UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

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| AMY COHEN, et al.,<br>PLAINTIFFS,<br><br>v.<br><br>BROWN UNIVERSITY, CHRISTINA PAXSON, as successor to VARTAN GREGORIAN, and JACK HAYES, as successor to DAVID ROACH<br>DEFENDANTS | Case Number: 92-CV-0197-JJM-LDA |

**PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO ENFORCE JUDGMENT, TO ADJUDGE IN CONTEMPT AND FOR EMERGENCY RELIEF**

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## I. INTRODUCTION

Plaintiffs hereby file the within Supplemental Brief in support of their Motion to Enforce Judgment, to Adjudge in Contempt, and for Emergency Relief, ECF 357, and Memorandum of Fact and Law in Support, ECF. 357-1 (filed June 29, 2020) (hereinafter "Motion to Enforce").

In their Motion to Enforce, Plaintiffs argued that Brown's decision to eliminate the women's varsity equestrian, fencing, golf, skiing, and squash teams, if implemented, would be a gross violation of the Joint Agreement of the parties, incorporated in the Judgment of the Court, entered on October 15, 1998 ("Joint Agreement") and would cause immediate and irreparable harm to the class.[1]

Since the filing of their Motion, Plaintiffs have taken expedited discovery and depositions of four officials and decisionmakers from Brown. That discovery has confirmed the truth of what Brown itself stated on June 6, 2020: that its decision to eliminate the five women's teams violates the Joint Agreement.

But that discovery showed something even more troubling: as it turns out, Brown *knowingly violated* the Joint Agreement (and by extension Title IX) because it wanted to use this dispute as a vehicle for *challenging* the Agreement—presumably so that it can proceed to violate Title IX with impunity. In internal emails Brown fought tooth-and-nail to hide, it decided to deflect the anger generated by its decision to eliminate men's track, field, and cross country onto the Court and the female student-athletes at Brown, and to blame the Joint Agreement (which Brown

[1] The Joint Agreement constitutes the binding agreement of the parties on Brown's plan for compliance with Title IX of the Education Amendments, 20 U.S.C. § 1681, as to its intercollegiate athletic program. (A copy of the Joint Agreement is attached to the Motion to Enforce as Exhibit A, ECF 357-2.)

Chancellor Samuel Mencoff called a "pestilential thing" with Brown President Christine Paxson's agreement). Defendants wanted to develop a plan to attack the Joint Agreement more subtly, so, in President Paxson's words, it could avoid riling up "the [Amy] Cohens of the world." But Plaintiffs file their Motion before Brown could get all its ducks in a row.

More details on this disturbing turn of events are set forth below. But, before reviewing why Brown's disturbing behavior, internal deliberations, and previously-hidden documents underscore the validity of Plaintiff's Motion to Enforce, it may be helpful to review where things stood before discovery started.

**Brown's Blatant Violation of the Joint Agreement**: On May 28, 2020, simultaneous with notice to the affected athletes, counsel for Brown advised class counsel that Brown was, effective immediately, removing five women's and six men's teams from the varsity program, and creating two varsity sailing teams, called women's and co-ed sailing. Christina Paxson, *Excellence initiative to reshape athletics at Brown* (May 28, 2020) https://www.brown.edu/about/administration/president/statements/excellence-initiativereshape-athletics-brown.

At the time, Brown said its decision "is not a measure to reduce budget or an effort to contend with the financial impact of the pandemic." *Id*. Rather, the decision was designed to improve the "excellence" of Brown's athletic program. *Id*. Brown's counsel acknowledged that the actions would trigger the Joint Agreement's requirement that women's and men's intercollegiate participation rates be within 2.25% of their undergraduate enrollment rates and represented that Brown's new program would meet that requirement. The teams being eliminated were men's and women's golf, fencing, and squash, women's skiing and equestrian, and men's cross country, indoor/outdoor track and field.

Not surprisingly, this decision was met with dismay from the student athletes, many of whom had been heavily recruited by Brown and had foregone the chance to attend other schools in reliance on Brown's promise that they would be able to play their chosen sport at the University. Brown's decision, which came in the wake of tragic killing of George Floyd by Minneapolis police officers, particularly engendered uproar because three of the eliminated teams—men's track, field, and cross country—had a large number of minority athletes.

Instead of reinstating those teams and an appropriate number of women's teams, Brown chose to violate Title IX and the Joint Agreement. In response to the public outcry following the May 28 decision, on June 6, 2020, Brown President Christina Paxson tried to shift the blame for eliminating the three men's teams onto the Joint Agreement (and onto the class of women athletes at Brown) by announcing that men's track, field and cross country had been eliminated in order to comply with the Joint Agreement and that, if men's track, field, and cross country "were restored at their current levels and no other changes were made, *Brown would not be in compliance with our legal obligations under the [Joint] Agreement*." *See* Christina Paxson, *Addressing Brown varsity sports decisions* (June 6, 2020), https://www.brown.edu/about/administration/president/statements/addressing-brown-varsity-sports-decisions. (emphasis added).

Then on June 9, 2020, just three days later, Paxson announced that Brown was restoring men's track, field, and cross country, and that *no other changes were being made to restore any of the women's teams*. In a letter to the Brown community, she wrote, "The reinstatement is effective immediately and *does not alter other decisions to reduce the number of varsity sports as part of the initiative*." Letter from President Paxson: Track and field and cross country (June 9, 2020) https://www.brown.edu/news/2020-06-09/track This decision placed Brown in clear violation of Title IX and the Joint Agreement, just as President Paxson said it would. *See* ECF 357-1at 13–14.

Plaintiffs' counsel contacted Brown and Brown refused to concede what President Paxson had *already* admitted: that reinstating the three men's teams without *also* adding back women's teams violated the Joint Agreement. Instead, Brown took the position in pre-filing discussions that its preseason 2020-21 rosters proved it *was* (or, at least, will be) in compliance.

**Plaintiffs' Motion to Enforce**: Because of the direct and irreparable injury to plaintiff class members and the continued existence of their programs, Plaintiffs moved to enforce the Joint Agreement on an expedited basis. *See* ECF 357-1. In their Motion to Enforce, Plaintiffs challenged Brown's arguments by explaining, *inter alia*, that:

1. The predicted participation numbers Brown was relying on are unreliable and based on hopeful projections about larger team sizes" rather than their actual size. ECF 357-1 at 19-21;

2. Brown's numbers included 25 women and 10 men participating in coed sailing and the *same* 25 women participating in women's sailing, when coed and women's sailing had yet to operate as varsity sports. ECF 357-1 at 21-22;

3. Brown's numbers counted those same 25 women participating in coed and women's sailing twice—as if they were 50 student-athletes. ECF 357-1 at 21-22; and

4. The Joint Agreement specifically provides that compliance will be based on participation numbers measured *at the end of the academic year*, yet Brown was seeking to demonstrate compliance based on hypothetical predictions about varsity teams that do not yet actually exist. ECF 357-1 at 22-23.

Brown responded to the Motion to Enforce by continuing to argue that the elimination of the women's teams does not (or will not) violate Title IX. *See* ECF 366 (filed July 9, 2020) ("Brown Opposition"). It insisted that its compliance with the Joint Agreement could only be measured by its preseason 2020-21 numbers; and that Plaintiffs were not entitled to know or see

anything else. In the face of determined and repeated resistance by Brown (including repeated disregard of this Court's orders, expansive claims of confidentiality, redactions without privilege logs, and repeated motions for protective orders designed to avoid disclosure), the Court ordered expedited discovery and allowed Plaintiffs to learn what Brown was trying to hide.

When Plaintiffs filed their Motion, they did not know or understand why Brown was purposefully violating the Joint Agreement and advancing what seemed to be a frivolous argument (based on unrealistic numbers) as to why it was in compliance. Nor did Plaintiffs know or understand why Brown was fighting so hard to keep the information about its activities secret.

Now, however, because of the Court's orders, Brown has produced the information it was hiding. And Plaintiffs now understand why, in the wake of Brown's original decision to eliminate more athletic opportunities for men than women—which would have brought Brown closer to gender equity than ever before[2]—the school publicly announced that it would be in violation of the Joint Agreement if it reinstated the men's track, field, and cross country without adding back any women's teams *and, three days later, did so*.

