21-1032

IN THE

United States Court of Appeals

FOR THE FIRST CIRCUIT

AMY COHEN; EILEEN ROCCHIO; NICOLE A. TURGEON; KAREN A. MCDONALD; MELISSA KURODA; LISA C. STERN; JENNIFER HSU; JENNIFER E. CLOUD; DARCY SHEARER, individually and on behalf of all others similarly situated; JODY BUDGE; MEGAN HULL,

Plaintiffs-Appellees,

CATHERINE LUKE; KYLE HACKETT, individually and on behalf of all others similarly situated,

Plaintiffs,

—v.—

BROWN UNIVERSITY; CHRISTINA PAXSON, as successor to VARTAN GREGORIAN; JACK HAYES, as successor to DAVID ROACH,

Defendants-Appellees,

ABIGAIL WALSH; LAUREN LAZARO; ROSE DOMONOSKE; MEI LI COSTA; ELLA POLEY; ALYSSA GARDNER; LAUREN MCKEOWN; ALLISON LOWE; TINA PAOLILLO; EVA DURANDEAU; MADELINE STOCKFISH; SONJA BJORNSON,

Objectors-Appellants.

On Appeal from the United States District Court
for the District of Rhode Island
Case No. 1:92-cv-197
The Honorable John J. McConnell, Jr., Chief Judge

BRIEF FOR DEFENDANTS-APPELLEES

ROBERT CLARK CORRENTE
WHELAN CORRENTE
& FLANDERS LLP
100 Westminster Street, Suite 710
Providence, Rhode Island 02903
(401) 270-4500

ROBERTA A. KAPLAN
GABRIELLE E. TENZER
MARCELLA COBURN
KAPLAN HECKER & FINK LLP
350 Fifth Avenue, Suite 7110
New York, New York 10118
(212) 763-0883

Attorneys for Defendants-Appellees

CORPORATE DISCLOSURE STATEMENT

Defendant-Appellee Brown University is a Rhode Island private, nonprofit corporation. It has no parent corporation and no publicly held corporation owns 10 percent or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

Cases

Regulations

Rules

Other Authorities

REASONS WHY ORAL ARGUMENT NEED NOT BE HEARD

Grasping to come up with some "far-reaching implications" of this case, Obj. Br. 1,[1] Objectors-Appellants make the dire prediction that the district court's approval of the settlement could somehow "serv[e] as the template for future abuse by educational institutions seeking to avoid their Title IX obligations," *id.* But there is really no chance of that happening here. In reality, this appeal presents run-of-the-mill issues about the reasonableness of the parties' settlement of a decades-old class action that does not affect Brown University's obligations under Title IX at all, much less allow Brown to "avoid" federal law.

Because the factual and legal arguments concerning the reasonableness of this particular settlement are sufficiently presented in the parties' briefs and the record and do not present any novel or difficult issues of fact or law, Defendants-Appellees respectfully submit that the Court's adjudication of this appeal would not be significantly aided by oral argument. *See* Fed. R. App. P. 34(a)(2)(C); L.R. 34(a)(2).

[1] Citations to "Obj. Br. _" refer to the Objectors' opening brief.

INTRODUCTION

At some point, "'there must be an end to litigation.'" *Cotto v. United States*, 993 F.2d 274, 278 (1st Cir. 1993). And when it comes to "hard-fought, complex class action[s]" like this one, this Court has expressed a clear policy preference for reasonable settlement. *See In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 36 (1st Cir. 2009). While reaching such a settlement is never easy, the parties in this case managed to do it—with the deft assistance of Magistrate Judge Patricia A. Sullivan—after diligently litigating their interests and carefully examining the strength of their respective positions.

The settlement reached by the parties modifies the obligations of Brown University under a decades-old consent judgment called the Joint Agreement. The Joint Agreement, which has been in effect since 1998, resolved a Title IX class action between defendants Brown University, its then-President Vartan Gregorian, and its then-Athletic Director David Roach (together "Brown" or "the University"), on the one hand, and the Plaintiffs-Appellees ("Plaintiffs"), on the other, by ensuring that the University would adhere to a strict gender proportionality requirement with respect to participation on its varsity sports teams.

After Brown announced certain changes to its athletics program last spring, Plaintiffs filed a motion in the district court to enforce the Joint Agreement. Operating on an expedited timeline, the parties fully and vigorously litigated their

dispute about Brown's compliance with the Joint Agreement's gender proportionality requirement. More specifically, Brown collected, reviewed, and produced tens of thousands of pages of documents to Plaintiffs, and the parties conducted six depositions, served five separate expert reports, and briefed several discovery disputes. The parties also fully briefed the merits and both sides prepared for an evidentiary hearing.

As a result, by the time Brown and Plaintiffs took part in a court-ordered mediation led by Magistrate Judge Sullivan, there is no question that they had enough information to evaluate the "advantages and disadvantages of the proposed settlement as against the consequences of going to trial or other possible but perhaps unattainable variations on the proffered settlement." *Id*. And because such extensive discovery preceded equally extensive arm's-length negotiations mediated by Magistrate Judge Sullivan, the settlement the parties reached was not only the preferred outcome as a matter of policy, but it was also presumptively reasonable under Federal Rule of Civil Procedure 23. *Id.* at 32-33. The district court therefore acted well within its considerable discretion when it scrutinized the settlement under the relevant Rule 23(e) factors and approved it as fair, reasonable, and adequate.

Objectors-Appellants ("Objectors") have offered a lot of rhetoric but no good reason to question that unsurprising conclusion. To start, their complaints about the adequacy of the Class Representatives—which boil down to the fact that they have

continued to represent the class after graduating from Brown—fundamentally misunderstand settled law of class action proceedings. Under clear precedent, class representatives may remain adequate representatives even if their individual claims become moot after class certification. Objectors next challenge the adequacy of the relief provided by the settlement, but ignore the fact that a class action settlement need only accord *reasonable* relief to the class (like Brown's agreement to reinstate two women's varsity teams and maintain the gender proportionality requirement until the end of the Joint Agreement in 2024), not the best imaginable relief (like the unending consent decree that Objectors would prefer). And Objectors' final gripe—that the settlement treats class members inequitably by reinstating only certain of Brown's women's varsity teams—is a red herring. It is black letter law (and the law of this case) that Brown retains discretion to add or subtract varsity teams from its athletics program so long as it complies with Title IX and the requirements of the Joint Agreement (while it remains in effect).

