In the United States Court of Appeals for the First Circuit

No. 21–1032

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.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR DISTRICT OF RHODE ISLAND, CASE NO. 1:92–CV–00197, JUDGE JOHN J. MCCONNELL, JR.

BRIEF OF PLAINTIFFS–APPELLEES

Lynette Labinger
(No. 23027)
128 Dorrance St.
Box 710
Providence, RI 02903
(401) 465-9565
ll@labingerlaw.com

Arthur H. Bryant
(No. 21973)
Bailey & Glasser, LLP
1999 Harrison St.
Suite 660
Oakland, CA 94612
510-507-9972
abryant@baileyglasser.com

Lori Bullock
(No. 1197230)
Newkirk Zwagerman
521 E. Locust St.
Suite 300
Des Moines, IA 50309
515-883-2000
lbullock@newkirklaw.com

COOPERATING COUNSEL for AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF RHODE ISLAND and PUBLIC JUSTICE

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for Plaintiffs-Appellees certify that Plaintiffs-Appellees are not a subsidiary or affiliate of a publicly owned corporation and no publicly owned corporation that is not a party to this appeal has a financial interest in the outcome.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

Other Authority

COUNTER-STATEMENT OF THE ISSUES PRESENTED

A. Introduction

Plaintiffs respectfully disagree with Objectors' Statement of the Issues presented for review. Objectors' brief contains only two points of argument, notwithstanding its list of six issues.

Issues 1, 2, and 3, as stated by Objectors, all contend that, solely because of the passage of time since this case was filed and settled, the class representatives who brought this case, settled it, ensured Brown's compliance with the settlement ever since, and instituted and prosecuted this proceeding to enforce the settlement, could not adequately represent the class as a matter of law now—and the district court, before considering the proposed settlement modification, was required to appoint new class representatives. However, Objectors did not move for the removal, modification, or substitution of the class representatives; did not move to modify or decertify the class; and did not otherwise squarely present or preserve this issue for consideration below. As a result, they waived it and it should not be considered.

Issues 4 and 5 presented by Objectors are actually one issue: "whether the district court acted within its discretion when it approved the modification to the Joint Agreement as fair, reasonable and adequate pursuant to Federal Rule of Civil Procedure 23(e), following notice to the class, an opportunity for objections, and a fairness hearing?"

Issue 6 as stated by Objectors, which calls for a determination on the merits of the mandates of Title IX, was not presented to the district court, nor could it have been in the procedural posture of a proposed settlement. In addition, it has not been argued by Objectors in their brief on appeal.

Accordingly, Plaintiffs respectfully submit the following counter-statement of issues.

B. Counter-Statement of the Issues Presented

1. Whether Objectors preserved or properly presented a claim in the district court that a class action Judgment cannot be modified as a matter of law unless new class representatives with active claims are first appointed? If so, is this a correct statement of law?

2. Whether the district court acted within its discretion when it approved the modification to the Joint Agreement as fair, reasonable and adequate pursuant to Federal Rule of Civil Procedure 23(e), following notice to the class, an opportunity for objections, and a fairness hearing?

STATEMENT OF THE CASE

A. The Origins of this Appeal.

In May 1991, Brown University announced the elimination of four teams from its university-funded intercollegiate athletic varsity program. Women's gymnastics and volleyball, along with men's golf and water polo, were demoted from "funded varsity" status and lost, among other things, university financial support, university-funded coaching staff, access to trainers, varsity equipment and facilities, and preference in admissions for recruited athletes. The teams were advised that they could continue to compete at the varsity level *if* they self-funded and *if* other institutions were willing to continue to include them in their schedule. *Cohen v. Brown University*, 809 F. Supp. 978, 981-982 (D.R.I. 1992) ("*Cohen I*"), *aff'd,* 991 F.2d 888 (1st Cir. 1993) ("*Cohen II*").

Plaintiffs, members of the two demoted women's teams, as well as other women athletes, filed a class action suit in 1992, alleging that Brown had violated Title IX of the Education Amendments, 20 U.S.C. §1681 ("Title IX"), by demoting the teams, not offering equivalent participation opportunities to other women, and maintaining programmatic inequities between the men's and women's varsity programs. The district court granted the motion of the Plaintiffs[1] to represent a class

[1] With the exception of two Plaintiffs who were voluntarily dismissed before judgment, A20–21, 24 (ECF 39, 60, 89, 92), all Plaintiffs designated to serve as 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." *Cohen I* at 979. Plaintiffs did not seek and the Court did not require subclasses.

Class counsel have represented the Plaintiffs and plaintiff class for almost three decades throughout the pre-judgment and post-judgment proceedings. No party or interested person (including the Objectors) has sought to modify or decertify the certified class, challenge the appointment or adequacy of the Plaintiffs as class representatives or their counsel as class counsel, or substitute new class representatives or class counsel for any reason at any time, pre- or post-judgment. A1–55.

In 1992, following a lengthy hearing and extensive legal analysis, the district court granted a preliminary injunction ordering Brown to restore the two eliminated women's teams to fully-funded varsity status, with all levels of support as existed before the cuts, and prohibiting Brown from cutting, or reducing the level of support of, any other women's funded varsity team pending decision on the merits. *Id.* at 1001. The First Circuit affirmed, *Cohen II*, issuing the first appellate decision to address the application of the "Three-Part Test" of the Policy Interpretation issued

---

representatives have continued to prosecute this action, pre- and post-judgment, on behalf of the class.

by the Department of Education to enforce its Title IX Athletic Regulations, 34 C.F.R. §106.41(c)(1). *Cohen II* continues to be extensively cited.

During trial, the parties reached a partial settlement concerning the "equality of treatment" claim applicable to funded women's varsity teams, to remain in effect for a period of three years. After notice to the class, the district court held a fairness hearing on December 16, 1994 and approved the partial settlement. *Cohen v. Brown University*, 879 F. Supp. 185, 192–93 (D.R.I. 1995) (*Cohen III*), *aff'd in part and rev'd in part,* 101 F.3d 155 (1st Cir. 1996) (*Cohen IV*), *cert. denied*, 520 U.S. 1186 (1997). *See also* A30–32, referencing ECF 152–155, 161, 163.

Trial continued on the claim that Brown failed to effectively accommodate the interests and abilities of the plaintiff class. The district court ruled in favor of Plaintiffs and the plaintiff class. The court found that Brown was not in compliance with any part of the Three-Part Test. It found that Brown had failed to "fully and effectively accommodate the interests and abilities" of women by offering water polo as a club sport and by offering gymnastics, fencing, and skiing at the self-funded level. *Cohen III* at 212. Brown was directed to submit a plan to come into compliance with Title IX. *Cohen III* at 214.

In a separate Order (A137, "Remedial Order"), the district court rejected Brown's proposed compliance plan as "fatally flawed" and not a good faith effort. A141,144. The court did not give Brown another opportunity to submit a new plan,

instead ordering Brown to elevate women's gymnastics, water polo, skiing and fencing to university-funded status, but staying the order pending appeal. A148.[2]

On appeal, the First Circuit reaffirmed its earlier decision in *Cohen II* as "law of the case" and rejected Brown's constitutional challenges. Even though this Court "agree[d] with the district court that Brown's proposed plan fell short of a good faith effort to meet the requirements of Title IX," *Cohen IV*, 101 F.3d at 187, it reversed the Remedial Order, instead remanding to afford Brown another opportunity to propose a remedial plan. *Id.* at 188. Brown's petition for *certiorari* was denied. 520 U.S. 1186 (1997).

