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 the District of Rhode Island, Case No. 1:92-cv-00197-JJM, Judge John J. McConnell, Jr.

REPLY BRIEF OF OBJECTORS-APPELLANTS

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PRELIMINARY STATEMENT

Appellees request this Court to adopt a new approach to class action jurisprudence that runs contrary to well-established constitutional due process requirements and the express language of Federal Rule of Civil Procedure 23(e).[1] Under Appellees' proposed vision of the Rule 23 settlement approval standards, if a court finds a class representative to be adequate when originally certifying a class, that determination will remain conclusive in perpetuity and forever satisfy all constitutional requirements relating to adequate representation, even where a replacement settlement (or modification of an existing settlement) is reached after the original Class Representatives' membership in the class ceased thirty years ago. Appellees' proposal eliminates court review of class representative adequacy and the entry of related findings, allowing instead the cornerstone due process mandates of class action jurisprudence to be automatically satisfied. Appellees fundamentally misunderstand the Rule 23(e) mechanism and improperly disregard the due process rights of absent class members that were violated here.

Contrary to Appellees' view, due process adequate representation by a zealous, stakeholding class representative is a mandatory, continuing requirement

[1] Unless otherwise defined herein, all capitalized terms shall have the meaning ascribed to them in Objectors-Appellants' Opening Brief ("Obj. Br.").

throughout the pendency of a class action and an explicit constitutional safeguard required to be demonstrated as part of a district court's final approval of every class settlement. This is particularly so where there have been substantial modifications to an original settlement that are adverse to the class, as is the case here. This requirement is embodied in the explicit terms of Rule 23(e) which require a finding that "the class representatives . . . *have* adequately represented the class." Absent demonstration of that due process-compliant representation, the doors to class-wide resolution of absent class members' rights and claims through settlement remain locked. Contrary to Appellees' arguments, the 1992 certification did not provide the key.

The mere fact that the Class Representatives were deemed adequate to represent the class in 1992, as then-current class members, does not overcome their subsequent loss of any remotely cognizable stake in this case that would support their possession of the required incentive to vigorously pursue the class's rights under the 1998 Joint Agreement. There was not a single class representative involved in the proceedings instituted below to address Brown's violations of the class's rights under that Joint Agreement who was actually a member of the class.[2]

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[2] The 1992 certified class consists 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." *See Cohen v. Brown Univ.*, 991 F.2d 888, 893 (1st Cir. 1993).

By extension, not a single Class Representative suffered any harm or even held any of the class's rights that they released by entry into the Class Settlement. Indeed, the evidence presented establishes that the Class Representatives were simply figureheads. A thirty-year-old finding of adequacy to represent the class simply cannot suffice to satisfy the requirement of contemporaneous adequate representation that was necessary to permit the release of critical rights held by the class under the Joint Agreement by non-member Class Representatives whose involvement was merely symbolic.

That impermissible void in representation by Class Representatives with live claims resulted in a Class Settlement that needlessly forfeited critical indefinite-in-duration rights and protections possessed by the class under the original Joint Agreement. In addition to holding Brown to concrete compliance standards and continued oversight by Class Counsel, that Agreement provided the class with a streamlined and a far less costly, time consuming and risky enforcement mechanism to address Brown's failures – including swift discovery devices – which enabled the class to avoid the protracted judicial resolution of claims inherent in start-from-scratch litigation. The differences between enforcement of the original terms and the new requirements are significant and have real-life implications.

Despite Appellees' predictable discounting of the importance of the rights released, all the protections afforded to the class by the Joint Agreement will now

expire in August 2024: a result secured by Brown only through its intentional violation of the Joint Agreement in a shockingly calculated manner intended to pit gender and race interests against each other. The importance of those protections is only elevated by Appellees' dismissiveness of the Appellant Objectors' rights that they have sacrificed for short-term benefits to a limited set of class members.

Remand is required to prevent an irremediable affront to the rights of the absent class members at Brown University and to prevent future abuse by educational institutions seeking to avoid their court-ordered, as well as independent Title IX, obligations.

ARGUMENT

I. APPELLEES HAVE NOT REFUTED THAT THE DISTRICT COURT DID NOT EVALUATE THE CLASS REPRESENTATIVES' ADEQUACY RELATIVE TO THE 2020 SETTLEMENT IN VIOLATION OF RULE 23(e)(2).

Federal Rule of Civil Procedure 23(e) requires a district court to follow defined, due process-based procedures prior to approving a class settlement. Appellees failed to acknowledge that the recent 2018 amendments to Rule 23(e) purposefully made explicit that courts must consider whether "the class representatives . . . have adequately represented the class" in that final approval process. Fed. R. Civ. P. 23(e)(2)(A); *see also* Advisory Committee Notes, 2018 Amendments on Fed. R. Civ. P. 23(e)(2) (purpose of amendment is to "focus the

court . . . on the core concerns of procedure and substance that should guide the decision whether to approve the proposal"). The requirement that a court make that finding as part of final approval is mandatory and embedded in Rule 23(e)(2)'s text.

