No. 21A___

In the Supreme Court of the United States

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,

Petitioners,

v.

AMY COHEN ET AL., individually and on behalf of all others similarly situated,

Respondents.

APPLICATION TO EXTEND TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI FROM JANUARY 25, 2022 TO MARCH 26, 2022

To the Honorable Stephen Breyer, as Circuit Justice for the First Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30.3, petitioners Abigail Walsh, Lauren Lazaro, Rose Domonoske, Mei Li Costa, Ella Poley, Alyssa Gardner, Lauren McKeown, Allison Lowe, Tina Paolillo, Eva Durandeau, Madeline Stockfish, and Sonja Bjornson respectfully request that the time to file a Petition for a Writ of Certiorari be extended 60 days from the date on which the Petition is currently due, on January 25, 2022, to and including March 26, 2022. This application is being filed at least 10 days before that date. *See* Sup. Ct. R. 13.5. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254 to review this case.

Background

This petition arises within the landmark class action case regarding gender equity in collegiate athletics under Title IX of the Education Amendments Act of 1972 ("Title IX"), and its implementing regulations. Originally instituted in 1992, this action was brought by female then-members of university-funded varsity sports at Brown University ("Brown") to challenge gender inequities and disparities in funding and opportunities for participation in Brown's varsity sports. After years of litigation, including multiple appeals, a settlement agreement was reached in 1998 (the "Joint Agreement").

The following undisputed facts are significant:

1. The class representatives were then current student athletes who had a concrete, actual stake in the action—each would suffer harm or gain a benefit. The class representatives had interests that were coincident with the absent class members.
2. A so-called "Joint Agreement" that secured critical rights for the class, including objective benchmarks against which Brown's compliance with its Title IX obligations could be measured, was formally approved, adopted by the Court, and docketed, granting preliminary approval as a class action settlement on June 23, 1998, and the compliance plan was entered as a final class action judgement ("1998 Brown Class Action Settlement") on October 16, 1998 (USDC Rhode Island No. 92-0197 Docket No. 282) after notice to the class and an opportunity to be heard.
3. The instant litigation was "closed" by the District Court on October 16, 1998. *Id.*

4. A so-called "Amended Settlement" substantively changing and reducing the rights and protections afforded female Brown students was entered into between Brown and attorneys for the plaintiff class, but the class representatives remained same, and no current female students were added as representatives, nor was any person who suffered current injury by the Amended Settlement agreement.
5. The designated Class Representatives graduated about the time the case was closed by the District Court in 1998 and so the designated class representatives for the so-called 2020 "Amended Settlement":
    a. had no actual, concrete stake in the action because they would not suffer harm or gain a benefit from the abandonment of the benefits provided by the terms of the 1998 Brown Class Action Settlement;
    b. no longer shared a commonality of interests with the current absent class of female athletes, which included active members of Brown's varsity teams and women entering Brown who were subjected to Brown's adverse changes or the entire removal of the athletic programs upon which they based their decision to attend Brown.
    c. had no interests in the class action 2020 Amended Settlement that were coincident with the 2020 absent class members;
    d. were not current student athletes impacted by the abandonment of material terms[1];

[1] Appellants advance that the following terms are material: the swift and cost-effective mechanism for enforcing of Brown's obligations in the event of its non-compliance, and mandatory reporting of Brown's statistics and data. Additionally, the so called amended 2020 Agreement expressly stated that violation of its terms could not be used as evidence of noncompliance and a replaced permanent compliance with a 2024 end date to its terms.

6. The enforcement action[2] that eventually lead to the District Court's approval of the Brown Class Action Settlement took almost a decade to finally bring relief to the class of women athletes.
7. The related litigation was contentious and labor intensive. Brown University vigorously fought every step. It was resource draining on both the female student athlete class and the courts. The litigation was costly - even at that time costing approximately a million dollars.
8. The1998 Brown Class Action Settlement was indefinite in duration and provided class members with a swift and cost-effective mechanism for the enforcement of Brown's obligations in the event of its non-compliance and mandatory reporting of Brown's statistics.
9. During the intervening years, Brown violated the terms of the agreement multiple times.
10. The swift and cost-effective mechanism for the enforcement enabled class counsel and the District Court and class counsel to force Brown back into compliance.
11. In May 2020, Brown announced that it was eliminating multiple varsity sports, consisting of both female and male teams, and publicly blamed the Joint Agreement for the need to eliminate, specifically, three male sports with high minority athlete participation.
12. The announcement was fraudulent. It willfully and expressly was intended to pit race against gender. In addition, an email from a Brown official stated

[2] Including the efforts that lead to its filing.

that the express purpose of eliminating the sports was "...to go after the Consent Decree once and for all? Could we...kill this pestilential thing?" Mencoff, Samuel. "Re: Athletics." Message to Christina Paxson, President. 4 June 2020.

13. Three days later, Brown reinstated those three men's teams after public outcry.
14. The adequacy requirements of class representatives and the standards by which the review of the adequacy of the class representatives that must be carried out by the Court are at the core of this petition. Without the adequate class representees mandated by FRCP Rule 23 and the Constitution, the absent class members were denied Due Process.

Moreover, both the District Court and the Appellate Court shifted the burden of proof from the Appellees who acted to unearth and replace a nearly 25-year-old finally-approved class action settlement to absent class members who were not given notice that the terms of a settlement, of which they were beneficiaries, was being revoked. This context, despite the continued validity and demonstrated need and effectiveness of the Joint Agreement in securing Brown's Title IX compliance over the years and the fact the impetus for change was based on a fraud pitting race against gender to make the Court "look bad," Class Counsel voluntarily agreed and fought to have the final settlement replaced with a new agreement that sacrificed and forfeited critical rights and benefits to the class while going against their own expert's opinion on Brown's woman's sports programs.

