No. _____

In The

Supreme Court of the United States

ABIGAIL WALSH, *et al.*,

Petitioners,

v.

AMY COHEN, *et al.*, individually and on behalf of all others similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Twenty-two (22) years after a class action settlement was finally approved, a District Court revoked an approved class action settlement without notice to absent class members and without the District Court otherwise carrying out a full Due Process driven Rule 23 review. The revoked, approved class action settlement provided class members with substantial benefits and relief such as an immediate enforcement procedure.

The new class action settlement eliminated these protections and material terms and imposed a near immediate end date on the agreement.

The Petitioners are absent members of the certified class who objected at the final approval hearing and later appealed.

The First Circuit affirmed the revocation of an existing, approved class action settlement. This led to a fundamentally different settlement by: (i) imposing a burden on absent class members to prove the replacement settlement is unfair; (ii) finding that a District Court is not required to make findings regarding adequate class representatives and counsel prior to approving a class action settlement; (iii) finding that a settlement can place members in conflict with each other; and (iv) finding that the absent class members are not entitled any notice prior to revoking and substituting in a new class action settlement.

The questions presented are:

1. Does the Constitutional Due Process driven analysis set forth in Rule 23 have exceptions?

QUESTIONS PRESENTED – Continued

2. If so, what exceptions and what circumstances trigger the District Court's authority to make such exceptions?

RULE 14.1 STATEMENT

In addition to the Petitioner listed in the caption the following individuals were appellants below and are Petitioners here: Lauren Lazaro, Rose Domonoske, Mei Li Costa, Ella Poley, Alyssa Gardner, Lauren Mckeown, Allison Lowe, Tina Paolillo, Eve Durandeau, Madeline Stockfish, and Sonja Bjornson.

In addition to the respondent named in the caption the following individuals were Plaintiff Appellees below, and are respondents here: Ellen Rocchio, Nicole Turgeon, Karen Mcdonald, Melissa Kuroda, Lisa Stern, Jennifer Hsu, Jennifer Cloud, Darcy Shearer, Jody Budge, Megan Hull, Catherine Luke, And Kyle Hacket.

In addition to the respondents listed in the caption, the following individuals and entities were defendant-appellees below and are respondents here: Brown University, Christina Paxson, as successor to Vartan Gregorian, and Jack Hayes, as successor to David Roach.

RELATED CASES

Cohen v. Brown Univ. (Cohen I), No. 92-0197, U.S. District Court for the District of Rhode Island. Judgment entered December 22, 1992.

Cohen v. Brown Univ. (Cohen II), No. 92-0197, U.S. Court of Appeals for the First Circuit. Judgment Entered December 16, 1993.

Cohen v. Brown Univ. (Cohen III), No. 92-0197, U.S. District Court for the District of Rhode Island. Judgment entered March 29, 1995.

Cohen v. Brown Univ. (Cohen IV), No. 92-0197, U.S. Court of Appeals for the First Circuit. Judgment Entered November 25, 1996.

Cohen, et al. v. Brown University et al. No. 03-2125, U.S. Court of Appeals for the First Circuit. Judgment Entered September 24, 2003.

Cohen, et al. v. Walsh et al. No. 21-1032 U.S. Court of Appeals for the First Circuit. Judgment Entered October 27, 2021.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioners pray that the Supreme Court grant a writ of certiorari to review the judgment of the court below.

OPINIONS BELOW

The order of the district court denying Petitioners' objection to the revocation of a class action settlement is found at (App. 35-44) and the district court's final judgment (App. 45-121) is reported at *Cohen v. Brown University (Cohen III)*, 879 F. Supp. 185, (D.R.I. 1995). Excerpts of the transcript are found at (App. 138-142).

JURISDICTION

The judgment of the court of appeals was entered on October 27, 2021. (App. 1-34). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix to this petition. (App. 122-137).

STATEMENT

A. Proceedings through Revocation of the Finally Approved Settlement

1. In 1991 several active student athletes sued Brown University on the basis that Brown's conduct was unlawful and violated Title IX. (App. 5).