**The Shocking Truth**: Chillingly, Plaintiffs discovered that Brown *consciously chose* to violate the Joint Agreement in order to deflect the anger at its decision *onto the Court and the female athletes at Brown* and to use that anger as a means to get rid of the Joint Agreement entirely. As recounted below, Brown reinstated the men's track, field, and cross country teams *and no women's teams* because, instead of dealing with the racial and other furor its decision to eliminate

[2] As set forth in the Motion to Enforce, ECF 357 at 6 ¶¶16-17, based on the preceding two years' experience, Brown initially proposed to eliminate approximately 69 women participants and 93 male participants by cutting the eleven teams from the varsity program, which, depending on undergraduate enrollment, was likely to bring the proportion of women athletes within 0.49% of undergraduate enrollment.

the three men's teams raised, it wanted to "channel all this emotion away from anger at Brown to anger at the court and kill this pestilential thing"—i.e. the Joint Agreement.

Brown could have avoided all of this—the Motion to Enforce, the discovery, all of it—if it had simply reinstated sufficient women's teams *along* with the reinstated men's teams. Brown has the money to do that: it publicly *admitted* that its original decision to eliminate the 11 teams was *not* based on budgetary concerns; it wanted to improve the competitiveness of its "overall" program.

But Brown *chose* not to go that route, and it did so for the most cynical of reasons: it planned to use the anger over Brown's attempted elimination of the men's teams as a means to forever rid itself of the "pestilential thing" known as the Joint Agreement. The supreme irony, of course, is that only reason the Joint Agreement exists is because Brown violated Title IX by eliminating women's varsity teams way back in 1992. But Brown, apparently, does not learn from its mistakes.

This Court should not tolerate Brown's decision to use its women athletes as pawns in its bid to avoid compliance with the Joint Agreement. These students are not "participation opportunities"; they are human beings. Defendants' efforts to avoid responsibility for Brown's illegal gender discrimination this year should be no more successful than they were when this suit was filed nearly 30 years ago. Plaintiffs' Motion to Enforce Judgment should be granted and Defendants should be enjoined from eliminating any women's intercollegiate athletic varsity team unless and until they can prove that the elimination of these teams does not and will not violate the Joint Agreement and this Court's Judgment.

## II. THE EXCELLENCE IN ATHLETICS INITIATIVE WAS DESIGNED TO DECREASE THE NUMBER OF VARSITY TEAMS, INCREASE THE COMPETITIVENESS OF THE REMAINING VARSITY TEAMS, AND ADVANCE GENDER EQUITY.

**The Original Plan.** Brown's decision to eliminate over twice as many women as men from its intercollegiate athletic program was the result of its Excellence in Athletics Initiative. The process actually started in 2018-2019, when President Paxson engaged a consultant, Collegiate Sports Association, "to conduct a broad review of how we could make our varsity athletics programs more competitive." (Ex. 4, Paxson Depo. at 40).[3] As a result of that review, in December 2019, President Paxson decided to appoint an *ad hoc* Committee on Excellence in Athletics ("the Committee"), chaired by Trustee Emeritus Kevin Mundt, to advise her on restructuring the varsity athletic program to make it more competitive. [4]

One of the Committee's stated goals was to reduce the number of varsity sports at Brown, to increase the competitiveness of the remaining varsities. Another was to move closer to gender equity in athletics at Brown. The Committee was instructed that the "Final combination of varsity teams had to meet the following criteria – Gender equity: increase the fraction of varsity opportunities for women." (Ex. 25, BROWN 524). Committee members were shown PowerPoints explaining that "Eliminating any women's teams reduces variance from 3.5% to 2.25%," (Ex. 23,

[3] The following depositions are referenced in this submission: Deposition of President Christina Paxson, conducted on August 14, 2020; Deposition of Athletic Director Jack Hayes, conducted on August 15, 2020; Deposition of Director of Sailing Program John Mollicone, conducted on August 13, 2020; and Deposition of Committee Chair Kevin Mundt, conducted on August 17, 2020.

[4] *New initiative to reshape, improve competitiveness in Brown varsity and club athletics* (May 28, 2020) https://www.brown.edu/news/2020-05-28/athletics-excellence. "The Initiative's launch follows a deliberative process that dates back to an external review of Brown Athletics conducted in the 2018-2019 academic year, which found that the high number of varsity sports at Brown was a barrier to competitiveness."

BROWN 488), and emphasizing that **"Maintaining gender equity in athletics is not just about compliance with the consent decree and Title IX: it is also the right thing to do."** (Ex. 25, BROWN 512 (bold in original)).

President Paxson was directly and closely involved in the development, review, and outcome of this decision-making process. The Committee was strictly advisory.[5] President Paxson developed the initial "charge" for the Committee, which she shared with Chairman Mundt and Brown Corporation Chancellor Mencoff on January 5, 2020. (Ex. 28, BROWN 26993-26996). In this first draft, President Paxson made clear that her goal was to significantly reduce the number of varsity sports at Brown:

> Specifically, the committee will assess existing varsity and club sports with respect to the criteria outlined below, and make recommendations about which sports should take on club or varsity status. *The goal should be to reduce the overall number of varsity sports to no more than 25 (although I will be glad to see a report that offers options with numbers that range from 23 to 27.*)

(Ex. 28, BROWN 26995 (emphasis added)).

The Committee charge also acknowledged that "any plan must be compliant with the Title IX standards specified in Brown's consent decree. Basically, if Brown eliminates any women's varsity sports, the percentage of each gender participating in the program will have to be within 2.25% of each gender's participation in the undergraduate enrollment for the same academic year." (Ex. 28, BROWN 26993–26996). While the charge to the Committee was thereafter revised to remove any reference to a specific number of teams (Ex. 29, BROWN 26930–26931), these two goals—to reduce the number of varsity teams and enhance gender equity—remained the same.

[5] *See, e.g.*, Ex. 15, BROWN 26042 (Committee Chair Mundt asking President Paxson to publicly "stat[e] clearly that this is the university's and corporation's decision, and that our committee was there to help analyze and recommend.").

(Ex. 4, Paxson Depo. at 45; Ex. 1, Hayes Depo. at 44) (Ex. 29, BROWN 26930–26931).

The Committee was directed to work in complete confidentiality. Paxson Exhibit 5. The Committee kept no minutes or notes. (Ex. 3, Mundt Depo. at 49–50).

At the Committee's first meeting, on March 12, 2020, the Committee members, joined by President Paxson and Athletic Director Hayes, were instructed on their charge, provided relevant information, and briefed by Brown's General Counsel on Title IX, the *Cohen v. Brown University* lawsuit, and the Joint Agreement (sometimes referred to by Brown officials as the "Consent Decree") in the case. (Ex. 4, Paxson Depo. at 48–49, Ex. 27, BROWN 586–605).

At its second meeting, on April 17, 2020, the Committee was asked to focus on two alternative scenarios. Each involved elevating the sailing program—identified as coed and women's sailing—to varsity status. And each involved cutting, or converting to club status, varsity men's and women's fencing, golf, and squash. In Scenario 1,[6] men's tennis (but not women's) would also be cut, as well as men's and women's track and field and men's cross country. In Scenario 2, both men's and women's tennis would be cut, along with women's equestrian, and men's track, field and cross country (but not women's). (Ex. 22, BROWN 493).

The Committee recommended Scenario 2 at the April 17 meeting, and that scenario was ultimately presented to the Corporation Committee on Campus Life on May 14, 2020. Hayes Depo. at 95. According to President Paxson, it was actually *her* recommendation, since the Committee had been formed to advise the President. President Paxson prepared the PowerPoint presentation to the Corporation Campus Life Committee, which supported the restructuring. (Ex. 4, Paxson Depo. at 64-67; Ex. 25, BROWN 509–532). Under the restructuring approved by the Campus Life

[6] Defendants continued, in later analyses, to use the term "scenario" to discuss different alternatives. The later "scenarios" are unrelated to the two discussed here.

Committee, Brown's 38 teams would be reduced to 27. Depending on the metric utilized, the percent of "athletic opportunities" for women would increase from 50.7% to 52.8% or higher. (Ex. 25, BROWN 525). Brown's female undergraduate enrollment rate in 2019-20 was 52.3%. (Ex. 31, BROWN 129). This plan included the elimination of men's and women's tennis from the varsity lineup.

The proposed restructuring was next presented by the President to Brown's governing body, the Brown Corporation, on May 21, 2020. By that time, however, men's and women's tennis had been removed from the chopping block by President Paxson. (Ex. 4, Paxson Depo. at 87–88). Because the two tennis teams are roughly the same size, the change did not materially alter the gender equity analysis. (Ex. 1, Hayes Depo. at 106–107).