Appellees did not – and cannot – refute that the district court failed to make any specific findings as to the adequacy of the Class Representatives. In fact, there is no indication that the court considered the adequacy of representation beyond its conclusion that Class Counsel adequately represented the class. Defendants-Appellees (or "Brown") concede in their description of the district court's evaluation of the Rule 23(e)(2) factors that it considered Class Counsel's representation alone, stating "[o]n 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." Brown Br. at 15 (parenthetical in original). As detailed below, that misstep caused the court to approve a settlement agreement negotiated by Class Counsel without any of the due process safeguards provided by the participation of stakeholding class-member class representatives representing the unnamed class members.

Because the district court failed to conduct the required analysis of the Class Representatives' adequacy under Rule 23(e)(2)(A), its approval should be reversed on that basis alone.

II. THE DISTRICT COURT ERRED BY APPROVING A CLASS SETTLEMENT REACHED WITHOUT RULE 23(e)(2) ADEQUATE REPRESENTATION BY ITS CLASS REPRESENTATIVES

A district court faced with a class action settlement for approval carries a particularly weighty burden and a heightened responsibility to the absent class members whose rights are sought to be compromised and released without a full trial or related proceedings. *See Grunin v. International House of Pancakes,* 513 F.2d 114, 123 (8th Cir.), *cert. denied,* 423 U.S. 864 (1975) (district court "must serve as a guardian of the rights of absent class members" when approving class action settlement); *Key v. Gillette Co.*, 782 F.2d 5, 7 (1st Cir.1986) (court has continuing duty to assure adequacy of representation in class suit). Because judicial approval of a class settlement implicates inviolate constitutional rights held by those absent class members, demonstrated due process-compliant adequate representation by both class representatives and class counsel is explicitly included in Rule 23(e). Fed. R. Civ. P. 23(e) ("Settlement, Voluntary Dismissal, or Compromise"). That adequate representation guarantee extends to representation during litigation proceedings and negotiations leading up to a proposed settlement. Fed. R. Civ. P. 23(e)(2)(A) (settlement approval conditioned on finding that "the class representatives and class counsel *have* adequately represented the class") (emphasis added); *see also In re California Micro Devices Sec. Litig.*, 168 F.R.D. 257, 260 (N.D. Cal. 1996) ("A critical factor in determining whether a settlement is worthy

of court approval under FRCP 23(e) is whether the class has been 'fairly and adequately' represented by the class representative during settlement negotiations.").

To downplay the magnitude of the task faced by a district court, Appellees dangle the purported "fairness" and "reasonableness" of the Class Settlement's terms, emphasizing the court's discretion and "considerable range" given, as if Rule 23(e)'s approval requirements were a mere formality. Brown Br. at 19-20 (citing "short list" of concerns to consider and policy of favoring settlement). The law is plainly otherwise. The presence of due process-compliant adequate representation by the Class Representatives was not a matter of court discretion and none of Appellees' arguments overcome its absence here.

A. The Rule 23(a) Certification in 1992 Does Not Establish the Class Representatives' Adequate Representation of the Class for Approval of the 2020 Class Settlement under Rule 23(e).

Both Plaintiffs-Appellees and Brown rely upon the 1992 class certification in this case as purportedly satisfying the Rule 23(e) adequacy of representation needed to allow for approval of the 2020 Class Settlement. Appellees' position is that the appointment of the Class Representatives in 1992 to conduct the litigation of their Title IX claims, and the associated presumed finding that they were adequate

representatives of the class for that purpose,[3] suffices to establish their adequacy to represent that class and settle their new enforcement-related claims nearly thirty years later under Rule 23(e). That position does not comport with either the plain language of Rule 23(e) or the continuing right to due process held by the present class members relative to the Class Settlement.[4]

Rule 23(e)(2)(A) – the unequivocal list of the requirements to be met for court approval of a settlement of "[t]he claims, issues or defenses *of a certified class* – or a class proposed to be certified for purposes of settlement" – explicitly requires that "the class representatives *and* class counsel *have* adequately represented the class." Fed. R. Civ. P. 23 (emphasis added). The italicized language establishes that Rule 23(e) requires an evaluation of the representation provided by class representatives – even those of an already certified class – during the litigation and negotiations leading up to settlement. That language further defeats Appellees' argument that Rule 23(e)'s adequacy of representation requirement was merely redundant of the Rule 23(a) adequacy of representation evaluation performed by the court in 1992

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[3] Appellees have not cited to anything in the record indicating that the district court made a specific finding as to class representative adequacy in 1992.

[4] It also bears highlighting that the district court did not state that it had relied upon the 1992 certification to find the Class Representatives adequate when approving the Class Settlement.

when certifying the class.[5] The terms of Rule 23(e) alone thus foreclosed using the 1992 certification to establish adequacy of representation here.

Even more, Appellees fail to present any discussion of the due process underpinnings of Rule 23(e) – which enable the resolution of class claims through settlements – or the role class representatives play in satisfying them. Remarkably, Plaintiffs-Appellees do not even mention due process in their 44-page brief and Brown refers to it merely twice in passing, even appearing to suggest it is not even required for a settlement class certification.[6] Appellees have failed to explain how the dictates of due process representation by aligned representatives, possessing incentive to vigorously pursue class rights and claims, are met by non-class-member Class Representatives nearly thirty years later. *See In re MyFord Touch Consumer Litig.*, 13-CV-03072-EMC, 2019 WL 1411510, at *8 (N.D. Cal. Mar. 28, 2019) (although class was already certified, court preliminarily approved settlement only after revisiting adequacy issue to ensure class representatives would "vigorously"

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[5] Contrary to Brown's mischaracterization (Brown Br. at 22), the Appellant Objectors have never taken the position that they are entirely redundant for any purpose. Appellants merely accurately noted the overlapping legal issues involved when evaluating adequacy – alignment of interests, incentive to vigorously pursue class claims and lack of conflict by the class representatives – between Rule 23(e) and Rule 23 (a), not the time frame of that analysis.