2. Brown aggressively contested this claim, dragging the costly, resource draining litigation out for over a decade *See Cohen IV*, 101 F.3d at 162. The prosecution of the case cost over one (1) million dollars.

3. In 1992, The District Court certified a class and, appointed Class Representatives who were then current student-athletes. (App. 5-6).

4. In 1998, the parties reached an agreement which was approved by the District Court. ("Finally Approved Class Action Settlement," "FACA," or "FACA Settlement") (DE 276).

5. The FACA Settlement included a Title IX compliant proportional representation scheme where each gender's athletics programs at Brown must be within a certain percentage of each gender's respective campus presence. *Id*.

6. Under the terms of the FACA Settlement, Brown was required to submit an annual report disclosing that their sports programs were in compliance and a violation of the Title IX related compliance terms was considered a breach of the FACA Settlement. *Id*.

7. To avoid another decade of litigation that cost over one million dollars, a material term in the FACA Settlement expressly provided that breaches were

entitled to streamlined discovery and review by the court via expedited motion practice. *Id*.

8. For the next twenty-two years the terms of the Finally Approved Class Action Settlement proved to be necessary and worked effectively. (App. 7).

9. On multiple occasions Brown was found to be violation and the breaches were resolved through enforcement of the streamlined discovery and expedited review process.

B. Events Proceeding Revocation of the Finally Approved Settlement and Court Approval of New Settlement

1. In May 2020, Brown University President Christina Paxson announced Brown would downgrade certain sports teams from varsity to club status, while simultaneously upgrading some to varsity. (App. 7).

2. It is not in dispute that Brown University leadership exchanged emails that openly expressed a willful plan to pit race against gender to provoke a fierce backlash that they would use to undermine the finally approved class action settlement. (App. 8).

3. Specifically, Brown's plan was outlined in an email from Chancellor Samuel M. Mencoff emailed Brown President Christina Paxson *id*.:

   "But here's an idea. Could we use this moment, where anger and frustration, especially from track and squash, are intense and building to go after the Consent Decree once and for all? Could we

channel all this emotion away from anger at Brown to auger at the court and kill this pestilential thing?

The argument would be that the Consent Decree is forcing us to eliminate these sports, and the court would then be bombarded with e-mails and calls as we are now. We would be aligned then with all who oppose us now."

4. Multiple additional similar emails were exchanged, and Brown university adopted the plan to pit race against gender to have a finally approved class action settlement revoked by a United States Federal court. *Id*.

5. Notwithstanding that unlawful basis for the proposed revoking of a FACA Settlement, the parties entered a mediation under a magistrate judge. (DE 374).

6. This mediation resulted in the revocation of FACA Settlement and the submission to the District Court of a replacement settlement that stripped away the material terms that benefitted the absent class members. (DE 389).

7. For example, the FACA Settlement:

   a. incorporated compliance standards and statistics as compliance benchmarks;

   b. required Brown to disclose their compliance benchmark data and statistics;

   c. defined breaches of the Title IX requirement benchmarks as evidence of a violation of the FACA Settlement;

d. provided for streamlined discovery and expedited Court review and enforcement procedure;

e. had no end date. (DE 276).

8. The replacement class action settlement on appeal eliminated all of the above material terms and also placed a near immediate end date on the duration of the terms where no such date has been included within the FACA Settlement. (DE 389; 391).

9. The Class Representatives, each of whom graduated from Brown University decades earlier:

a. did not have any interest or stake in the litigation and were utterly unaffected by the removal of the material terms or all else contained the new settlement;

b. had no interests coincident with the present and future absent class members affected by revocation of the FACA Settlement and the replacement settlement;

c. did not evidence that they considered and represented the interests of the absent class members adequately. (DE 389; 391; 393).

10. For its part the District Court's opinion offered no facts or analysis addressing the above Rule 23 considerations following the objection of the absent class members. (DE 395).

11. Class Counsel did not offer any evidence as to why their response to Brown University's open and undisputed act of willfully breaching the FACA Settlement by pitting race against gender to serve as

a catalyst that would result in the revocation of the FACA Settlement was:

a. the removal of the material terms individually enumerated above;

b. the placement of an end date on the often enforced agreement where none had previously been in place; met their Rule 23 burden of adequacy;

c. the revocation of the FACA Settlement and the consideration and approval of the Replacement Settlement was carried out without adequate notice to absent class members. (DE 392).

