plaintiffs also have no effective rejoinder to BOE's showing that it would be impossible to identify after the fact which of the claimants would have been appointed, given BOE's complex and decentralized hiring process. And plaintiffs fail to dispute BOE's showing that Title VII remedial principles require a classwide damages adjustment in such circumstances to account for the less-than-full probability that any particular claimant would have been appointed.

1. Plaintiffs fail to refute BOE's showing that a substantial number of class members likely would not have been appointed.

Plaintiffs' main contention is that the comparator-based probability-of-appointment data should be ignored because there were sufficient vacancies such that all class members could in theory have obtained BOE teaching appointments (Pl. Br. 55, 59-62). But that theoretical possibility of full employment is irrelevant to BOE's showing that, *even with such vacancies*, 25% of similarly situated PPTs[4] who

[4] Preparatory provisional teachers, or "PPTs," were BOE teachers who did not meet the requirements for provisional state certification (which included passing the LAST), but were granted renewable one-year "state temporary licenses" until the

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passed the LAST never received such appointments (BOE Br. 59-60). This could be due to many factors, including individual choices, principals' multiple objective and subjective selection criteria, and the fact that passing the LAST was not the only prerequisite for appointment (*see id.* at 9-12, 52-53). Whatever the cause, the comparator data show that the existence of sufficient vacancies does not guarantee that each class member would have filled one if they had passed the LAST on the first attempt.

Plaintiffs continue to rely uncritically on the district court's 2013 statement that, due to the large number of vacancies, all qualified class members would have obtained permanent teaching appointments (SPA-11-12). But for the reasons just discussed, the total number of vacancies does not affect BOE's probability-of-appointment analysis. Moreover, as BOE showed in its opening brief, and plaintiffs do not dispute, the court's statement is an unreliable foundation for a damages award. The court made it at a stage of the case when damages were not yet at issue, without the benefit of BOE's statistics, and in reliance on

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State ended the program in 2003 (*see* BOE Br. 10-11). Most class members were once PPTs.

representations by plaintiffs that significantly overstated the teaching qualifications of the class (*see* BOE Br. 58-64). Plaintiffs identify no valid reason for the district court to rely on this unsubstantiated, out-of-context observation rather than BOE's showing of what really happened to comparators.

2. Plaintiffs cannot square their position with Title VII remedial principles.

Plaintiffs seek refuge in a misreading of Title VII caselaw, claiming that it precludes a probability-of-appointment reduction whenever the number of vacancies exceeds the number of class members (Pl. Br. 59-62). But unsurprisingly, the law does not support the unfair windfall plaintiffs seek to preserve.

Plaintiffs rely on *Claibourne v. Illinois Central Railroad*, 583 F.2d 143 (5th Cir. 1978) (Pl. Br. 59). But in *Claibourne*, unlike here, the defendant railroad had a policy of granting "carman" promotions to *every* qualified white employee, while entirely denying them to black employees. *Id.* at 148-49. In that context, the court's further finding that there was sufficient "carman" work for all 27 class members to perform logically meant that there should be no probability-of-

promotion reduction for any class member. *Id.* at 149-50. But *Claibourne* sheds no light on the situation here, where BOE showed that *not every* non-African-American, non-Latino PPT who passed the LAST ended up getting a BOE teaching appointment.

Plaintiffs' attempt to distinguish the cases BOE cited in its opening brief likewise fails. Plaintiffs contend that none of those cases are applicable because they supposedly involved situations where the number of class members exceeded the number of vacancies (Pl. Br. 60-61). But, in fact, in many of the cases the number of class members *did not* exceed the total number of vacancies. Rather, those cases relied on the same sort of statistical analysis BOE uses here to determine that class members had less than full probabilities of obtaining the positions at issue and to pro-rate their awards accordingly.

For example, in *Ingram*, the number of vacancies significantly exceeded the number of backpay-eligible class members, not the other way around.[5] The court nonetheless found it an abuse of discretion to

[5] There were 66 referrals by the defendant union during the discriminatory period, of which 10 were minorities, leaving 56 referrals where discrimination could have prevented a minority union member from being hired, compared to 18 backpay-eligible class members. *Ingram*, 709 F.2d at 810, 13. BOE's opening brief (at 55 and

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award full backpay to the 18 backpay-eligible class members. Based on a demographic analysis of the local workforce, the court held, it was unreasonable to assume that more than seven of the class members would have been hired but for discrimination. *Ingram*, 709 F.2d at 810-13. Thus the court pro-rated the backpay awards of the 18 class members to reflect their more limited probability of hire, *id.* at 812-13—just as BOE proposed should occur here.

The same was true in *Hameed v. International Association of Bridge, Structural & Ornamental Iron Workers, Local Union No. 396*, 637 F.2d 506, 520-21 (8th Cir. 1980), where backpay-eligible class members did not exceed total vacancies, but the court held that backpay should be pro-rated because a statistical analysis of applicant-pool demographics showed that class members had a less than 100% probability of obtaining one of the discriminatorily denied positions.[6]

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n.16) noted that there were 27 hires potentially affected by the discriminatory policy, but this figure was not based on the full, relevant time period. *Compare Ingram*, 709 F.2d at 810, *with id.* at 811. In any event, either figure shows that backpay-eligible class members *did not* exceed vacancies.

[6] Out of 397 hires, only 22 went to African Americans, leaving 375 that could have been filled by African American applicants. *Id.* at 520. Demographic analysis showed that only 45 of those openings likely would have gone to an African American absent discrimination. *Id.* While the group of backpay-eligible class

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Similarly, in *Stewart v. General Motors Corp.*, 542 F.2d 445 (7th Cir. 1976), the court did not determine whether the backpay-eligible class members exceeded the total number of possible promotions to salaried positions. Rather, the reason for pro-rating backpay was the fact that not all employees obtained such promotions, regardless of discrimination. *Id.* at 452-53. Thus, the court ordered a study be performed to determine what proportion of comparable white employees received promotions, *id.* at 453—just as BOE did here.