The plan approved by the Corporation on May 21, 2020, and announced by Brown on May 28, 2020, would have achieved both of the goals mentioned above. (Ex. 4, Paxson Depo. at 92; Ex. , BROWN 606-607). It eliminated six men's and five women's varsity teams and was designed to bring Brown closer to gender proportionality than it had ever been before. (Ex. 1, Hayes Depo. at 45–46). It was also thought to fulfill the other "criteria" the "final combination of varsity teams had to meet:" (1) "Favor teams that have higher ratings, (competitiveness, facilities, community impact)," (2) "Give each varsity team the "optimal squad size (calculated in a variety of ways)," and (3) "Consider impact on diversity." (Ex. 25, BROWN 524). But that plan was never implemented.

The reaction to it proved Brown had not adequately considered the impact on diversity. And Brown's reaction to that showed why Plaintiffs' Motion to Enforce Judgment had to be filed: Brown was willing to jettison its goal of increasing gender equity as "**the right thing to do"** and violate the Title IX Consent Decree when it could have easily satisfied both—by reinstating

women's teams when it decided to reinstate men's track, field, and cross- country.

## III. THE BACKLASH TO ITS DECISION TO ELIMINATE MEN'S TRACK, FIELD, AND CROSS COUNTRY PROMPTED BROWN TO ABANDON GENDER EQUITY AND INTENTIONALLY VIOLATE THE JOINT AGREEMENT.

The decision to cut five women's teams and six men's teams from the varsity lineup and to elevate the sailing program to varsity status, approved by the Brown Corporation on May 21, 2020, was announced on May 28, 2020, and, almost immediately, generated wide and loud opposition. Supporters of men's track, field, and cross country mounted a major campaign challenging the decision to eliminate the three men's varsity teams, particularly highlighting the loss of racially diverse athletes when the nation was focused on the death of George Floyd in Minneapolis and the Black Lives Matter movement. (Ex. 4, Paxson Depo. at 120).

Stung by the extraordinarily bad publicity and horrible messaging that the University's decision had engendered, Brown sought to tamp down the campaign publicly, while privately reassessing the decision to include men's track, field, and cross country in the eliminated varsity sports.

By June 4, 2020, senior decision-makers at Brown were already exploring whether and how they could reinstate the three men's teams. A series of emails exchanged between the President, the Chancellor of the Brown Corporation (Brown's governing body) [7] and the Athletic Director disclose Brown's true motivations and intentions.

On June 4, 2020, at 8:40 pm, AD Hayes wrote to Chancellor Mencoff to explain the impact of reinstating men's track, field, and cross country. In the example, Hayes used the "Brown plan" numbers and gave three scenarios. In Scenario I, the just-approved and just-announced plan was

[7] The Brown Corporation is the governing body and the Chancellor is the head of the Corporation. (Ex. 4, Paxson Depo. at 13-14).

expected to produce 407 male athletes and 456 female athletes, a total of 863 athletes. (This included double-counting women on sailing.)[8] In Scenario II, adding back men's track, field and cross country, which AD Hayes pegged at 60 more men, the women's percentage would drop to 49.4%.[9] (Ex. 15, BROWN 27004, 24781–24783, 24776–24778). With undergraduate enrollment "trending to 52% female,"[10] at 2.25%, the permitted variance from 52.0% would be 49.75%. (Ex. 15, BROWN 27004, 24781–24783, 24776–24778).

In Scenario III, Hayes observed that Brown could easily satisfy the Joint Agreement by reinstating women's equestrian at the same time.[11] "The variance in the third example is about 1%. If the undergraduate female enrollment rose slightly above 52%, we could make slight reductions to selected men's teams and/or increases to selected women's teams to remain in proportionality." (Ex. 15, BROWN 27004); (*see also* Ex. 15, BROWN 24781–24783), expressing a readiness to

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[8] The "Brown plan" numbers represented one of several calculations that President Paxson and the Committee had considered and analyzed in exploring alternative scenarios. The "Brown plan" numbers treated indoor and outdoor track as one number. The numbers appear in a Brown-prepared spreadsheet, BROWN 502, marked as Exhibit 13 at the deposition of AD Hayes. According to Hayes, he last used the spreadsheet with the numbers as updated May 20, 2020 and did not run the numbers thereafter. (Ex. 1, Hayes Depo. at 111).

[9] At 923 athletes, 2.25% represents over 20 athletes, big enough to field one or two of the eliminated teams. In the "coach's ideal roster size," which Hayes used to populate BROWN 502, men's track, field and cross country were listed as having 72 participants, not 60. (Ex. 20, BROWN 26445).

[10] In 2019-20, undergraduate enrollment was 52.3% women. (Ex. 31, BROWN 129). In public statements, President Paxson characterized Brown as approximately 53% women. *See* Paxson, *Addressing Brown varsity sports decisions*.

[11] In this scenario, Hayes counted men on track, field and cross country as a total of 60 participants and women on equestrian as a total of 32 participants. (Ex. 15, BROWN 27004). In fact, according to Brown's annual reports to Plaintiffs, the average number of women on equestrian in 2019-20 was 23.5 (Ex. 31, BROWN 129) and in 2018-19 was 21.5 (Ex. 30, PL 61).

increase women's rosters. [12]

Ten minutes later, at 8:50 pm, Chancellor Mencoff wrote to President Paxson with another idea: let's *not* try to comply with the Consent Decree; *let's try to kill it*. Mencoff attached "data on our Ivy League peers that I requested from Jack." As Mencoff saw it, if Brown were not subject to the Consent Decree, it would have more latitude than even a 3.5% variance from the undergraduate enrollment rates (let alone the newly-lowered 2.25% variance) in the varsity sports it offered to its women student-athletes. It could increase the size of its men's teams, bring back men's track, field, and cross country and make no other changes.[13]

In an email well worth quoting at length, Mencoff wrote that rather than comply with the Joint Agreement, they could "kill this pestilential thing" by redirecting the public's anger away from the University and *onto the court and the female athletes:*

> As we know, the existence of the Consent Decree, and the math behind it, leads us to the *Excellence in Athletics* strategy. That needs to be explained clearly as the predicate for why we have come out the door we have.
>
> But here's an idea. Could we use this moment, where anger and frustration, especially from track and squash, are intense and building to go after the Consent Decree once and for all? Could we channel all this emotion away from anger at Brown to anger at the court and kill this pestilential thing? The argument would be that the Consent Decree is forcing us to eliminate these sports, and the court

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[12] Hayes testified, in direct contradiction to these written statements, that he would *never* add women to women's teams in order to achieve proportionality. (Ex. 1, Hayes Depo. at 118).

[13] "I have asked Jack to analyze whether, if we were no longer subject to the Consent Decree and had the latitude to operate within the bands of our Ivy peers, we could achieve the roster size realignment that we are seeking [that is, larger men's teams] while retaining track for example." (Ex. 15, BROWN 24794–24795).

The attachment compared variances from proportionality, using EADA data for 2018-19. (Ex. 15, BROWN 24795). Of course, none of the other Ivies had been found to have violated Title IX by terminating women's athletic opportunities in the past and ordered to demonstrate compliance in the future.

> would then be bombarded with e-mails and calls as we are now. We would be aligned then with all who oppose us now.

Mencoff to Paxson, 6/4/2020 at 8:50 p.m. (Ex. 15, BROWN 24794).

Hayes wrote back at 9:31 p.m., analyzing the same three scenarios, except this time claiming he was using the "EADA count."[14] Hayes stated that the percentages for women athletes increase using the EADA count. (Ex. 15, BROWN 24781). Hayes did not state—as Hayes knew—that the EADA numbers produce "a much higher number" for women's track than the Joint Agreement, and also measure only the first date of competition, rather than an average of the first and last competition as mandated by the Joint Agreement. (Ex. 1, Hayes Depo. at 113–114). Even using the EADA count instead of the court-mandated count, Brown would not be in compliance without adding back equestrian with 32 athletes, *but see* n. 11, *supra*, and even then, engaging in "minor tweaks" to both the men's and women's rosters. (Ex. 15, BROWN 24781).

Chancellor Mencoff responded at 9:42 pm, asking if Brown would have the flexibility to have a 3.6% variance under Scenario II if there were no Consent Decree. Hayes wrote back at 9:47 pm, stating that he agreed. (Ex. 15, BROWN 24781). At 9:56 p.m., Hayes reminded the Chancellor that, "[s]ince we have been previously sued, we would likely be best off if we were as close to 52% as possible. We can get there easily in scenario III." (Ex. 15, BROWN 24776).