[6] *See* Brown Br. at 25 n.12 (citing *Telles v. Midland College*, No. 17 Civ. 83, 2018 WL 7352424, at *3 (W.D. Tex. Sept. 7, 2018) as "certifying a settlement class under Rule 23(e) without addressing, or even mentioning, due process").

protect class members' rights and finding "[t]hat remains the case"). That is because they did not.

The Supreme Court, like this Court, has affirmed that the due process adequate representation requirement is a continuing one. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) ("The Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members."), *citing Hansberry v. Lee*, 311 U.S. 32, 42–43, 45 (1940); *Key*, 782 F.2d at 7. Indeed, courts possess an affirmative duty to ensure its presence not only at certification or final approval but throughout the class proceedings. *Key*, 782 F.2d at 7; *Silber v. Mabon*, 957 F.2d 697, 701 (9th Cir. 1992); 2 Newberg & Conte, § 11.41 (Rule 23(e) requires court considering proposed class settlement to "independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished");

Contrary to Appellees' arguments, the requirement of demonstrating adequate representation does not cease once a class is certified. Significantly, courts explicitly consider the adequacy of representation provided by the class representatives for a previously certified class when ruling upon a proposed class settlement under Rule 23(e). *See*, *e.g.*, *Baker v. SeaWorld Entm't, Inc.*, 14-CV-02129-MMA-AGS, 2020 WL 4260712, at *5 (S.D. Cal. July 24, 2020); *In re Tyco Int'l, Ltd. Multidistrict*

Litig., 535 F. Supp. 2d 249, 261 (D.N.H. 2007) (court considered "the deep involvement of the class representatives in overseeing the prosecution of the case, and with their commitment to that obligation" when approving class settlement); *Deluca v. Farmers Ins. Exch.*, 17-CV-00034-TSH, 2020 WL 5071700, at *3 (N.D. Cal. Aug. 24, 2020) (when evaluating settlement where class was previously certified, court considered under Rule 23(e) that "representative Plaintiffs were actively involved in the litigation"). As such, and as embodied in Rule 23(e), a court's evaluation of a named plaintiffs' adequacy is not frozen in time as to the circumstances existing when a prospective evaluation is made as to adequacy when certifying a class under Rule 23(a). *See* Fed. R. Civ. P. 23(e); *Jenkins v. Raymark Indus., Inc.,* 782 F.2d 468, 472 (5th Cir.), *reh'g denied,* 785 F.2d 1034 (5th Cir.1986) (describing factors that establish prospective adequacy determination at certification).

Plaintiffs-Appellees' reliance upon this Court's opinion in *Voss v. Rolland*, 592 F.3d 242 (1st Cir. 2010) demonstrates their fundamental misunderstanding of the mechanisms underlying the approval of class settlements. Plaintiffs-Appellees argue that *Voss* establishes the conclusiveness of the 1992 certification on the issue of the Class Representatives' adequacy relative to the new Class Settlement, indeed as to any "proposed settlement reached by a previously certified class." Pl. Br. at 24. There, the Court upheld the rejection of a motion to decertify the class made by

parents of class-members who had been members of the class since its certification over a decade prior, citing their failure to challenge certification previously. Conspicuously absent in *Voss* was any discussion or evaluation of the issue of the adequacy of representation provided by the class representatives under Rule 23(e).[7] Nevertheless, the class representatives there, as persons with mental developmental disabilities, still retained an entitlement to the protections and rights established in the original settlement agreement. Moreover, to the extent that Plaintiffs-Appellees rely upon *Voss* to argue that the Appellant Objectors were obligated to move for decertification to allow them to challenge the adequacy of the Class Representatives' representation relative to the proposed Class Settlement, there is no support in the law for any such requirement. That proposition runs contrary to the explicit,

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[7] Plaintiffs-Appellees inaccurately depict the Court's footnoted reference to the Supreme Court's decision in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), which stated that *Amchem* "discussed courts' obligations when reviewing class certification for settlement only and not for litigation" and that it did not apply. They argue that language establishes that different, and lesser, adequate representation standards apply after certification. *See* Pl. Br. at 24, *citing id.* at 251 n.17. In reality, the Court's discussion related to the propriety of the district court's refusal to grant their motion to decertify the class. It in no way held that the continuing requirement of adequacy of representation for Rule 23(e) approval is compromised after class certification. In fact, the district court reevaluated adequacy when determining to deny the motion for decertification. *See Rolland v. Patrick*, CIV.A. 98-30208-KPN, 2008 WL 4104488, at *5 (D. Mass. Aug. 19, 2008). Unlike the *Voss* objectors, the Appellant Objectors here did not, and do not, seek decertification of the class. In any event, that footnote actually supports that a court possesses obligations to the class in connection with reviewing settlement agreements.

mandatory terms of Rule 23(e)(2)(A), which require the demonstration of adequacy even where a class has already been certified.