There is no meaningful distinction between the rationale for pro-rating damages in these cases and the rationale for doing so here. In both situations, statistics show that not all class members would have obtained positions in the absence of discrimination. Indeed, plaintiffs agreed with this view before they were against it. In a 2011 letter to the district court advocating for their own proposed aggregate methods of calculating certain aspects of backpay, plaintiffs cited some of the same cases that BOE relies on, and argued that "[c]lass-wide methods have

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members had not yet been identified, the court noted that this group would include many of the 180 African American applicants who had been denied the positions at issue. *Id.*

been recognized as no less precise than individual determinations" for calculating counterfactual backpay (A-1074 (citing *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 261 (5th Cir. 1974)); *see also* A-1075 (citing *Hameed,* 637 F.2d at 521)).[7]

Contrary to plaintiffs' arguments (Pl. Br. 58, 64-65), the application of a probability-of-appointment reduction does not conflict with the goal of making victims "whole" or with the general principle of resolving uncertainties against the party responsible for them, even assuming that the principle could properly be applied against BOE. Rather, applying such a reduction is mandated by the fundamental principles that a Title VII remedy must as nearly as possible "recreate the conditions and relationships that would have been had there been no unlawful discrimination," and "should not constitute a windfall at the expense of the employer." *Ingram*, 709 F.2d at 811, 812 (cleaned up). Those principles define what it means to make a victim "whole"

[7] BOE's briefs use the prefix "A-" to refer to the Joint Appendix of Classwide Documents and "CA-" to refer to the Confidential Joint Appendix of Classwide Documents, filed on November 8, 2019. The briefs use the prefix "MS-A-" for the Joint Appendix of Class Member-Specific Documents and "MS-CA-" for the Confidential Joint Appendix of Class Member-Specific Documents, which were filed as deferred appendices.

and, as the cases show, cannot be ignored in the name of resolving uncertainties against the discriminator. Rather, the obligation to award relief tailored to the damages suffered by the class as a whole compels pro-rating awards where not all class members would have obtained a discriminatorily denied position and it is impossible, without a "quagmire of hypothetical judgments," to determine which ones would have been chosen. *Stewart*, 542 F.2d at 452.

3. Individual hearings do not provide an adequate means to account for the probability of appointment.

There is no merit to plaintiffs' contention that BOE's opportunity to prove that particular claimants would not have been hired is an adequate alternate to pro rata probability-of-appointment reductions (Pl. Br. 63-64). As BOE established in its opening brief (at 52-54), individualized showings with regard to counterfactual appointment are nearly impossible to make in most instances because hiring decisions turn on countless factors, unknowable in that hypothetical world, such as the specific schools to which the applicant would have applied, the quality of references and of competing applicants, the applicant's interview and sample lesson, and the match between an applicant's

particular skills, experience, and methods and the particular principal's hiring criteria and subjective judgment.

Plaintiffs do not attempt to dispute this characterization of BOE's hiring process. They also offer no explanation of how BOE could meaningfully demonstrate in an individual hearing that a particular class member would not have been appointed. Instead, they argue vaguely that "personnel records and evaluations" in BOE's possession would allow BOE to make this showing (Pl. Br. 64). Such records, however, do not suffice to answer the myriad questions relevant to whether a particular class member would have been appointed. And while plaintiffs now attempt to downplay this inherent unknowability, they recently embraced it when discussing a comparator-based classwide figure to account for the length of time it would have taken class members to obtain a teaching appointment after hypothetically passing the LAST. In that context, plaintiffs argued that the duration was indeterminable on an individual basis because it would "have to take into account an interview by a principal, *subjective factors that we really can't recreate*" (A-1847 (emphasis added)).

Plaintiffs were speaking there about the impossibility of determining just one hiring variable on an individualized basis. Panning back to consider all of the complex, discretionary judgments involved in teacher hiring, it becomes clear that if the court had truly attempted to determine in individual hearings which class members would have been hired, it would have stepped "into a quagmire of hypothetical judgments in which any supposed accuracy in result would be purely imaginary." *Stewart*, 542 F.2d at 452 (cleaned up).

But in reality, the court made no such attempt. Instead, it entirely ignored the subjective, multi-factored hiring process and the fact that only 75% of similarly situated comparators were appointed after passing the LAST. Instead, the court simply assumed that all class members would have been appointed unless BOE proved the specific reason, in a counterfactual world, that a particular class member clearly would not have been (SPA-12). By assuming away the counterfactually unprovable reasons for non-appointment, this approach assured that the individual hearings would not result, in the aggregate, in a damages award that accords with the but-for-discrimination conditions reflected in the comparator data. And the fact

that the court resolves all uncertainties against BOE in each individualized hearing (A-2030) only exacerbates the prejudicial impact of the court's approach.

Finally, there is no merit to plaintiffs' contention that BOE would "enjoy a windfall" if its probability-of-appointment reduction were applied while BOE also is able to challenge in individual hearings whether individual claimants would have been appointed (Pl. Br. 62-63). The fact that it may be reasonably certain that some class members either would or would not have been appointed is fully consistent with applying a pro rata reduction for class members where neither outcome can be predicted with certainty.

And contrary to plaintiffs' argument, BOE's proposed approach would yield it no windfall. Plaintiffs ignore that we would apply *no* probability-of-appointment reduction to a significant number of class members—146 of the 347 judgments on this appeal—consisting of teachers who had and lost, or eventually obtained, BOE teaching appointments (*see* BOE Br. 46 n.13 and separate Addendum filed with BOE's opening brief). This exclusion reflects a judgment that these class members' actual experience of obtaining BOE teaching appointments

shows with reasonable certainty that they would have obtained them in the but-for world as well. The number of class members thus excluded from the probability-of-appointment reduction vastly outstrips the very small number of claimants, if any, that the district court has determined would not have been appointed.[8] There is no windfall for BOE.