The next day, June 5, 2020, at 12:06 pm, President Paxson wrote Chancellor Mencoff to state that she agreed with his approach and was following through. "This might be the perfect moment to petition the court to get us out of this agreement, which would let us restore men's

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[14] "EADA" stands for the Equity in Athletics Disclosure Act, 20 U.S.C. §1092(g). EADA counts indoor and outdoor track as two separate sports and counts participants only on the first day of competition, while the *Cohen* consent decree counts indoor and outdoor track as one team and averages the count on the first and last day of competition. (Ex. 1, Hayes Depo. at 29). AD Hayes acknowledged that using the EADA count instead of the *Cohen* count would produce a larger number of women athletes. (Ex. 1, Hayes Depo. at 113).

track, field and CC and still remain in compliance with Title IX. The question would be how quickly can we do this." (Ex. 15, BROWN 26044).

At 12:55 pm, on June 5, 2020, President Paxson wrote to Committee Chair Mundt expressing the same plan:

> Honestly, if we were not under the consent decree, we could bring back men's track and field and stay in compliance with Title IX (as it is applied to every other university.) I have been thinking about using this as a moment to petition the court for relief.

(Ex. 15, BROWN 26042). Mundt heartily agreed: "I think your last thought has tremendous merit and we should pursue that path." (Ex. 15, BROWN 26042).

Chancellor Mencoff continued this conversation in private with Richard Friedman, the Corporation Secretary, on June 7, 2020, as the Corporation and President Paxson continued to plan reinstatement of men's track, field and cross country without any other changes.

> The consent decree drove us to eliminate a big men's sport, and football was out. I think that disclosing that we plan to try to overturn the consent decree also gives us a somewhat graceful way to back down and reinstate track. I still wonder about some of the nuances about how to position this, as we discussed yesterday.

(Ex. 16, BROWN 25965).

Brown's public face was far different than its private planning. On June 6, 2020, President Paxson issued a letter to the Brown community stating, "Since the announcement of the athletics initiative, there have been requests to restore men's track, field and cross country; however if these sports were restored at their current levels and no other changes were made, Brown would not be in compliance with our legal obligations under the settlement agreement." And on June 9, 2020, when President Paxson announced that Brown was reinstating men's track, field and cross country, she said nothing about Brown's plan to go after the Joint Agreement or how Brown would or could comply with the Court's Order. That, too, was deliberate. As she explained to Chancellor Sam

Mencoff and Committee Chair Kevin Mundt, on June 9, 2020, she decided not to publicly disclose Brown's intention to fight the consent decree:

> Sam, Kevin,
>
> I wanted you to see the letter that we intend to send out after the students are told about reinstating men's track, field and cross country. I expect both of you may have wanted us to be more explicit about our intention to fight the consent decree. *Our concern is that this could rile up the Cohens of the world and put us in a defensive posture. We need space to work out a rock-solid legal strategy and then go on the offensive.* That said, I'd really value your reaction to the letter. Thanks.

(Ex. 16, BROWN 26190 (emphasis added)).

The foregoing exchange discloses, at the highest levels of Brown University, a contempt for this Court's Judgment and a determination to explore ways not to comply with the Joint Agreement, but rather to avoid it. In addition, the exchange reveals a fundamental misunderstanding by senior Brown officials of Brown's obligations under Title IX. These officials repeatedly expressed the notion that, if there were no Joint Agreement, Brown would have more flexibility to eliminate teams for women. In their view, whatever number Title IX imposes for "substantial proportionality," under Prong One, it is, or must be, greater than 2.25%, or even 3.5%, because other Ivy institutions—which had not cut women's sports or been sued-- have a larger variance in the proportion of male and female athletes than Brown.

But that's not the law. As the Court observed in 1995 in this case, Title IX requires that "the gender balance of its intercollegiate athletic program [must] *substantially* mirror[ ] the gender balance of its student enrollment." *Cohen v. Brown Univ.*, 879 F. Supp. 185, 200 (D.R.I. 1995); *see also id.* at 202 ("[s]ubstantial proportionality is properly found only where the institution's intercollegiate athletic program mirrors the student enrollment as closely as possible."). *Id.* at 111. Nor is there "a statistical safe harbor at" a fixed percentage. "Instead, the Clarification instructs

that substantial proportionality is properly determined on a 'case-by-case basis' after a careful assessment of the school's 'specific circumstances,' including the causes of the disparity and the reasonableness of requiring the school to add additional athletic opportunities to eliminate the disparity." *Biediger v. Quinnipiac University*, 691 F.3d 85, 106 (2d Cir. 2012) (citing 1996 OCR Clarification at 4). Although there is no magic number for determining proportionality, courts do not hesitate to find noncompliance where the "identified disparity" is attributable to a school's own misconduct, such as "careful control of its own athletic rosters." *Id.* at 101.

## IV. BROWN TRIED TO HIDE THE TRUTH FROM PLAINTIFFS AND THE COURT.

On June 9, 2020, President Paxson announced that Brown was reinstating the men's track, field, and cross country teams and making no other changes. As Plaintiffs' Motion recounts, ECF 357 at 3 ¶10, on June 10, 2020, Plaintiffs' class counsel notified Defendants in writing that they were in "gross violation" of the Joint Agreement and began efforts to resolve the matter without Court intervention. On June 11, 2020, after requesting an opportunity to confer, Plaintiffs forwarded a request for information about the deliberative process leading to the decisions, none of which appeared to be publicly available. Plaintiffs' request was appended as Exhibit G to their Motion to Enforce, ECF 357-8, and included the following request:

> 3. The proceedings and actions of the University (defined as including all departments and offices, including the Department of Athletics, Office of the President, Board of Trustees and Corporation) in considering, adopting and/or approving the decision, including:
>
> a. All committee meeting agenda and minutes, and correspondence within the University
>
> b. All data reviewed by the University not provided above
>
> c. All analyses of team composition, sizes, rosters, including projections and "what-if scenario" analyses, not provided above

> d. All reports, recommendations made and/or resolutions adopted by the University, including all projections of team size, composition, and rosters of the "before" and "after" programs

ECF 357-8 at 1.

In this initial request, Plaintiffs specifically and expressly asked for all correspondence within the University, including the Department of Athletics, Office of the President, and the Board of Trustees and Corporation, related to considering, adopting and/or approving the decision to cut teams, including five women's varsity sports. On June 18, 2020, class counsel also asked Defendants to provide them with all data, reports, analyses, and other information leading up to and forming the basis for the decision to reinstate the men's track, field, and cross country teams and make no other changes. ECF 357 at 4, ¶ 14.

Plaintiffs' Motion to Enforce, ECF 357, was filed on June 29, 2020. The Court held a preliminary scheduling conference with counsel on July 2, 2020. At that time, the Court issued a text order directing Defendants "to expeditiously produce to the Plaintiffs *all information* that Brown has to the elimination of certain athletic teams as it relates to gender." (Emphasis added.) When Defendants tried to interpose the entry of a protective order as a condition of production, the Court entered its Order of July 11, 2020, ECF 367, ordering Defendants "to produce, no later than Friday July 17, 2020, *all documents* concerning the elimination of certain athletic teams *as it relates to gender."* ECF 367 at 2 ¶ 3 (emphasis added). The Court further ordered Defendants "to produce, no later than Friday July 24, 2020, *all documents concerning the elimination of certain athletic teams*." ECF 367 at 2 ¶ 4 (emphasis added).

Despite this clear, unmistakable directive, Defendants' production carefully and selectively recast the Court's orders and declared that Defendants were producing "all information available at the time to predict whether Brown will be in compliance with the Joint Agreement's proportionality requirement for the 2020-2021 academic year." ECF 370-2. But, at that time,

Defendants had a series of emails, detailed above, between the Athletic Director, the President and the Chancellor of Brown University that discussed how Brown might comply with the Joint Agreement and included numbers, albeit with little analysis. These were not produced on July 17 or 24, 2020. Defendants also had a series of emails that discussed possible ways to manipulate the size of the women's track team. (Ex. 17, BROWN 24347-24351) These were not produced on July 17 or 24, 2020.

As Brown was considering the feasibility of reinstating the men's track, field and cross country teams, Brown's President, Corporation Chancellor, Corporation Secretary and Athletic Director also discussed Brown's compliance with the Joint Agreement (which they called the "Consent Decree"). As detailed in the preceding section, AD Hayes advised that, under the current numbers, reinstating the track program without other changes would not meet 2.25%. Hayes advocated restoring another women's team, such as equestrian, along with the men's track field, and cross country teams, to ensure compliance. (Ex. 15, BROWN 24782). In response, the Chancellor bemoaned the untenable constraints that the Consent Decree placed upon Brown (calling it "pestilential"), and urged the President to petition the Court to terminate the Consent Decree so that Brown could have more flexibility than 2.25% variance from undergraduate enrollment of women (let's "kill this pestilential thing"). (Ex. 15, BROWN 26044). Brown's President *agreed* with this plan. "I think it's a good idea…This might be the perfect moment to petition the court to get us out of this agreement, which would let us restore men's track, field and CC and still remain in compliance with Title IX." (Ex. 15, BROWN 26044).