B. The Joint Agreement.

On remand, the parties agreed upon a compliance plan, called the "Joint Agreement," A101, which was approved by the court after notice to the class and hearing on fairness. A41. The Joint Agreement was incorporated into the Judgment of the Court on October 15, 1998. A41, 135. By the time the Joint Agreement was reached, all of the Plaintiffs had long completed their studies at Brown. A674.

The compliance plan in the Joint Agreement effectuated Brown's decision to comply under Part One[3] of the Three-Part Test by providing how and when

---

[2] Brown had restored women's volleyball to funded varsity status in 1994. *Cohen III* at 191 n.17.

[3] "The first benchmark furnishes a safe harbor for those institutions that have distributed athletic opportunities in numbers 'substantially proportionate' to the gender composition of their student bodies. Thus, a university which does not wish

participants are counted and by specifying the maximum permissible differential between women undergraduates and women athletes at Brown. The Joint Agreement identified the teams that were then part of Brown's varsity program. It specified that Brown's variance between undergraduate enrollment and athletic participation rates for women could be as high as 3.5%—which represents over 30 individuals in a program of 890[4]—and that the maximum permitted variance would drop to 2.25% if Brown altered the lineup of varsity teams in a way adverse to women, such as by reducing the status of or eliminating a women's team or creating or elevating the status of a men's team.[5] It specified reporting and a vehicle for enforcement. The Joint Agreement was "indefinite in duration as to those provisions concerning measurement of participation rates by applicable percentages (proportionality)"—meaning that neither side could argue that the agreed-upon gap of 3.5% or 2.25% was not the fair measure of "substantial proportionality" under Part One at Brown.

---

to engage in extensive compliance analysis may stay on the sunny side of Title IX simply by maintaining gender parity between its student body and its athletic lineup." *Cohen II* at 897–98.

[4] Brown's total program of men and women typically equals or exceeds 890 athletes each year. A77. *See also* nn. 22-23, *infra.*

[5] Plaintiffs respectfully disagree with Objectors' characterization of the obligations of the Joint Agreement: specifically, when the addition of a new men's team, with certain specific exceptions, were to trigger the 2.25% drop-down, there is no requirement that a women's team be added at the same time. *See* Obj. Brief at 11. Certain no-cut provisions and team minimum funding guarantees reduced annually and ended entirely within the first four years of settlement. A112-113.

A103. The Joint Agreement was subject to revision or modification by agreement of the parties or upon application by any party, each requiring approval by the court. *Id*. The court "retain[ed] jurisdiction concerning interpretation, enforcement and compliance with this Agreement." A117.

Post-judgment litigation actively continued for another five years to resolve attorneys' fees and costs. A41–47.

Outside of the courtroom, beginning in 1998 and continuing every year thereafter for more than twenty years, Plaintiffs through class counsel conducted an annual review of Brown's compliance with the requirements of the Joint Agreement, with the parties primarily addressing and resolving disputes without court intervention[6] until Brown announced that it was restructuring its varsity athletic program and eliminating five women's varsity teams for 2020–21. A78–79.

C. Recent Events Giving Rise to this Appeal.

On May 28, 2020, Brown announced that it was restructuring its varsity athletic program, including the removal of five women's and six men's teams from the varsity program. Brown made a public announcement, advised athletes, and notified class counsel, acknowledging that the actions would trigger the Joint

[6] In 2000, the court approved the parties' request to create separate golf teams for men and women. ECF 326-327, A45. Other issues, including Brown's failure to achieve the "permitted variance" in several years, were addressed and resolved by the parties directly without court involvement. A56–57, A178, A451–59.

Agreement's drop-down to 2.25% and representing that Brown's new program would meet that requirement. The teams were identified as men's and women's golf, fencing, and squash, women's skiing and equestrian, and men's cross-country and indoor/outdoor track and field. Brown also announced that it was elevating its club sailing program to varsity status and creating varsity women's and co-ed sailing teams. A79–80.

It appeared that Brown could meet the 2.25% mandate because Brown was removing substantially more men than women from its varsity program. A60–61.

On June 6, 2020, Brown's President publicly stated, in response to a campaign to restore men's indoor/outdoor track, field and cross-country, that, if those teams "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." A58. Three days later, on June 9, 2020, Brown announced that it was restoring men's track, field and cross-country. No women's teams were reinstated. A58.

The following day, Plaintiffs through class counsel notified Brown that the revised plan constituted a "gross violation of the Joint Agreement" and sought relevant information. A163–64. Brown provided some, but not all, of the information requested by class counsel. A149–57, 161–62. Brown declined to confer to attempt a resolution, taking the position that its revised plan complied with the Joint Agreement. A63, 84.

Plaintiffs then filed a comprehensive motion to enforce the judgment, to adjudge Brown in contempt, and for emergency relief seeking reinstatement of the five women's teams pending hearing. A56 (ECF357). The district court approved an expedited discovery and hearing schedule. During the ensuing two months, the parties engaged in intense, contentious discovery and motion practice, A49–50, 198–202, including exchange and review of thousands of documents, six depositions of fact and expert witnesses, and preparation of substantial prehearing briefs and exhibits.[7] While Plaintiffs contended that the restructured program would not, and was not designed to, produce a varsity program for women within 2.25% of undergraduate enrollment, Brown disagreed. A204–214, 495–514. The parties presented expert reports supporting their respective positions. A594.

In prehearing submissions, Brown contended that the data demonstrated that it would achieve compliance at the 2.25% level. A495–514. Brown also argued that, even if it miscalculated the number of male and female athletes on its restructured program, compliance could be reached by restoring one women's team, not all five, and that it was Brown's choice which team to restore, both under case law and the express terms of the Joint Agreement.[8] A515.

---

[7] At the fairness hearing, counsel for the Objectors acknowledged that the discovery—conducted by class counsel—"was amazing." ADD21.

[8] Brown's position found support in past decisions in this case. "Brown has wide latitude in structuring its intercollegiate athletic program. Brown may choose, for example, to drastically reduce the number of intercollegiate teams it sponsors. Or it

In reply, Plaintiffs acknowledged that a final decision in their favor might not require the restoration of all five teams, but argued that, until Brown demonstrated that it was in compliance, all five teams should be reinstated to prevent irreparable harm. A538.

After all prehearing briefs were submitted, the parties participated in mediation conducted by Magistrate Judge Sullivan, resulting in the parties' agreement, subject to Rule 23 class approval, to resolve the current dispute and modify the Joint Agreement.[9] A590.

Class counsel consulted with Plaintiffs and more than 50 class members on the eliminated teams both in hearing preparation and mediation.[10] In addition to consultation on the merits and settlement, ten members on the five eliminated teams

---

may decide to eliminate the varsity program altogether." *Cohen I* at 999. The last time the trial court found Brown had not proposed a good faith plan and decided to substitute its own Remedial Order, this Court reversed and gave Brown another chance. *Cohen IV* at 187–88.