In fact, this approach would still result in a *plaintiff's* windfall, albeit less of one than the current rulings will. Because the relative size of the two categories just described is so imbalanced, outcomes for the class as a whole will still be skewed in favor of appointment, resulting in an overall counterfactual appointment rate that exceeds the 75% rate seen in the comparator data. This means that applying a 25% probability-of-appointment reduction to class members where no reasonably certain prediction of appointment or non-appointment can be made would not actually result, in the aggregate, in an award that fully tracks the comparator data.

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[8] During the time period that the judgments on this appeal were entered (through September 3, 2019), no express non-appointment findings were made. BOE has identified fewer than ten class members who were awarded test-taking fees, but no backpay, under circumstances that might suggest an implicit finding that they would not have been appointed (*e.g.* MS-A-2511-15).

Below, BOE's expert proposed a more balanced approach, but the district court rejected it. His analysis featured offsetting categorical exclusions from the 25% probability-of-appointment reduction based on certain objective facts. Thus, while he proposed no reduction for class members who eventually passed the LAST and obtained teaching appointments, he also proposed to award no backpay to class members who eventually passed the LAST but did *not* obtain a BOE teaching appointment (A-1728-29)—the logic being that this experience, too, is indicative of the class members' but-for-discrimination appointment experience. The remainder of the class (with some additional exclusions) would have received the 25% reduction (*id.*).

The court, however, rejected BOE's proposal to award no backpay to the category of class members whose actual post-passage experience resulted in no appointment (SPA-14-15), leaving BOE's proposal imbalanced in favor of plaintiffs even if the 25% reduction is applied as proposed on this appeal. In that light, retaining BOE's ability to show that certain smaller categories of class members would not have been

appointed, while still applying a 25% reduction to others, is more than fair to plaintiffs.[9]

B. Plaintiffs' objections to the calculation of the probability-of-appointment reduction are unpreserved, unfounded, and irrelevant to the appeal.

Plaintiffs also make an unpreserved and meritless objection to the foundation of the probability-of-appointment reduction that BOE has proposed, contending that it should be rejected as unsupported (Pl. Br. 56-57). This argument is not properly before the Court, having never been raised below. *See, e.g., United States v. Bilzerian*, 926 F.2d 1285, 1294-95 (2d Cir. 1991). If plaintiffs were at all confused about BOE's expert's data, methodology, or results, they could, and should, have said so in the months following the submission of the report, when BOE's expert could have addressed any supposed confusion over his data or methods.

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[9] If the Court believes it would be inappropriate to apply a reduction while allowing BOE to show, based on objective facts, that certain class members or categories of class members would not have been appointed, it should still order the district court to make pro rata probability-of-appointment reductions, without allowing individualized non-appointment showings.

The objection is also patently wrong. As BOE's expert, Dr. Erath, explained in his report, his proposed reduction derived from a straightforward review of appointment results for non-African-American, non-Latino PPTs who passed the test. He further noted where he found this information, explaining that he had relied on, among other sources, "Service and salary history for all [BOE] employees from 1995-2014, showing position held, salary step, and dates" and "LAST history, showing test dates and pass/fail outcome, produced by New York State" (A-1727). Moreover, BOE contemporaneously shared with plaintiffs files containing his supporting data, analysis, and results.[10]

Finally, plaintiffs' objections to the specific size of the probability-of-appointment reduction are irrelevant to this appeal. Below, plaintiffs objected to applying *any* probability-of-appointment reduction *in principle*, not to the particulars of BOE's calculation of the proper reduction. And the district court rejected BOE's proposed reduction on

[10] At plaintiffs' request, within days of submitting his report Dr. Erath uploaded his files containing this supporting information to a file transfer portal set up by plaintiffs' counsel specifically for this purpose.

that erroneous legal ground, rather than based on any perceived deficiency in BOE's expert's methodology or analysis (SPA-11-12, A-2029-31). That error requires a remand for recalculation of damages. When the cases are back before it, the district court may consider arguments, if any, about why the particular reduction should be different than the 25% found by BOE's expert. But for purposes of this appeal, plaintiffs' belated and feigned objection does them no good.

C. BOE preserved its argument for a classwide probability-of-appointment reduction.

Finally, plaintiffs' preservation arguments are meritless (Pl. Br. 43-44). Plaintiffs do not dispute that BOE filed objections to the district court regarding the Special Master's recommendation to deny BOE's proposed classwide probability-of-appointment reduction (A-2049-52). That ends any question of preservation. *See Potamkin Cadillac Corp. v. B.R.I. Coverage Corp.*, 38 F.3d 627, 631-32 (2d Cir. 1994) (considering on appeal issues raised in objections to Special Master's report).

Nonetheless, plaintiffs contend that BOE waived its argument for a reduction by failing to object on that ground during the individualized hearings for each individual class member (Pl. Br. 43). But by the time

the individualized hearings began, in late 2016, the district court had already rejected a classwide probability-of-appointment reduction, finding such a reduction to be "preclude[d]," and instead permitted BOE to present only individualized evidence that "a specific claimant would not have been hired for some non-discriminatory reason" (SPA-11-12). BOE cannot have waived an argument by failing to repeatedly raise it after it had definitively been rejected. Confirming this common-sense point, the report and recommendation for each judgment acknowledges that BOE agreed to the Special Master's request to "raise objections only to aspects of the demand that had not previously been addressed by" the court's rulings (*e.g.*, MS-A-38).

Plaintiffs' other preservation arguments are equally meritless (Pl. Br. 43-44). Contrary to plaintiffs' contention, BOE *did* note that a classwide reduction was necessary to properly account for "the subjective decisions that cause some candidates not to be hired" (A-2051). And while BOE opposed remedy-phase class certification in part on the ground that plaintiffs' vaguely defined proposed methodology for classwide backpay calculation should not be credited toward a showing that classwide issues predominated over individualized ones (A-1581),

BOE did not argue that it would always be inappropriate to use comparator-based statistics to account for inherent uncertainties in backpay calculations. Moreover, BOE lost that motion—a remedy-phase class was certified.[11]

More relevant is that plaintiffs argued that a "pure individual-by-individual approach" in this case would result in a "quagmire of hypothetical judgments," noting that courts have recognized that "the size of the class, subjectivity in employment decisions, number of vacancies for employment and other concerns," can, in cases like this one, render it "impossible … to determine awards on an individual basis" (A-1077). These statements, rather than plaintiffs' position in this appeal, accurately state the controlling legal principles.