*None of these documents* were produced on July 17, 2020, when the Court directed the production of "all documents concerning the elimination of certain athletic teams as it relates to gender," nor on July 24, 2020, when the Court directed the production of "all documents

concerning the elimination of certain athletic teams." ECF 367

In fact, the only fair conclusion to be drawn from Defendants' course of conduct in these proceedings is that Defendants had no intention of *ever* producing these documents and hoped to keep them hidden. On July 30, 2020, after making a selective, carefully curated production, which did not include any of these documents,[15] Defendants filed a Motion for a Protective Order, asking the Court to "limit[] discovery to that already ordered by the Court and deferring discussion of any additional discovery until after the hearing" in September. ECF 370 at 2. In their Motion, Defendants represented that they had "produced documents to Plaintiffs, which included all existing materials necessary to conduct the mathematical analysis required by the Joint Agreement's gender proportionality requirement for both the 2019-20 and 2020-21 academic years." ECF 370 at 4.

Not only was that statement incorrect,[16] but, with the benefit of hindsight, it is clear that Defendants were recasting the Court's actual directives in a way that they could later argue—if their plan did not work—that they did not understand that the withheld information had been ordered by the Court. Thus, in letters describing later production, defense counsel included a self-serving statement that all of the additional information being produced was responsive to a letter of July 27, 2020 from Plaintiffs. *See, e.g.*, Letter of R. Kaplan to L. Labinger, of August 9, 2020. In their Reply in support of the Motion for a Protective Order, ECF 372, filed July 31, 2020, Defendants described documents sought but not yet produced as "thousands of irrelevant documents," ECF 372 at 3, when Defendants knew that those documents included discussions—at Brown's highest levels—of ways to circumvent or terminate Brown's obligations under the

[15] These documents were not produced until August 9, 2020. *See, e.g.*, Ex. 19, Letter of R. Kaplan to L. Labinger, of August 9, 2020 (referencing production of bates numbers 24253-26195).

Court's Judgment, as well as a fundamental misunderstanding of the purpose and operation of the permitted variance.

Not only had Plaintiffs been seeking, among other things, "all correspondence" relating to the decisions to eliminate and reinstate varsity teams, since mid-June, 2020, but the Court's *orders* were expansive and clearly mandated production of *all documents* concerning the elimination of the varsity teams. Defendants' decision to withhold multiple contemporaneous emails—to and from the named Defendants—discussing the challenge of compliance and a plan to circumvent Brown's obligations under the Judgment in order to carry out the elimination of five women's varsity teams does not pass the laugh test.[17]

Respectfully, there is only one conclusion that can fairly be drawn from Defendants' actions: Defendants deliberately and consciously withheld critical documents concerning their decision-making and their contempt for this Court's Judgment and filed their July 30 Motion for a Protective Order, ECF 370, hoping that Plaintiffs and the Court would never see them.

## V. BROWN'S COMPLIANCE PLAN: IS "JACK HAYES WILL 'MAKE IT WORK.'"

Brown *knew* that that reinstating men's track, field, and cross country as varsity sports without *also* reinstating women's teams would violate the Joint Agreement. But that did not stop Brown from trying to get away with it. The school's officials were not yet ready to directly attack the Joint Agreement. So, they decided on a new tack. Their "plan" for compliance became "AD Jack Hayes will 'make it work.'"

In their depositions, Brown President Christina Paxson, Athletics Committee Chair Kevin Mundt, and Hayes testified that, once they decided to reinstate men's track, field, and cross county,

[17] *See, e.g., Reed v. Town of Gilbert,* 576 U.S. 155, 184 (2015) (Breyer, J., concurring in the judgment).

Brown would not even consider reinstating a women's team, even though as discussed earlier, AD Hayes acknowledged in his email to Chancellor Mencoff that Brown could be in compliance if they reinstated women's equestrian. (Ex. 4, Paxson Depo. at 125) (Ex. 15, BROWN 27004, 24781–24783, 24776–24778). Instead, they testified that their plan was simply that Jack Hayes would "make it work" with "roster management." (Ex. 4, Paxson Depo. at 107); (*see also* Ex. 4, Paxson Depo. at 107–109; Ex. 3, Mundt Depo. at 71; Ex. 1, Hayes Depo. at 116).

> Q.· ·Did you receive any reports, formal or informal, from the athletic director as to analyses of what would need to be done to achieve compliance?
>
> A.· ·He told me he could make it work.· He didn't say how, but he said, "With appropriate roster management, we can make it work."· We would be in compliance with *Cohen*.

(Ex. 4, Paxson Depo. at 107). Both Paxson and Mundt testified that they never asked for, nor were they shown, any analysis of *how* AD Hayes would make it work. (Ex. 4, Paxson Depo. at 107–109; Ex. 3, Mundt Depo. at 71)

The notion that key leaders of a nationally-renowned university facing a court hearing and potential liability– one of whom had already announced the school will be in violation of the law if "no additional changes" were made – would agree to let an employee somehow "make it work" and *not ask how* is simply astonishing. If credited, it demonstrates a complete abdication of responsibility to adhere to this Court's Judgment. Brown's officials may accept "Jack will make it work" as adequate proof the school will be in compliance. This Court cannot.

Moreover, as explained below, the evidence already shows that Hayes's approach to "making it work" through roster management involves relying on unreliable preseason rosters with inflated numbers of women, increasing women's teams beyond their historical sizes, counting women listed on rosters for a sport that has yet to complete a varsity season, and counting many

of the women participating in that sport twice. As Plaintiffs demonstrated in their initial Motion (ECF 357), these are not reliable or appropriate methods of proving compliance with either the Joint Agreement or Title IX.

**A. Brown's Reliance On Preseason Rosters And Roster Management Is Not Supported By The Law Of This Case Or The Joint Agreement.**

Despite testifying that roster management meant capping the men's rosters and not forcing women's teams to increase their roster sizes, AD Hayes actually plans to artificially increase the sizes of the women's teams as evidenced by the women's track, field, and cross country teams. (Ex. 1, Hayes Depo. at 116–118). During the course of discovery, Plaintiffs were provided with two different sets of numbers for preseason rosters for the 2020-21 seasons. These numbers are predictions at best and in some sports represent roster sizes far beyond what the teams have carried in years past.

Regardless, Brown has previously *admitted* that preseason roster numbers fluctuate considerably from the actual rosters. In 2010, Brown submitted a plan to class counsel to get the athletic program back into compliance with the Joint Agreement, as it was not able to meet substantial proportionality in the 2009-10 season. (Ex. 33, PL 122–129). In the plan, Brown stated:

> These projected rosters are subject to considerable fluctuation. As athletes have begun responding to the eligibility data requests there have been subtractions from the rosters because some of the returning players, as well as some of the potential walk-ons have decided they will not be on the team this year and removed themselves from consideration. A handful of others have been injured or decided to take a semester or year away from Brown.

(Ex. 33, PL 124). Brown now asks the Court to take the 2020-21 projected rosters as absolute proof that Brown will be in compliance next year, despite the fact that these rosters appear to carry far more women than in years past. However, Brown's own preseason numbers have not even stayed consistent between the months of June and July this year as evidence in the discovery produced.