12. The District Court's order approving the revocation of the FACA Settlement and approval of the Replacement Settlement that did not contain any of the material terms that benefitted the absent class member's offered without adequate notice to the class:

a. Offered no analysis based on findings that the settlement was fair adequate and reasonable;

b. Offered no analysis based on findings that the removal of the material term setting benchmarks and mandating reporting was fair, adequate and reasonable;

c. Offered no analysis based on findings that the Class Representatives were adequate;

d. Offered no analysis based on findings that class counsel were adequate; and

e. Offered no analysis based on findings that the class notice was adequate. (DE 395)

13. Appellants objected to the proposed new settlement. (App. 9) *See Cohen v. Brown Univ.*, 16 F.4th 935 (1st Cir. 2021).

14. The District Court overruled the Appellant's objection on December 21, 2020. (DE 395).

15. The Appellants timely appealed. (App. 10).

16. Oral Argument was held on September 8, 2021.

17. During Oral Argument, the First Circuit Court of Appeals the Court first advised Appellants that a District Court is not required under FRCP 23(e)(2)(A) make findings that the Class Representatives were adequate, even when the adequacy was challenged by an absent class member. (App. 138-142).

18. During Oral Argument the First Circuit Court of Appeals advised Appellants that absent class members who objected to the replacement of a finally approved class action settlement with a new settlement that removed all material terms that benefitted them that they carried a further burden of proving it is unfair. (App. 138-142).

REASONS FOR GRANTING THE PETITION

Resolution claims through the class action mechanism is not by right. It is an administrative convenience that conflicts with constitutional due process. Federal Rule of Civil Procedure 23 ("Rule 23") enumerates benchmark standards and procedures that are intended to guarantee that the Constitutional Due Process protections afforded absent class members remain in place. They include a fiduciary duty imposed on the reviewing court, and findings relating to the fairness of the settlement and the adequacy of class counsel and the Class Representatives. No exceptions are expressly enumerated in Rule 23.

Case law interpreting Rule 23 has been decided by this Court and the Circuits.

In addition to violating the Due Process rights of the absent Brown University class members, this high-profile case, if affirmed and not taken up and reversed or clarified, will directly impact the Due Process rights of absent class members when it is adapted by other Courts based on the legal reasoning and end result. The circuit split is straightforward – are there exceptions to the Rule 23 requirements set forth in Rule 23 that protect the Due Process rights of absent Class members, and if so what are those exceptions and what circumstances trigger the District Courts' authority to make such exceptions?

More specifically, the points in issue are:

1. Did the Class Representatives adequately represent the absent class members?

2. Did the Class Representatives have a stake in the action or interests that were coincident with the absent class members?

3. Did the Class Counsel adequately represent the absent class members?

4. Were the absent class members given adequate notice of the plan to revoke a Finally Approved Class Action Settlement and replace it with a new one that removed all terms that materially benefitted them?

The Court should grant certiorari, vacate the judgment below, and remand for further proceedings wherein the District Court will:

1. Make factual findings and offer its related analysis on all points enumerated in Rule 23; and

2. Make factual findings and offer its related analysis on why exceptions to the points enumerated in Rule 23 apply.

I. The courts of appeals are divided over whether a district court must make findings on the points enumerated in Rule 23.

A. The Standard Applied by the First Circuit Directly Conflicts with Other Circuits.

FRCP 23(e)(2)(A) requires that a District Court ensure that the Class Representatives adequately represent the absent class members. The District Court did not do so and the First Circuit Court of Appeals endorsed this approach. *See Cohen v. Brown Univ.*, 16 F.4th 935 (1st Cir. 2021). First, the Court failed to conduct any substantive analysis as to the adequacy of the Class Representatives as required for approval of a class settlement under Rule 23(e)(2)(A).