The fact that class representatives are substituted throughout the course of class action litigation further undermines Appellees' argument that the 1992 certification locked in the Class Representatives as adequate going forward. *See Phillips v. Ford Motor Co.*, 435 F.3d 785 (7th Cir.2006) (Posner, J.) (noting that "substitution of unnamed class members for named plaintiffs who fall out of the case because of settlement or other reasons is a common and normally an unexceptionable ('routine') feature of class action litigation ... in the federal courts ...." and collecting cases). That substitution routinely occurs after the mooting of a representative's claims to ensure that the continued litigation (as opposed to appeal of a class certification denial) is conducted by a stakeholding class member with live claims. *See Kremens v. Bartley*, 431 U.S. 119, 134-35 (1977) (remanding after district court's grant of certification "for reconsideration of the class definition, exclusion of those whose claims are moot, and substitution of class representatives with live claims."); Federal Judicial Center, Manual for Complex Litigation (3d) § 30.16 (1995) (suggesting that "replacement of a class representative may become necessary when, for example, the representative's individual claim has been mooted"); *Villalpando v. Exel Direct Inc.*, 12-CV-04137-JCS, 2015 WL 5179486,

at *38 (N.D. Cal. Sept. 3, 2015) (where "claims of class representatives are rendered moot, the court may substitute appropriate representatives with live claims").

Despite Appellees' wish to the contrary, changed circumstances are not meaningless and may render a previous class representative inadequate. Here, those changed circumstances foreclosed the Class Representatives' adequacy. None held any live claims and had not for twenty-five years. Indeed, none of the Class Representatives (who had all graduated by 1995) had ever held the rights or claims that were released by the 2020 Class Settlement because they arose from Brown's obligations under the 1998 Joint Agreement, nor will they be impacted by the radically diminished relief. *See Larson v. AT & T Mobility LLC*, 687 F.3d 109, 132–33 (3d Cir. 2012) (noting "it is difficult to understand how the Class Representatives, none of whom were Sprint customers at the time that the Settlement Agreement was executed, had the interest, much less the incentive, to stop Sprint from enforcing flat-rate ETFs against its current customers").

Plaintiffs-Appellees inaccurately contend that evidence was presented to the district court that established adequate representation by the Class Representatives. That position is contrary to the record. There was no evidence submitted to the court regarding the participation or position of a single Class Representative relative to the enforcement motion, the settlement negotiations or the Class Settlement. Class Counsel's reliance upon declarations by current Brown class

members submitted in support of its enforcement motion is insufficient. Rule 23(e) requires demonstration of adequate representation by "the class *representatives*," not non-intervening class members. Fed. R. Civ. P. 23(e) (emphasis added). In addition, those declarations were submitted at the initiation of the enforcement proceedings and thus do not speak to their participation or position on settlement. Similarly, Class Counsel's citation to conclusory language in its brief in support of final approval is woefully short of evidence and no testimony as to the participation of any Class Representative was presented at the final approval hearing. *See* Pl. Br at 11 n.10 (citing to A675 (bald statement in Joint Motion for Final Approval of Proposed Settlement) and ADD26 (statement at fairness hearing that spoke with current athletes). Plaintiffs-Appellees' approach to class representative appointment and involvement as a mere nuisance should be rejected.[8]

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[8] Although the case of *Flores v. Meese [Garland],* C.D. Cal. 85-cv-04544, receives extended discussion, Plaintiffs-Appellees concede its inapplicability. Pl. Br. at 28, *citing Flores v. Rosen*, 984 F.3d 720, 744 (9th Cir. 2020) (touting that no one has attempted to challenge the continued status of the presently non-class member status of the class representatives). Plaintiffs-Appellees use *Flores* to attempt another stab at a waiver argument, citing Ninth Circuit opinions finding that the government had waived its ability to challenge class certification. *Id.* None of those opinions related to the approval of a new class settlement and Rule 23(e) due process requirements. In any event, the due process failings in other cases cannot possibly justify allowing them in this case. Similarly, Plaintiffs-Appellees' reliance upon *Binta B. ex rel. S.A. v. Gordon*, 710 F.3d 608, 618 (6th Cir. 2013)

Plaintiffs-Appellees' invocation of "chaos" that would purportedly arise if an exception to class members' due process rights is not countenanced to allow non-stakeholding former class members to continue as class representatives in long-standing cases falls flat. Pl. Br. at 26-27. It pales in comparison to the chaos that the forfeiture of due process protections in class actions would bring. Requiring substitution in the event of modification of a consent decree which requires court approval under Rule 23(e) is not overly burdensome. As noted above, courts routinely allow requests for the substitution of class representatives and that request could easily have been made here. *See also Bennett v. Nucor Corp.*, 3:04CV00291 SWW, 2010 WL 143696, at *2 (E.D. Ark. Jan. 7, 2010), *aff'd*, 656 F.3d 802 (8th Cir. 2011), *cert. denied*, 566 U.S. 922 (2012).