[9] Between the first plenary session on September 9, 2020, and the execution of a terms sheet on September 17, 2020, the magistrate engaged the parties in intense shuttle diplomacy, spanning nearly two dozen conferences, before the parties reached agreement. A51–53.

[10] "Class Counsel worked diligently to make sure that both the Class representatives and the members of the Class most directly affected by Brown's recent decision to transition five women's teams from varsity status—the current members of those teams—were fully informed about, and provided input into, the prosecution and proposed settlement of the case. It is notable that none of those Class members directly affected by the transition have objected, and that the small number of Class members who did object never discussed their concerns with Class Counsel." A675–76; *also* ADD26.

submitted declarations in support of relief, detailing their specific interests and injuries. A271–336.

The district court gave preliminary approval to the proposed settlement, approved notice to the class and set a schedule for objections and a fairness hearing. A629.

D. The Settlement at Issue.

The settlement reached by the parties required Brown to immediately restore two of the women's teams—equestrian and fencing—to varsity status with their previous level of support. It also ensured that, if Brown were to restore any of the three remaining men's teams, another women's team would also be reinstated, so that the resulting total of newly-restored women's teams would be at least two more than the number of newly-restored men's teams.

The settlement modified the Joint Agreement, which was indefinite in duration and which class counsel had been monitoring for over 20 years, to end August 31, 2024. It guaranteed that, until then, there would be no reduction in status of any existing women's varsity team and that Brown would not add any other men's team.

Except for specific modifications, all operative terms of the Joint Agreement remain in effect, including the methodology for counting participants and the requirement to stay within 2.25% of undergraduate enrollment. The parties agreed

that men and women participating in Brown's sailing program would only be counted once for purposes of the Joint Agreement, regardless of how Brown labeled the sailing team(s). The parties also agreed that the controlling 2.25% measurement would end on August 31, 2024 and would not prospectively release or bind any party thereafter. ADD 6-7. The settlement specified additional reporting requirements to address the changes. ADD2.

Personal notice was provided to over 3,500 women. This included approximately 450 women participating in Brown's intercollegiate athletic varsity program, all women undergraduates at Brown, those on leave, and those who had deferred matriculation. A672. Notice was also provided on Brown's websites for athletics and admissions, as well as on three websites associated with class counsel. A600. The proposed settlement also garnered significant local and national publicity. *See, e.g.*, Mark Pratt, *Brown women's sports settlement gets preliminary approval*, ABC News (Sept. 25, 2020), https://abcn.ws/2QkRYG7.

E. The Objection.

One objection was filed on behalf of twelve athletes on the women's gymnastics and ice hockey teams, which were not impacted by Brown's restructuring of its varsity athletic program. A631. Importantly, none of the class members from the women's varsity teams cut by Brown, including the three teams that were not reinstated, objected to the settlement.

The twelve declarations supporting the Objection are identical except for the name of the declarant and her sport. A642–53. Each attests that the Objector is a current student and team member and that participating on a varsity team was an important part of her decision to attend Brown, but none contains any information as to how the declarant would be adversely affected by the settlement. That information is not apparent since the settlement guarantees that the Objectors' sports will continue through August 2024. The Objectors, as current students, are members of the classes of 2021–2024. Before (or after) objecting, none of the Objectors had reached out to class counsel for information (as invited in the class notice, A626). A675–76.

In the district court, the Objectors raised three arguments: (1) the notice was inadequate; (2) the proposed settlement class was improper and could not be certified; and (3) the terms of the settlement were not fair and adequate.

On the first ground, the Objectors conceded that they received notice of the proposed settlement. They asserted that publication of the notice was insufficient as to other class members. A638. Objectors have not briefed this issue on appeal, and it is not further addressed.

On the second ground, Objectors incorrectly claimed that the parties were proposing certification of a settlement class, that the requirements for certification of a settlement class were not met, and that, as a result, the proposed settlement

could not be approved.[11] Objectors claimed that "[t]he Proposed Settlement fails to comply with basic prerequisites for certification of a settlement class as well as for approval of a class action settlement." A631. They objected to "the proposed settlement class" as "uncertifiable." *Id.* They contended that, in order to approve the settlement, a new settlement class, with subclasses, was required, and that the original Plaintiffs were not qualified to serve as class representatives for that purpose.[12] A635–37.

On the third ground, with respect to the terms of the settlement, the Objectors claimed that class members were losing rights under the Joint Agreement without "meaningful or equivalent additional relief." A637. Among the rights that the Objectors claimed were lost were "safeguards relative to the funding of Brown's women's sports,"[13] protections against retaliation, and streamlined metrics and mechanism to enforce compliance. In addition, the Objectors claimed that the

[11] The Objectors have attempted to recast their argument on appeal, without acknowledging the shift. Instead of arguing that a settlement class should not have been certified, Objectors now claim that the Plaintiffs could no longer adequately represent the certified class because of the long passage of time. While neither claim has merit, the Court should not entertain an argument not properly presented to the district court in the first instance.

[12] The Objectors did not explain how the Plaintiffs and class counsel had the authority to prosecute the enforcement action on behalf of the class, but not to settle the dispute.

[13] A638. To the contrary, all original funding guarantees expired nearly twenty years ago. The 2020 settlement actually added funding guarantees not required under the Joint Agreement.

settlement treated class members inequitably because two teams were reinstated and three were not, and class members who graduate after August 2024 will not benefit from the Joint Agreement after that. A638.

F. Motion for Final Approval and Decision Below.

The parties responded to each of the issues raised by the Objectors in the Motion for Final Approval. A654. The motion addressed the adequacy of the legal representation of the already-certified class, describing the development of the record, the arm's length negotiations conducted through court mediation, and the depth of experience of class counsel, both in the area of the law and their association with the case—spanning over 25 years for three of the attorneys for the class—as all supporting a presumption of reasonableness. A660–64. The motion pointed out that the Plaintiffs were not seeking certification of a settlement class and that the prior certification, the law of the case, and controlling case law all supported Plaintiffs' status as class representatives. The motion affirmatively represented that Plaintiffs and current class members had actively participated in the conduct of the enforcement proceedings and mediation. A674–75.

The motion outlined the benefits of the settlement to the class. These include benefits beyond the Joint Agreement. The original no-cut and funding guarantees expired nearly twenty years ago, such that the Joint Agreement did not prohibit Brown from cutting women's teams—only required it to provide a program for

women within 2.25% of undergraduate enrollment if it did. The proposed 2020 settlement modification removed that discretion by requiring the reinstatement of two women's teams to varsity status (with the requirement to restore more women's teams if any of the cut men's teams were restored) and guaranteeing the status of all other women's varsity teams for the remaining life of the Joint Agreement. The proposed settlement also provided that, for purposes of calculating the 2.25% variance, women participating in the sailing program would not be counted as members of two teams, a point hotly contested in the enforcement proceedings. A668.

The motion addressed each of Objectors' specific complaints about the settlement. As to funding safeguards, the settlement created new safeguards where none existed. A678. The settlement provided additional relief to members of the varsity teams that had not been threatened with elimination in 2020. This guarantee directly benefited the Objectors and the class. A678. The motion addressed Objectors' complaints of the loss of reporting provisions and protection against retaliation, observing that developments in statutory and case law now provide equivalent protections independent of the Joint Agreement. A679–80.