Second, the Class Representatives, all of whom had ceased being members of the class over two decades ago, were not adequate Rule 23 representatives. Without due process-compliant Class Representatives, the Settlement Agreement was incapable of approval.

Finally, the Settlement Agreement was neither fair, nor reasonable, nor adequate under Rule 23(e). There was no valid basis to forfeit the material terms and rights of the class possessed under the FACA Settlement in exchange for a replacement settlement that failed to secure for them meaningful or equivalent relief while giving away very useful material terms, conditions and procedures that had been in place for over two decades. Add to that the approval was silent on an

otherwise remarkable record that rewarded Brown's intentional violation of a court order.

Accordingly, final approval should be reversed, and the case remanded. The court also punted on adequacy of representation This is an important topic that should be discussed.

Rule 23(e)(2) was amended in 2018 to cut through the clutter and provide organizing principles for the core analysis.[1] As the Committee Note explained, "[a] lengthy list of factors can take on an independent life, potentially distracting attention from the central concerns that inform the settlement-review process."[2] To simultaneously free courts from the unnecessary burden of discussing every factor in every case, while focusing them on the core concerns, the amended Rule requires courts to consider just four questions: whether (A) the Class Representatives and class counsel have adequately represented the class; (B) the settlement was negotiated at arm's length; (C) the relief

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[1] Donald R. Frederico, *The Roles of the Players in Class Settlements. Part 3: The Judge*, Nat'l L. Rev. (Mar. 4, 2020), https://www.natlawreview.com/article/roles-players-class-settlements-part-3-judge. Mr. Frederico notes, "As the Advisory Committee Notes to the 2018 Amendments to Rule 23 explain, '[t]he decision to give notice of a proposed settlement to the class is an important event.' The parties are expected to provide the court with sufficient information from which it can make the required findings, and federal judges are expected to conduct a meaningful review of the proposed settlement before authorizing notice. This 'front-loading' of the settlement approval process makes sense, given the often significant costs and delay attendant to the lengthy notice process." *Id.*

[2] Fed. R. Civ. P. 23(e)(2) advisory committee's note.

provided to the class is adequate; and (D) the settlement treats class members equitably relative to each other.

Notably, none of the core concerns were addressed by the District Court, who instead applied a new standard of review that circumvents the offering of findings and analysis.

As the Committee Note helpfully explains, the first two concerns are "procedural." They assess indirectly whether the settlement is fair, reasonable, and adequate by examining whether the process that led to it was sound.[3] The second two concerns are "substantive." They assess directly whether the settlement's terms are fair, reasonable, and adequate.

Because the Rule 23(e)(2) amendments do not explicitly displace or supersede the factors developed under circuit law, these best practices continue to identify the circuit factors. But to help accomplish the purposes of the 2018 amendments, the guidelines do so by organizing those factors within the four core considerations identified by Rule 23(e)(2) itself and emphasizing that the factors should be addressed only when they inform those core considerations. This approach is consistent with the Committee Note's explanation that "[t]his amendment therefore directs the parties to present the settlement to the court in terms of a shorter list of core concerns, by focusing on the primary procedural considerations and substantive

[3] *Id.*

qualities that should always matter to the decision whether to approve the proposal."[4]

The courts' application of amended Rule 23(e)(2) during the 20 months since its promulgation has been uneven, with a majority applying both the rule's core considerations and the relevant circuit's list of factors.[5] But the better view and the one adopted by a minority of the courts and these best practices is to adhere to the intent and spirit of the amended rule by focusing the analysis on the core considerations and organizing the discussion around those considerations.[6]

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[4] *Id.*

[5] Post-2018 cases in five circuits applied both the Rule 23(e)(2) core considerations *and* the circuit list of factors, including: *Briseno v. Henderson*, 998 F.3d 1014 (9th Cir. 2021); *In re Equifax Inc. Customer Data Security Breach Litig.*, 999 F.3d 1247 (11th Cir. 2021); *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 330 F.R.D. 11 (E.D.N.Y. 2019); *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686 (S.D.N.Y. 2019); *Chambers v. Together Credit Union*, No. 19-CV-00842, 2021 WL 19484452 (S.D. Ill. May 14, 2021); *Norcia v. Samsung Telecommunications America, LLC*, No. 14-cv-00582, 2021 WL 3053018 (N.D. Cal. July 20, 2021); *Anderson Living Trust v. Energen Resources Corp.*, No. 13-909, 2021 WL 3076910 (D.N.M. July 21, 2021).