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[11] Plaintiffs (Pl. Br. 14), like the district court (SPA-12-13), incorrectly suggest that BOE's proposed aggregate approach to attrition is inconsistent with the court's prior rejection, at the remedy-phase class-certification stage, of the plaintiffs' proposal to have its expert make classwide adjustments to backpay "to account for the probability that a teacher would have earned more or less … as a result of various opportunities and circumstances set forth in the [collective bargaining agreements]" (A-1620). The court did not rule that all classwide methods for calculating backpay were inappropriate (*id.*). Indeed, plaintiffs receive the benefit of various aggregate methods for calculating backpay under the current damages model, including a comparator-based projection of counterfactual pay increases for achievement of educational milestones (Pl. Br. 31), a comparator-based projection of the time from hypothetical LAST passage to appointment (A-2319), and a comparator-based average of additional counterfactual earnings beyond regular salary (*see, e.g.,* MS-A-19-20 n.57).

POINT III

THE DISTRICT COURT ERRED BY FAILING TO PROPERLY ACCOUNT FOR POST-APPOINTMENT ATTRITION

The same fundamental principle that requires the use of pro rata probability-of-appointment reductions here also requires application of pro rata post-appointment-attrition reductions: a Title VII remedy must "as nearly as possible, recreate the conditions and relationships that would have been had there been no unlawful discrimination." *Ingram*, 709 F.2d at 811 (cleaned up). Because the district court adopted an individualized approach to recreating counterfactual careers that paid no attention to whether known, comparator-based rates of attrition would be properly accounted for across the class as a whole, the court violated this fundamental principle and abused its remedial discretion. Plaintiffs' attempts to justify the district court's improper approach all fail.

A. Title VII remedial principles require an approach to calculating backpay that accurately accounts for post-appointment attrition across the class.

Plaintiffs' contend that the district court's case-by-case approach to attrition was appropriate because Title VII caselaw does not require

the "irrebuttable" application of attrition probabilities notwithstanding individual facts (Pl. Br. 67). But plaintiffs' framing masks the true issue in this appeal and mistakes BOE's point. While Title VII caselaw does not mandate irrebuttable reliance on statistics in calculating backpay in all cases, it does require equity to both the class and the defendant, and an accurate recreation, in the aggregate, of the but-for-discrimination conditions, so that the overall award is "proportionate to the court's best determination of the *actual* compensatory losses of a class." *City of Miami*, 195 F.3d at 1301; *see Ingram*, 709 F.2d at 811-12. By establishing a process for case-by-case attrition determinations that was not tethered to the goal of accurately accounting for attrition over the class as a whole, the court violated these core principles and abused its discretion.

BOE's proposed approach maintains fidelity to aggregate accuracy while accounting for individual facts that eliminate uncertainty: uniformly apply attrition probabilities to years where there is uncertainty as to whether class members would have remained a BOE teacher in their counterfactual career. If plaintiffs or the court preferred a more individualized approach to charting counterfactual careers, it

was incumbent on them to identify some workable mechanism to ensure that the overall allocation of counterfactual attrition across the class remained consistent with the attrition rates seen in the comparator data—what plaintiffs' expert referred to as "creat[ing] the variance in the hearings themselves" (A-1802 at 47:6-7; *see* BOE Br. 74-77). What the district court could not do is what it did: create an unbounded individualized process that was not targeted, in the aggregate, to the known rates of attrition. Plaintiffs' breezy discussion of the caselaw does not undermine this basic point.

1. Plaintiffs' handful of cases say nothing about whether a classwide approach was required here.

Plaintiffs note that courts in a few (non-class-action) cases have declined to apply comparator-based attrition rates, relying instead on individual determinations (Pl. Br. 69-71). But those cases, involving small groups of plaintiffs, small comparator sets, and shorter potential backpay periods, are fundamentally different from this one.

In *Ernst v. City of Chicago*, there were only five plaintiffs, and the comparator set consisted of just 79 paramedics, of whom 17 had left employment. 2018 U.S. Dist. LEXIS 215340, at *2, 60 (N.D. Ill. Dec. 21,

2018). Given these small numbers, the court was able to review the specific reasons each of the 17 comparators had left and found that none of the five plaintiffs would have left for those reasons. *Id.* at *62-63. Similarly, *E.E.O.C. v. Joe's Stone Crab, Inc.* involved only five claimants, with a shorter potential backpay period, and attrition estimates drawn from small comparator sets. 15 F. Supp. 2d 1364, 1371-74, 1371 n.8 (S.D. Fla. 1998). And *E.E.O.C. v. Dial Corp.* involved just 54 claimants and a maximum possible backpay period of five years. 469 F.3d 735, 739-40 (8th Cir. 2006).

None of these cases presented anything like the problem here of accounting for inherently irreproducible counterfactual attrition across a class of thousands and a decades-long potential backpay period.[12] In the circumstances of this case, the extremely large and robust set of comparator data on rates of attrition provides the only reliable guide for

[12] The average time from counterfactual appointment to the date of judgment for the class members on this appeal was nearly 20 years (19.51). BOE's opening brief mistakenly reported this figure as 20.37 (BOE Br. 124) and thus as "more than 20 years" (*id.* at 67) due to an error in three entries in the penultimate column of the Table on page 104 of BOE's opening brief. (The entries reading 119.33, 119.39, and 119.40 should have been blank.) Relatedly, on page 66, "329 of 347" and "158 of 347" should read "325 of 343" and "154 of 343," respectively, but the brief's characterizations of these figures—"over 90%" and "nearly half"—remain accurate.

constructing class members' counterfactual careers so that the classwide award is tailored to the actual losses of the class as a whole.