In short, and contrary to Objectors' baseless accusations of bad faith against Brown, there is nothing troubling or out-of-the-ordinary about the district court's approval of the parties' settlement in this case. This appeal presents a simple question with a simple answer: the district court properly applied the correct factors under Rule 23(e), and the decision below should be affirmed.

COUNTER-STATEMENT OF THE ISSUE

1. Did the district court properly exercise its discretion in approving the parties' class action settlement as "fair, reasonable, and adequate" under Federal Rule of Civil Procedure 23(e)?

COUNTER-STATEMENT OF THE CASE

A. The Parties' 1998 Settlement Agreement (the "Joint Agreement")

From 1992 to 1998, Brown was involved in a fiercely contested class action over whether its athletics program provided enough opportunities for women to participate in varsity sports to satisfy Title IX of the Education Amendments of 1972. *See generally Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996). In connection with that litigation, the district court ultimately certified a class of "all present and future Brown University women students and potential students who participate, seek to participate, and/or are deterred from participating in intercollegiate athletics funded by Brown" and appointed select members of the women's gymnastics and volleyball teams as class representatives. *Cohen v. Brown Univ.*, 809 F. Supp. 978, 979 (D.R.I. 1992) (*Cohen I*). After certification of the class, a preliminary injunction hearing, and a trial on the merits—book-ended by two appeals to this Court—the parties settled their dispute. More specifically, in 1998, Plaintiffs and Brown entered

into the Joint Agreement, A101, which the district court (Judge Torres) approved under Rule 23(e). *See* A41; A135-36.[2]

Now, more than two decades later, the Joint Agreement still remains in effect. It imposes obligations on Brown that are materially different from those generally applicable to any other college or university receiving federal funds. In particular, the Joint Agreement requires Brown to provide varsity "participation opportunities" at a level such that "the percentage of each gender participating . . . is within [a fixed percentage] of each gender's percentage in the undergraduate enrollment for the same academic year." A108-09. That percentage is 3.5, unless, among other actions, Brown eliminates or replaces existing women's varsity teams, in which case the permitted variance drops to 2.25 percent. *Id.* Title IX does not impose such a rigid numerical standard. *See Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, U.S. Dep't of Educ. at 4, Off. of Civil Rights (Jan. 16, 1996). The Joint Agreement also requires Brown to report to Class Counsel every August with information about the gender proportionality requirement "for the academic year just being completed," calculating participation based on the average number of participants on the first *and last* day of competition. A110-11, A113-114. Compliance with the gender proportionality requirement is therefore determined

[2] Citations to "A__" refer to the Joint Appendix.

retrospectively. A78 (Plaintiffs' emergency motion); *see also* A114-15. That differs significantly from the reporting requirements under the federal Equity in Athletics Disclosure Act ("EADA"), which counts participation as of the first day of competition only. *See* 34 C.F.R. § 668.47(c)(2)(i); A481. The Joint Agreement also counts indoor and outdoor track & field as a single sport, A110-11; the EADA does not include that restriction, *see* 34 C.F.R. § 668.47; A680. And the Joint Agreement creates a process through which the parties can jointly craft a remedy for any year in which Brown is out of compliance. A114.

B. Brown's Compliance with the Joint Agreement

As shown by the "Difference" column in the chart below, Brown has complied with the Joint Agreement's 3.5 percent gender proportionality requirement for the vast majority of the twenty-plus years that the Joint Agreement has been in effect.

Table 3

	Fall Semester Student Body Ratios		Student Athlete Ratios		
Year	% Male Students	% Female Students	% Male Athletes	% Female Athletes	Difference
1998-1999	46.38%	53.62%	47.28%	52.72%	0.89%
1999-2000	47.39%	52.61%	47.67%	52.33%	0.27%
2000-2001†	---	---	---	---	---
2001-2002	46.02%	53.98%	50.83%	49.17%	4.82%
2002-2003	45.77%	54.23%	47.90%	52.10%	2.14%
2003-2004	45.25%	54.75%	46.82%	53.18%	1.57%
2004-2005	46.27%	53.73%	50.75%	49.25%	4.47%
2005-2006	46.67%	53.33%	48.86%	51.14%	2.19%
2006-2007	48.53%	51.47%	50.97%	49.03%	2.44%
2007-2008	48.05%	51.95%	50.98%	49.02%	2.93%
2008-2009	48.25%	51.75%	50.73%	49.27%	2.49%
2009-2010	47.67%	52.33%	53.21%	46.79%	5.54%
2010-2011	47.80%	52.20%	48.70%	51.30%	0.91%
2011-2012	48.72%	51.28%	49.83%	50.17%	1.11%
2012-2013	48.22%	51.78%	48.56%	51.44%	0.34%
2013-2014	48.51%	51.49%	49.23%	50.77%	0.72%
2014-2015	48.87%	51.13%	49.97%	50.03%	1.10%
2015-2016	47.70%	52.30%	48.88%	51.12%	1.18%
2016-2017	47.79%	52.21%	50.42%	49.58%	2.63%
2017-2018	47.26%	52.74%	50.13%	49.87%	2.87%
2018-2019	46.28%	53.72%	48.96%	51.04%	2.68%
2019-2020	47.71%	52.29%	49.94%	50.06%	2.23%
2020-2021	47.71%	52.29%	48.00%	52.00%	0.29%

D. Ct. ECF 380-2, tbl. 3.[3] And ever since 2012, when Christina Paxson became Brown's President, Brown has been in compliance with the Joint Agreement by a comfortable margin every single year. *See* A480.[4]

[3] This chart was created by Brown's statistical expert, Dr. Orley Ashenfelter. *See* D. Ct. ECF 380-2. Between 1998 and 2012, Brown exceeded the then-applicable 3.5 percent variance threshold only four times. A78. Each time, consistent with the provisions of the Joint Agreement, Brown notified Class Counsel and the parties resolved the issue without the need for judicial intervention. *Id.*

C. Brown's 2020 Athletics Restructuring Decision

Although Brown is committed to excellence in its athletics program, A374, from 2009 to 2018, the University won only a meager 2.8 percent of the Ivy League championships overall—the lowest success rate in the League. *Id.*; A482. The University's competitiveness has been hampered, in substantial part, by the size and sprawl of its athletics program. As of March 2020, Brown offered "38 varsity sports and 33 club sports," making it the "third largest [athletics program] in the country" after Stanford and Harvard (which obviously are much larger institutions). A444.