[6] Post-2018 cases in three circuits applied only the Rule 23(e)(2) factors, including: *Li v. Aeterna Zentaris, Inc.*, No. 3:14-cv-07081, 2021 WL 2250904 (D.N.J. June 1, 2021); *In re Peanut Farmers Antitrust Litig.*, 2:19-cv-00463, 2021 WL 3174247 (E.D. Va. July 27, 2021); *Loreto v. Gen. Dynamics Info. Tech.*, No. 3:19-cv-01366, 2021 WL 3141208 (S.D. Cal. July 26, 2021); *Norcia v. Samsung Telecomm. Am.*, No. 14-cv-00582, 2021 WL 3053018 (N.D. Cal. July 20, 2021).

Rule 23(e)(2) was revised in 2018 and specifically instructs courts to consider whether "the Class Representatives . . . have adequately represented the class" when making that determination. Fed. R. Civ. P. 23(e)(2)(A). Constitutional due process requires the presence of that adequate representation. *Hansberry v. Lee*, 311 U.S. 32, 45 (1940).

Here, the District Court's summary rejection of the Objectors' objection as to the adequacy of their Class Representatives on the ground that it found the Class Settlement "reasonable" does not constitute meaningful consideration of that prerequisite element, nor does it evidence that the district court satisfied its fiduciary duty to absent class members. The court's complete failure to address specifically the acute issues arising from the representation of the class by the non-class member Class Representatives ran afoul of Rule 23's recent amendments' stated purpose of "focus[ing] the court . . . on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." *See* Advisory Committee notes, 2018 Amendments on Rule 23(e)(2).

In any event, the district court's approval of the Class Settlement under Rule 23(e) was in error because the named Class Representatives 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 in violation of Rule 23(e)(2)(A) because they had no stake in the action and their interests were not aligned with the absent members of

the class. In fact, there is no evidence in the record that the purported Class Representatives were even consulted or did anything whatsoever represent the class, and certainly no evidence establishing that they vigorously pursued the claims of the absent class members. Thus, from the record, it appears that only class counsel effectively filled the role of Class Representatives.

A class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011). To permit class treatment and disposition of unnamed, absent individuals' claims, due process requires that such individuals be adequately represented by the named Class Representatives – Class Representatives that have a current and concrete interest in the issues in the case and the relief sought. *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 827 F.3d 223, 231 (2d Cir. 2016), *cert. denied*, 137 S. Ct. (2017).

The standard that the First Circuit applied in their opinion is different from other circuits. In *Clark v. State Farm Mut. Auto. Ins. Co.*, 245 F.R.D. 478 (D. Colo. 2007), *aff'd*, 590 F.3d 1134 (10th Cir. 2009), the Court stated that "because the Plaintiff had nothing to gain or lose from the future outcome of the case made the Plaintiff . . . nothing more at this point than a curious onlooker." Similarly, in *Flores v. Rosen*, 984 F.3d 720 (9th Cir. 2020), the Court said that "Even after certification . . . the court must still inquire into the adequacy of representation and withdraw class certification if adequate representation is not furnished."

Here, Class Representatives have been certified, but they are not adequate and should be withdrawn.

Even the District Court has held inconsistent opinions regarding the decertification of a class. "If the district court concludes that putative class members are not 'similarly situated,' it may decertify class, and dismiss opt-in plaintiffs without prejudice or if, court finds that putative class members are 'similarly situated,' it permits case to go to trial as a class . . . " *Kane v. Gage Merch. Servs., Inc*., 138 F. Supp. 2d 212 (D. Mass. 2001).

As multiple circuits have now explicitly recognized, there is a split among the federal appellate courts as to whether Rule 23(e)(2)(A) requires that a District Court ensure that the Class Representatives adequately represent the absent class members. Not only did the District Court not arrive at the correct conclusion, the First Circuit did not either.