2. Plaintiffs fail in their attempt to distinguish the caselaw requiring a classwide approach to attrition here.

Plaintiffs' attempt to distinguish the cases BOE relies on is equally flawed. Plaintiffs contend that the cases should be ignored because they do not specifically mention attrition and because they purportedly required classwide methods only to address the probability of hire in circumstances where class members outnumber vacancies (Pl. Br. 72-74). But plaintiffs' argument regarding vacancies is misplaced, as described above (at 12-14). And more fundamentally, the principle that the cases espouse is not limited to the probability-of-hire context.

The cases stand for the proposition that Title VII remedies must aim to recreate, as nearly as possible, the but-for-discrimination conditions and must be tailored to the harm suffered by the class as a whole. *See Ingram*, 709 F.2d at 811-12; *City of Miami*, 195 F.3d at 1301. Thus, where, as here, the class is large, the time period is long, and the events to be counterfactually recreated turn on multiple unknowable, non-objective factors and discretionary choices, courts should not step

"into a quagmire of hypothetical judgments in which any supposed accuracy in result would be purely imaginary." *Stewart,* 542 F.2d at 452 (cleaned up); *see Pettway*, 494 F.2d at 261. Instead, a classwide approach is required to ensure as accurate a recreation as possible of the damages suffered by the class as a whole. Plaintiffs identify no reason why these principles are not just as applicable to counterfactual attrition as they are to the probability of hire.

The Seventh Circuit's decision in *Stewart v. General Motors Corp.* illustrates the point. There, faced with the uncertainty not only of determining which class members would have been hired, but how their careers would have progressed, the Court required the district court on remand to "trace over a period of time the history of a group of white hourly employees which is comparable to the group of black employees constituting the class receiving the backpay award" and to use the results of that study to estimate the overall backpay owed to "the black hourly employees as a group." *Stewart*, 542 F.2d at 453. Such a study would have captured both promotions and attrition and is no different

from what BOE proposed here.[13] *See also Pettway*, 494 F.2d at 263 (requiring classwide approach to backpay, such as formula based on "actual advancement of a comparable group not discriminated against"); *Hameed*, 637 F.2d at 521 (requiring comparator-based approach to backpay calculation).

B. The district court's approach is not designed to accurately recreate but-for-discrimination attrition in the aggregate.

Plaintiffs also contend that the district court's approach to attrition comports with Title VII's "make whole" mandate because it requires that the attrition probabilities be considered "in the first instance" and then permits the parties to prove that deviations are warranted (Pl. Br. 75-78). But, as noted above, Title VII's mandate to make victims of discrimination whole does not differ from, but is defined by, the requirement to accurately recreate but-for-

[13] Plaintiffs' attempts to distinguish *Stewart* are unavailing (Pl. Br. 73-74). The fact that the court recognized that counterfactual promotions to certain positions could be determined solely based on seniority does not alter its holding that other counterfactual questions, for which no "objective standards" were determinative, required a classwide, comparator-based approach. *Stewart,* 542 F.2d at 452. Plaintiffs' speculation that the decision was motivated by a desire to promote settlement merely underscores that plaintiffs are unable to distinguish the case.

discrimination conditions across the class as a whole. The district court's process is not designed to achieve that end.

While the attrition probabilities are to be considered "in the first instance" under the court's approach (A-2035), the court neither set standards for when those probabilities could be set aside, nor prescribed a method to ensure that the counterfactual attrition determinations, in the aggregate, generally track the comparator-based attrition rates. Any correspondence between the outcomes of this standardless approach and the comparator data would therefore have been purely accidental. And, in fact, there is none.

Plaintiffs are wrong to suggest that the process is fair because BOE has an equal opportunity to convince the Special Master to set aside the attrition statistics and cut short an individual claimant's backpay award (Pl. Br. 76-77). By its very design, the process is strongly skewed against BOE. Because the Special Master resolves all uncertainties against BOE, each inherently uncertain counterfactual attrition determination is made with a heavy thumb on the scale in plaintiffs' favor.

The proof that the Special Master will accept as reason to set aside the attrition statistics is also imbalanced. Plaintiffs point to the Special Master's statement that BOE would be able show, for instance, that backpay should be cut off because a particular claimant "was convicted of a crime, ceased working altogether, or moved out of state to aid an ailing relative" (Pl. Br. 77 (quoting A-2036-37)). But the very narrowness of these examples illustrates BOE's point by implicitly acknowledging that BOE had no way of proving, with facts from class members' actual lives, whether and when they would have left a counterfactual teaching position for most of the myriad subjective, factually contingent reasons that teachers do in reality.

Moreover, even when an objective fact might seem probative of an early departure, BOE's ability to prove attrition was shut down by the Special Master's repeated holding that "subsequent behavior after suffering adverse employment consequences that flowed from unlawful discrimination cannot be said to predict with any reliability how a Claimant would have behaved absent the discrimination" (*e.g.*,

MS-A-3090).[14] Indeed, it is no coincidence that the Special Master qualified his "moved out of state" example with "to aid an ailing relative." When class members moved out of state for other reasons, the Special Master disregarded the evidence, reasoning that they might not have moved if they had become BOE teachers.[15] If the butterfly effect of an initial LAST failure eliminates the counterfactual probative value of all, or nearly all, subsequent behavior, then BOE stood little chance of proving that a class member would have stopped teaching for BOE.

By contrast, plaintiffs were not burdened by the same limitation on their ability to prove that class members would never have left a BOE teaching position. As BOE showed in its opening brief, and as plaintiffs concede, the Special Master eliminated attrition probabilities and awarded full backpay through judgment or retirement based on

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[14] Plaintiffs complain that BOE's opening brief cited certain instances in which the Special Master recited this principle to reject BOE's arguments about counterfactual educational attainment or other similar issues, rather than to reject BOE's attrition arguments (Pl. Br. 79-80). But plaintiffs do not dispute that this was the Special Master's operating principle in making attrition determinations. The fact that BOE's ability to rely on objective evidence was hamstrung in multiple areas affecting backpay hardly boosts plaintiffs' argument that the process was fair.