By contrast, the Brown Appellees attempt to diminish the importance of class representatives altogether, arguing that the focus is upon class counsel alone when evaluating a settlement and that its representation supplants the need for demonstrated, continuing adequate representation by class representatives post-

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does not support its position. That case involved a prevailing party fee claim, and the court stated that there was never any determination of the mooted representative's adequacy because it was not raised. Of note, it further stated that "a district court's responsibilities with respect to Rule 23(a) do not end once the class is certified . . . [E]ven after certification . . . the court must still inquire into the adequacy of representation and withdraw class certification if adequate representation is not furnished."

certification. Rule 23(e) makes no such distinction, but explicitly includes both "the class representatives *and* class counsel." Fed. R. Civ. P. 23(e)(2)(A); *see also In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1083 (6th Cir. 1996) (rejecting district court statement that class representative is just a "symbol"); Wright & Miller, 7A Federal Practice and Procedure § 1766 (3d Ed. 1998) (class representatives must be genuinely involved in the litigation, not just figureheads "lending their names to a suit controlled entirely by the class attorney"). To avoid that language, Appellees misleadingly cite to a single sentence in the 2018 Advisory Committee Notes to Fed. R. Civ. P. 23(e)(2), which states "the focus at this point is on the actual performance of *counsel* acting on behalf of the class." *See* Brown Br. at 23 (emphasis in brief). The full text makes plain that the Notes were not discounting the need for adequate class representatives, but delineating the different inquiry as to counsel's adequacy in the settlement context [Rule 23(e)] verses at initial appointment [Rule 23(a)]:

> If the court has appointed class counsel or interim class counsel, it will have made and initial evaluation of counsel's capacities and experience. But 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). It is the actual performance of counsel (like that of the class representatives) that is relevant in the settlement context, not the fact of it being rendered by "counsel," as contended by

Brown.[9] To imply that class counsel can effectively serve as a proxy for class representatives with current substantive rights would stand Rule 23(e) jurisprudence on its head.

Brown's attempt to discount this Court's holding in *Key v. Gillette Co.*, 782 F.2d 5 (1st Cir. 1986) -- establishing the continuing requirement of adequacy of representation post-certification -- as applicable only to class counsel is equally unavailing. The explicit past tense of Rule 23(e)(2)(A)'s requirement that the class representatives "have adequately represented the class" in reaching the proposed settlement contradicts their distinction. Courts routinely apply *Key* when analyzing the adequacy of a named plaintiff. *See, e.g., In re New Motor Vehicles Canadian Exp.*, MDL 1532, 2006 WL 623591, at *4 (D. Me. Mar. 10, 2006).

Finally, Plaintiffs-Appellees' creative spin on the 1992 certification as cloaked in the law of the case relative to the 2020 Settlement merits only abbreviated discussion. "[T]he law of the case doctrine forecloses reconsideration of issues that were decided—*or that could have been decided*—during prior

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[9] In the proceedings below, Class Counsel likewise discounted the required role of class representatives in the settlement of class claims, asserting it was "unclear" whether Rule 23(e)'s requirement that class representatives adequately represent the class "adds anything." A661. In apparent recognition of the fallacy of that position, Class Counsel has switched to a law of the case argument and baseless claims of waiver.

proceedings." *AngioDynamics, Inc. v. Biolitec AG*, 823 F.3d 1, 5 (1st Cir. 2016) (emphasis in original) (citation omitted), *cert. denied*, 137 S. Ct. 631 (2017). As described above, adequate representation is a "continuing" requirement whose satisfaction under Rule 23(e) could not possibly be established by a 30-year-old finding unrelated to the new Class Settlement. Interpretation of that doctrine, which is prudential and inherently discretionary, to override the constitutionally-protected due process of class members and foreclose inquiry into the representation provided by the Class Representatives in reaching the Class Settlement is insupportable. *See Daumont-Colon v. Cooperativa de Ahorro y Credito de Caguas*, 982 F.3d 20, 26 (1st Cir. 2020). Plaintiffs-Appellees' position that there are no changed circumstances in the adequacy of the Class Representatives since the 1992 certification is disingenuous at best.

Plaintiffs-Appellees' related contention that the Advisory Committee Notes to Rule 23(e)(1) support its law of the case argument is similarly deficient. They cite to the statement that more limited information is permitted to be provided when a class has already been certified. Pl. Br. at 28 (citing Advisory Committee Notes, 2018 Amendments on Fed. R. Civ. P. 23(e)(1)). However, Rule 23(e)(1) relates to the requirements of the notice to be given to the class prior to approval of a settlement, not to the actual information needed by a court to consider if a

proposed settlement is fair reasonable and adequate under Rule 23(e)(2). Fed. R. Civ. P. 23(e)(1).[10]

The 1992 Certification Order simply is not a cure for the lack of contemporaneous adequate representation by stakeholding class representatives. Appellees' reliance upon the 1992 certification to establish the adequacy of representation provided by the Class Representatives in 2020 for the Class Settlement should be rejected.

B. Appellees' Contention that the Mootness of the Class Representatives' Claims Is Irrelevant to the Class's Adequate Representation under Rule 23(e) Ignores Governing Law.

Appellees contend that the mooting of the Class Representatives' claims is irrelevant to the Rule 23(e) class settlement approval mechanism. According to Appellees, the fact that the Class Representatives have not been class members or held class rights and claims for over twenty-five years is legally insignificant: in other words, once a class member, always an adequate class representative. Appellees assert that the Supreme Court's holding in *Sosna v. Iowa*, 419 U.S. 393

[10] Appellees' argument that the Class Representatives were not class members at the time of the Joint Agreement's approval in 1998 as somehow validating the 2020 approval of the new Class Settlement is irrelevant. Even if they were erroneously deemed sufficient for the purposes of the 1998 settlement, an issue not raised by the then-class members, that cannot justify perpetuating any error now.