II. The courts of appeals decision conflates decisions from other United States Courts of Appeals on the same legal issue and presents a questions of exceptional importance, justifying clarification.

Rule 23 requires the Court to make findings on:

1. The adequacy of Class Representatives;
2. The adequacy of class counsel;
3. The fairness and reasonableness of the settlement; and

4. The adequacy of the class notice. *See* FRCP 23.

The District Court in *Brown* did not consider the adequacy of the Class Representatives, or the fairness and reasonableness of the settlement. The First Circuit Court of Appeals affirmed this practice. The circuits are divided over what a shared interest is between class members and Class Representatives, as well as what makes class members adequate or inadequate to represent the class as whole. Circuits are also still inconsistent over how to gauge the level of adequacy even after certification.

A. The First Circuit's decision directly conflicts with decisions of five circuits.

This case arises out of another decision in which the First Circuit has followed the minority rule and allowed members of the class to be inadequately represented. This decision directly conflicts with the following decisions of the Second, Sixth, Seventh, Eighth, Ninth, and Eleventh circuits:

Second Circuit: *See Martens v. Thomann*, 273 F.3d 159 (2d Cir. 2001) (Remanding case for district court to explain its decision because "it is better to remand to seek clarification from the district court" rather than engage in "inappropriate speculation" as it relates to fairness of the settlement).

Sixth Circuit: *See Binta B. ex rel. S.A. v. Gordon*, 710 F.3d 608 (6th Cir. 2013) ("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.")

See also Pettry v. Enterprise Title Agency, Inc., 584 F.3d 701 (6th Cir. 2009) ("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).

Seventh Circuit: *See Culver v. City of Milwaukee*, 277 F.3d 908 (7th Cir. 2002) ("the mootness of a named plaintiff's claim . . . makes him presumptively [an] inadequate [Class Representative]").

Eighth Circuit: *See Grunin v. International House of Pancakes*, 513 F.2d 114 (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).

Ninth Circuit: *See Flores v. Rosen*, 984 F.3d 720 (9th Cir. 2020) ("Even after certification . . . the court must still inquire into the adequacy of representation and withdraw class certification if adequate representation is not furnished").

Eleventh Circuit: *See Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1148 (11th Cir. 1983) ("a disparate

distribution favoring the named plaintiffs requires careful judicial scrutiny into whether the settlement allocation is fair to the absent members of the class").

B. The Adequacy of Class Representatives.

Article III demands that a plaintiff have a "personal stake" in a case or controversy. *Raines v. Byrd*, 521 U.S. 811, 820 (1997). Accordingly, to establish standing, a plaintiff must show (i) that they suffered an "injury in fact, which is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). The injury must be "fairly traceable" to the defendant's action, *Lexmark Intl., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125 (2014) (citing *Lujan*, 504 U.S. at 560), and not from the "independent action of some third party not before the court," *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 42 (1976).

Rule 23(e) is clear that its requirements, including the adequacy of representation by Class Representatives under subsection (2)(A), apply regardless of whether a class has been previously certified in the litigation or is being sought for purposes of settlement. Fed. R. Civ. P. 23(e). Thus, even where a settlement is reached subsequent to class certification, the

due process requirement that the Class Representatives be adequate continues to apply. *See In re MyFord Touch Consumer Litig.*, 13-CV-03072-EMC, 2019 WL 1411510, at *8 (N.D. Cal. Mar. 28, 2019) (in case where class already certified, court preliminarily approved settlement only after revisiting adequacy issue regarding alignment of interests to ensure Class Representatives would "vigorously" protect class members' rights and finding "[t]hat remains the case"). Those due process protections simply do not disappear once certification is granted, and, by the same token, certification does not exist in perpetuity. *See*, e.g., *Key*, 782 F.2d at 7 (affirming decertification of class in employment discrimination suit for lack of adequate representation); *Barney v. Holzer Clinic, Ltd.*, 110 F.3d 1207, 1214 (6th Cir. 1997) ("duty to assay whether the named plaintiffs are adequately representing the broader class does not end with the initial certification; as long as the court retains jurisdiction over the case it must continue carefully to scrutinize the adequacy of representation") (citation omitted).