[15] *See, e.g.* MS-A-3094-95, 3099 (awarding backpay through judgment without attrition reduction despite class member moving out of state and working, sporadically, only in non-education-related jobs).

factors such as taking the LAST multiple times or simply having a job at the time of claim resolution (even if not in education or for long stretches of time) (BOE Br. 80-82). That plaintiffs were able to rely on such evidence, while BOE was circumscribed by the notion that any behavior subsequent to failing the LAST is inherently unreliable, illustrates the fundamental imbalance of the district court's individualized approach to attrition.

Plaintiffs miss the point in their attempts to rationalize the Special Master's disparate treatment of "subsequent behavior" when relied on by plaintiffs as opposed to BOE (Pl. Br. 79). Even if "discrimination derails the careers and limits the choices of its victims" (*id.*), the remedy for that discrimination must be "proportionate to the court's best determination of the *actual* compensatory losses of a class," *City of Miami*, 195 F.3d at 1301. An individualized process that allows plaintiffs to rely on facts of a type that BOE cannot is a process that could never recreate, or even approach, the attrition statistics expected for the class as a whole, and thus is not calculated to result in a just award in the aggregate.

C. The court's individual rulings cannot, and do not, salvage a process that is not designed to recreate the actual harm to the class as a whole.

Plaintiffs contend that the court's case-by-case approach to attrition must be deemed reasonable because BOE has chosen not to individually challenge on this appeal any specific attrition determinations, and did not maintain case-by-case objections to many of them below (Pl. Br. 78, 85). But that contention simply pretends that BOE is bringing a different appeal than it is. BOE's argument is that even if the individual determinations may not be clearly erroneous viewed alone, the court's process itself is an abuse of discretion because it is not designed to produce a lawful award to the class as a whole.

The same flaw undermines plaintiffs' contention that the examples BOE cited in its opening brief support the court's approach to attrition (Pl. Br. 86-88). Plaintiffs assert that it would have been "perverse" for the Special Master to have applied attrition probabilities to "reduce" the backpay of class members who took the LAST multiple times and who were employed (albeit, not in education) at the time the Special Master resolved their claims (Pl. Br. 88). Indeed, plaintiffs argue (Pl. Br. 79, 88)—and the Special Master effectively agreed (*see*

supra at 35-36)—that it would be perverse to apply attrition probabilities based on nearly any aspect of a class member's career because doing so would supposedly punish them for BOE's discrimination.

But that could be perceived as perverse only in the topsy-turvy landscape of the court's approach to attrition, in which Title VII's mandate to recreate but-for-discrimination conditions (including attrition) in the aggregate has been replaced by a standardless review based on sympathy, intuition, and the guiding principle that all uncertainties should be resolved against BOE. If applying attrition probabilities is treated as an unfair "punishment" of victims of discrimination—as the district court's approach invited plaintiffs and the Special Master to treat it—there is no chance that attrition will be accurately accounted for, either individually or across the class as a whole. Thus, plaintiffs' argument only highlights the fundamental flaw in the district court's approach.

In a similar vein, plaintiffs contend (Pl. Br. 83-84) that it would be illogical to apply attrition probabilities to class members who continued working for BOE in non-teacher capacities after losing a PPT position.

Plaintiffs claim that these individuals should be treated no differently from those who ultimately passed the LAST and obtained teaching appointments—class members to whom BOE does not propose to apply attrition probabilities, because their BOE teaching end date, if any, can be drawn from their actual careers. But, under the classwide approach proposed here—in which comparator-based probabilities are applied across the board to class members for whom the determination is inherently uncertain—the distinction between these two categories is entirely logical.

For those who eventually passed the LAST and were appointed BOE teachers, their real-life experience eliminates the need for counterfactual recreation of attrition in either direction: if the class member leaves, for example, the year after being appointed, backpay ends then based on real-life attrition, while if the class member stays through judgment, backpay continues through judgment. But for those who worked for BOE in non-teaching positions, attrition from a hypothetical BOE teaching position is a matter for counterfactual recreation, as evidenced by the fact that plaintiffs do not propose that *leaving* a BOE non-teaching position should be treated as definitive

evidence that the class member would have left a BOE teaching position at the same time. Because a counterfactual attrition prediction is required for such class members, attrition probabilities must be applied to them to ensure that, in the aggregate, the counterfactual attrition allocated to the class is commensurate with the comparator-based attrition rates.[16]

Plaintiffs also claim that the court's approach can be justified because the court cut off backpay for some class members before their judgment date (Pl. Br. 81-82). But plaintiffs never claim that these cut-off backpay periods meaningfully alter the overall skew resulting from the court's wholesale rejection of attrition probabilities, and the vague analysis plaintiffs do present plainly overstates the balancing effect, if any, of these judgments.

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[16] Even if one accepted plaintiffs' premise that attrition should not apply to years of continued BOE employment in non-teaching capacities, it would not affect the overall point that a classwide approach to attrition was required here—it would simply change the scope of that approach. Moreover, contrary to plaintiffs' unsupported claim that 105 of the 223 class members to whom BOE's attrition argument applies continuously worked for BOE "through the date of judgment" (Pl. Br. 83), just 21 of the 223 did so even through their retirement or claim-resolution dates, much less until judgment.