During the 2019-20 academic year, President Paxson established a Committee on Excellence in Athletics "to determine whether Brown should re-focus its efforts on perhaps a smaller and different menu of varsity teams so as to increase the competitive balance within the Ivy League and to pursue a standard of excellence at Brown." A445. The Committee was charged with making recommendations to increase the competitiveness of Brown's varsity teams while also "[p]roviding for gender equity" and "[e]nsuring diversity and inclusion." A362.

---

[4] The number of participants from the first and last day of competition in 2020-21 did not yet exist at the time of the district court proceedings. A495. This table uses the varsity coaches' projected roster sizes for 2020-21. The projections were based on official "Roster Declaration Forms," which each varsity coach signed or certified was an accurate student-by-student list of their anticipated team rosters, and the historical predictive accuracy of which was verified by regression analyses conducted by Dr. Ashenfelter. *See* A486; A503-04.

On May 28, 2020, as a result of the Committee's deliberations and recommendations, Brown announced its decision to transition eleven varsity teams to club status (men's and women's fencing, men's and women's golf, women's skiing, men's and women's squash, women's equestrian, and men's track & field and cross country) and to elevate two highly successful club teams to varsity status (women's sailing and co-ed sailing). Christina H. Paxson, *Excellence Initiative to Reshape Athletics at Brown*, Brown Univ. (May 28, 2020), https://www.brown.edu/about/administration/president/statements/excellence-initiative-reshape-athletics-brown. In the days following that announcement, many Brown athletes and alumni expressed concern that the decision to transition men's track & field and cross country to club status would disproportionately impact opportunities for Black male student athletes. Christina H. Paxson, *Addressing Brown Varsity Sports Decisions*, Brown Univ. (June 6, 2020), https://www.brown.edu/about/administration/president/statements/addressing-brown-varsity-sports-decisions ("June 6 Letter"). In addition, members of the women's track & field and cross country teams communicated their own concerns that eliminating the corresponding men's teams would negatively impact the women's teams through loss of staffing and camaraderie. Christina H. Paxson, *Decision on Track and Field and Cross Country*, Brown Univ. (June 10, 2020), https://www.brown.edu/news/2020-06-09/track.

In response to this criticism, President Paxson initially observed that if the men's track & field and cross country teams were restored at their current levels and no other changes were made, the University would not be in compliance with the Joint Agreement. June 6 Letter. But in light of the concerns expressed by students and alumni, Brown began evaluating whether it might be possible to reinstate men's track & field and cross country while still maintaining Brown's overall compliance with the Joint Agreement. After assuring itself that reinstatement was in fact compatible with the Joint Agreement's numerical requirements, the University reinstated men's track & field and cross country as varsity teams. In other words, by making "some modifications to men's rosters," Brown confirmed that it "could be [in compliance]" with the Joint Agreement, A268, projecting a variance for 2020-21 of only 0.29 percent, A497.[5]

D. Proceedings Before the District Court

Plaintiffs filed an emergency motion to enforce the Joint Agreement in response to Brown's restructuring announcement. They alleged that Brown had grossly violated the gender proportionality requirement *prospectively*, for the then-upcoming 2020-21 academic year. A56-57. That motion was premature at best,

[5] Indeed, even if Plaintiffs had convinced the district court that Brown could count women sailors who participate on both the women's and co-ed sailing teams as only one "participation opportunity," Brown projected that it would still have been comfortably within the Joint Agreement's permitted variance for the 2020-21 academic year at 1.55 percent. A499.

because the Joint Agreement provides that participation ratios must be determined *retrospectively*, *i.e.*, for the year just completed. A171. Nevertheless, the district court ordered the parties to proceed with expedited discovery and briefing. A49.

After the district court resolved several discovery disputes, Brown expeditiously collected, reviewed, and produced to Class Counsel tens of thousands of pages of documents. ADD34-35.[6] Class Counsel deposed three Brown officials, including President Paxson and Athletic Director Jack Hayes. *See* A188 n.3. The parties also engaged in extensive expert discovery, serving five separate expert reports and taking two expert depositions. ADD35; A487-88. Brown's statistical expert, Princeton economics professor Dr. Orley Ashenfelter, authored two reports establishing that Brown had accurately projected compliance with the Joint Agreement's gender proportionality requirement for the upcoming 2020-21 academic year. A495-500.[7] After submitting over one hundred pages of briefing, the parties began preparing for an evidentiary hearing. ADD35; A56-100; A168-221; A469-541.

In advance of that hearing, the parties participated in court-ordered mediation with Magistrate Judge Sullivan. ADD35. Brown and Plaintiffs each submitted

---

[6] Citations to "ADD _" refer to the Addendum to Objectors' opening brief.

[7] One indication of the strength of Dr. Ashenfelter's report is the fact that Class Counsel elected not to depose him.

mediation briefs and took part in an initial mediation session. A51. Judge Sullivan then held *23* additional conferences with the parties over the span of a week. A51-53. As a result of these intense negotiations, the parties ultimately reached an agreement that would resolve the claims raised by Plaintiffs' emergency motion, thereby avoiding the need for an evidentiary hearing. The settlement was to be formalized as an amendment to the Joint Agreement subject to class notice, an opportunity to object, and the district court's approval. A594; A608; ADD2-9.

E. Terms of the Settlement

The settlement provides substantial benefits to the Class. And—like any negotiated resolution to hard-fought litigation—also embodies concessions and compromises by both parties. The settlement imposes the following new obligations on Brown:

- Restore two of the five transitioned women's teams (women's equestrian and women's fencing) to varsity status;[8]
- Refrain from adding any additional varsity men's teams or from reducing the status of or eliminating any varsity women's teams for the remaining term of the Joint Agreement;
- Maintain at least the same level of support for each restored women's team that it received before being transitioned from varsity status in May 2020, provided that the level of support may be reduced if the overall level of

[8] In addition, if a men's team that had been slated to transition to club status in May 2020 (other than men's track & field and cross country) is restored to varsity status, Brown must restore to varsity status a total number of women's teams that is at least two greater than the number of men's teams restored. ADD4.

> funding for Brown's athletics program is reduced or the team does not compete due to COVID-19.

See ADD3-5.

The requirements of the 1998 Joint Agreement otherwise remain in effect until August 31, 2024, when the Joint Agreement will finally terminate after 26 years. ADD5-6. For the final academic year of the Joint Agreement in 2023-24, Brown will provide additional, interim reports of participation rates within thirty days after the first date of competition for each varsity team. ADD6. Although the parties continue to dispute the issue, the settlement provides that each individual identified on one or more of Brown's sailing squad list(s) will be counted as a single participant for purposes of the Joint Agreement.[9] ADD5.