G. The Fairness Hearing.

The parties and the Objectors appeared at the fairness hearing through counsel only. Counsel for Objectors did not clarify or expand on any of the grounds for

objection, or address any of the responses provided by the parties in the motion for final approval. Objectors continued to refer to the class as a newly proposed "settlement class" which required the appointment of new class representatives. ADD20–21. Objectors complained that class counsel had failed to keep up the vigorous work that they had done in the past. ADD21. Objectors contended a settlement class was not necessary and that the original Joint Agreement should not be modified. ADD21–22.

The Objectors did not call or seek to examine any witnesses or offer any evidence to support their Objection. Objectors did not address or dispute the representation that Plaintiffs (as well as current athletes) were actively involved in the enforcement and settlement proceedings.

After hearing from all counsel, the trial court asked class counsel to provide Plaintiffs' perspective in agreeing to place an end date on the Joint Agreement. ADD28. Counsel explained that, as presented in the motion for final approval, the 2.25% maximum variance could be viewed as beneficial, by keeping Brown from claiming that it was free to have a larger gap, but also as a negative, since it protected Brown in perpetuity from a challenge by women student-athletes that "substantial proportionality" at Brown required a smaller gap to comply with Title IX. ADD29–30. "We'd rather have them [] worrying about [achieving] 0.0 percent once their obligation not to cut any teams ends." ADD30.

The district court approved the settlement in a bench decision. The court rejected Objectors' complaint about class counsel, characterizing the advocacy for the plaintiff class as zealous and substantial, resulting "in a well-developed record which enabled an effective and successful arm's length negotiation." ADD35. The court found that the settlement treated class members "equitably relative to each other." ADD35. The court acknowledged and rejected the grounds raised by the Objectors and noted that the twelve Objectors represented "a very small fraction of the class members as a whole." ADD36.

SUMMARY OF ARGUMENT

In this appeal, twelve members of the certified class have objected to the parties' agreement, with the district court's approval, to modify the consent judgment entered in 1998, known as the Joint Agreement. The Joint Agreement has been in place for over twenty years and had no termination date.

The Joint Agreement, approved in 1998 and incorporated in the Judgment of the court, is binding upon the certified class. Plaintiffs were designated as class representatives in 1992 and have been represented by class counsel continuously since 1992. The Joint Agreement expressly contemplated that it is subject to modification by agreement of the parties, with approval of the court in accordance with Rule 23, Fed. R. Civ. P. A103.

In this case, after a very intense, protracted battle concerning compliance, the

parties did seek modification in the form of an amendment to the Joint Agreement.

The Objectors' argument that the Plaintiffs are disqualified to continue to represent the certified class was not preserved for appeal and is contrary to the law of the case as well as controlling precedent of the United States Supreme Court.

The district court's approval of the proposed modification to the 1998 settlement was within its discretion, consistent with the law and the facts, and should be affirmed by this Court.

ARGUMENT

THE DISTRICT COURT'S DECISION SHOULD BE AFFIRMED.

Standard of Review

"We review the district court's approval or disapproval of a settlement for abuse of discretion. … Under that standard, embedded legal issues are reviewed de novo and factual findings are reviewed for clear error." *Bezdek v. Vibram USA, Inc*., 809 F.3d 78, 82 (1st Cir. 2015) (citations omitted).

I. OBJECTORS' ARGUMENT THAT THE CLASS IS INVALID BECAUSE IT LACKS CURRENT CLASS REPRESENTATIVES WAS WAIVED AND IS CONTRARY TO CONTROLLING PRECEDENT.

On appeal, Objectors claim that Plaintiffs "ceased being members of the class decades ago and no current named class members were substituted in their place. As such, they were inadequate representatives of the class as a matter of law." Obj. Brief at 22.

As a threshold matter, this argument was waived because objectors did not make it in the district court. *See Rosaura Bldg. Corp. v. Municipality of Mayaguez*, 778 F.3d 55, 63 (1st Cir. 2015) ("Time and time again we have held that arguments not advanced before the district court are waived."); *see also Emp'r Ins. Co. of Wausau v. OneBeacon Am. Ins. Co.*, 744 F.3d 25, 29 (1st Cir. 2014) ("'It is a virtually ironclad rule that a party may not advance for the first time on appeal either a new argument or an old argument that depends on a new factual predicate.'")

(*citing Cochran v. Quest Software, Inc.*, 328 F.3d 1, 11 (1st Cir. 2003)).

But even if this Court were to consider this argument, it fails badly as a matter of law.

Objectors ignore that the district court certified this class in 1992, and, in doing so, determined the Plaintiffs would adequately and fairly represent the class. A18. The case proceeded to judgment as a certified class, which is binding upon the class members. Nothing has changed about that fact: this is *still* a certified class. No party, and no interested person, has sought to modify or decertify the class, pre- or post-judgment.[14]

The parties' agreement to modify the judgment presented no reason for the court to revisit that certification here. The matter having proceeded to judgment, its status as a class action and the Plaintiffs' status as class representatives—in the absence of specific evidence in the record of an actual change in circumstances—is the "law of the case." *Cohen IV* at 167.

> "The law of the case doctrine precludes relitigation of the legal issues presented in successive stages of a single case once those issues have

[14] There are no subclasses and never were. Citing one case, Objectors suggest that subclassing is the norm in Title IX challenges. It is not. Other cases besides *Cohen* proceeding on behalf of a broad class of women athletes include: *Portz v. St. Cloud State Univ.*, 297 F. Supp. 3d 929, 942–43 (D. Minn. 2018); *Biediger v. Quinnipiac Univ.*, No. 09–cv–621, 2010 WL 2017773 (D. Conn. 2010); *Foltz v. Delaware State Univ.*, 269 F.R.D. 419, 426 (D. Del. 2010) (rejecting university's argument that members of one eliminated team could not adequately represent a class of all women athletes); *Favia v. Indiana Univ. of Pennsylvania*, 812 F. Supp. 578 (W.D. Pa.1993), *aff'd*, 7 F.3d 332 (3d Cir. 1993).

> been decided." *Cohen v. Brown Univ.*, 101 F.3d 155, 167 (1st Cir. 1996). The doctrine "afford[s] courts the security of consistency within a single case while at the same time avoiding the wastefulness, delay, and overall wheel-spinning that attend piecemeal consideration of matters which might have been previously adjudicated." *United States v. Connell*, 6 F.3d 27, 30 (1st Cir. 1993).

Ms. M. v. Falmouth Sch. Dep't, 875 F.3d 75, 78 (1st Cir. 2017).