Cases applying the adequacy of representation requirement in Rule 23(e)(2)(A) to approve class settlements have focused upon the alignment of interests and injuries suffered by the named Class Representatives with the unnamed class members and that vigorous representation thereby ensured. *See*, e.g., *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 692 (S.D.N.Y. 2019) (applying Rule 23(e)(2)(A)'s adequacy of representation prong to approve settlement where named plaintiffs suffered same injury as class and

thus had interest in vigorously pursuing class claims); *In re Samsung Top-load Washing Mach. Mktg., Sales Practices & Products Liab. Litig.*, 17-ML-2792-D, 2020 WL 2616711, at *12 (W.D. Okla. May 22, 2020); *In re USC Student Health Ctr. Litig.*, 218CV04940SVWGJS, 2020 WL 5198251, at *1 (C.D. Cal. Feb. 25, 2020). Those cases further envision the involvement of the named representatives in the litigation proceedings and settlement negotiations as required as well as their commonality of interest and vigorous level of representation.

Here, the named Class Representatives did not, and could not, adequately represent the class in reaching the Class Settlement. They are no longer class members and have not been for decades. They do not have interests aligned with the class and do not possess adequate incentives to vigorously pursue them. In fact, they do not even hold any claims or stake in the litigation. *See East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (Class Representative must be part of the class and "possess the same interest and suffer the same injury" as the class members); *Rand v. Cullinet Software, Inc.*, 847 F. Supp. 200, 213 (D. Mass. 1994) ("[A] fundamental requirement of representatives in a class action is that they must be members of the subclasses they seek to represent."); *Tate v. Hartsville/Trousdale County*, 3:09-0201, 2010 WL 4822270, at *2 (M.D. Tenn. Nov. 22, 2010) (decertifying class where "the initial basis upon which certification was granted no longer exists, to wit, the existence of an identified suitable Class

Representative to carry the torch"); *Lavin v. Chicago Bd. of Ed.*, 73 F.R.D. 438 (N.D. Ill. 1977) (inadequate representation where named plaintiff had graduated high school and had no continuing injury). The named Class Representatives certainly cannot claim to suffer the same injury as current class members or possess incentives to represent the interests of the class.

Among the other defects, the significant passage of time since the Class Representatives' status as female Brown varsity athletes disqualifies them as adequate representatives of the class, who are permitted to compromise and negotiate the forfeiture of their rights and to bind that same class to a Settlement Agreement. Indeed, as noted, 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, or that they actually "represented" in any sense the class in anything other than name. The named party must be an adequate representative.

C. The Adequacy of Class Counsel.

Class Counsel must adequately reflect the class. Adequate representation of the absent class members by the named representatives with aligned interests and claims in a cornerstone of due process. As seen *infra*, the Rules seemingly allow courts to exercise such discretion, and there should be minimal discretion when interpreting a rule.

Rule 23(g), for instance, requires that, in appointing class counsel, a court must consider factors such as "counsel's experience in handling class actions" and "knowledge of applicable law," and may consider "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1). If more than one adequate applicant seeks appointment, "the court must appoint the applicant best able to represent the interests of the class." Fed. R. Civ. P. 23(g)(2).

The absent class members here should have guaranteed adequate representation and constitutional due process, as other circuits have guaranteed to class members. Instead, they were guaranteed to have an expiring settlement that will not benefit them in the near future. Only the vacation of the order and remand to appoint actually adequate representatives with a stake in the litigation will provide the class with an opportunity to have their interests zealously represented and prevent any circumvention of Title IX and ensure that class members' right stay constitutionally protected.

Inadequate counsel is a justifiable reason to decertify a class. *Jianmin Jin v. Shanghai Original, Inc.*, No. 19-3782 (2d Cir. 2021).

D. The Fairness and Reasonableness of the Settlement is Disagreed Upon Between Circuits.

To protect the interests of absent class members, Rule 23(e) obligates courts to approve class action settlements before they become final to ensure the settlements are "fair, reasonable and adequate."