F. Rule 23 Approval

Federal Rule of Civil Procedure 23(e) sets out the process for approving a proposed settlement in a certified class action. The district court must first notify all class members of the proposed settlement and then allow any class member to object. Fed. R. Civ. P. 23(e)(1), (5). In this case, only a single group of twelve objectors together submitted objections to this settlement. A657. Those twelve objectors represent a tiny fraction of the Class, and only about 2.7 percent of Brown's women

[9] Brown's concession to count participation opportunities in this way creates an exception to the provision in the Joint Agreement that "women and men student-athletes who participate on more than one intercollegiate athletic team . . . [are] counted separately for each team on which they participate." A110.

varsity student-athletes at the time of the settlement. A672 & n.2. Each objector is a member of Brown's women's varsity gymnastics or hockey teams—neither of which was affected in any way by the recent restructuring of Brown's athletics program. A640.

In order for the district court to approve the proposed settlement, it must hold a hearing, consider various factors identified in Rule 23(e), and find that the settlement is fair, reasonable, and adequate. The district court heard from counsel for Objectors and for the parties at such a hearing on December 15, 2020. ADD11. The court acknowledged the significant contributions of Magistrate Judge Sullivan in mediating the settlement. ADD33. The court also concluded that, based on its review of the record and the settlement, President Paxson "has remained steadfastly committed to gender equity in athletics at Brown" and that she "has had a commitment to the [Joint Agreement] and to Title IX." *Id.* And the court specifically recognized Class Counsel Lynette Labinger, finding that "any implication that Ms. Labinger had anything but the 100 [percent] best interest of the entire class and her decades-long fight for gender equity is just wrong." ADD34.

The district court then evaluated the settlement by considering the four factors listed in Rule 23(e)(2). On the first factor (whether the class representatives and class counsel have adequately represented the class), the district court concluded that Class Counsel's representation was not only adequate, but that it was a "credit" to

Class Counsel "in regards to gender equity both in athletics and beyond." ADD34. On the second factor (whether the proposal was negotiated at arm's length), the court detailed the tremendous amount of discovery and briefing undertaken by the parties, concluding that "[t]hese efforts resulted in a well-developed record which enabled an effective and successful arm's length negotiation with Magistrate Judge Patricia Sullivan." ADD35.

With respect to the third factor (the adequacy of the relief in light of the cost and risks associated with a trial on the merits and appeal), the district court found that the settlement "account[ed] for many of the issues raised by the parties throughout this long litigation." ADD35. And on the fourth factor (intra-class equitable treatment), the court concluded that the settlement "treats each class member equitably relative to each other." ADD35. Turning to "the reaction of the class," a factor not enumerated in Rule 23(e) but consistently applied by courts evaluating class action settlements, the district court summarized Objectors' arguments, including their contentions that "the class representatives are not valid and that the release is not fair and reasonable and that there has been inadequate notice." ADD36. But the district court was not persuaded—"[i]n fact, just the opposite." *Id.* As the district court noted, Objectors made up only "a very small fraction of the class members as a whole," which was "in and of itself representative of the settlement's reasonableness." *Id.*

In light of its findings, the district court overruled the objections and granted final approval of the settlement as fair, reasonable, and adequate. *Id.* Objectors timely appealed. A723.

STANDARD OF REVIEW

The district court's approval of a class action settlement is reviewed for abuse of discretion. *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d at 32. Any legal issues are reviewed de novo, and factual findings are reviewed for clear error. *Nat'l Ass'n of Chain Drug Stores v. New Eng. Carpenters Health Benefits Fund*, 582 F.3d 30, 45 (1st Cir. 2009).

SUMMARY OF ARGUMENT

The district court was well within the "considerable range" of its discretion in approving the parties' settlement as fair, reasonable, and adequate. *Nat'l Ass'n of Chain Drug Stores*, 582 F.3d at 45.

First, the settlement is obviously procedurally fair under the first two factors, Rule 23(e)(2)(A) and (B). *See* 2018 Advisory Committee Notes to Fed. R. Civ. P. 23(e)(2) (noting that these are "procedural fairness" factors). Objectors' only challenge to the settlement's procedural fairness is that Class Representatives (not Class Counsel) were inadequate. But Objectors' contention is based on a fundamental misunderstanding of basic class action principles. Case after case makes clear that, contrary to Objectors' argument, it is legally insignificant that

Class Representatives graduated from Brown long before this settlement was negotiated. Under such circumstances, Class Representatives could—and did—"still adequately represent the class despite the mootness of [their] individual claim[s]." *See, e.g.*, *Kerkhof v. MCI WorldCom, Inc.*, 282 F.3d 44, 54 (1st Cir. 2002).

Second, the settlement is also substantively fair under the third and fourth factors, Rule 23(e)(2)(C) and (D). *See* 2018 Advisory Committee Notes to Fed. R. Civ. P. 23(e)(2) (noting that these are "substantive fairness" factors). As the district court determined, the settlement provides adequate relief to the Class and it treats all Class members equitably relative to each other. While Objectors seem to think that a perpetual consent decree is the only adequate relief in these circumstances and that Class members are entitled to have certain Brown teams retain their varsity status forever, neither contention holds water. "In institutional reform litigation, injunctions should not operate inviolate in perpetuity." *In re Pearson*, 990 F.2d 653, 658 (1st Cir. 1993). And as the law of this case establishes, it is left "entirely to Brown's discretion" how to "balance its program to provide equal opportunities for its men and women athletes." *Cohen v. Brown Univ.*, 879 F. Supp. 185, 214 (D.R.I. 1995) (*Cohen III*).

Third, the fairness of the settlement is amply supported by the "reaction of the class." *See In re Compact Disc Litig.*, 216 F.R.D. 197, 206 (D. Me. 2003) (as cited by *Nat'l Ass'n of Chain Drug Stores*, 582 F.3d at 44 n. 13). With the exception of

the twelve Objectors who make up only a miniscule fraction of the Class as a whole, none of the hundreds of Class members took issue with the settlement, including Class members whose teams (unlike Objectors') were actually transitioned from varsity to club status.