(1976) and its progeny support their position. Appellees' arguments are without merit.

Appellees' novel expansion of *Sosna* as purportedly establishing that mootness does not impact the ability of a class representative to continue as an adequate class representative or to settle class claims distorts its holding and is contradicted by subsequent Supreme Court precedent. At issue in *Sosna* was satisfaction of the Article III jurisdictional requirement that a case or controversy exist where the named representative's claims had been mooted by the passage of time. The Court found that the controversy remained alive post-certification under Article III for the class claims, despite the mooting of the named representative's claims. In doing so, the Court made explicit that its holding

> [did] not automatically establish that appellant is entitled to litigate the interests of the class she seeks to represent, but it does shift the focus of examination from the elements of justiciability to the ability of the named representative to 'fairly and adequately protect the interests of the class.'

Id. at 403 (citing Fed. R. Civ. P. 23(a)). *Sosna* did not address the adequacy of non-class-member class representatives (who do not hold live claims) to release and settle class claims under Rule 23(e). Rather, it suggests the opposite.

Likewise, Brown incorrectly asserts that the Supreme Court subsequently applied *Sosna* to hold in *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980) (another Article III-related decision) that a class representative need not hold a

personal stake in the outcome of the action after certification. Brown Br. at 23. In *Geraghty*, the Supreme Court allowed the named plaintiff to appeal the denial of class certification even after that plaintiff's individual claims had become moot. The Court explicitly stated that it was "hold[ing] only that a case or controversy still exists [and that] [t]he question of who is to represent the class is a separate issue." *Id.* at 406. The Court went on to make an explicit distinction between Geraghty's status as "a proper representative for the purpose of appealing the ruling denying certification of the class that he initially defined," which it held he was, and his status as "a proper representative for the purpose of representing the class on the merits . . . to continue to press the class claims," which it did not decide. *Id.* at 407.

Brown's related contention that certification of a class – even thirty years prior – transforms the class into a due-process-immune monolith that can continue to conduct headless class litigation, including releasing absent members' claims ad infinitum, is indefensible.[11] *See East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431

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[11] Brown's cited cases are inapposite for its contention that "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." Brown Br. at 24. In *Grant ex rel. Family Eldercare v. Gilbert*, 324 F.3d 383, 389-90 (5th Cir. 2003), certification had been *denied* and the court actually found the named plaintiff did *not* possess standing to certification to pursue mooted claims. Similarly, *Kerkhof v. MCI WorldCom, Inc.*, 282 F.3d 44, 54 (1st Cir. 2002) involved the *denial* of a post-judgment motion for certification, which this Court upheld, and found the mootness of the plaintiff's

U.S. 395, 404 (1977) (class representative must be part of class, possess same interest and suffer same injury as class members). In addition to contorting the Supreme Court's holdings, that position cannot be squared with either Rule 23(e) or the bedrock principle of continuing due process adequate representation. In reality, the Court's holdings that a class action attains its own legal status post-certification relate purely to the ability to continue the litigation under Article III despite the mooting of class representative claims, not that the class representatives themselves are adequate to do so.

Multiple courts have rejected Appellees' reading of *Sosna* as allowing class litigation to be conducted by an unaligned, non-stakeholding class representative. *See Tate v. Hartsville/Trousdale County,* 2010 WL 4822270, at *3 (explaining limits of *Sosna* and citing cases); *Kifer v. Ellsworth,* 346 F.3d 1155, 1156 (7th Cir.2003) (citing *Sosna* but stating "a class action suit cannot proceed in the absence of a class representative"); *Hadix v. Johnson*, 182 F.3d 400, 406 n.3 (6th Cir.1999) (under *Sosna* mootness of original named plaintiff's claims does not moot class action but

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claims did not negate adequacy as to the certification issue, consistent with *Sosna* and *Geraghty*. Brown's final case, *Martens v. Thomann*, 273 F.3d 159, 173 n.10 (2d Cir. 2001), did not even mention adequacy of representation, addressing in dicta the standing of mooted class representatives to pursue a motion to enforce a settlement once again in the context of *Sosna* and *Geraghty*. It is a Procrustean leap to argue that such standing confers ability to compromise and release class claims in a new settlement altogether.

to satisfy Rule 23's concerns, "the appropriate solution would be for the district court to allow for the substitution of class representatives with live claims").

Appellees' cherry-picked reliance upon cases applying narrow exceptions that permit a class representative to continue to represent the class despite the mooting of her claims is thus unavailing. Those cases fall into neat categories that are easily distinguishable in that a requisite personal stake is found to be retained by the plaintiff or a danger exists that the defendant may be manufacturing mootness by picking off class representatives through settlement. *See Geraghty*, 445 U.S. at 398 (plaintiff with mooted claims retained personal stake to appeal class certification issue because plaintiff faced "some likelihood of becoming involved in the same controversy in the future"); *Culver v. City of Milwaukee*, 277 F.3d 908, 912 (7th Cir.2002) (mootness of named plaintiff's claim does not make unnamed class members' claims moot under *Sosna*, but "it makes him presumptively inadequate [to represent the class] ... unless the defendant is executing a strategy of buying off class representatives successively in an effort to derail the suit").