This is true even where the settlement proposed is pre-judgment, rather than a modification of an existing judgment. *See* 2018 Advisory Committee Notes to Fed. R. Civ. P. 23(e)(1) ("If the court has already certified a class the only information ordinarily necessary is whether the proposed settlement calls for any change in the class certified, or of the claims, defenses, or issues regarding which certification was granted."); *see also In re Banc of Cal. Sec. Litig.*, No. 17–00118, 2019 WL 6605884, at *1 (C.D. Cal.2019) (explaining that fairness determination does not require court to revisit certification).[15]

This Court's decision in *Voss v. Rolland*, 592 F.3d 242 (1st Cir. 2010), presented a similar procedural posture. There, a small group of objectors appealed

[15] *See, e.g., Parish v. Sheriff of Cook Cty.*, No. 07 C 4369, 2016 WL 1270400, at *1 (N.D. Ill. 2016) (declining to decertify a class pre-judgment based on law of the case and the absence of "materially changed or clarified circumstances or changes in the law requiring decertification. … Pursuant to Rule 23(c)(1)(C), [a]n order that grants or denies class certification may be altered or amended before final judgment. … However, [i]n the absence of materially changed or clarified circumstances, or the occurrence of a condition on which the initial class ruling was expressly contingent, courts should not condone a series of reargruments on the class issues by … the opponent of the class … ." *Id.* (quoting 3 W. Rubenstein, A. Conte & H. Newberg, Newberg on Class Actions § 7:47 (4th ed. 2011)) (footnote omitted).

from the approval of an amended settlement agreement between plaintiff class and the state. The action started in 1998, with class certification in 1999, and an original settlement in 2000. In 2008, the parties "negotiated a new settlement to reduce the state's active-treatment burden." *Id.* at 248. A small group of objectors lodged a formal objection and also moved to decertify the class, claiming that the class representatives' interests diverged from theirs, making them inadequate. *Id.* at 250. The district court, after hearing, denied both motions and objectors appealed.

With respect to class certification, the Court observed that the original certification decision was rendered in 1999, was not appealed, and was final. The *Voss* objectors also failed to appeal from the denial of their motion to decertify, which "doom[ed] their attempt to raise the class certification issue before us." *Id.* at 251 (footnote omitted). That left only "the district court's approval of the amended settlement." *Id.*

Objectors in *Voss*, like Objectors here, cited to *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), in an effort to conflate the district court's obligations in reviewing adequacy of representation and certifying a class—when first presented for purposes of settlement—with a court's review of a proposed settlement reached by a previously certified class. *Compare* Obj. Brief at 25. This Court disagreed. "[*Anchem*] discussed courts' obligations when reviewing class certification for settlement only and not for litigation. *It does not apply." Voss*, *supra* at 251 n.17

(emphasis added; citation omitted).

Voss should dispose of Objectors' argument that the 2020 modification is invalid because the class representatives are not still attending Brown. The class was certified; it is still certified; and the class representatives are still valid representatives. There is simply no legal basis for Objectors' argument to the contrary.

Objectors nonetheless insist that the Plaintiffs cannot be class representatives because they are no longer personally impacted by Brown's decision. But, for all of their selective quotations and references to inapposite cases where a settlement class and settlement are proposed contemporaneously, Objectors have failed to acknowledge controlling precedent of the United States Supreme Court.

It is well established that where, as here, a class has been certified and the Plaintiffs were members of the class with live claims at the time of certification, they can continue to represent the class in a case against the named defendants, "even though the claim of the named plaintiff has become moot." *Sosna v. Iowa*, 419 U.S. 393, 402 (1975). In *Sosna*, the Supreme Court concluded that plaintiff was entitled to challenge a one-year residency requirement to obtain a divorce in Iowa in a representative capacity even though she had long since completed the one-year requirement and had obtained her divorce in another state. *Sosna*, *supra* at 398–99 and nn. 6–7.

In 1992, when the 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" was certified, each of the Plaintiffs was directly impacted by the changes made to Brown's intercollegiate athletic program. In 1998, when the district court approved the Joint Agreement, all of the Plaintiffs had long since graduated. Nothing about their status or interest or ability to represent the interests of the class has changed due to the passage of more time. To the contrary, the history of post-judgment proceedings demonstrates that the Plaintiffs and class counsel have diligently fulfilled their fiduciary duties to the class for more than twenty years, including mounting a vigorous and often acrimonious enforcement proceeding against Brown to challenge the 2020 restructuring. The parties affirmatively represented on the record that the Plaintiffs were consulted and participated in both the enforcement and settlement proceedings.[16] A675–76; ADD26; *see* n.10, *supra*. The fact that the specifics of those consultations do not appear in the record is unremarkable since both attorney-client communications and discussions in court-supervised mediation are confidential. In the absence of an evidentiary contest, the district court was well

[16] Objectors are simply wrong in asserting that "there was no indication in the record that those prior female Brown athletes were even consulted with or involved in the negotiation or decision-making process regarding the Settlement Agreement." Obj. Brief at 28.

within its discretion to accept those representations without requiring the parties to develop it further. Objectors did not question those representations below, either through informal or formal requests for information or evidentiary submission at the fairness hearing.

To overcome the abuse of discretion standard, Objectors seem to contend that, at some point, or for some purposes, Plaintiffs as a matter of law were disqualified from continuing to serve as class representatives. Obj. Brief at 22, 27–28. But none of the cases cited by Objectors stands for this proposition, and Plaintiffs have found no such case in their research. Nor would we expect to find one, as it would subvert *Sosna* and create chaos in enforcing and/or modifying long-standing class action consent judgments, such as *Voss* and *Cohen*.

For example, *Flores v. Meese [Garland],* C.D. Cal. 85-cv-04544, commenced in 1985 on behalf of a certified class of migrant children to challenge their conditions of detention at the border. *Reno v. Flores*, 507 U.S. 292 (1993) (rejecting facial challenge and remanding). Thereafter, a consent judgment governing detention of minors was entered in 1997. *Flores v. Lynch*, 828 F.3d 898, 901 (9th Cir. 2016). The government's compliance with that consent order has been the subject of widespread publicity and a succession of enforcement proceedings over the years, all brought in the name of Jenny Flores, who was 15 in 1985, and thus over 25 at time of settlement,

and other minors in related cases.[17] While the government has not, like Objectors here, tried to challenge Ms. Flores' or other named plaintiffs' continued status as class representatives, it has periodically attempted to revisit the class certification, without success. In 2016, the government challenged the scope of the class. The Ninth Circuit rejected the effort both on the basis of the named plaintiffs' original allegations and "more importantly, the government waived its ability to challenge the class certification when it settled the case and did not timely appeal the final judgment." *Id.* at 908.

The government tried again in 2020, this time claiming that flaws in the certified class "constitute[d] changed circumstances warranting termination of the Agreement." Among other things, the government, like Objectors here on appeal, claimed that recent changes in the standards for class certification should be applied. The Ninth Circuit rejected this effort as well:

> The government contends that the standards for class certification have changed and would preclude certification of the same class today. But the government cites no authority supporting its suggestion that the evolution of Rule 23 standards warrants termination of a consent decree concerning a previously certified class, particularly when the government has never moved to decertify or modify the class. The government has not carried its burden to establish that the supposed flaws in the certified class constitute a significant change warranting termination of the Agreement.
>
> We are mindful of the reality that under certain circumstances, it will

[17] The original complaint is available online at https://bit.ly/33QKgGM, accessed 5/3/21.

> be appropriate to amend or terminate long-running consent decrees. *See Horne*, 557 U.S. at 447–49, 129 S.Ct. 2579. But the government has not shown that the district court abused its discretion in denying termination in this instance.