ARGUMENT

I. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN DETERMINING THAT THE PARTIES' SETTLEMENT SATISFIED RULE 23(E)

While Objectors devote a significant portion of their brief to recounting the past (both recent and distant), little of their narrative is accurate, let alone relevant to the sole question before the Court—whether the district court properly exercised its discretion in approving the settlement under Rule 23(e). Under that Rule, a court "must approve the settlement in a class action and, to do so, must allow a hearing and make a finding that the settlement 'is fair, reasonable, and adequate,' or (in shorthand), 'reasonable.'" *Nat'l Ass'n of Chain Drug Stores*, 582 F.3d at 44 (quoting Fed. R. Civ. P. 23(e)(2)). District courts "enjoy[] considerable range in approving or disapproving a class action settlement, given the generality of the standard and the need to balance benefits and costs." *Id.* at 45. The exercise of that discretion is guided by certain basic principles. For one, public "policy encourages settlements" of class actions. *Id.* at 44. And district courts "must presume the settlement is reasonable" where "the parties negotiated at arm's length and conducted sufficient discovery."

Bezdek v. Vibram USA, Inc., 809 F.3d 78, 82 (1st Cir. 2015). These policies and presumptions, when combined with the abuse-of-discretion review standard, set an impossible hurdle for Objectors to overcome here.

Rule 23(e) presents "a short[] list of core concerns" consisting of four reasonableness factors—two procedural, two substantive. 2018 Advisory Committee Notes to Fed. R. Civ. P. 23(e)(2); *see also* William B. Rubenstein, 4 Newberg on Class Actions § 13:48 (5th ed. 2020) ("Newberg"). In evaluating the settlement, the district court properly applied all four factors, along with assessing the reaction of the class as a whole to the proposed settlement. *See* ADD34-36; *see also, e.g.*, *In re Compact Disc Litig.*, 216 F.R.D. at 206; Newberg § 13:58. The district court properly concluded that these factors compel the conclusion that "the settlement . . . in this case is fair, adequate and reasonable," ADD34, and that none of the objections presented provides any reason to question that conclusion, ADD36.

A. Class Counsel and Class Representatives have adequately represented the Class.

The first of the procedural factors the district court considered under Rule 23(e) is whether both Class Counsel and Class Representatives have "adequately represented the class." Fed. R. Civ. P. 23(e)(2)(A). The district court's conclusion that they have is amply supported by the factual record and the case law.

1. Class Counsel adequately represented the Class.

Class Counsel Lynette Labinger and Arthur Bryant have been working on this case since 1992, when it was filed. They have been representing the Class ever since, including by receiving annual reports from Brown about its compliance with the Joint Agreement. A661-62. Indeed, Objectors do not even contest the adequacy of Class Counsel's representation here, nor could they. As the district court explained, Class Counsel's efforts were "beyond" adequate and "resulted in a well-developed record which enabled an effective and successful arm's length negotiation." ADD35. The amount of discovery completed, along with Class Counsel's "adequate information base," easily satisfies Rule 23(e)(2)(A). *See In re Compact Disc Litig.*, 216 F.R.D. at 206; 2018 Advisory Committee Notes to Fed. R. Civ. P. 23(e)(2); *accord* Newberg § 13:49. And given Class Counsel's "experience[] . . . in class action litigation," including almost three decades in this one, their participation weighs in favor of approval of the settlement. *See* Newberg § 13:59.

2. Class Representatives adequately represented the Class.

a. The mootness of their individual claims did not render Class Representatives inadequate.

The essence of Objectors' argument with respect to Class Representatives is that they could not adequately represent the Class "as a matter of law . . . because they had no stake in the action" after graduating and "their interests were not aligned

with the absent members of the class."[10] *See, e.g.*, Obj. Br. 22; *see also id.* at 27 ("they do not even hold any claims or stake in the litigation"); *id.* at 1 (same). But the adequacy of Class Representatives was adjudicated under Rule 23(a)(4) when the district court first certified the Class back in 1992. *See Cohen I*, 809 F. Supp. at 979-80. That certification necessarily required a finding by the district court that "the representative parties will fairly and adequately protect the interests of the class," Fed. R. Civ. P. 23(a)(4), and was never challenged. Indeed, Objectors concede that the "adequacy" determinations under Rules 23(a)(4) and 23(e)(2)(A) are analytically "redundant." Obj. Br. 24 n.6. *See, e.g.*, *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 701 (S.D.N.Y. 2019); Newberg § 13:48; *see also In re Banc of Cal. Sec. Litig.*, No. 17 Civ. 118, 2019 WL 6605884, at *1 (C.D. Cal. Dec. 4, 2019) (explaining that fairness determination does not require court to revisit certification); 2018 Advisory Committee Notes to Fed. R. Civ. P. 23(e) (same).[11] Class Representatives have continued to adequately represent the Class since certification,

---

[10] Objectors argue that reversal is required because of the district court's "complete failure to address specifically th[ese] acute issues." Obj. Br. 21. But the district court *expressly* acknowledged Objectors' argument, noting that they objected "on several grounds arguing that the class representatives are not valid." ADD36.

[11] To the extent Objectors argue that a heightened adequacy standard applies to settlements under Rule 23(e), as compared to class certification under Rule 23(a), Obj. Br. 24 n.6, that is inconsistent with settled law cited above. Their invocation of *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997), does not support their argument either. The parties in *Amchem* sought class certification at the time of settlement; this Class has been certified for many years.

including when the district court originally approved the Joint Agreement in 1998—which was already *after* all the Class Representatives had graduated from Brown. A41; A135; A674-75. As the Rule 23(e) commentary on class settlement explains, "the focus at this point is on the actual performance of *counsel* acting on behalf of the class." 2018 Advisory Committee Notes to Fed. R. Civ. P. 23(e)(2) (emphasis added).

Moreover, Objectors' argument that Class Representatives with moot claims are by definition inadequate under Rule 23 is contrary to the United States Supreme Court's decision in *Sosna v. Iowa*, 419 U.S. 393 (1975), and the cases applying it. "[A] named plaintiff whose claim on the merits expires *after* class certification may still adequately represent the class" because "vigorous advocacy can still be assured through means other than the traditional requirement of a 'personal stake in the outcome.'" *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 (1980) (citing *Sosna*, 419 U.S. 393). That is so because at the point of class certification, the "'unnamed persons described in the certification acquire[] a legal status separate from the interest asserted by [the named plaintiff],' with the result that a live controversy may continue to exist, even after the claim of the named plaintiff becomes moot." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 74 (2013) (citing *Sosna*, 419 U.S. at 399-402).