The 2020-21 preseason rosters become even less reliable for actual participation on the remaining women's teams when compared to the *actual* roster sizes for the 2019-2020 seasons and beyond.[18]

| | **June 11 Production (Roster Declarations)** | **July 17 Production (Roster Declaration)** | **2019-2020 roster size (average)** | **Difference between July Preseason Roster and 2019-2020 rosters** |
|---|---|---|---|---|
| **Women's Teams** | | | | |
| Basketball | 15 | 15 | 13.5 | 1.5 more women |
| Crew | 53 | 53 | 49 | 4 more women |
| Cross Country | 26 | 27 | 19 | 8 more women |
| Field Hockey | 26 | 25 | 23.5 | 1.5 more women |
| Gymnastics | 22 | 22 | 15 | 7 more women |
| Ice Hockey | 23 | 23 | 18.5 | 4.5 more women |
| Lacrosse | 36 | 36 | 30 | 6 more women |
| Rugby | 32 | 33 | 34 | |
| Sailing (coed) | 25 | 24 | | |
| Sailing (women's) | 25 | 24 | | |
| Soccer | 32 | 32 | 27 | 5 more women |
| Softball | 23 | 23 | 18 | 5 more women |
| Swimming & Diving | 38 | 37 | 38 | |
| Tennis | 12 | 12 | 8 | 4 more women |
| Track & Field | 55 | 58 | 43 | 15 more women |
| Volleyball | 21 | 21 | 19.5 | 1.5 more women |
| Water Polo | 23 | 23 | 23 | |
| **Totals** | **487** | **488** | **379** | Increase of 63 women to the remaining teams (not including sailing) from last year |
| **Totals including double counting 24 women sailors:** | | **488** | **427** | Increase of 111 women |

These rosters show that Brown's "plan" for compliance largely consists of padding the numbers by adding additional athletes to existing women's teams and double-counting projected

[18] The underlying source for the roster declarations and spreadsheet have not been appended to this brief, but can be provided if necessary, the 2019-2020 roster sizes can be found at (Ex., 31, BROWN 129).

participants on sailing. According to Brown, all but three of the women's teams will be larger next year than in the past year. Brown even contemplates increasing the size of some teams, such as gymnastics and track, by more than 35 percent. Setting aside the fact that this is an extraordinary amount of women to add to these teams in the course of a year, it is difficult for Plaintiffs to believe that these women—if they are included on the teams—will receive a *genuine* participation opportunity. *See Biediger v. Quinnipiac Univ.*, 728 F. Supp. 2d 62, 94 (D. Conn. 2010), *aff'd*, 691 F.3d 85 (2d Cir. 2012) ("whether an athlete counts will hinge not only on whether he or she is on a roster list, practiced with a team, or competed in games over the course of the academic year; it will also be decided by examining the totality of the circumstances surrounding his or her participation").

Simply put, achieving Title IX compliance through "roster management" is legally indefensible where the "management" does not provide *real* participation opportunities for the affected athletes. *See id. See also Mayerova v. E. Michigan Univ.*, 346 F. Supp. 3d 983, 995 (E.D. Mich. 2018), *appeal dismissed*, 18-2238, 2020 WL 1970535 (6th Cir. Apr. 20, 2020) (rejecting "roster management" where "EMU has not explained, for example, how its goal to increase track rosters is responsive to the developing interests and abilities of women. Nor has EMU articulated what those developing interests and abilities might be. EMU has not conducted interest surveys to gauge student interest in athletics for the past few years."); *Portz v. St. Cloud State Univ.*, 196 F. Supp. 3d 963, 976–77 (D. Minn. 2016) (rejecting attempt to satisfy Title IX through "roster management" and double counting participation opportunities and noting that "[i]n order to count for Title IX purposes, a participation must be genuine and 'real, not illusory.'") (citation omitted).

The most accurate numbers the Court can use to determine compliance with the Joint Agreement are the rosters from the 2019-20 season.[19] These numbers represent actual women who competed in all (or at least some) of a season and are the only concrete numbers that the parties have to rely upon. They show that Brown is and will be in violation. *See* Plaintiffs' Memorandum of Law in Support of Motion to Enforce, ECF 357-1 at 18-20. Plaintiffs' expert will also provide the Court with testimony that, when looking at the average size of the women's teams over the last nineteen years, the difference between Brown's projections for the 2020-21 season and the actual rosters over the years is even greater and the 2020-21 projected roster numbers are not a valid measurement.

**B. A Case Study of Roster Manipulation: The Track Team.**

Brown's machinations regarding women's track illustrate its strategy of using roster manipulation to comply with the Joint Agreement. On June 7, 2020, AD Hayes was trying to "make it work" when he spoke with Tim Springfield, the head coach of track, field, and cross country about increasing the size of the women's roster. (Ex. 17, BROWN 24349-24351). In his email on June 7, Coach. Springfield detailed for AD Hayes and Deputy AD Colin Sullivan that the women's track, field, and cross country teams could have a total of eighty-one women (26 on the cross country team and 55 on the track and field team) for the 2020-21 season.[20] (Ex. 17, BROWN 24349–24350). In comparison, in the 2019-20 season, the women's track, field, and cross country teams had sixty- two women (19 cross country and 43 track and field). (Ex. 31, BROWN 129).

[19] Review of the 2018-19 season, which is the last full completed season, produces comparable results. (Ex. 30, PL 61-62).

[20] Plaintiff notes that the email stated there will be 26 women on the cross country team, 55 women on the indoor track team, and 55 women on the outdoor track team, but, pursuant to the Joint Agreement, Brown is not permitted to double-count indoor and outdoor track.

Further, the preseason rosters for the same time period only had 84 women between track, field, and cross country. (Ex. 34, 35, BROWN 438–440, 444–446; 447–449).

The email explained how the coach could further increase the roster sizes up to 89 women for the 2021-22 season or possibly 95 women for the 2021-22 season. (Ex. 17, BROWN 24350). Already, AD Hayes and the track coach were looking at inflating the women's teams by almost twenty women for the 2020-21 season—and the padding just gets worse from there.

Just two days later, Coach. Springfield suggested strategies to grow the women's roster for the 2020-21 season to somewhere between 90 women and 96 women on the track, field, and cross country teams. (Ex. 17, BROWN 24349). The plan included immediately recruiting women at Brown who ran cross country/track in high school, with seemingly little regard to whether these women could have a meaningful participation opportunity on the team. Coach. Springfield went on to suggest that these women would compete at local/regional meets, not at the meets that are the usual Ivy League or NCAA competitions for Brown track, field, and cross country athletes. (Ex. 17, BROWN 24349).

It became even more clear that Brown's intent was to add as many women to the team rosters as possible to "make it work" when AD Hayes asked how high Coach. Springfield could get his roster numbers for the 2020-21 season. (Ex. 17, BROWN 24347). On June 9, Deputy AD Sullivan said the women's track, field, and cross country teams could get to "150+" with walk-ons. However, to even make it feasible to have a team of this size, Deputy AD Sullivan acknowledged that Brown would have to start providing housing and food for the student-athletes for January training and indoor track meets—which is evidently something Brown is only doing for their premier runners ("high-level folks") currently—and providing training shoes and racing shoes for the additional women athletes as well. (Ex. 17, BROWN 24347). Brown would also have

to raise enough money to be able to afford these additional expenses if it wanted to be able to keep these extra women on the teams. (Ex. 17, BROWN 24347).

It is impossible to believe that these additional women will receive the same meaningful participation opportunity as the first 20 or even 40 women on these teams. In addition to being entirely unreliable numbers for counting how many women will be participating on these teams—increasing over the course of a couple days—these communications demonstrate Brown's willingness to consider doing *anything* (other than reinstating women's teams) to give the *appearance* that it will be in compliance with the Joint Agreement, even padding women's teams with so many athletes that their actual participation will be dramatically diluted, at best. That does not satisfy the Joint Agreement or Title IX. *See Biediger*, 728 F. Supp. 2d at 62. *See also* Remedial Order of August 16, 1995, ECF 357-3. [21]

Brown's idea of compliance seems to be increasing these women's team's sizes to where they would have to participate in local/regional competitions—not the normally-scheduled competitions—and Brown would have to provide housing, food, and equipment for women just to keep them engaged in the sport, rather than offer them the same opportunities as other varsity athletes at Brown. That is not sufficient for purposes of Title IX. *Biediger*, 728 F. Supp. 2d at 90 (citing Letter from Stephanie Monroe, Assistant Secretary for Civil Rights of the Department of Education (Sept. 17, 2008) ("2008 OCR Letter")).

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[21] As this Court previously held: "In no sense is an institution providing equal opportunity if it affords varsity positions to men but junior varsity positions to women. Attempting to pad the women's varsity participation numbers in this way indicates a regrettable lack of interest in providing an intercollegiate athletic experience for its female students that is equivalent to that provided to its male students." ECF 357-3 at 6-7 (footnotes omitted). In 2001, Plaintiffs disputed Brown's attempt to prove compliance by including "junior varsity" athletes as part of its women's teams. Brown agreed that it would no longer attempt to count them. (Ex. 32, PL 10).

This is just one example. Women's track, field, and cross country is only one team for which the projected preseason rosters for 2020-21 evidence an increase in roster sizes from the sizes of the teams in years past.