Absent class members believe, correctly, that this settlement was not fair, reasonable or adequate. Indeed, how could it be when it is being decided primarily by representatives who no longer have any stake in the action? This settlement, which has a concrete ending date of August 2024 (DE 389; 391) violates the protections that afforded to the class under the Joint Agreement. The new settlement only offers limited, short-term gains by only benefitting select class members. This is unfair and unreasonable.

Additionally, it conflicts with courts in other jurisdictions. *See Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1148 (11th Cir. 1983). "Although there is no rule that settlements benefit all class members equally, *Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 506 n. 5 (5th Cir. 1981), a disparate distribution favoring the named plaintiffs requires careful judicial scrutiny into whether the settlement allocation is fair to the absent members of the class. Courts have refused to approve settlements on the ground that a disparity in benefits evidenced either substantive unfairness or inadequate representation."

The settlement also unfairly treats class members relative to each other in violation of Rule 23(e)(2)(D). This settlement clearly benefits some student-athletes but disregards the others. For example, two sports teams were reinstated by the settlement, but three were now omitted, leaving their members high-and-dry. (App. 8-9).

Because this settlement has an expiration date of 2024, it is even more unfair and unreasonable. Students who plan on attending Brown University and playing sports in the future and after 2024 will face the same inequitable treatment. These future student-athletes would have received far more rights and equity had they been subject to the prior settlement agreement, rather than the one approved by the District Court and confirmed by the Court of Appeals.

A court may approve a class action settlement if it is fair, adequate, and reasonable. A court determines a settlement's fairness by looking at both the settlement's terms and the negotiating process leading to the settlement. *See* Rule 23(e). Here, the settlement is not fair because it completely ignores current student-athletes at Brown University.

E. The Adequacy of Class Notice.

Adequate notice of the settlement must be provided to the class. Rule 23(e)(1)(B) requires the court to direct notice in a reasonable manner to "all class members who would be bound" by a proposed settlement, voluntary dismissal, or compromise. Failure to

give adequate notice of settlement is not only a violation of Rule 23, but also may violate due process protections. Settlement notice provides absent class members the ability to object to the propriety of the settlement, and, in the case of Rule 23(b)(3) class actions, "the court may refuse to approve a settlement" unless it affords class members a "new opportunity to request exclusion" (or opt out) from the class settlement. *See* Rule 23.

Future student-athletes of Brown University could not have received adequate class notice because of the expiration of this settlement. Whereas future students had peace of mind to know that their sports were protected by an indefinite settlement agreement when the district court protected them in 1998, the present settlement cannot offer the same protection since it expires in 2024. (DE 276). Thus, the future and absent class members cannot have adequate notice. If adequate notice cannot be given to present and future members of the class, which in this case it cannot, the settlement must be ratified, and the class decertified.

F. The District Court's Fiduciary Duty.

The District Court has a fiduciary duty to absent class members and must carry out a Rule 23 analysis that includes factual findings. Here, these is no evidence that the court carried out any sort of analysis or satisfied its fiduciary duty to the absent class members.

Because the court failed to specifically address the issues that stem from the representation of the class by the non-class member representatives run afoul of Rule 23's recent amendments. (App. 35-121). The final order can, and should, be reversed and remanded for this reason alone.

CONCLUSION

A class action is an exception to the usual rule that litigation is conducted by, and on behalf of the individually named parties only. To permit class treatment and disposition of unnamed, absent individuals' claims, due process requires that such individuals be adequately represented by the named Class Representatives – Class Representatives that have a current and concrete interest in the issues in the case and the relief sought.

Each item enumerated in Rule 23 carries essential protections with it that must be afforded to absent class members. They cannot be side stepped or glossed over.

The essential analysis required by Rule 23 is no longer required by the First Circuit. Here, as a result of the side stepping and a permitted glossed over standard of review, inadequate Class Representatives allowed a twenty-two-year-old finally approved settlement order to be revoked and replaced with a new agreement that stripped away all the terms that materially benefitted absent class members. Equally as

bad as the failure to carry out the full Rule 23 analysis is the fact that this was done without adequate without notice to the absent class members.

For the reasons detailed above, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

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