Indeed, as a result of certification, "a named plaintiff whose claim on the merits expires after class certification" not only maintains Article III standing, but also "may still adequately represent the class," especially when class certification under Rule 23(a) has already established class representative adequacy. *Grant ex rel. Fam. Eldercare v. Gilbert*, 324 F.3d 383, 389 n.8 (5th Cir. 2003) (emphasis omitted); *Kerkhof*, 282 F.3d at 54 ("[Plaintiff] might still adequately represent the class despite the mootness of her individual claim."); Newberg § 2:10 ("A class representative whose claim has been mooted . . . may also continue to pursue the merits of the class's case *if the case has been certified* prior to mootness" (emphasis added)); *see also Martens v. Thomann*, 273 F.3d 159, 173 n.10 (2d Cir. 2001) ("special standing rules exist for class representatives," allowing them to "continue to represent a class even if their individual claims become moot" after certification, including in subsequent proceedings to enforce a consent judgment).

Objectors' failure to appreciate the impact of class certification in 1992 explains why all of the cases they invoke are inapposite. For example, Objectors rely principally on *Key v. Gillette Co.*, 782 F.2d 5, 7 (1st Cir. 1986), which emphasized the due process roots of the adequate representation requirement under Rule 23(a). While no one disputes that adequate class representation is important, *Key* does not apply here because that case affirmed decertification of a class due to the inadequate

performance of class *counsel*, not class *representatives*. *Id.*[12] The other decisions that Objectors cite in support of their inadequacy argument are likewise inapposite because each addresses either (1) the inadequacy of proposed representatives *before class certification*,[13] or (2) class representatives who were *never class members in the first place*.[14] No one disputes that Class Representatives in this case were members of the class they sought to represent at the time of certification. Under

---

[12] The other cases cited by Objectors are equally off-base. *See Telles v. Midland College*, No. 17 Civ. 83, 2018 WL 7352424, at *3 (W.D. Tex. Sept. 7, 2018) (certifying a settlement class under Rule 23(e) without addressing, or even mentioning, due process); *Silber v. Mabon*, 957 F.2d 697, 698 (9th Cir. 1992) (vacating settlement due to constitutionally deficient notice procedures).

[13] *See* Obj. Br. 27 (citing *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (court refused to certify a class because the proposed representatives "were not members of the class of discriminatees they purported to represent" at the time they sought certification); *Rand v. Cullinet Software, Inc.*, 847 F. Supp. 200, 213 (D. Mass. 1994) (same); *Lavin v. Chi. Bd. of Educ.*, 73 F.R.D. 438, 439 (N.D. Ill. 1977) (court refused to certify class where named plaintiff graduated *before certification*, and thus was "not a member of the class she [sought] to represent under rule 23(b)(2)")).

[14] *See* Obj. Br. 27 (citing *Tate v. Hartsville/Trousdale County*, No. 09 Civ. 201, 2010 WL 4822270, at *1-2 (M.D. Tenn. Nov. 22, 2010) (decertification of named plaintiff whose "claims [were] dismissed on the merits" because "[u]nlike some possible unnamed class members, he suffered no constitutional injury"); *id.* at 28 (citing *Robinson v. Gillespie*, 219 F.R.D. 179, 186 (D. Kan. 2003) (denying class certification where "plaintiffs fail[ed] to make a threshold showing, either by name or by descriptive language, of who the proposed class representatives are" and proposed 196 class representatives, "some of . . . whom some plaintiffs allege[d were] within one subclass" but who may not have belonged to that subclass); *id.* at 26 (citing *Barney v. Holzer Clinic, Ltd.*,110 F.3d 1207, 1214 (6th Cir. 1997) (court decertified an overbroad class because "the named plaintiffs are not in the end even members of the class that was certified")).

Sosna and related cases, the mootness of their individual claims does not make them inadequate representatives as a matter of law. *See supra* pp. 23-24.

b. The Class Representatives have no conflict of interest.

Objectors also miss the mark when they argue that Class Representatives are inadequate because of "the significant passage of time since the Class Representatives' status as female Brown varsity athletes." Obj. Br. 28. The passage of time alone does not, as a matter of law, give rise to the sort of fundamental conflict of interest that might disqualify Class Representatives as inadequate. Since "perfect symmetry of interest is not required" for a plaintiff to represent a class, "[o]nly conflicts that are fundamental to the suit and that go to the heart of the litigation prevent a plaintiff from meeting the Rule 23(a)(4) adequacy requirement." *Matamoros v. Starbucks Corp.*, 699 F.3d 129, 138 (1st Cir. 2012) (quoting Newberg § 3:58).

Here, there is no reason to believe that Class Representatives, who have litigated this case from its inception, suddenly stand in a position of "affirmative antagonism" to the interests of the very same class they originated. *See* Newberg § 3:58. Indeed, the one case Objectors cite that *did* find sufficient conflicts of interest actually proves our point: in *Johnson v. Rausch, Sturm, Israel, Enerson & Hornik, LLP*, 333 F.R.D. 314, 318-20 (S.D.N.Y. 2019), the proposed class representative was inadequate where he was slated to recover approximately 300 times more than

the individual class members under the proposed settlement. Objectors obviously cannot identify any such comparable antagonism here. *See id.* at 318-19.

Objectors' other efforts at identifying a conflict of interest between Class Representatives and the rest of the Class are meritless. For example, to the extent that Objectors are arguing that Class Representatives are inadequate because they do not include "members of [all] the various sports affected," Obj. Br. 29, that argument is totally out of step with a spate of Title IX precedents uniformly holding that sport-specific class representation is not required, *see, e.g.*, *A.B. by C.B. v. Haw. State Dep't of Educ.*, 334 F.R.D. 600, 611 (D. Haw. 2019); *Portz v. St. Cloud State Univ.*, 297 F. Supp. 3d 929, 946-47 (D. Minn. 2018); *Foltz v. Del. State Univ.*, 269 F.R.D. 419, 423-24 (D. Del. 2010). It is also inconsistent with the law of this very case. *See Cohen I*, 809 F. Supp. at 979 (certifying a single class of "all present and future Brown University women [student-athletes]," without any subclasses, and appointing only "members of the women's gymnastics and volleyball teams" to represent them).

Miller v. University of Cincinnati, which Objectors cite for the proposition that there is an "inherent conflict" when all of the named plaintiffs were members of a single sport, is of no help to them either. *See* Obj. Br. 25. *Miller*, unlike the present case, did not deal with gender proportionality in participation at all; instead, the *Miller* plaintiffs complained that the women's rowing team specifically, and the

women's athletics program writ large, was provided unequal access to athletic *benefits and resources*. 241 F.R.D. 285, 286, 290 (S.D. Ohio 2006). The particular claim in *Miller* made the team identity of the class representatives relevant in a way that it is not in this case. *See Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 92 (2d Cir. 2012) (explaining distinction between "effective accommodation" (like the original *Cohen* claims) and "equal treatment claims" (like those in *Miller*)).[15] For similar reasons, Objectors' suggestion that subclassing would not only be appropriate, but is somehow mandated, is contrary to the law of this case and settled Title IX precedents. *See, e.g.*, *Foltz*, 269 F.R.D. at 423-24.