Setting a pre-judgment backpay end date does not eliminate the probability of attrition before that date. For example, the vast majority of the 21 pre-judgment end dates that plaintiffs claim account for "millions of dollars" less in backpay (Pl. Br. 82 (citing *id.* at 34 n.109)), were set based on the class member's retirement (*see* BOE Br. at 103-10 (Table)). But BOE's expert showed, in his original proposal, that pre-retirement attrition probabilities could be separately calculated and applied while also setting a retirement-based end date (A-1731-32, A-1731 n.7). Plaintiffs' examples—and the fact that the court's process treated the setting of any backpay end date as a reason to omit all attrition probabilities—simply illustrates that the court's process for accounting for attrition was not designed to adequately capture it.[17]

Plaintiffs also attempt to justify the district court's approach to attrition by arguing that the Special Master did not *always* refuse to

[17] Due to incorrectly accounting for years that class members spent as PPTs, the rough estimates of the amount of the plaintiffs' windfall provided on page 87 of BOE's opening brief are somewhat overstated, but remain significant even when corrected. Instead of a 40% reduction in backpay, accounting for pre-retirement attrition would result in an approximately 28% reduction among the 181 class members referenced on that page. Applying that reduction to the nearly $133 million in damages awarded to those class members produces an estimated $37 million windfall—one that will only multiply as awards are calculated for the 4,000-plus class members not consolidated in this appeal.

apply attrition probabilities. In support of this claim, however, they point only to judgments entered after the 347 consolidated on this appeal (Pl. Br. 85 n.256). And the fact that plaintiffs identify just 17 instances where attrition was applied—16 by agreement, just one by Special Master ruling—out of the 859 *additional* judgments entered by the date of plaintiffs' brief (bringing the total number of judgments to 1,206), only reinforces BOE's point that the attrition probabilities play essentially no role in the individualized process.

Contrary to plaintiffs' suggestion (Pl. Br. 90), a classwide approach to attrition would not unfairly benefit BOE by allowing it to receive the benefit of the pro rata attrition reductions while retaining the backpay end dates that the court determined to fall prior to the judgment date. BOE does not seek a double benefit, but simply a method that ensures that, in the aggregate, the counterfactual attrition attributed to the class tracks the comparator data. For example, as explained above (at 42), one way to adequately account for both retirement and attrition may be to determine a retirement date for each class member and apply pre-retirement attrition probabilities to the previous years, as BOE originally proposed (A-1731-32). On remand the

district court can decide whether retirement dates and other backpay end dates determined for reasons that would already be captured in the comparator-based attrition probabilities should be discarded in connection with applying classwide attrition probabilities, or whether such end dates should be kept, with or without the need to make any adjustments to the attrition probabilities.

Nor, finally, is BOE's proposed approach to attrition too "vague," as plaintiffs contend (Pl. Br. 89-91). To the contrary, BOE has shown that the district court abused its discretion by applying an approach to post-appointment attrition that did not use aggregate fidelity to the comparator-based attrition statistics as its guiding principle and thus violated the fundamental requirement that a Title VII remedy must "as nearly as possible, recreate the conditions and relationships that would have been had there been no unlawful discrimination." *Ingram*, 709 F.2d at 811 (cleaned up). On remand, the district court should apply an approach that accounts for attrition in a manner that adheres to the comparator-based attrition probabilities for the class as a whole. While certain details may need to be worked out, the approach is far from vague. Indeed, it is precisely what the caselaw has long required.

D. BOE has preserved its post-appointment attrition argument.

Just as with the probability of appointment, plaintiffs present a baseless preservation argument regarding post-appointment attrition (Pl. Br. 44-45). Again, there can be no preservation problem here, where BOE filed objections to the district court regarding the Special Master's recommendation to deny BOE's proposal to apply a classwide post-appointment reduction (A-2051). *See, e.g. Potamkin Cadillac*, 38 F.3d at 631-32.

First, plaintiffs mischaracterize the record in claiming that BOE conceded that it had "no objection" to the Special Master's approach to post-appointment attrition as long as it had access to relevant discovery. To the contrary, BOE's objection letter—on which plaintiffs rely for the purported concession—makes clear that, regardless of discovery, BOE objected to the Special Master's refusal to adopt classwide approaches to accounting for the probability of hire as well as post-appointment attrition, contending that the Special Master's approach would result in an "unlawful[]" windfall for plaintiffs (A-2049-52). BOE's later "no objection" statement related to an entirely different point: whether limitations on discovery violated BOE's due process

rights (A-2052). BOE explained that it would have no *due process* objection if discovery were adequate; in so doing, it certainly did not withdraw its overall objection to a process it contended would result in an excessive award in the aggregate.

Next, plaintiffs are incorrect in asserting (Pl. Br. 44-45) that BOE waived its argument for applying post-appointment-attrition probabilities to certain class members or counterfactual years because BOE purportedly never requested to do so before the Special Master. Contrary to plaintiffs' contention, BOE's expert proposed to apply post-appointment attrition to all class members who had not passed the LAST, without excluding those who had been demoted from an appointed teaching position (A-1730-31, 2055). Indeed, the Special Master did not understand BOE's argument to exclude demoted class members (A-2033-38), and BOE's objection letter did not draw the distinction that plaintiffs now suggest (A-2051-52). Likewise, BOE's expert did not endorse excluding from attrition probabilities years when

plaintiffs remained full-time BOE employees in non-teaching capacities after losing PPT positions based on failing the LAST.[18]

Finally, as in the probability-of-appointment context, plaintiffs are far off base in contending that BOE waived its classwide attrition argument by failing to raise individualized objections to each of the Special Master's case-by-case attrition determinations (Pl. Br. 45-46). BOE's appeal is based on its objection to the court's overall approach to attrition, not on the application of that erroneous approach in individual cases. The court rejected BOE's arguments for classwide post-appointment attrition well before the individualized hearings began, and BOE agreed to the Special Master's request to "raise objections only to aspects of the demand that had not previously been addressed by" the district court's rulings (*e.g.*, MS-A-38). As this request

[18] While the wording of his report is not as clear as it could have been on this point, BOE's expert shared files with plaintiffs that showed his data, analysis, and results, which make clear that such an exclusion was not applied. With regard to plaintiffs' comment (Pl. Br. 27) that BOE only made a limited objection to the Special Master's later assertion that class members who "remained at the BOE … would have remained at least as long" in a counterfactual world, the Special Master's statement (A-2212) came *after* the court had already rejected BOE's classwide attrition proposal. At issue was simply what could be presumed in individual hearings, conducted under a preponderance of the evidence standard, not whether it would be appropriate to make such an assumption as part of a classwide approach.

reflects, BOE did not relinquish its fundamental objection to the district court's flawed approach by declining to repeat it endlessly, to no effect.