For example, in support of this new agreement, Class Counsel filed an expert report by Dr. Donna Lopiano on September 8, 2020, in which she concluded that Brown's restructured

selection of men's and women's sports did not meet Title IX's mandates. A542-89. She specifically noted that the replacement sport of sailing was not a compliant solution and that priority should have been given to keeping women's sports that already existed at Brown. A556, 558, 566-67, 572-73. Dr. Lopiano further opined that equestrian, skiing, and squash—sports that were eliminated—are strong collegiate programs while sports that were added like fencing and golf are in rebuilding cycles. A572t 31.

In point of fact, not a single named class representative will be in any way affected by the new Class Settlement, and not a single female athlete who will be directly and adversely affected by the new Class Settlement is included as a class representative. The new settlement proposed to and approved by the court is a new and substantively very different settlement from that approved nearly twenty-five years ago. And, the specific injuries suffered by the group of former class members is different than the injuries suffered by the current class members -- who were entitled to rely upon the existing Joint Agreement and all of its benefits and rights. A clearer case of unaligned and inadequate representation is harder to imagine.

Adequate representation of absent class members by named representatives with aligned interests and claims is an inviolate cornerstone of due process. Multiple current female Brown varsity athletes (the "Appellant Objectors") negatively impacted by the changes objected on various grounds, challenging as inadequate the former class members' qualifications as class representatives, and the Class Settlement as unfair and unreasonable, all in violation of Federal Rule of Civil Procedure 23. Nevertheless, the District Court and United States Court of Appeals for the First Circuit gave its final approval to the Class Settlement over those objections.

Thus, in the end, Brown's objective of pitting race versus gender scheme achieved its goal of shortening and eliminating the Joint Agreement. Subsequent to August 2024, no current class

member will have the benefit of the rights they previously possessed under the Joint Agreement. While Brown's clear breach of the Joint Agreement and related conduct is as unquestionably clear as it is unconscionable, it successfully and directly served to rid the university of direct oversight and accountability and eradicated the Plaintiff class's ready mechanism of bringing Brown's penchant for noncompliance to light and obtaining redress, all without any current students as class representatives who suffered a deprivation by virtue of this Amended Agreement.

Inadequate representation is a fatal defect and denial of due process. The Supreme Court must opine on the differing burdens of proof in order to prevent the denial of due process going forward. The adversely affected absent class members are guaranteed adequate representation and constitutional due process. Those guarantees were not satisfied here. Only vacation of the order and remand to appoint adequate representatives with an actual, concrete stake in the litigation will provide the class with an opportunity to have their interests zealously represented and prevent this circumvention of Title IX and class members' constitutionally protected rights.

Accordingly, the question presented here will be of great interest to the Supreme Court, absent class members at Brown University, but also to those educational institutions who might seek to avoid their court-ordered, as well as independent Title IX, obligations in the future. The broad impact of the First Circuit's decision is clear—well-established constitutional due process requirements and the express language of Federal Rule of Civil Procedure 23(e) would be ignored.

The petition will argue that a court finding a class representative to be adequate when originally certifying a class is a determination that should not remain conclusive in perpetuity and forever satisfy all constitutional requirements relating to adequate representation, especially where a replacement settlement (or modification of an existing settlement) that adversely affects current class members can be reached after the original Class Representatives' membership in the class

ceased thirty years ago.

Further, Congress clearly did not intend for Class Representatives with no live claims and no current, active interests to survive as having "adequately represented the class." The petition will describe how petitioners' interpretation is the most consistent with the plain language of Federal Rules of Civil Procedure 23(e). The petition will also make clear the palpable unfairness for countless student-athletes who may be affected by Class Representatives with no live claims in the future by creating a Class Settlement that does not benefit or adversely affect them in any way.

Reasons for Granting an Extension of Time

The time to file a Petition for a Writ of Certiorari should be extended for 60 days for at least three reasons:

1. No prior request for an extension was made.
2. The impact of Covid-19 and the holidays – multiple members of the firm tested positive in the months leading up to the deadline, and most recently over the last few weeks. Additionally, Mr. Bonsignore is undergoing surgery at the Massachusetts General Hospital this week. The additional time will assist counsel in preparing a concise and well-researched petition that will be of maximum benefit to this Court.
3. Whether or not the extension is granted, the petition will be considered during this Term—and, if the petition were granted, it would be argued in the next Term. The extension is thus unlikely to substantially delay the resolution of this case or prejudice any party.
4. Finally, the Court is likely to grant the petition. While further research is

necessary to fully elucidate the basis for that review, the petition will raise significant concerns about the First Circuit's approach to interpreting FRCP 23(e), and the dramatic adverse impacts that the First Circuit's decision will have on educational institutions. Given that thousands of class action lawsuits are filed every year, and a large amount of those cases rely on class representatives that adequately serve the rest of the class, the impact of the First Circuit's interpretation of what kind of class representative qualifies as adequately serving the class is obvious. By allowing thirty-year-old class representatives with no current, active interest to be considered adequate, the First Circuit clearly violated the rights of class members in this case by denying them due process. Given the breadth and importance of class action lawsuits and constitutional rights, this Court's immediate intervention is necessary to correct the First Circuit's approach before it undermines proper participation by class members on multiple lawsuits.

Conclusion

For the foregoing reasons, the time to file a Petition for a Writ of Certiorari in this matter should be extended for 60 days to and including March 26, 2022.

Respectfully submitted,

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January 12, 2022