B. The settlement was negotiated at arm's length.

Objectors do not address Rule 23(e)(2)(B)'s arm's-length negotiation factor, presumably because the district court was indisputably correct in holding that the parties engaged in "an effective and successful arm's length negotiation with Magistrate Judge Patricia Sullivan." ADD35. Not surprisingly, courts often treat "the involvement of a neutral or court-affiliated mediator" like Judge Sullivan as a strong indicator that negotiations "were conducted in a manner that would protect

[15] Similarly, *S.G. by and through Gordon v. Jordan School District*, *see* Obj. Br. 29-30, involved a particular claim that, unlike the claims in this case, *did* create a conflict. No. 17 Civ. 677, 2018 WL 4899098, at *2 (D. Utah Oct. 9, 2018) (subclass of female athletes sought an injunction creating a girls-only tackle football team, while a broader class of female students sought more athletic opportunities for girls in general).

and further the class interests." 2018 Advisory Committee Notes to Fed. R. Civ. P. 23(e)(2); *see also, e.g.*, *Rapuano v. Trs. of Dartmouth Coll.*, 334 F.R.D. 637, 655 (D.N.H. 2020); *Crane v. Sexy Hair Concepts*, *LLC*, No. 17 Civ. 10300, 2019 WL 2137136, at *2 (D. Mass. May 14, 2019); *In re Patriot Nat'l, Inc. Sec. Litig.*, 828 F. App'x 760, 763 (2d Cir. 2020)); *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1178 (8th Cir. 1995). As noted above, a settlement like this one—"negotiated at arm's length" and after the parties "conducted sufficient discovery"—is entitled to a presumption of reasonableness. *See Bezdek*, 809 F.3d at 82 (quoting *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24 at 33).

C. The settlement provides adequate relief to the Class.

Rule 23(e)(2)(C) instructs the district court to consider whether "the relief provided for the class is adequate, taking into account . . . the costs, risks, and delay of trial and appeal," along with other relevant factors. Fed. R. Civ. P. 23(e)(2)(C). The district court expressly considered these factors here, determined that the settlement "accounts for many of the issues raised by the parties throughout this long litigation," and concluded that the settlement was therefore reasonable. ADD35. That determination was well within the district court's considerable discretion. *See Nat'l Ass'n of Chain Drug Stores*, 582 F.3d at 45.

As an initial matter, it bears emphasizing that the Plaintiffs faced significant risks that they would obtain *no relief at all* after an evidentiary hearing and appeal

on the merits. *See* Fed. R. Civ. P. 23(e)(2)(C)(i). Brown's merits briefing, including a powerful expert report from Dr. Ashenfelter, made clear that, even without reinstating two women's teams pursuant to the settlement, Brown was, and always would have been, in compliance with the gender proportionality requirement of the Joint Agreement. *See supra* pp. 8, 9 n.4, 12. Given their very real risk of losing, *see id.*, the settlement provided substantial benefits to Plaintiffs.[16]

Objectors' primary argument for why the settlement relief is inadequate is that the settlement terminates the Joint Agreement in August 2024. Obj. Br. 30. In other words, in Objectors' view, "concerns regarding [Brown's] good faith and future conduct" mean that the Joint Agreement cannot be allowed to end. *Id.* at 31. Objectors are wrong on both the facts and the law. On the facts, they decry what they call Brown's "carefully plotted scheme" to "intentionally violate the Joint Agreement," *id.*, without bothering to cite anything in the district court's decision in support of their irresponsible accusations. Nor could they: nothing in the record or the district court's findings supports their blatant mischaracterization. To the contrary, the district court emphasized that President Paxson "has remained

[16] Indeed, to the extent that the parties' briefs on appeal diverge with respect to their views on the merits, that difference would itself be evidence of the reasonableness of the compromises embodied in the settlement. *See Common Cause R.I. v. Gorbea*, No. 20 Civ. 318, 2020 WL 4365608, at *4 (D.R.I. July 30, 2020) (approving consent decree under Rule 23, the "adequacy and reasonableness" of which was evidenced by the fact that it was a "compromise and . . . the plaintiffs did not get everything that they sought").

steadfastly committed to gender equity in athletics at Brown, and that she has a commitment . . . to the [Joint Agreement] and to Title IX." ADD33. Looking at "the entire record" and "all the evidence," the district court concluded, "history will tell us that [President Paxson] has been a strong and capable advocate for gender equity in Brown athletics." *Id.*[17]

Objectors' position is equally wrong on the law. There is nothing unfair or unreasonable as a matter of law about terminating a consent decree, even where it was originally indefinite. Requiring the Joint Agreement to continue in perpetuity runs counter to the federal courts' well-founded concerns about never-ending consent decrees. *See, e.g.*, *In re Pearson*, 990 F.2d at 658 ("In institutional reform litigation, injunctions should not operate inviolate in perpetuity."); *Still's Pharmacy, Inc. v. Cuomo*, 981 F.2d 632, 639 (2d Cir. 1992) ("[A] consent decree is 'not intended to operate in perpetuity.'" (quoting *Bd. of Educ. v. Dowell*, 498 U.S. 237, 248 (1991))).

[17] Objectors have not argued that the district court's findings on this point are clearly erroneous or even acknowledged the findings at all. Instead, they sling invective, accusing Brown of (among other things) having concocted a "racist and sexist scheme" to terminate the Joint Agreement. Obj. Br. 16. Those frivolous allegations are utterly baseless and directly contradicted by the record. Still, no amount of inflammatory language, however far removed from reality, can fix the obvious and fatal flaws of Objectors' legal arguments.

Indeed, for these reasons, the consent-decree remedy is supposed to be flexible and adaptable, rather than rigid and perpetual. *See, e.g.*, *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932) ("The consent is to be read as directed toward events as they then were. It was not an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be."); *Bos. Chapter, NAACP, Inc. v. Beecher*, 295 F. Supp. 3d 26, 36 (D. Mass. 2018) (granting motion to modify consent decree and imposing "presumptive five-year termination date"). That is especially true where, as here, the "goals of the consent decree have been achieved," there has been "little legal activity concerning the decree in recent years," and pending litigation raises "more current concerns." *Youngblood v. Dalzell*, 925 F.2d 954, 961 (6th Cir. 1991). It bears emphasizing that Brown has been consistently in compliance for nearly the entire life of the Joint Agreement. *See supra* p. 8.