Flores v. Rosen, 984 F.3d 720, 744 (9th Cir. 2020) (footnote omitted). A review of the docket on PACER confirms that *Flores* continues to be litigated in the name of class representative Flores, without substitution of class members post-judgment.

Likewise, in *Binta B. v. Gordon*, 710 F.3d 608 (6th Cir. 2013), the Sixth Circuit addressed and rejected a post-judgment attack on class representative status. There, a class of Medicaid enrollees entered a consent judgment with Tennessee over its managed care procedures. By the time of the court's decision in 2013, the case had been active "for over thirty years." *Id.* at 613. The class was certified in 1985, with consent decrees entered and revised many times between 1986 and 2005. When plaintiffs' counsel later sought attorneys' fees and costs, Tennessee claimed a fee award could not be made because there was no viable class representative, since all but one of the certified representatives had died and the one remaining representative had moved out of state. *Id.* at 618.

The Sixth Circuit disagreed. Relying on *Sosna*, the court held that the fact that the remaining representative had moved out of state was not a basis to conclude that she was no longer adequate to represent the class in the absence of anything in the record to indicate that she had withdrawn or been found inadequate to serve as class representative.

> [A] named class representative may still adequately represent the class, for purposes of Rule 23, even if the representative's personal claims have become moot, at least until such time that there is a determination that the representative is no longer adequate. Applying these principles to this case, the fact that Fitts moved to Alabama and was disenrolled from TennCare does not inexorably lead to the conclusion that she was not an adequate class representative under Rule 23.

Binta B., *supra* at 619.

Thus, no error of law attaches to the continued service of Plaintiffs as class representatives.[18] The district court was well within its discretion to conclude that Plaintiffs and their class counsel adequately and vigorously represented the interests of the class.

II. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION FINDING THAT THE MODIFICATION TO THE JOINT SETTLEMENT AGREEMENT WAS FAIR, REASONABLE, AND ADEQUATE.

The district court was also well within its discretion finding the settlement was fair, reasonable, and adequate. Ample authority applying Rule 23(e) makes clear that the district court properly exercised its discretion in approving the settlement modifying the Joint Agreement and Judgment.[19] The district court "enjoys

[18] In fact, if Objectors had filed and preserved a motion to modify or decertify, it would be subject to review on an "abuse of discretion" standard. *Voss*, *supra* at 245–46.

[19] According to the Advisory Committee, the 2018 amendment to Rule 23(e) was "not to displace" the "lists of factors" bearing on reasonableness developed by each circuit, "but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal"). *See* 2018 Advisory Committee Notes to Fed. R. Civ. P. 23(e)(2). The

considerable range in approving or disapproving a class action settlement, given the generality of the standard and the need to balance benefits and costs." *Nat'l Ass'n of Chain Drug Stores v. New England Carpenters Health Benefits Fund*, 582 F.3d 30, 44–45 (1st Cir. 2009). "When sufficient discovery has been provided and the parties have bargained at arms-length, there is a presumption in favor of the settlement." *City Partnership Co. v. Atl. Acquisition Ltd. Partnership*, 100 F.3d 1041, 1043 (1st Cir. 1996) (citations omitted). "[T]he ultimate decision by the judge involves balancing 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." *Chain Drug Stores*, *supra* at 44. In approaching the review, the district judge does not start from a position of pure neutrality, but rather from a "principle of preference" for settlement. *Durrett v. Housing Auth. of City of Providence*, 896 F.2d 600, 604 (1st Cir. 1990) (quotations, citations omitted). *See also In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 36 (1st Cir. 2009).

Moreover, because "the parties' attorneys are experienced and knowledgeable

---

two procedural factors enumerated in Rule 23(e)(2) include whether "the class representatives and class counsel have adequately represented the class" and whether "the proposal was negotiated at arm's length." Fed. R. Civ. P. 23(e)(2)(A)–(B); *see also* William B. Rubenstein, 4 Newberg on Class Actions § 13:48 (5th ed. 2020). The two substantive factors include the adequacy of relief to the class and whether "the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(C)–(D).

about the facts and claims, their representations to the court that the settlement provides class relief which is fair, reasonable and adequate should be given significant weight." *Rolland v. Cellucci*, 191 F.R.D. 3, 10 (D. Mass. 2000); *see also Bussie v. Allmerica Fin. Corp.*, 50 F. Supp. 2d 59, 77 (D. Mass. 1999); *Varacallo v. Mass Mut. Life Ins. Co.*, 226 F.R.D. 207, 240 (D. N.J. 2005).

The district court here acted fully in accordance with these principles when it found this settlement to be fair, reasonable, and adequate. The latest round of this litigation—and the settlement negotiations—were extremely hard fought. The district court found that class counsel "beyond adequately" represented the interests of the class and that the settlement was preceded by a "well-developed record" and arm's length mediation conducted by the Magistrate Judge. The court found "that the proposed settlement accounts for many of the issues raised by the parties throughout this long litigation." The court rejected the claim that the settlement treated class members inequitably. It noted that the twelve objectors represented "a very small fraction of the class members as a whole, and about 2.7 percent of the women varsity student athletes." ADD34–36.

The district court correctly applied the governing principles. The settlement was reached on the eve of hearing after the parties developed an extensive record and fully briefed the issues after arm's length negotiations conducted through court mediation. As described above, the settlement achieved substantial benefits for the

class. Class counsel's experience and credentials were documented, A662–65, and well known to the district court. ADD34–35. Before the district court, the parties set forth in detail a discussion and application of each of the factors to be considered by the district court under Rule 23(e), with citation to relevant law. A660–82.

Below, Objectors conceded the strength of the record developed by Plaintiffs ("amazing") and the credentials and experience of class counsel. ADD21. Counsel for Objectors acknowledged "that it's a very steep uphill battle to come into a court and try to have something overturned that a magistrate judge took a great hand in." ADD20. At bottom, Objectors complain that the settlement is not the outcome that they would advocate and that it was not a good bargain. ADD21.

Objectors employ a scattershot approach to attacking the settlement, stubbornly avoiding any discussion of what it actually does and ignoring the fact that Objectors themselves are directly benefitted and suffer no injury from the modifications to the Joint Agreement.

We glean the following, overlapping, complaints from Objectors' Brief, 30–33:

- The modified settlement terminates the "indefinite-in-duration" protections of the Joint Agreement.
- The modified settlement "alter[s]… many substantial rights, protections and benefits currently possessed by class members in exchange for minimal and limited short-term gains largely benefitting only select class members," creating a conflict.

- It rewards Brown's bad behavior.
- It favors the wrong teams for reinstatement and treats class members on the cut sports inequitably.
- It sacrifices the rights of class members on "all other teams for reinstatement of those two sports."

Other than a recitation of each point, there is no reasoned argument. There is no citation to authority. There is no basis for these claims.

Objectors nowhere explain how they are adversely affected by the modified settlement. To the contrary, the modified settlement guarantees that *their* teams (ice hockey and gymnastics) will not be cut, at least for the likely duration of their studies at Brown. Objectors purport to assert the injuries of future class members and class members on the three teams which were cut and not reinstated. Notably, those class members did not object to the settlement.

Objectors' principal complaint seems to be that the modified settlement terminates the indefinite-in-duration protections of the Joint Agreement on August 31, 2024. Plaintiffs considered the changes to the Joint Agreement a worthwhile compromise for several reasons, each of which was presented to the district court.