Thus, cases holding that a named plaintiff with mooted claims may continue to litigate the class certification issue on appeal despite the loss of a personal stake do not negate the need for that personal stake if the representative is to continue to litigate or to settle the class's claims. *See Kremens v. Bartley*, 431 U.S. 119 (1977) (remanding for substitution of named plaintiff with live claims where named

plaintiffs' claims had become mooted). In *Pettry v. Enterprise Title Agency, Inc.*, the Sixth Circuit found that even *Geraghty* did not save an action from failing to meet the live controversy requirement where the named plaintiffs' claims had been mooted through settlement. 584 F.3d 701, 707 (6th Cir. 2009). Of particular relevance here, the Court noted that, even if it had remanded the case, "severe difficulties on the merits of class certification" would exist because the mooted plaintiffs would "have little, if any, incentive to advocate on behalf of the putative class" and would likely be inadequate for lack of the requisite shared interest in pursuing litigation in which they possessed a personal stake. *Id.*; *see also Clark v. State Farm Mut. Auto. Ins. Co.,* 245 F.R.D. 478, 485 (D. Colo. 2007) ("fact that [plaintiff with mooted claims] has nothing to gain or lose from the future outcome of this case [made] Plaintiff . . . nothing more at this point than 'a curious onlooker'") (citation omitted), *aff'd,* 590 F.3d 1134 (10th Cir. 2009).

Here, where the Class Representatives lost any stake in the litigation twenty-five years ago and the defendants' conduct did not moot the claims, the requisites of due process adequacy were not met.[12] There was no evidence that those

[12] Brown incorrectly asserts that the Objectors-Appellants presented a Rule 23 adequacy-based argument that the passage of time created a fundamental conflict of interest to disqualify the Class Representatives. Brown Br. at 26, *citing* Obj. Br. at 26. No reference to the conflict standard appears there. Rather, Appellants correctly argued that the significant passage of time since their class membership

Representatives participated in any manner in the reaching of the settlement. Unless the Rule 23(e)(2)(A) requirement that any proposal must include adequate representation by "the class representatives" is meaningless, the Settlement's failure to be negotiated and agreed to by stakeholding class representatives mandates its rejection.

C. Plaintiffs-Appellees' Waiver Argument Is Meritless.

Plaintiffs-Appellees' threshold argument that the Appellant Objectors waived any argument as to the adequacy of the Class Representatives is devoid of any factual anchor or legal merit. Plaintiffs-Appellees suggest that the Objectors failed to raise the adequacy of representation issue below in the district court and thus cannot raise it on appeal. Pl. Br. at 21. Even a cursory reading of the Objection filed with the district court reveals the patent inaccuracy of that assertion. A631-653 (Objection); A636 ("the named Plaintiffs who acted as class representatives for the original Joint Agreement are not qualified to act as named representatives for the Settlement Agreement under Rule 23 because they are no longer class members").

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existed disqualified the Class Representatives as adequate. In addition, in each of the cases relied upon by Brown for their argument that class representatives from multiple sports were not necessary, the courts focused upon the existence of a conflict as "speculative" at certification – as opposed to settlement – stage, and where there was no prior settlement and its incumbent rights being enforced.

To the extent that Plaintiffs-Appellees are arguing that the Objectors were obligated to move for decertification in addition to objecting to final approval, that position is meritless. The Objector Appellants followed the explicit procedure for objecting to the Class Settlement stated in the notice and no challenge to the propriety of that submission was ever made. Moreover, as detailed above, there is no legal support for the proposition that objectors must move to decertify to properly challenge adequacy of their representatives in reaching a class settlement.

III. THE SETTLEMENT AGREEMENT NEEDLESSLY FORFEITS SIGNIFICANT PROTECTIONS AND RIGHTS HELD BY THE CLASS UNDER THE JOINT AGREEMENT, RENDERING IT UNFAIR, UNREASONABLE AND INADEQUATE.

It is beyond dispute that the Class Settlement forfeited substantial rights, protections and benefits possessed by class members under the 1998 Joint Agreement. The Class Settlement negated the indefinite duration of the Joint Agreement in favor of an August 2024 end date and removed the streamlined and far less costly, time consuming and risky enforcement mechanism for addressing Brown's violative conduct. Also of note, the new agreement leaves class members negatively impacted in the position of having to locate and retain new counsel. The sacrifice of class members' enduring rights was given up for immediate pyrrhic gains that largely benefit only select class members for several years. To defend approval of the Class Settlement, Appellees tout its purported benefits to those certain class

members and emphasize the difficulties faced in pursuing Title IX-related litigation. Those arguments only serve to further the Appellant Objectors' case.

Both Appellees highlight various disputes regarding the legality of Brown's 2020 program manipulations to argue that the "the costs, risks, and delay of trial and appeal" support the Class Settlement, purportedly meeting the Rule 23(e)(2)(C) evaluative factor for the adequacy of relief to the class. As detailed in the Appellant Objectors' Opening Brief, it is exactly that risk which renders the forfeited streamlined enforcement mechanisms of the Joint Agreement critical here. The significant value of that mechanism and its objective benchmarks was amply demonstrated in the swift enforcement proceedings, including the revealing discovery they produced, leading up to this appeal.