Put simply, the mere fact that a twenty-plus year-old consent decree will one day terminate does not constitute inadequate relief as a matter of law. Objectors' argument that the settlement is inadequate because it removes the Joint Agreement's streamlined judicial enforcement provisions, Obj. Br. 31-32, is likewise meritless, as it is premised on the same flawed assumption that the Joint Agreement's terms should be etched in stone for eternity.

Not surprisingly, Objectors also ignore the significant benefits provided by the settlement, then cherry-pick other parts to argue that the benefits are "illusory." *See id.* 32-33. But none of their objections undermines the district court's conclusion, in its "considerable range of discretion," that the relief provided to the class is adequate. *Nat'l Ass'n of Chain Drug Stores*, 582 F.3d at 45. And if Objectors' underlying argument is that Plaintiffs should have continued litigating this case, they nowhere account for the costs, risks, or delay of an evidentiary hearing and appeal, *see* Fed. R. Civ. P. 23(e)(2)(C), nor the strength of Brown's case, *see* A487-88 (discussing the content of Brown's expert reports); A488 & n.8 (discussing the content of Plaintiffs' expert report); *see also supra* pp. 12, 30-31. To the extent that Objectors are attempting to introduce issues relating to Title IX compliance on this appeal, *see* Obj. Br. 7 (Issue 6), they are way off base. The merits proceeding on Plaintiffs' emergency motion was focused exclusively on compliance with the Joint Agreement, not Title IX. *See* A481 & nn.2-3.

D. The settlement treats Class members equitably.

The last enumerated factor in a Rule 23(e) fairness determination is whether the proposed settlement "treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D). As the district court explained below, intra-class equity requires that the settlement "treats each class member fairly," but that "does not necessarily mean equally." ADD35; *see also Swinton v. SquareTrade, Inc.*, 454 F.

Supp. 3d 848, 875 (S.D. Iowa 2020). And in ultimately concluding that this "settlement treats each class member equitably relative to each other," ADD35, the district court unquestionably acted within its considerable discretion.

Objectors contend that the settlement benefits students on the reinstated varsity teams at the cost of those on teams that have not been reinstated to varsity status. Obj. Br. 33. This argument rings particularly hollow from these Objectors, however, since they are members of two teams that were *never affected at all* by the recent restructuring of Brown's athletics program and remain varsity student-athletes. Indeed, not a single member of any of the teams that were actually impacted objected to the settlement. A657. Similarly, Objectors erroneously contend that terminating the Joint Agreement in August 2024 treats "different and future graduation classes" inequitably relative to current students and further "trades away the rights of members on all other teams" for the benefit of only the reinstated teams. Obj. Br. 33. Rejecting the settlement on this basis, however, would as a practical matter require the conclusion that the Joint Agreement can *never* be modified or terminated by the district court. Every year, after all, Brown—like all colleges—has students who graduate and students who matriculate as freshmen.

What Objectors fail to recognize is that neither Title IX, nor the Joint Agreement, nor any other source of law provides any Brown sports team with a right to continue to compete as a varsity team indefinitely. *See Cohen III*, 879 F. Supp. at

214; *Equity in Athletics, Inc. v. Dep't of Educ.*, 504 F. Supp. 2d 88, 100 (W.D. Va. 2007) ("Title IX does not establish a right to participate in any particular sport in one's college and there is no constitutional right to participate in intercollegiate . . . athletics."). Brown has always retained "discretion to decide how it will balance its program" under the Joint Agreement and, in exercising that discretion, "may eliminate its athletic program altogether, it may elevate or create the requisite number of women's positions, it may demote or eliminate the requisite number of men's positions, or it may implement a combination of these remedies." *Cohen III*, 879 F. Supp. at 214. In other words, there is no such thing as "inter-team" discrimination—all Class members have the right to "equal opportunities for [Brown's] men and women athletes," but not the right to the continuation of any particular varsity sport. *Id.* As a result, Class members here all have the same claim—ensuring that Brown's varsity athletics program is in compliance with the Joint Agreement's gender proportionality requirement. And that grievance is remedied equitably among all Class members by the settlement, which guarantees an equitable and proportionate program going forward.

E. The overall reaction of the Class confirms the settlement's fairness.

Finally, in assessing the reasonableness of a class action settlement, courts often consider "the class's reaction to the proposed settlement, specifically the quality and quantity of any objections." Newberg § 13:58; *see also In re Compact*

Disc Litig., 216 F.R.D. at 206. Here, as the district court observed, the "small group" of Objectors from two women's teams "represents a very small fraction of the class members as a whole, and about 2.7 percent of the women varsity student athletes." ADD35-36. Accordingly, the district court correctly determined that a single objection on behalf of a miniscule fraction of the Class is itself evidence of the reasonableness of the settlement. *See*, *e.g.*, *Del Sesto v. Prospect Chartercare, LLC*, No. 18 Civ. 328, 2019 WL 5067200, at *4 (D.R.I. Oct. 9, 2019) ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement." (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 118 (2d Cir. 2005))); *In re Colgate-Palmolive Softsoap Antibacterial Hand Soap Mktg. & Sales Pracs. Litig.*, No. 12 Md. 2320, 2015 WL 7282543, at *12 (D.N.H. Nov. 16, 2015) (same).

CONCLUSION

For the reasons set forth above, the district court's decision should be affirmed.

May 19, 2021

Respectfully submitted,

/s/ Roberta A. Kaplan
Roberta A. Kaplan
Gabrielle E. Tenzer
Marcella Coburn
KAPLAN HECKER & FINK LLP
350 Fifth Avenue | Suite 7110
New York, NY 10118
(212) 763-0883
rkaplan@kaplanhecker.com
gtenzer@kaplanhecker.com
mcoburn@kaplanhecker.com

/s/ Robert C. Corrente
Robert C. Corrente
WHELAN CORRENTE & FLANDERS LLP
100 Westminster Street, Suite 710
Providence, RI 02903
401.270.1333
rcorrente@whelancorrente.com

Counsel for Defendants-Appellees

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,236 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in size 14 Times New Roman font.

Dated: May 19, 2021

/s/ Roberta A. Kaplan
Roberta A. Kaplan

Counsel for Defendants-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2021, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the First Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

Dated: May 19, 2021

/s/ Roberta A. Kaplan
Roberta A. Kaplan

Counsel for Defendants-Appellees