Brown's tactic of inflating the size of women's teams to achieve compliance appears to be baked into the program. In an email from the water polo coach on May 13, 2020, the coach stated that his ideal roster size for the water polo team is 19 men and 20 women. (Ex. 24, BROWN 26413). However, he added that he always tries to carry more women on his team to help with the Title IX numbers and that there were 24 women on the roster last year. (Ex. 24, BROWN 26413). The sailing coach indicated his ideal team size would be 12 men and 18 women, but the projected rosters have the sailing team at *24* women and 10 men, and, as detailed below, has been prohibited from having more men on the team. Brown seems to have no hesitancy in adding women to its teams that will not receive genuine participation opportunities. Female students at Brown were asked to recruit women to the teams to ensure Brown was compliant with the Joint Agreement, even if these women rarely practiced or played during competitions. (Ex. 5, Jacobs Declaration at ¶27). Female students from the eliminated teams have even been offered spots on the remaining teams to increase roster sizes. (Ex. 7, Vilandrie Declaration at ¶11). These are just the examples from student-athletes who are brave enough to speak against their own university.

Brown's reliance on the 2020-21 preseason rosters and planned manipulation of roster numbers to obtain compliance should be rejected. In addition to artificially inflated roster numbers, these estimated roster sizes are, at best, projections of what Brown *hopes* will be the team sizes this upcoming year. As Plaintiffs briefed in their initial motion, expressions of intent or interest, as opposed to actual participation, were championed by Brown as a more accurate way to measure "participation opportunities" and rejected by the Court in *Cohen III*. *See* 879 F. Supp. at 203-04.

This Court should not allow this behavior now and allow a year or more of gross non-compliance because Brown trusts Jack Hayes to "make it work." *See Favia v. Indiana Univ. of Pa.*, 812 F. Supp. 578, 585 (W.D. Pa 1993), *aff'd*, 7 F.3d 332 (3d Cir. 1993) ("You can't replace programs with promises.").

**C. Brown Cannot Rely On Sailing To Demonstrate Compliance.**

As Plaintiffs stated in their Motion to Enforce, the elevation of sailing to a varsity sport cannot be the basis for demonstrating compliance with the Joint Agreement, because sailing cannot be counted as a varsity sport until the team has had its first competitive season.

Importantly, the Court should note that, in years past when Brown wanted to change to its sports offerings, Brown's counsel reached out to class counsel to discuss the possibility and make sure any changes would not affect compliance with the Joint Agreement. Brown could have done that here. Had Brown reached out to class counsel, the parties could have discussed adding the sailing program as a varsity sport before eliminating any other teams, so that sailing was an established varsity sport at the time of any desired elimination. In fact, AD Hayes testified that Brown could have done exactly that, just as it added women's rugby in 2014. (Ex. 1, Hayes Depo. at 112:1–9). But Brown did not take any such action. And the sailing coach and AD Hayes both testified that key aspects of what is needed to confirm a varsity sport is not in place for sailing at this time.

AD Hayes testified that, although he believes the sailing team is already a varsity team, there are many aspects of being a varsity team that do not yet exist. (Ex. 1, Hayes Depo. at 154–156). The sailing coach confirmed that many details about becoming a varsity team had not been finalized. The roster is not finalized and will not be until after the team hold tryouts. The schedule is not finalized for the any competition that may occur in the spring. (Ex. 2, Mollicone Depo. at69–

72). The team does not have varsity uniforms, access to the varsity trainers, or the academic services available to all varsity athletes. (Ex. 2, Mollicone Depo. at 69–72). Coach Mollicone further acknowledged that once the sailing team is officially able to start athletic activities, when the students o it will have access to varsity benefits. (Ex. 2, Mollicone Depo. at 69–72). All of these missing details, along with the lack of a start of competition, show *why* Brown cannot use numbers from the sailing program to demonstrate compliance with the Joint Agreement now. The law makes clear that the promise of an additional team cannot take the place of the participation opportunities Brown is trying to eliminate now. *See Favia* 812 F. Supp. at 585

**D. Sailing Should Not Count as Two Participation Opportunities.**

Brown cannot count sailing as a varsity sport for compliance purposes this year, but, even if Brown had an already-established varsity sailing program, it *still* could not properly count the women participating in coed and women's sailing *twice*. Brown is trying to count the *exact same women* on both teams two times. Plaintiffs provided some detail about double-counting in their initial Memorandum, ECF 357-1 at 23-24, but information obtained during discovery makes it clear that being involved in both women's and coed sailing does not amount to more than one participation opportunity for the female student-athletes involved.

Importantly, Plaintiffs believe the situation Brown has created with its sailing program is most akin to the indoor/outdoor track counting issue that was addressed as part of the Joint Agreement. In the Joint Agreement, the parties agreed to count indoor and outdoor track as *one* participation opportunity because they did not represent a separate athletic participation opportunity for the student athletes who competed on those teams. (Joint Agreement, ECF 357-2 at 10, Sec. F.1.).

The same analysis should apply to the sailing team. The women on the sailing team will not be afforded additional benefits, training, or competition opportunities by being a member of both the so-called "women's" and "coed" sailing teams. Brown knows this to be true. Prior to this year, the club varsity team was always considered to be *one* team, with the women participating in both coed and women's races (called regattas). (Ex. 2, Mollicone Depo. at 83–85). Further, other Ivy League schools also recognize that participating in both women's and coed events are not separate participation opportunities, a fact Brown was well aware of when it decided to try and advance a compliance plan that double-counted these women. (Ex. 2, Hayes Depo. at 152–153 (confirming Harvard and Dartmouth do not double-count the women on their sailing team)). Plaintiffs' expert, Dr. Lopiano will also provide the Court with testimony regarding how college sailing is structured and why these women should not be counted twice.

John Mollicone, the sailing coach, confirmed that, while Brown may wish to count the women in the sailing program twice, these women will not receive double the benefits or double the opportunities to compete. As the coach of the club sailing team for the last twenty years, he is very knowledgeable about how college sailing operates. (Ex. 2, Mollicone Depo. at 17–18). In college sailing, club teams are permitted to compete with varsity teams, so the rules and structure of the Brown team will not change once the sailing team becomes a varsity team. (Ex. , Mollicone Depo. at 72). Pursuant to the college sailing governing body, each college is allowed to compete in 18 competition weekends for each year, regardless of how many teams they have. (Ex. 2, Mollicone Depo. at 45–46). The sailing season runs from September to May/early June, with a break during the winter months. (Ex. 2, Mollicone Depo. at 34). However, colleges can, and Brown does, send groups of student athletes to multiple regattas in a single competition weekend. (Ex. 2, Mollicone Depo. at 46). A regatta lasts the entire weekend, with races on Friday, Saturday, and

Sunday. (Ex. 2, Mollicone Depo. at 44). Regattas are typically either coed or women's races. (Ex. 2, Mollicone Depo. 47–48). In a coed race, it is permissible for a college to have a boat made up of all women, all men, or mix gender. (Ex. 2, Mollicone Depo. at 37). A female student athlete can compete in either a coed race or a women's race on any given day of a regatta, *but not both*. (Ex. 2, Mollicone Depo. at 57–58).

Therefore, as Mollicone testified, adding a "women's" team would not result in additional competition opportunities for the female student-athletes. (Ex. 2, Mollicone Depo. at 87) Brown will not be allowed to compete in more competition weekends because it supposedly has two teams. (Ex. 2, Mollicone Depo. at 87). There will not be separate practices for the women's teams (Ex. 2, Mollicone at 86–87). The evidence makes clear that the women do not gain any additional benefits by being part of the coed team that they do not already have by being part of the coed team. *See Biediger*, 728 F. Supp. 2d at 9094. (Ex. 8, Declaration of Emilia Ruth at ¶¶20–27 ). Brown student athlete Emilia Ruth, a member of the Plaintiff class, has sailed with Brown for the last two seasons and loves sailing, but she does not receive additional participation opportunities from being part of coed and women's teams. (Ex. 8, Ruth Declaration at ¶¶20–27). Outside of an additional championship race, women on the "women's" have *one* participation opportunity, sailing for Brown in regattas over 18 weekends of competition.

In short, unlike a student who competes in two different sports, female students on the sailing team are not getting multiple sports experiences nor any additional benefits. Just as Brown is not permitted to count indoor and outdoor track as two sports under the Joint Agreement, it does not get to count sailing as two sports either.