As further justification for negation of the Joint Agreement, and by extension its blatant violation of it, Brown argues that the Agreement, as a consent-decree remedy, was not intended to be "rigid and perpetual" but rather "flexible and adaptable." Brown Br. at 32. However, that position contradicts the Agreement's specific and enduring terms, which were court-ordered and agreed to by Brown. It also cannot escape observation that Brown did not seek modification of that decree in a good faith court proceeding, but chose instead to just intentionally violate it and generate an outcry in the court of public opinion. *See Lelsz v. Kavanagh*, 629 F. Supp. 1487, 1489 (N.D. Tex. 1986) ("Modification is not a remedy to be lightly

awarded; its purpose is to correct injustice, not to permit parties to escape obligations they tire of or find too expensive."); *Salazar v. D.C.*, 729 F. Supp. 2d 257, 260 (D.D.C. 2010) (rejecting attempt to modify civil rights consent decree after ten years of court oversight, stating "[m]odification is an extraordinary remedy, as would be any device which allows a party—even a municipality—to escape commitments voluntarily made and solemnized by a court decree"), *appeal dismissed*, 671 F.3d 1258 (D.C. Cir. 2012). In addition, neither Appellee acknowledges that the continued existence of the Joint Agreement would impact the posture of future litigation by the class by requiring Brown to demonstrate its compliance with the Agreement, rather necessitating demonstration of a violation of Title IX. *See Biediger v. Quinnipiac Univ.*, 928 F. Supp. 2d 414, 434 (D. Conn. 2013) ("evidence sufficient to prove a *violation* is sometimes qualitatively different from evidence sufficient to prove *compliance*") (emphasis in original). Neither Appellee adequately acknowledges, and the district court failed to appreciate, the value to the class of having the rights and protections of the Joint Agreement as a benefit that is entirely separately from those provided by Title IX.

Plaintiffs-Appellees seek to brush aside the egregiousness of the conduct of Brown that gave rise to this dispute and resort to launching baseless accusations of

revenge-seeking against the Appellant Objectors.[13] Pl. Br. at 42. Sadly, Plaintiffs-Appellees fail to recognize that the Appellant Objectors are asserting many of the very arguments made by Plaintiffs-Appellees against Brown's manipulations. For example, the Appellant Objectors' position that the reinstated sports do not bring Brown into compliance with its Title IX obligations was advanced by Dr. Lopiano in an expert report submitted by Plaintiffs-Appellees. A542-89. Plaintiffs-Appellees' choice to yield those evidence-backed positions and the Appellant Objectors' rights under the Joint Agreement in favor of a short-term solution was an unfair and inadequate trade-off.

Predictably, Brown too attempts to brush aside the magnitude of the rights forfeited by the Class Settlement and to downplay the seriousness of its violative conduct. However, Brown's penchant for exceeding the boundaries of good faith – and the valid concerns it raises regarding its future conduct relative to its female athletic programs – is further evidenced in its less-than-candid depiction of the circumstances at issue here. Incredibly, Brown contends that nothing in the record supports that it engaged in a "'carefully plotted scheme' to 'intentionally violate the

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[13] Plaintiffs-Appellees' defense devolves into a campaign of inaccurate footnotes, which merits brief recognition. For example, they assert that the Appellant Objectors "complain" that they did not press "the claim for money damages" but that none was ever made in this case. Pl. Br. 42 n.24 (citing Obj. Br. at 17). In reality, the Appellant Objectors plainly stated not that such a claim had been made, but that damages should have been sought.

Joint Agreement.'" Brown Br. at 30. One need only take a perfunctory glance at its internal emails regarding the "pestilential" Joint Agreement (which Brown aggressively sought to shield from public view) and its premeditated, calculated plan to pit gender and race interests against each other to rid itself of it without riling up "the 'Cohens' of the world" – all of which appear plainly part of the record – to discern the inaccuracy of that statement. *See* A182, 186, 194; A338, 346-51, A354. The district court's failure to give proper weight to that incontrovertible evidence as supporting the need for the continued protections of the Joint Agreement's enforcement mechanisms was in error.

Finally, Appellees' attempt to cast as irrelevant the distinctly different impact of the Class Settlement upon class members does not comport with Rule 23(e). *See* Fed. R. Civ. P. 23(e)(2)(D) (settlement must treat class members equitably relative to each other). Indeed, Plaintiffs-Appellees admit that their focus was upon providing "benefits to the class *now*" (i.e. the reinstatement of certain sports) in the sacrifice of the ongoing, long-term value of the enduring protections in the Joint Agreement held by the Objectors. Br. at 36. Plaintiffs-Appellees repeatedly undercut the protections afforded to the entire class in the very agreement it sought to enforce just a few months ago as crucial. Brown's argument that it always retained the discretion to alter or eliminate its programs under Title IX and the Joint Agreement does not address the disparate impact of the Class Settlement upon class

members and lack of meaningful value received by them for the sacrifice of their rights. *See* Brown Br. at 34-35.

CONCLUSION

For the foregoing reasons, the Appellant Objectors respectfully request that this Court vacate the district court's order approving the Class Settlement and remand with instructions consistent with the legal standards discussed herein.

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Boston, Massachusetts

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6419 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. 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 Times New Roman 14pt.

Dated: June 9, 2021

By: */s/ Robert J. Bonsignore*
Robert J. Bonsignore

CERTIFICATE OF SERVICE

I hereby certify that on June 9, 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.

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