First, as part of the settlement, Brown agreed that it would not cut any other women's teams for the rest of the term of the Joint Agreement. As the 2020 experience demonstrates, the Joint Agreement did not prevent Brown from cutting women's varsity teams. The 2020 settlement provided immediate and long-lasting

relief to a large portion of the current class members, including the Objectors. Thus, the modified settlement did not sacrifice the rights of class members on "all other teams for reinstatement of those two sports."

Second, as part of the settlement, Brown agreed that it would immediately reinstate two of the five cut women's teams, at preexisting funding levels, and agreed to a formula to restore one or more of the three remaining teams if it restores any of the men's teams. This provided immediate relief to the class. To the extent that Objectors assume that all five teams would have been reinstated, permanently, as a result of the motion to enforce, they have presented no argument in support of that position. That is no surprise, because there was no legal basis for class counsel to force Brown into full reinstatement.

This is a crucial point—and one that Objectors completely fail to acknowledge. Under the Joint Agreement, even if Plaintiffs were completely successful on the motion to enforce and adjudge in contempt, Brown could elect to come into compliance by adding as few as *one* team for women, or *none*—by cutting its men's program. A538. That being so, one of the *only* ways to entice Brown into reinstating more teams was to agree to amend the Joint Agreement. Objectors' entire argument is predicated on their view that class counsel could have gotten Brown to put back all the teams if they had only tried harder. That argument simply ignores reality—and it ignores the law. *See, e.g.*, *Cohen IV*, 101 F.3d at 188 (remanding case

to provide Brown another opportunity to propose how it will reach compliance).

Plaintiffs and class counsel were also well aware, from experience, that a favorable decision would not necessarily provide any immediate relief: the trial court's decision in *Cohen III* in 1995 that Brown's program was not fully and effectively accommodating the interests and abilities of class members on water polo, skiing and fencing did not accord any relief to the athletes then participating on those teams, since the Remedial Order was stayed and the Joint Agreement did not enter until 1998. Here, Plaintiffs understood that, even if they litigated and won, a favorable decision would likely have been appealed, potentially delaying any relief to the class. Plaintiffs were also aware that there was no Title IX precedent to support either party's position on how to count women sailors designated as participating on both a women's and a coed sailing team. ADD25. So, the litigation could have gone on for a significant time, with disputed issues to be resolved, providing the class members no relief in the meantime.

What Objectors refuse to acknowledge is that, by agreeing to the settlement modification, Plaintiffs were able to provide real benefits to the class *now* and forestall the possibility that none of the teams would ever be restored, either because the motion to enforce was denied or because Brown elected to further shrink its men's program rather than to restore women's teams.

Plaintiffs consistently advocated for interim reinstatement of all five women's

teams. A92, 538. Plaintiffs did not favor one set of class members over another. To the contrary, *Brown* selected the teams that it would restore. Through mediation, Plaintiffs were able to secure Brown's agreement to put back two teams, but it was Brown that decided which teams to reinstate—because the law contemplates that a university has control over which teams to reinstate to bring itself into compliance with Title IX. *See, e.g.*, *Cohen IV*, 101 F.3d at 188.

That the settlement only restored some of the teams does not make it unfair; it was simply the best class counsel could achieve given the limitations of Title IX and the Joint Agreement. Rule 23's requirement that the court determine whether "the proposal treats class members equitably relative to each other," Fed. R. Civ. P. 23(e)(2)(D), does not require identical treatment. "Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." 2018 Advisory Committee Notes to Fed. R. Civ. P. 23(e)(2). "There is no requirement that all class members in a settlement be treated equally"; rather, Rule 23 requires only that all class members are treated fairly. *Swinton v. SquareTrade, Inc.*, 454 F. Supp. 3d 848, 875 (S.D. Iowa 2020), *appeal dismissed*, 2020 WL 6743476 (8th Cir. 2020).

The Joint Agreement allows Brown to cut women's teams—and to choose which ones—so long as the applicable maximum percentage is maintained. Part One

of the Three-Part Test ("safe harbor") focuses on the "substantial proportionality" of the entire women's program as compared to undergraduate enrollment and is satisfied without regard to which sports are provided (as long as they are genuine opportunities), or if the entire men's and women's programs are eliminated. Plaintiffs believe that the restoration of two women's teams will not only ensure that Brown achieves compliance at 2.25%, but likely well under the maximum, while restoring athletic opportunities rather than shrinking the entire program.[20]

Third, Plaintiffs disagree that the amended settlement gives up "many substantial rights, protections and benefits" by the termination of the Joint Agreement in August 2024. The only provisions actually identified by Objectors are the annual reporting requirements and the enforcement mechanism and metrics. But the annual reporting provisions, which had been stand-alone protections in 1998, now parallel statutory obligations which provide protections independent of the Joint

[20] Objectors' complaint that skiing or squash, rather than fencing, should have been restored ignores the requirements of the Three-Part Test and the provisions of the Joint Agreement. The very fact that Objectors suggest that a different lineup—pick skiing or squash, not fencing—would be acceptable demonstrates that the settlement was well within the range of compromise. "'[T]he very essence of a settlement is compromise.' *Officers for Justice v. Civil Serv. Comm'n of City & Cty. of San Francisco*, 688 F.2d 615, 624 (9th Cir. 1982) (citation omitted). Accordingly, '[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.' *Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1242 (9th Cir. 1998) (citation omitted)." *In re MyFord Touch Consumer Litig.*, No. 13–cv–03072, 2019 WL 1411510, at *10 (N.D. Cal. 2019).

Agreement.[21] A679–80.

That brings us to the enforcement mechanism and metrics. In this regard, based on their experience over the past 20-plus years and the evolution of the law of Title IX, class counsel considered the mechanism and metrics of the Joint Agreement, on balance, as more beneficial to Brown than to plaintiff class once the guarantees of no cuts and funding run out in 2024.

In the 1990s, the parties vigorously litigated the applicability, requirements, and constitutionality of aspects of the Title IX Athletic Regulations as authoritatively interpreted by the Department of Education in the Three-Part Test of the Policy Interpretation. Once the legal issue was resolved, the case was remanded for Brown to develop a plan to achieve compliance. Brown made clear that it chose to comply under Part One, by offering competitive opportunities for women in numbers "substantially proportionate" to undergraduate enrollment.

What did that mean? In 1998, we knew that a gap of 11.6% or larger would not satisfy Part One at Brown. *Cohen III* at 211 (13%); *Cohen I* at 991 (11.6%). In 1998, the parties also had the benefit of the 1996 "Clarification" issued by the Office

[21] Below, Objectors also complained about the loss of the anti-retaliation provision after the Joint Agreement terminates but have not continued that complaint on appeal. That is understandable because, after the Joint Agreement created a claim for retaliation in 1998, the U.S. Supreme Court recognized a claim for retaliation under Title IX. *See Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005).

for Civil Rights of the Department of Education, and accompanying "Dear Colleague" letter which provided additional guidance as to the application of the Three-Part Test:

> In addition, the Clarification does not provide strict numerical formulas or "cookie cutter" answers to the issues that are inherently case- and fact-specific. Such an effort not only would belie the meaning of Title IX, but would at the same time deprive institutions of the flexibility to which they are entitled when deciding how best to comply with the law.

Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test, U.S. Dep't of Educ. at 4, Office of Civil Rights (Jan. 16, 1996) available at https://bit.ly/3huekjO, accessed 5/3/21. In the Clarification, OCR counseled that "substantial proportionality" was not necessarily "exact proportionality" and required "determination on a case-by-case basis, rather than through use of a statistical test." It illustrated the distinction by two examples, each with a hypothetical 5% gap between participants and undergraduate enrollment. *Id.*

In 1998, there was no body of case law or definitive interpretation of compliance or non-compliance in the "small number" range. With no more guidance, the parties agreed upon a permitted maximum disparity of 3.5%, with the provision that each of the teams identified by the court in *Cohen III* as deserving of funded varsity status be elevated to self-funded status with guaranteed funding for a period of years. Thereafter, if Brown were to restructure its funded and self-funded programs in a way adverse to women or beneficial to a men's team, the permitted

maximum would drop to 2.25%.

The first reported decision finding that a "relatively small percentage of disparity" may nonetheless fail Part One is *Biediger v. Quinnipiac Univ.*, 728 F. Supp. 2d 62, 111–13 (D. Conn. 2010), *aff'd,* 691 F.3d 85 (2d Cir. 2012) (3.62% failed Part One in a program with 400 athletes because the "disparity represents enough players to sustain an independent team"). *See also Portz v. St. Cloud State Univ.*, 401 F. Supp. 3d 834, 845, 863 (D. Minn. 2019), *appeal pending,* 19–2921 (8th Cir.) (2.5% and 2.9% failed Part One in a program with 493/477 total athletes).

In 2020, because of the Joint Agreement, Brown's focus in restructuring its program was to meet the target differential of 2.25%. *E.g.*, A399. On an athletic program of 890 athletes,[22] that represents a difference of 20 athletes, [23] which leaves a gap from "exact proportionality" large enough to field both golf (average 10–11) and skiing (average 9-10), or to field squash (average 14). A154, 156. Because of the Joint Agreement, Plaintiffs' motion to enforce and to adjudge in contempt was

[22] Brown's total program of men and women typically equals or exceeds 890 athletes each year. A77. In restructuring its program, Brown did not claim it intended to reduce the overall size, although the parties strenuously disagreed as to the actual count. For example, in its opposition to Plaintiffs' motion to enforce the Joint Agreement, Brown claimed that its restructured program for 2020-2021 would total 938.5 athletes. A496.

[23] Using a different methodology, the 2.25% difference may represent as many as 40 athletes, based on Brown's program numbers for 2019-20. A157. *See Ohlensehlen v. Univ. of Iowa*, No. 20-cv-00080, 2020 WL 7651974, at *3 n.5 (S.D. Iowa 2020), *appeal dismissed*, No. 21-2103 and 21-2104 (8th Cir. 2/25/21) .

necessarily restricted to arguing that the restructured program was not designed to, nor would it achieve, compliance at the 2.25% level. A84. In the absence of the Joint Agreement, future women athletes will not be similarly constrained, and will be able to argue, in accordance with current case law, that a differential of 2.25% in a program of Brown's size does not satisfy "substantial proportionality" under Part One, because it is a gap large enough to field one or more viable women's teams at Brown.

Objectors also focus on Brown's conduct in the lead-up to the settlement and its failure to meet the 3.5% compliance level four times over the past 20-plus years as demonstrating that "Brown has repeatedly shown a propensity to engage" in "Title IX violative conduct." Objectors contend that approval of the settlement would reward Brown for bad behavior. Obj. Brief at 31.[24]

We disagree. Objectors appear more intent on punishing Brown for cutting sports from its varsity program and the way it defended its actions than on securing an agreement which restores and secures athletic opportunities for women athletes.

Plaintiffs and class counsel are, to put it mildly, no fans of the way Brown handled the roll-out of restructuring, the disputes over discovery, or their internal commentary, and we had a lot to say about it, both to the district court and to the

[24] Objectors complain that Plaintiffs "folded" and should have pressed the motion to enforce and the claim for monetary damages. Obj. Brief at 17. No claim for monetary damages was ever made in this case.

media.[25] But it was Plaintiffs and their counsel, not Objectors, who diligently explored and briefed the issues on behalf of the class and mined the discovery in support of a contentious enforcement proceeding, and who had the benefit of first-hand knowledge of the data and the case law.

None of that alters Plaintiffs' conclusion that the terms of the amendment to the 1998 settlement provide valuable benefits to the class which cannot be dismissed over outrage at Brown's conduct. Nor does it justify overturning the district court's well-reasoned decision to approve the settlement amending the Joint Agreement in this case. That decision was a sound exercise of the district court's discretion, fully supported by the facts and the law, and should be affirmed**.**

CONCLUSION

Plaintiffs believed Brown University violated the Joint Agreement in this case. They moved quickly to expose the truth and hold Brown accountable. Through intense, expedited litigation, Plaintiffs reached a settlement agreement reinstating two women's varsity intercollegiate athletic teams that Brown sought to eliminate, provided them funding guarantees, protected all of the remaining women's teams from elimination, and provided other significant benefits and protections to all

[25] *See, e.g.*, A186-189, 192-202. *See, e.g.*, Caron, McCann, *Brown University Wants Out of "Pestilential' Title IX Agreement in Pandemic year*, Sportico.com, Sept. 1, 2020, https://bit.ly/3yqjQK3.

women student-athletes at Brown now. The settlement allows the Joint Agreement to expire in 2024 because, in Plaintiffs' judgment, the benefits that the 2020 settlement provides to current student-athletes and that Title IX provides to future student-athletes will advance and protect gender equity in Brown University's intercollegiate athletic program for many years to come. For all of the reasons stated above, the district court's decision approving the settlement should be affirmed and this case should be remanded to the district court for further proceedings in accordance with the settlement.

Respectfully submitted,

/s/ Lynette Labinger
Lynette Labinger (No. 23027)
128 Dorrance St., Box 710
(401) 465-9565
Providence, RI 02903
ll@labingerlaw.com

/s/ Arthur H. Bryant
Arthur H. Bryant (No. 21973)
Bailey & Glasser, LLP
1999 Harrison Street
Suite 660
Oakland, CA 94612
510-507-9972
abryant@baileyglasser.com

/s/ Lori A. Bullock
Lori Bullock (No. 1197230)
NEWKIRK ZWAGERMAN, P.L.C.
521 E. Locust Street, Suite 300
Des Moines, IA 50309
515-883-2000
lbullock@newkirklaw.com

Cooperating counsel, American Civil Liberties Union Foundation Of Rhode Island and Public Justice

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements.

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,615 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. 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 in 14 point Times New Roman font.

Dated: May 19, 2021

/s/ Lori A. Bullock
Lori Bullock

CERTIFICATE OF SERVICE

I, Lori Bullock, hereby certify that on May 19, 2021, I served the foregoing brief with the Clerk of the United States Court of Appeals for the First Circuit through the court's electronic filing system, thereby providing all counsel of record with access to the filing.

Dated: May 19, 2021

/s/ Lori A. Bullock
Lori Bullock