## VI. PLAINTIFFS WILL BE IRREPARABLY INJURED IF THEIR VARSITY TEAMS ARE NOT REINSTATED.

As Plaintiffs detailed in their Memorandum of Law in Support of the Motion to Enforce, ECF 357-1, at 24-27, the prior litigation in this case confirms that interim relief is necessary to protect the athletes by preserving the status quo. In 1992, in *Cohen I*, the Court concluded that the Plaintiffs and class members would suffer irreparable harm if Brown's action to remove them from the varsity program were to stand while the Court determined whether Brown had violated Title IX. The Court found "a strong likelihood of irreparable harm in three major areas": recruitment, diminution of competitive level and access to varsity competition, and loss of coaching staff. *Cohen v. Brown Univ.*, 809 F. Supp. 978, 997–98 (D.R.I. 1992), aff'd, 991 F.2d 888 (1st Cir. 1993) ("*Cohen I*"). While this Court has already found that the elimination of women's opportunities creates irreparable harm, Plaintiffs believe it is important to detail the harm that will be caused to the women affected by Brown's current actions. In addition to declarations from the student athletes, testimony from Brown officials clearly cements the benefits of being a varsity athlete at Brown, benefits that no amount of money can remedy.

Coach Mollicone testified in detail about the benefits of varsity sports.

> Q. So what is your understanding of what will change for sailing as a varsity program?
>
> A. Yeah. So the added resources that we're going to gain are huge. We're going to get strength and conditioning trainers, nutritionist, sports psychology, academic resources, some publicity for our team that's much deserved, like brownbears.com, the Brown Daily Herald, the Providence Journal newspaper. Admission support, which is a huge thing. You know, we're losing recruits every year to Yale, Dartmouth, Harvard, Stanford because they're varsity programs and we're club.

(Ex. 2, Mollicone Depo. at 76–77; *see also* Mollicone Depo. at 80–82). Jack Hayes also acknowledged the benefits of being a varsity athlete, which are not provided to club team members. (Ex. 1, Hayes Depo. at 158–165).

But, even more telling are the experiences of the students themselves. We urge the Court to read closely all of the Plaintiffs' declarations submitted with this brief, but highlight a few of them below. (*See generally* Student Declarations, Exs. 5-14).

Pinya Pipatjarasgit is a junior at Brown and was a member of the women's golf team. (Ex. 13, Pipatjarasgit Declaration). Pinya has played golf since she was three years old and shares her love of the game with her family. Pinya specifically chose to attend Brown because she could receive Brown's unique open curriculum academic programming and fulfill her passion to play golf at the collegiate level. She turned down offers at other colleges, many of which included offers for scholarships, to come play for Brown. After Pinya learned that her sport had been eliminated, she looked into transferring to a school that matched Brown's academic caliber where she could play golf. Unfortunately, she quickly discovered that she would be unable to transfer to a comparable university as the transfer deadlines had passed and anywhere that she could play golf would not match the academic or athletic experience she receives at Brown. So Pinya was forced to choose between being able to play college sports or continue in her academic pursuits without being a student athlete.

While Brown may argue that Pinya can go forward play golf as a member of the club team, Brown has made it clear that the benefits of being a varsity athlete will not follow her to the club team:

> Jack Hayes and Brown have been unable to provide a plan for how they will improve the club golf team. I do know, however, that the club golf team will no longer have access to the varsity weight room and sports medicine. These facilities and resources are

> necessary for strength and conditioning training and treating injuries, which are both extremely integral to a competitive team. Our operating budget will eventually be significantly reduced, which might restrict our ability to practice at our home golf course and potentially create barriers to travel to competitive tournaments. Additionally, we do not know if we will even have a coach to lead our team.

(Ex. 13, Pipatjarasgit Declaration at 3–4). Pinya is just one member of the women's golf team, all of whom have been harmed in similar ways and their own way by Brown's decision.

Alexa Jacobs is starting her senior year at Brown and was set to be the co-captain of the women's squash team in the 2020-21 season. (Ex. 5, Jacobs Declaration). Alexa was recruited to play squash at Brown and chose Brown because of the caliber of its academic programing, the sense of community, and the ability to play college squash. As a senior it would be very difficult, if not impossible, to transfer to a new school to continue playing the sport she has played for over ten years. All of the hard work and dedication that Alexa put into excelling at Brown and on the squash team have been undermined by Brown's decision. Moreover, Alexa turned down opportunities to play at other colleges in order to play for Brown, only to have her sport eliminated in her final year. Without the Court's intervention, because of the unique and different competition structures of varsity and club squash, Alexa and her teammates may never have the opportunity to play squash at Brown again. Her declaration explains in detail why the elimination of the women's varsity squash team could lead to the elimination of women's squash at Brown—and irreparably injure everyone at Brown and in the Providence community involved in and benefitting from SquashBusters as well.

Hannah Woolley will start her senior year at Brown this fall and was the captain of the women's equestrian team. (Ex. 10, Woolley Declaration). Hannah chose Brown because the equestrian team had a long history of success and a coach who had been with the program for over twenty years. Hannah has been riding since she was a child and she has learned so much more than

how to ride a horse from being on the equestrian team. The 2020-21 season is Hannah's last opportunity to participate in the sport that she loves. Hannah and her teammates were devastated when they learned their sport had been eliminated, not only because they love to ride but also because they love that equestrian is an inclusive sport.

Hannah's teammate, Lauren Reischer is a perfect example of how equestrian is a sport that is open to all individuals. (Ex. 11, Reischer Declaration). Lauren has Cerebral Palsy and has been riding horses since she was three years old. Riding a horse taught Lauren's leg muscles how to separate. Within months of first learning to ride a horse, Lauren started walking for the first time as well. When Lauren was choosing a college, the ability to compete in equestrian at the collegiate level was key. As a senior, Lauren, too, will lose the ability to compete at the varsity level if her sport is not reinstated.

Maggie Beardsley is a junior at Brown and was the captain of the women's ski team. (Ex. 12, Beardsley Declaration). Maggie started skiing when she was two years old and began racing competitively when she was in third grade. Maggie chose Brown because it was one of the few schools in the nation with world class computer science and mathematics programs and a varsity ski team. After learning that her sport was being eliminated, Maggie reached out to another school in the Ivy League that had varsity skiing, but she, like many others, was told the deadline to transfer had passed. Maggie knows that her ability to compete at a high level will be gone unless her team is reinstated. Maggie not only lost her sport, but she lost a mentor in her coach, who left Brown for another coaching job after varsity skiing was eliminated. In addition to losing a coach, Maggie and her teammates lost the other varsity benefits that are critical to the ability to compete in skiing. The women on the ski team who choose to continue on in a club sport at Brown will not have access to the weight room and training room, and will only have one varsity trainer—which is

shared amongst all the club teams. Skiing is a dangerous sport, with a great potential for injury if the athletes are not able to exercise and train properly. It is unlikely, even as club sport, that the women of the ski team will be able to continue participating in the sport they love unless their team is reinstated to varsity status.

Anna Susini is a entering her junior year at Brown and was the captain of the women's fencing team before Brown eliminated her sport. (Ex. 6, Susini Declaration). Anna's fencing career started at her local YMCA when she was nine or ten years old. When Anna was applying to colleges, she limited her applications to schools that had a Division I fencing team. Even though she had another offer, Anna choose to come to Brown to play her sport and earn her degree in International Relations. After Brown announced the women's varsity fencing team was being eliminated, Anna realized that her ability to transfer to another university with a Division I fencing team was virtually non-existent. This ability became even more of an illusion because Brown did not inform the team members until June 12 that the last remaining deadline to be recruited to play at Ivy League school was on June 15. All the normal transfer deadlines had long passed by the time Brown announced its decision and most schools had already filled their recruitment slots for the next school year. Further, even if Anna did transfer to another school, it would likely add at least an extra year to her college education, which would harm her in additional ways.

All of these women, the other class members who submitted declarations, their teammates, and future student-athletes on the cancelled teams are being and will be irreparably injured by Brown's decision to cut their varsity teams. The Court should prohibit Brown from eliminating any of their teams—and order their reinstatement—unless and until Brown can prove that it is in compliance with the Joint Agreement and Title IX.

## VII. CONCLUSION

Brown University announced it would be in violation of the Joint Agreement and Title IX if it reinstated the men's track, field, and cross country teams and took no other action. It knew that, by reinstating women's teams, it could have advanced gender equity, like it said it wanted to do, and complied with the Joint Agreement and Title IX, which it said was "**the right thing to do**."

But Brown rejected that path. This Court should not countenance Brown's outrageous behavior. The Court should find Defendants in violation of its Judgment, reinstate the five women's teams Brown is seeking to eliminate, and prohibit Brown from eliminating any women's varsity team unless and until it can prove it is in actual compliance with its obligations under the Joint Agreement and the Judgment of this Court.

Respectfully submitted,

*/s/ Lynette Labinger*

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**CERTIFICATION**

I hereby certify that on August 26, 2020, a true copy of this document was delivered electronically using the CM/ECF system to all counsel of record.

*/s/ Lori A. Bullock*

Lori Bullock