POINT IV

THE COURT SHOULD REMAND THE AFFECTED JUDGMENTS FOR A NEW BACKPAY DETERMINATION WITHOUT EXTENDING THE BACKPAY PERIOD

If the Court does not revisit and reverse its liability ruling, it should remand the affected judgments (identified in the Addendum to BOE's opening brief) with instructions to determine backpay using a classwide approach to probability of appointment and attrition. Contrary to plaintiffs' contention (Pl. Br. 91-92), the reassessment of the damages awards should not result in an opportunity to extend the potential backpay period beyond the original date of judgment for the affected class members. Extending the potential backpay period is neither supported by this Court's precedent nor necessary to redress the harm suffered by class members. It would, however, unfairly penalize BOE for successfully challenging the excessive damages awards on appeal.

Since the purpose of the backpay remedy is to make plaintiffs whole for the injuries suffered, backpay should run from when the discriminatory action began until it "is rectified." *Clarke v. Frank*, 960 F.2d 1146, 1151 (2d Cir. 1992). The end date is "ordinarily" the date of judgment, *Sands v. Runyon*, 28 F.3d 1323, 1327 (2d Cir. 1994) (cleaned up), unless an earlier date marks the end of the discrimination, *Clarke*, 960 F.2d at 1151. Since the excessive judgments more than make plaintiffs whole, there is no reason to extend the backpay period, if, on appeal, the backpay award is determined to be excessive. Rather, the excessive award must only be corrected for the benefit of the defendant.

Indeed, this Court has shown that errors resulting in the imposition of excessive back pay should be corrected without extending the backpay period. In *Ingram*. the Court reduced an excessive damages award that "did not recreate the conditions that would have existed in the absence of discrimination" by modifying the judgments for each plaintiff. 709 F.2d at 812-14. Here, BOE similarly seeks to correct excessive damage awards that failed to properly recreate the but-for-discrimination conditions. As in *Ingram*, this Court should articulate the correct approach to such awards and order that the already-entered

judgments be modified accordingly, without extending the potential backpay period. *Id.* at 814.

Plaintiffs quibble that *Ingram* modified the district court's awards without mentioning their date of judgment (Pl. Br. 91), but the Court's silence on this point confirms that correcting an excessive backpay award does not require a new judgment date or extended backpay period. By plaintiffs' logic, the Court should have extended the judgment dates and allowed the plaintiffs to recover additional backpay up to the date of its decision.

It also makes no difference that the Court in *Ingram* reassessed damages itself, rather than remanding for the district court to do the work. *Ingram* found that the aggregate damages award overcompensated the class as a whole by failing to accurately recreate the but-for-discrimination conditions, and that classwide reductions needed to be made to ensure an appropriate award in the aggregate, just as BOE requests that the Court do here. It should make no difference whether the work necessary to revise the awards is done by the appellate court or the district court. Either way, the class has been

overcompensated—made more than whole—and adjustments need to be made to right-size the awards.

Plaintiffs cite no case law suggesting that a remand to recalculate damages necessitates an extended backpay period. They rely on *Sands v. Runyon* (Pl. Br. 92), but *Sands* does not require that courts extend the backpay period when correcting an errant judgment—especially one that overcompensates plaintiffs. The plaintiff in *Sands* appealed from a judgment that deprived him of more than two months of backpay and interest by stopping the backpay period before the judgment date. 28 F.3d at 1328. The defendant employer had also failed to make the plaintiff whole because the plaintiff continued to work for the defendant but was not being compensated at the appropriate salary level because the district court improperly denied him a retroactive promotion. *Id.* at 1328-29. The Court therefore ordered that backpay should run through the date of the corrected judgment on remand, since the plaintiff continued to suffer harm from the employer's discrimination. *Id.* at 1328.

Here, in contrast, plaintiffs do not dispute that their original judgments made them whole, including proper seniority adjustments

and pay increases where applicable. Plaintiffs fail to articulate how the harm they have suffered "continues through the pendency of this appeal" such that using the original judgment date would be "premature[]" (Pl. Br. 92). To the contrary, the plaintiffs were made whole and—if this Court agrees with BOE's view and orders revisions of their judgments—were overcompensated by the failure to account for the probability of appointment and post-appointment attrition in the original judgment. An opportunity to extend backpay through a new judgment date is not necessary or appropriate to remedy the harm plaintiffs suffered.

Plaintiffs' insistence on an extended potential backpay period also ignores that class members will be compensated for any delay in receiving payment through pre- and post-judgment interest (A-2200 n.9). *See Westinghouse Credit Corp. v. D'Urso*, 371 F.3d 96, 101 (2d Cir. 2004). Plaintiffs do not explain why, if BOE prevails on appeal, accounting for any appeal- or remand-related delay through ongoing accrual of interest, without an extended backpay period, would "add further injury to victimized class members" (Pl. Br. 92).

To the contrary, to allow the potential backpay period to be extended beyond the original date of judgment as a result of an appellate finding that the plaintiffs have been overcompensated could significantly undercut the Court's correction of that windfall, and punish BOE for successfully exercising its right to appeal. Accordingly, if the Court remands the judgments to appropriately account for the probability of appointment and post-appointment attrition, plaintiffs should not be permitted to benefit from an extended potential backpay period. Either the original judgment date should be retained, or the district court should be precluded from extending backpay beyond the date of the original judgment.

CONCLUSION

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

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word 2010, and according to that software, it contains 10,450 words, not including the table of contents, table of authorities, this certificate, and the cover.

/s/ Aaron M. Bloom
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